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
Circuit Court No. 0716-CV12620

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent disagrees with Appellant's jurisdictional statement in two respects. First, Appellant alleges that the motion for summary judgment granted by the Circuit Court 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")." This statement is incorrect. In addition to arguments relating to the Coverdell Act, the motion for summary judgment granted by the Circuit Court incorporated prior summary judgment briefing concerning several alternative bases for summary judgment, including that Respondent has official immunity under Missouri law. *See* LF at 76; LFS at 4-48.[1]

Second, Respondent disagrees that appellate jurisdiction in this Court is proper. While this Court has exclusive jurisdiction in all cases involving the validity of a statute, *see* Mo. Const. art. V, section 3, "a mere assertion that a statute is unconstitutional does not deprive the court of appeals of jurisdiction." *Glass v. First Nat'l Bank of St. Louis, N.A.*, 186 S.W.3d 766, 766 (Mo. 2005) (en banc). Rather, the constitutional issue presented must be "real and substantial, not merely colorable." *Id.* Appellant's constitutional challenge is wholly without merit and is unsupported by any authority.

[1] These arguments were first set forth in a prior motion for summary judgment filed by Respondent in May 2008. *See* LF at 76. With the Circuit Court's permission, Respondent incorporated these prior arguments by reference into his second motion for summary judgment so that all issues would clearly be presented for appellate review.

Therefore, Appellant's constitutional challenge is not colorable, much less "real and substantial." Therefore, this Court lacks jurisdiction to hear this appeal.

STATEMENT OF FACTS

I. THE PARTIES

Appellant Craig Dydell is a former student of the School District of Kansas City, Missouri (the "School District"). LF at 35. At all times relevant to Mr. Dydell's claims, Respondent Dr. Bernard Taylor, Jr., was Superintendent of the School District. LF at 31-32.

II. THE INCIDENT AT WESTPORT CHARTER SCHOOL

In January 2004 a student named J.W. was expelled from Westport Charter School for attempting to bring a knife onto school grounds. LF at 443.[2] On January 12, 2004, and as a result of the incident at Westport Charter School, J.W. was admitted to Two Rivers Psychiatric Hospital ("Two Rivers"). LF at 443. On January 26, 2004, J.W. was discharged from Two Rivers. LF at 443-444; LFS at 401. At the time of his discharge, doctors at Two Rivers described J.W.'s condition as follows:

> The patient has shown overall improvement in mood, specifically anger control. He has not displayed any dangerous behaviors or actions here in the hospital with the high degree of structure and supervision provided. . . . He is not suicidal, nor is he homicidal, and he is stable on his current medications. He has done extremely well with supervision and positive reinforcement and praise.

LF at 313.

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[2] Westport Charter School was not part of the School District. *See State ex rel. Sch. Dist. of K.C. v. Williamson*, 141 S.W.3d 418, 421-22 (Mo. App. W.D. 2004).

III. J.W.'S ENROLLMENT IN THE SCHOOL DISTRICT

In February 2004 J.W.'s mother sought to enroll him in the School District. LFS at 117. At this time, the School District's Student Discipline Office (a/k/a Student Hearing Office) and Admissions Departments became aware that J.W. had been arrested for the incident at Westport Charter School. LF at 319. Although Mr. Dydell alleges that "the School District reported [J.W.'s] criminal record to Taylor," the portions of the Legal File cited by Mr. Dydell do not support this allegation. *See* LF at 319, 349.[3] While J.W.'s mother sought to enroll J.W. in February 2004, he was not cleared for enrollment in the School District until June 17, 2004. LF at 349. Because he had a learning disability, at the time he was enrolled, J.W. was referred to the School District's Special Education Department to determine what school he should attend. LF at 349.

Although Mr. Dydell alleges that "[w]hen [J.W.] was cleared for enrollment, juvenile officers assigned to [J.W.] recommended that he be placed in either an alternative school or a day school," this statement is incorrect, as it relies on a recommendation made by J.W.'s juvenile officer in February 2004. LF at 317. J.W.'s juvenile officer issued an amended recommendation on June 8, 2004, shortly before J.W. was cleared for enrollment, which recommended that J.W. be placed in any type of school, "[w]hatever he qualifies for." LF at 465.

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[3] Mr. Dydell cites two memoranda that were sent from Dawn Patterson, Student Discipline Office, to the Admissions Office. There is no evidence either of these memoranda was sent to Dr. Taylor.

Mr. Dydell also alleges that "[e]ven though the Special Education Department should have taken [J.W.'s] criminal and psychiatric records into account in making its placement decision, those records were ignored because personnel in that department had been given no supervision or guidance from Taylor to do so." However, the portions of the Legal File cited by Mr. Dydell do not establish that the School District "ignored" J.W.'s criminal and psychiatric records. *See* LFS at 403-404. Further, the portions of the Legal File cited by Mr. Dydell do not establish that Dr. Taylor failed to give supervision or guidance to the Special Education Department. *See* LFS at 383, 403-404.[4]

Dr. Taylor agrees with Mr. Dydell's statement that J.W. was placed at Central High School by the Special Education Department. However, Mr. Dydell's allegation that Central High School was "one of the School District's most dangerous schools," is not established by the portions of the Legal File cited by Mr. Dydell. *See* LFS at 119. Further, while Mr. Dydell alleges that J.W.'s "placement was made without regard to [J.W.'s] criminal and psychiatric records," the portions of the Legal File cited by Mr. Dydell do not establish this allegation either. *See* LF at 293, 295; LFS at 405. Moreover, Mr. Dydell's allegation that "[n]o plan was put in place by Taylor to prevent [J.W.] from repeating what he had done at Westport Charter School," is also not established by the

[4] In any event, because he was a learning disabled student with an Individual Education Program ("IEP"), the federal Individuals With Disabilities Education Act ("IDEA") provided the exclusive procedure by which J.W.'s placement was to be determined. *See* 20 U.S.C. § 1400 *et seq.* *See* LFS at 28-34.

portions of the Legal File cited by Mr. Dydell. *See* LFS at 119.[5] Finally, Mr. Dydell's allegation that "none of the teachers or staff at Central High School were made aware of [J.W.'s] criminal record and his dangerous mental condition," is, similarly, not supported by the portions of the Legal File cited by Mr. Dydell. *See* LFS at 118-122.

IV. THE FEDERAL LAW GOVERNING J.W.'S PLACEMENT

In 2004 and 2005, the Special Education Department had exclusive jurisdiction over special education students like J.W. *See* LF at 291-292, 296-298. However, this was not simply School District protocol—the federal IDEA, 20 U.S.C. § 1400 *et seq.*, vested exclusive jurisdiction over the placement of special education students with an "IEP Team," which was coordinated through the Special Education Department.[6] *See* LFS at 28-35. The IEP Team had an obligation to create an IEP for J.W., that, under the IDEA, controlled the educational services and placement that J.W. was to receive. *See* LFS at 30-31.

Dr. Taylor agrees that the IEP created for J.W. did not reference J.W.'s previous attempt to bring a knife into Westport Charter School. LF at 327-347. However,

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[5] The portion of the Legal File cited (LFS at 119) does not reference Dr. Taylor.

[6] The IEP Team is composed of the child's parents, at least one regular education teacher, at least one special education teacher, and a representative of the local school district qualified to provide special education services. *See* LFS at 31 (citing 20 U.S.C. § 1414(d)(1)(B)). It may also include "other individuals who have knowledge or special expertise regarding the child, including related services personnel." *See* LFS at 31.

although Mr. Dydell alleges these "important records and dangerous mental condition should have been included in [J.W.'s] IEP, but there was no guidance or direction from Taylor to do so," the portions of the Legal File cited by Mr. Dydell do not establish this fact because they do not establish that Dr. Taylor failed to give guidance or direction to the Special Education Department. *See* LF at 278, 327-347, 436-437.

V. J.W.'S ATTACK ON MR. DYDELL

J.W. began school at Central High School in the fall semester of 2004. LF at 349. Mr. Dydell began school at Central High School a year later in the fall semester of 2005. LF at 35. Although Mr. Dydell alleges that he was a "good student with a promising future," Mr. Dydell supports this allegation merely by citing to his Amended Petition (*see* LF at 35), which is insufficient to establish this fact, given that Dr. Taylor did not admit it.

On September 13, 2005, Mr. Dydell was attacked by J.W. in the cafeteria at Central High School. LF at 46. The attack on Mr. Dydell took place over a year and half after the incident at Westport Charter School. *See* LF at 46, 443. In the Circuit Court below, Mr. Dydell did not allege, and introduced no evidence to show, that J.W. had any discipline problems or violent incidents from the time he began attending Central High School in the fall of 2004, until the attack on Mr. Dydell over a year later. *See* LF at 173-309.

Mr. Dydell alleges that J.W. was "given a box-cutter by District teacher Julia Hook during [J.W.'s] drafting class" and that "[J.W.] proceeded to take the box-cutter home and then he brought it back to Central High School on September 13, 2005."

However, in briefing below, Mr. Dydell was unable to produce any *admissible* evidence to establish that J.W. took the box-cutter home or that he brought it back to school. *See* LF at 447.[7] Mr. Dydell alleges that J.W.'s attack was "delusional," but the portions of the Legal File cited by Mr. Dydell to not establish this alleged fact and do not even contain the word "delusional." *See* LFS at 114.

Mr. Dydell alleges that, after he was attacked, "the School District acknowledged that [J.W.] should never have been placed at Central High School, and that his IEP was inadequate." However, the portions of the Legal File cited by Mr. Dydell do not establish this alleged fact. *See* LF at 272, 278, 287, 294-295, 358-360. Instead, after the attack, J.W.'s IEP team conducted an IDEA-mandated procedure called a "manifestation determination review," (*see* 34 CFR § 300.523), to determine the relationship between J.W.'s disabilities and the attack on Mr. Dydell. LF at 358-360. As a result of the manifestation determination review, the IEP Team concluded that, *in light of the attack on Mr. Dydell*, J.W.'s placement at Central High School was no longer appropriate. LF at 358-360. The School District did not conclude that Mr. Dydell "should never have been placed at Central High School," or that his "IEP was inadequate." LF at 358-360.

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[7] To establish these alleged facts, Mr. Dydell relied on a double-hearsay statement purportedly attributed to J.W., which was written in an incident report prepared by School District security personnel. *See* LF at 257-258, 352.

VI. SCHOOL DISTRICT POLICY JGF

On September 5, 2000, the School District enacted a written discipline policy titled "Policy JGF, Discipline Reporting and Records." LF at 239-242. Although Mr. Dydell alleges that Policy JGF was enacted to "address the critical need for the disclosure of information on dangerous students," the portions of the Legal File cited by Mr. Dydell do not establish this alleged fact. *See* LF at 239. Further, although Mr. Dydell refers to Policy JGF as the "Dangerous Student Regulation," that is not the title of the regulation; it has never been referred to as such by the School District or Dr. Taylor. LF at 239-242.

Mr. Dydell alleges that, under Policy JGF, teachers and School District employees with a need to know "had to be informed by 'school administrators' of any dangerous special education students with 'demonstrated or potentially violent behavior.'" However, the portions of the Legal File cited by Mr. Dydell do not establish this alleged fact. *See* LF at 240-241, 436-437. Instead, Policy JGF directed that "*any portion of a student's Individualized Education Program (IEP)* that is related to demonstrated or potentially violent behavior shall be provided to any teacher and other district employees with a need to know the information." LF at 241 (emphasis added).

Mr. Dydell also alleges that, under Policy JGF, "District teachers and other District employees with a need to know . . . 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 [law enforcement] in accordance with state law.'" However, the portions of the legal file cited by Mr. Dydell do not support this alleged fact either. *See* LF at 240-241, 436-437. Rather, under Policy JGF, teachers and other school district employees

with a need to know were to be "informed by the superintendent *or designee* of any act committed or allegedly committed by a student in the district that is reported to the district by [law enforcement] in accordance with state law." LF at 241 (emphasis added).

VII. GUIDANCE CONCERNING THE PLACEMENT OF SPECIAL EDUCATION STUDENTS

Mr. Dydell alleges that, while Dr. Taylor was Superintendent, 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." However, the handbook incorporated by reference both the federal IDEA and the Missouri State Plan For Special Education (which implements the IDEA at the state level) and indicated that these laws contained "all regulations that must be followed by the public school district and other responsive agencies." LF at 364. Notably, the federal IDEA requires the same placement procedure for *all* special education students. As the handbook explained, and under the IDEA:

> While the Act and regulations recognize that IEP teams must make individualized decisions about the special education and related services, and supplementary aids and services provided to each child with a disability, they are *driven by IDEA's strong preference that, to the maximum extent appropriate, children with disabilities be educated in regular classes with their nondisabled peers with appropriate supplementary aids and services* . . . . In determining the educational

> placement of a child with a disability, each public agency shall ensure that the placement decision: is made by a group of persons, including the parents, and other persons knowledgeable about the child; includes the meaning of the evaluation data; includes decision of the placement options; and is made in conformity with *Least Restrictive Environment (LRE).* Unless the IEP of the child with a disability requires some other arrangement *the child is educated in the school that he or she would attend if nondisabled . . . .*

LF at 376 (quoting Federal Register, Department of Education, Part II). Therefore, the Special Education Department did have guidance about how to handle the placement of special education students with a "criminal or dangerous psychiatric record."

Although Mr. Dydell alleges that Dr. 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 [J.W.]," the portions of the Legal File cited by Mr. Dydell do not establish this alleged fact. *See* LF at 249, 268, 270-271; *see also* LFS at 408-409.

Dr. Taylor agrees with Mr. Dydell's statement that Dr. Taylor had access to every file maintained by the School District. However, Mr. Dydell's allegation that J.W.'s "file contained [J.W.s'] psychiatric and criminal records," is not supported by the portions of the Legal File cited by Mr. Dydell. *See* LF at 303, 355-356.

VIII. THE MANAGEMENT STRUCTURE OF THE SCHOOL DISTRICT

Mr. Dydell alleges that Dr. Taylor "did not meet regularly with the heads of the various departments of the School District." This statement is misleading because it fails to note that Dr. Taylor met with members of his cabinet (associate and assistant superintendents) on a regular basis, and the members of his cabinet were, in turn, responsible for directly supervising departments. *See* LF at 303-304, 448.

Mr. Dydell alleges that, while he was Superintendent, Dr. 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." However, the portions of the Legal File cited by Mr. Dydell do not establish this fact. LF at 304. Specifically, Mr. Dydell's allegation presupposes that teachers and case managers were not receiving information on the criminal offenses of students. This is not what the Legal File reflects. Rather, in the portion of the Legal File cited by Mr. Dydell, Dr. Taylor merely testified that, under School District policy, the Student Hearing Office and School District's Legal Counsel were responsible for handling that information. LF at 304.

Mr. Dydell alleges that, while he was Superintendent, Dr. 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." However, the portions of the Legal File cited by Mr. Dydell do not support this alleged fact either. *See* LF at 268, 274.[8]

Mr. Dydell alleges that, "[t]he case manager assigned to [J.W.] acknowledged that teachers and case managers working with [J.W.] should have been informed of his criminal record." However, the portions of the Legal File cited by Mr. Dydell do not support this alleged fact. *See* LF at 269, 436-437.[9]

Dr. Taylor agrees with Mr. Dydell's statement that, "[w]hile he was Superintendent of the School District, [he] never reviewed 'any of the policies and procedures regarding the transfer of special education students into the District." However, Dr. Taylor explained that he did not review the policies and procedures because they had been established before he came to the School District and were carried out by the Special Education Department and Student Hearing Office with assistance and guidance from the School District's Legal Counsel and outside law firms. LF at 306. Dr. Taylor also explained that the School District's Legal Counsel was "constantly monitoring" and "reviewing" the policies, and was "well aware that that was something they should do." LF at 306.

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[8] In the portion of the Legal File cited by Mr. Dydell, *one* special education teacher (James Franson), testified that he had not received guidance from Dr. Taylor.

[9] In the portion of the Legal File cited by Mr. Dydell, *one* special education teacher (James Franson) testified only that knowledge of J.W's criminal record was "something that would be helpful." LF at 269.

Mr. Dydell alleges that "[w]hile 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." However, the portions of the Legal File cited by Mr. Dydell do not support this alleged fact. *See* LF at 307, 309.[10]

IX. MR. DYDELL'S ALLEGED INJURIES

Mr. Dydell alleges that he "was eventually discharged from medical care, but he was too afraid and too incapacitated to return to Central High School to complete his education," and that, as a result of the attack by J.W., he "suffered considerable pain and discomfort, but he continues to suffer significant headaches, twitching, anxiety, depression, sleep difficulty and other ailments." However, Mr. Dydell supports these allegations merely by citing to his Amended Petition (*see* LF at 36), which is insufficient to establish these facts because they were not admitted by Dr. Taylor.

X. MISSOURI'S RECEIPT OF FEDERAL EDUCATION FUNDING

In 1963, and pursuant to Mo. Rev. Stat. § 178.430.1 (Appendix at A11), the Missouri Legislature elected to receive all funds appropriated by the federal government for public schools as of that date and through "any other subsequent acts of congress which provide federal funds for public schools." LF at 67, 161-162, 164. Pursuant to

[10] In the portions of the Legal File cited by Mr. Dydell, Dr. Taylor testified only that he could not *recall* whether he or his cabinet revised the handbooks or guides for the Special Education Department. *See* LF at 449.

Mo. Rev. Stat. § 178.430.2, the Missouri Legislature deemed that "all funds appropriated under the provisions of such acts are accepted." LF at 67, 161-162, 164.

Pursuant to 5 CSR 50-321.010 (Appendix at A12), the Missouri Department of Elementary and Secondary Education ("DESE") promulgated regulations and standards for the receipt and distribution of these federal funds, including specifically federal funds received under Title I, Title II, and Title IV of the federal Elementary and Secondary Education Act. LF at 67 (citing 5 CSR 50-321.010), 161-162, 166-167. All such funds are received by the State of Missouri pursuant to Chapter 70, of Title 20 of the United States Code. LF at 67.

Among other types of federal funding for education, the State of Missouri, and the School District specifically, receive federal funds under Title I of the Elementary and Secondary Education Act. LF at 171-172. For example, in 2005 and 2006, the State of Missouri received approximately $380,000,000.00 in federal Title I funds. LF at 67, 129, 161-162, 169. Moreover, both the School District and the State of Missouri received federal Title I funds in the 2007-2008, and 2008-2009 school years. LF at 171-172.

PROCEDURAL BACKGROUND

Dr. Taylor is in agreement with Mr. Dydell's statement of the procedural background, with two exceptions. First, Mr. Dydell alleges the Circuit Court denied Mr. Dydell's Motion To Strike the Coverdell Act Defense in an order "drafted by Taylor's attorneys." This statement is not accurate. Although the undersigned counsel submitted a proposed order to the Circuit Court, the Circuit Court revised the proposed order by deleting sections and adding additional language and case citations. *See* LFS2 at 425.

Second, Mr. Dydell states that, the "second prerequisite" to establishing immunity under the Coverdell Act required Dr. Taylor "to prove that his conduct or lack thereof had been 'in conformity with' the relevant regulation of the School District." This alleged statement of fact is inaccurate and constitutes improper argument. The portion of the Coverdell Act that Mr. Dydell relies on actually refers to action "in conformity with Federal, State, and local laws (including rules and regulations)." *See* 20 U.S.C. § 6736(a)(2) (Appendix at A5). In the briefing below, Mr. Dydell argued that the phrase "local laws (including rules and regulations)" encompasses local school district policies. *See* LF at 183. Dr. Taylor argued that the phrase "local laws (including rules and regulations)," refers to local laws, rules, and regulations enacted by municipalities, such as cities and towns. LF at 452. Because the Circuit Court ruled in favor of Dr. Taylor, it is presumed to have adopted Dr. Taylor's view, and rejected Mr. Dydell's.

ARGUMENT

I. RESPONSE TO MR. DYDELL'S POINT 1: THE COVERDELL ACT IS A VALID EXERCISE OF LEGISLATIVE POWER UNDER THE SPENDING CLAUSE OF THE UNITED STATES CONSTITUTION

A. Standard of Review

The Circuit Court's grant of summary judgment is reviewed *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993) (en banc). However, where the appellant argues that summary judgment was granted on the basis of an unconstitutional statute, the appellant bears a high burden to prove the statute it unconstitutional because "[a] statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution." *State v. Richard*, 298 S.W.3d 529, 531 (Mo. 2009) (en banc). This Court must "resolve all doubt in favor of the act's validity" and "may make every reasonable intendment to sustain the constitutionality of the statute." *Reproductive Health Servs. of Planned Parenthood v. Nixon*, 185 S.W.3d 685, 688 (Mo. 2006) (en banc) (internal quotations omitted).

B. Overview Of The Coverdell Act

The Coverdell Act was part of the No Child Left Behind reforms enacted by Congress in 2001. It is codified at 20 U.S.C. § 6731 *et seq*. (Appendix at A5). The purpose of the Act 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 (emphasis added). The

Coverdell Act applies to states that receive federal educational funding, 20 U.S.C. § 6734, and expressly "preempts the laws of any State to the extent that such laws are inconsistent" with the Coverdell Act's provisions, 20 U.S.C. § 6735(a).

The first important provision of the Coverdell Act is its definition of the word "teacher." The Act's definition of "teacher" includes, in pertinent part: "a teacher, instructor, principal, *or administrator*," or "another educational professional who works in a school." 20 U.S.C. § 6733(6) (emphasis added).

Next, the Coverdell Act includes three separate and distinct limitations on liability for "teachers." First, the Coverdell Act provides "teachers" with immunity from ordinary negligence claims relating to "an act *or omission* of the teacher on behalf of the school" if:

> (1) the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity;
>
> (2) the 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 in the classroom or school*;
>
> (3) if appropriate or required, the teacher was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice involved in the State in which the harm

occurred, where the activities were or practice was undertaken within the scope of the teacher's responsibilities;

(4) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher; and

(5) the harm was not caused by the teacher operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to—

(A) possess an operator's license; or

(B) maintain insurance.

20 U.S.C. § 6736(a) (emphasis added).

Courts applying the Coverdell Act have, pursuant to the Act's plain language, extended immunity to "teachers" and dismissed and/or granted summary judgment on simple negligence claims such as those asserted by Mr. Dydell. *See, e.g.*, *Husk v. Clark County Sch. Dist.*, 2009 WL 3189347, at *2 (Nev. 2009) (affirming dismissal of simple negligence claim against teacher); *C.B. v. Sonora Sch. Dist.*, 691 F. Supp.2d 1123, 1149 (E.D. Cal. 2009) (dismissing tort claims against special education official of school district); *K.R. v. Sch. Dist. of Philadelphia*, 2008 WL 2609810, at *1 & 10 (E.D. Pa. 2008) (granting summary judgment to school district CEO, principal, vice-principal, and school psychologist); *Morrone v. Prestonwood Christian Academy*, 215 S.W.3d 575,

582-84 (Tex. Ct. App. 2007) (affirming grant of summary judgment in favor of teacher on negligence claim).

The Coverdell Act's second limitation on liability for "teachers" is that it limits punitive damages against "teachers" as follows:

> Punitive damages may not be awarded against a teacher in an action brought for harm based on the act or omission of a teacher acting within the scope of the teacher's employment or responsibilities to a school or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an act or omission of such teacher that constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.

20 U.S.C. § 6736(c)(1).

Third, the Coverdell Act limits the amount of non-economic damages that may be recovered against a "teacher" by eliminating joint and several liability as follows:

> (A) Liability
>
> Each defendant who is a teacher shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with response to which that defendant is liable.

(B) Separate judgment

The court shall render a separate judgment against each defendant in an amount determined pursuant to sub-paragraph (A).

(2) Percentage of responsibility

For purposes of determining the amount of noneconomic loss allocated to a defendant who is a teacher under this section, the trier of fact shall determine the percentage of responsibility of each person responsible for the claimant's harm, whether or not such person is a party to the action.

20 U.S.C. § 6737(b).

As defined by the Coverdell Act, "noneconomic loss" includes "physical or emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life . . . or any other nonpecuniary loss of any kind or nature." 20 U.S.C. § 6733(3).

C. Overview Of The Spending Clause

Mr. Dydell argues the Coverdell Act is not a proper exercise of power under the Spending Clause of the United States Constitution. The Spending Clause permits Congress to "lay and collect Taxes, Duties, Imposts, Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const.

Art. I, § 8, cl. 1. Under the Spending Clause, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

Legislation enacted pursuant to the Spending Clause is "in the *nature* of a contract: in return for federal funds, the states agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added). However, regulations and statutes that apply to states under the Spending Clause are *also* enforceable as the supreme law of the land under the Supremacy Clause of the United States Constitution. *See Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 261, 269 (1985) (under the Supremacy Clause, conditions imposed by Congress on receipt of federal funds *preempt* state laws to the contrary); *Mo. Child Care Ass'n v. Cross*, 294 F.3d 1034, 1040 (8th Cir. 2002) (same); *see also O'Brien v. Mass. Bay Transp. Authority*, 162 F.3d 40, 43 (1st Cir. 1998) ("The rule then, is crystal clear: as long as a state receives federal funds for a particular purpose, its law, if contrary to conditions attached to the funds, must give way to federal law."). Thus, to the extent Mr. Dydell claims that conditions on receipt of federal funds are binding only as a matter of contract, his argument is contrary to well-established law.

D. The Coverdell Act Satisfies *South Dakota v. Dole*

In *South Dakota v. Dole*, 483 U.S. 203 (1987), the United States Supreme Court held there are only four limitations on Congress' use of the Spending Clause. First, the "exercise of spending power must be in pursuit of 'the general welfare.'" *Id.* "In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Id.* Second, Congress

must state the condition "unambiguously . . . enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* Third, the condition on receipt of federal funds must be related to a particular "national project or program." *Id.* at 207-08. Finally, the condition must not induce the States to "engage in activities that would themselves" violate a constitutional provision. *Id.*

1. <u>The Coverdell Act is in pursuit of the general welfare.</u>

First, the Coverdell Act was included with the No Child Left Behind reforms as part of Congress' attempt to improve education throughout the country. Congress included the Coverdell Act's provisions so that qualified teachers and school administrators would not be deterred from entering the field and so that school professionals could focus on educating students rather than worrying about lawsuits. *See* H.R. REP. No. 107-69, at § 2302 (2001) (Appendix at A14). According to congressional findings regarding the Coverdell Act,

> [c]larifying and limiting the liability of teachers, principals and other school professionals who undertake reasonable actions to maintain order, discipline and an appropriate educational environment is an appropriate subject of federal legislation because (A) the scope of the problems created by the legitimate fears of teachers, principals and other school professionals about frivolous, arbitrary or capricious lawsuits against teachers is of *national* importance; and (B) millions of children and their families across the *Nation* depend on teachers, principals and other school professionals for the intellectual development of children.

Id. (emphasis added). Thus, No Child Left Behind, and the Coverdell Act specifically, were enacted by Congress in an attempt to improve the general welfare.

2. <u>The Coverdell Act unambiguously allows the states to make a knowing and free choice to be bound by its terms.</u>

Second, the Coverdell Act clearly and unambiguously notifies states that, as a consequence of accepting federal education funds, states will be bound by its terms. Specifically, the Coverdell Act 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 (emphasis added). The "chapter" referenced by the Coverdell Act is Chapter 70, of Title 20 of the United States Code, also known as the Elementary and Secondary Education Act, which provides for all types of federal education funding. *Morrone*, 215 SW.3d at 582. Each of the substantive changes to state law imposed by the Coverdell Act is clearly enumerated in the statute. The State of Missouri clearly knew it had a choice to decline federal funds and retain current tort law concerning teacher and school administrator liability, or accept federal funds and modify tort law for certain claims against teachers and school administrators as set forth in the Coverdell Act.

3. <u>The Coverdell Act is clearly related to a national program of improving school performance.</u>

Third, the conditions imposed by the Coverdell Act are clearly related to the national program of improving school performance through No Child Left Behind. Regardless of whether Mr. Dydell agrees that providing school teachers and administrators with immunity will improve school performance, it is Congress' decision

to make. Indeed, the grant of immunity is routinely used to improve public services by protecting public employees such as police officers, judges, and agency officials. *See, e.g.*, *Southers v. City of Farmington*, 263 S.W.3d 603, 610 (Mo. 2008) (en banc). In fact, as discussed *infra* at Section V.F, an overwhelming majority of states provide immunity to teachers and school administrators on their own accord. Thus, it is within Congress' discretion to determine that providing immunity for school teachers and administrators will further the national program of improving school performance.

4. No other constitutional provisions serve as an "independent bar" to the Coverdell Act.

Finally, there are no other constitutional provisions that serve as an independent bar to the conditional grant of federal funds under the Coverdell Act. The United States Supreme Court has construed this fourth limitation on Spending Power very narrowly:

> the 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language from our earlier opinions stands for the unexceptionable proposition that the power may not be used to *induce the States to engage in activities that would themselves be unconstitutional*.

Dole, 483 U.S. at 210-11 (emphasis added). Thus, the exercise of the Spending Power violates an "independent constitutional bar" only if the federal government induces the states to violate an express constitutional prohibition—such as the First Amendment's protections for freedom of speech and freedom of religion, or the Fourteenth

Amendment's prohibition on certain types of discrimination. *Id.* The Tenth Amendment is *not* an "independent constitutional bar" to the Spending Power. *See New York v. United States*, 505 U.S. 144, 167-69 (1992).

The Coverdell Act does not cause the State of Missouri to violate any express constitutional prohibition, such as by causing the State to discriminate on the basis of race, to promote religion, or to restrict speech. *See Dole*, 483 U.S. at 211. There is no question (and Mr. Dydell does not argue) that, in the absence of the Coverdell Act, the State of Missouri could extend immunity to school administrators, impose mandatory comparative fault and comparative damages for certain claims against school administrators, and elevate the standard for punitive damages. Therefore, because the Coverdell Act satisfies all four limitations set forth in *Dole*, it is constitutional.

E. Congress May Impose Conditions On Receipt Of Federal Money That Go Beyond Specifying How Money Is Spent

Although he does not contest that the Coverdell Act satisfies *Dole* (which is determinative), Mr. Dydell suggests the Coverdell Act is unconstitutional because "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent." Mr. Dydell relies on Justice O'Connor's dissent from *Dole*. Of course, a dissent is not controlling. Mr. Dydell cannot establish that the Coverdell Act "undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution," *see Richard*, 298 S.W.3d at 531, when his only authority on point is a dissent.

In any event, and contrary to Mr. Dydell's reading of Justice O'Connor's dissent, the funding program the Court approved in *Dole* did more than "specify how the money should be spent." In *Dole* the relevant federal statute conditioned receipt of federal highway funding on the states raising their minimum drinking age to 21. 483 U.S. at 203. A requirement that states raise their minimum drinking age is more than a specification for how to spend federal highway money.

In fact, the law is clear: Congress "may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal *statutory and administrative directives.*" *Id.* at 206 (emphasis added). Since *Dole*, the United States Supreme Court and other courts have routinely upheld federal spending programs that condition the states' receipt of federal funds on compliance with statutory or regulatory objectives that go beyond specifying how to spend money.

A good example is *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In that case the Court held that, by accepting federal education funding, states subject themselves to the administrative enforcement scheme of Title IX, which prohibits sex discrimination in educational programs. *Id.* at 639. By accepting federal education funding, state educational institutions consent to being sued for money damages by students seeking to enforce Title IX. *Id.* at 640-41. Clearly, the spending conditions approved in *Davis* went beyond telling the states how to spend money. *See also, e.g.*, *Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 170-71 (3d Cir. 2002) (upholding provision of federal Rehabilitation Act, which stated that, by receiving *any*

federal monies, states waive sovereign immunity from suit for violations of the Rehabilitation Act); *O'Brien*, 162 F.3d at 43 (upholding provision of federal Urban Mass Transportation Act which conditioned States' acceptance of transportation funds on requirement that employees be tested for drug and alcohol use and finding that all State laws to the contrary were *preempted*). Thus, the Coverdell Act is constitutional, even though it does more than specify how federal money should be spent.

F. The Coverdell Act Is Not Unconstitutional Because It Affects Missouri Litigants

1. Congress may impose conditions on receipt of federal funds that operate directly by force of federal law.

Without any authority, Mr. Dydell asserts that, "[t]ypically, Congress enacts spending legislation with conditions which require the States to impose laws and regulations upon themselves as a condition to receiving federal funds." Thus, according to Mr. Dydell, Congress "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." Mr. Dydell implies the Coverdell Act is unconstitutional because it applies through operation of federal law, rather than by enticing states to change their own laws.

Mr. Dydell's premise that Congress "typically" exercises Spending Power by enticing states to change their own laws is wholly unsupported. *Dole* merely requires that states have full notice of the change in state law that will be worked by their acceptance of federal funding, regardless of the mechanism through which the change

occurs. This way, the states are "cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207. Thus, the conditions imposed by a federal spending program can apply by federal supremacy and preemption, rather than by having the states amend their own laws. *See Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 717 (10th Cir. 2004) ("Congress' spending power enables it to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with *federal statutory and administrative directives*." (emphasis added)).

For example, Title IX's prohibitions on sex discrimination apply to state educational institutions that receive federal funding. *Davis*, 526 U.S. at 638. Title IX's provisions apply directly, as a matter of federal law. Despite this, the United States Supreme Court upheld Title IX as a valid exercise of Congressional spending power. *Id.* at 640-48.

Indeed, most federal spending programs impose conditions that take effect immediately, as a matter of federal law, whenever states accept federal funds. *See Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484, 2487-88 (2009) (by accepting federal funds under IDEA, states are required by federal law to provide "free and appropriate public education" to all disabled students); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-75 (1993) (federal regulation setting speed limit for trains applied directly to states upon their receipt of federal railroad funds and *preempted* state law to the contrary); *Blum v. Bacon*, 457 U.S. 132, 145-46 (1998) (federal regulation prohibiting discrimination against recipients of welfare applied directly upon states' receipt of federal funds and *preempted* state laws to the contrary). Thus, the Coverdell Act is not unconstitutional

because it creates immunity and other protections for teachers and administrators by operation of federal law and by preempting state law to the contrary.

2. Conditions imposed on states through their receipt of federal funds may affect individual litigants and deprive them of certain causes of action they would otherwise have under state law.

Mr. Dydell next contends that Congress cannot "directly regulate individuals or state institutions that do not receive federal funding under the guise of the Spending Clause." Whatever Mr. Dydell means by the phrase "directly regulate," he appears to argue the Coverdell Act is unconstitutional because it deprives him of the ability, as an individual litigant, to sue Dr. Taylor for the same claims and in the same manner as he could a defendant not protected by the Coverdell Act.

Mr. Dydell is wrong. Congress may condition receipt of federal funds on the states' agreement that federal law will preempt state law in such a manner as to constrain the rights of the state's citizens. In other words, once a state accepts federal funds pursuant to some condition imposed by a federal spending statute, the federal statute becomes binding on the state under the Supremacy Clause and preempts any state law to the contrary. *See Carleson v. Remillard*, 406 U.S. 598, 600 (1972); *Townsend v. Swank*, 404 U.S. 282, 286 (1971). Once state law is preempted, a private litigant (such as Mr. Dydell), can no longer take advantage of it and must instead fit his claim within the federal framework. This is precisely how the Coverdell Act operates—it immunizes school administrators from certain claims of ordinary negligence, imposes absolute comparative fault and comparative damages in claims against school administrators, and

heightens the standard for imposing punitive damages against school administrators, *by supplementing and preempting* state law to the contrary.

CSX Transportation v. Easterwood, 507 U.S. 658 (1993), illustrates this principle. In *Easterwood* the widow of a truck driver who was struck by a train sued the railroad and alleged the railroad was negligent for operating the train at an excessive speed. *Id.* at 661. Prior to the accident, the State of Georgia accepted funds from the federal government under the Highway Safety Act for use in improving railroad grade crossings. *Id.* at 663. Under the Highway Safety Act, Georgia's receipt of federal funds was conditioned on its agreement that regulations issued by the federal Secretary of Transportation would "cover the subject matter of" speed and grade crossing regulations and, therefore, preempt all state laws to the contrary. *Id.* at 674-75.

At the time of the accident, the federal regulations required that trains not exceed 60 miles per hour. *Id.* at 673. The train that struck the widow's husband was traveling at less than 60 miles per hour. *Id.* Despite this, the widow claimed the train was traveling too fast for conditions, such that the railroad breached a common-law duty to operate the train at a safe and moderate rate of speed. *Id.* The United States Supreme Court held that, because the train was traveling below the speed limit set by the federal regulation, the widow's state negligence claim was barred and preempted by federal law. *Id.* at 674-75. Thus, *Easterwood* clearly holds that a federal spending program may condition receipt of federal funds on a change in state law (facilitated by federal preemption) that bars the claims of individual litigants. The United States Supreme Court affirmed this rule in *Norfolk Railway Co. v. Shanklin*, 529 U.S. 344, 357-58 (2000) (finding individual

plaintiff's claim for negligent placement of railroad signs was preempted by funding conditions imposed by receipt of federal funds by the *state*).

This First Circuit case *O'Brien v. Massachusetts Bay Transportation Authority*, 162 F.3d 40 (1st Cir. 1998), also illustrates this rule. *O'Brien* involved conditions imposed on the Commonwealth of Massachusetts by its receipt of federal funds under the Urban Mass Transportation Act. *Id.* at 41. Pursuant to the Act, Massachusetts agreed that, if it accepted federal funds for mass transportation (which it did) it would conduct random drug and alcohol testing on all "mass transportation employees responsible for safety-sensitive functions." *Id.*

When the Massachusetts Bay Transportation Authority implemented a testing program as required by the act, members of a transportation union sued to enjoin the testing program, arguing it violated their rights under the Massachusetts Constitution to be free from unreasonable searches and seizures. *Id.* The case was removed to federal district court where the court entered summary judgment in favor of the transportation authority, holding that the union members' claims under the state constitution were preempted. *Id.*

On appeal, the Second Circuit affirmed the federal district court's reasoning and held that the union members' state constitutional rights were preempted by Massachusetts' receipt of federal funds. *Id.* As the Second Circuit explained:

> [P]reemptive legislation enacted under the spending power presents states with a choice: they may either accept federal funds (and subject themselves to requirements imposed by federal law) or decline such funds (and avoid

> the necessity of abiding by those requirements). . . . When Congress delineates conditions governing the receipt of federal dollars and a state agency accepts the money on that basis, the Supremacy Clause requires conflicting local law to yield. . . . *[I]t is of no moment that in this instance federal law supplants a state constitution—as apposed to a statutory or regulatory provision—Such a result is exactly what the letter of the Supremacy Clause demands.*

Id. at 43-44 (emphasis added) (citing, among others, *Easterwood*, 507 U.S. at 663-64). Thus, *O'Brien* stands for the proposition that a state's receipt of federal funds can even result in the preemption of its citizens' rights under a state constitution.

By further illustration, the Eighth Circuit has held that, by agreeing to conditions imposed by a federal spending program, a state may actually cause individual state employees to be personally liable for conduct that, before the state's receipt of funds, was entirely legal. In *Missouri Child Care Association v. Cross*, 294 F.3d 1034 (8th Cir. 2002), the court held that state employees could be subject to liability for failing to comply with conditions imposed by a federal spending statute. *Id.* at 1041. In so holding, the Eighth Circuit rejected the employees' argument that the funding statute was merely a "contract[] with the participating states and therefore those statutes are not 'supreme law.'" *Id.* 1034-35, 1040. As the Eighth Circuit explained, the United States Supreme Court "makes clear that it is using the term 'contract' metaphorically, to illuminate certain aspects of the relationship formed between a State and the federal government in a program." *Id.* at 1041. The Eighth Circuit held that, instead of applying

as a matter of contract law, the spending program at issue applied to the State of Missouri, and *thus to the individual litigants themselves*, through the Supremacy Clause. *Id.*

Easterwood and *Shanklin* (which are controlling) and *O'Brien* and *Cross* (which are highly persuasive) illustrate that conditions on receipt of federal funds can limit the rights individual litigants may assert in state court. This does not mean, as Mr. Dydell contends, that the spending program at issue "directly" regulates state litigants. Indeed, Mr. Dydell's argument assumes the false premise that he has an inherent right to sue Dr. Taylor in negligence for the injuries Mr. Dydell sustained from the attack. Not so. Mr. Dydell has a right to sue Dr. Taylor for negligence *only to the extent allowed by state law*. The State of Missouri is entirely free to change its law (which it routinely does). In this case, and by accepting federal education funding, the State of Missouri agreed to the changes in its law worked by the preemptive effect of the Coverdell Act. As a consequence of the *State's decision* to be bound by the Coverdell Act, Mr. Dydell has no viable claim against Dr. Taylor. If Mr. Dydell believes this result is unjust, he should complain to the Missouri Legislature.

Mr. Dydell's reliance on *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986), and *Fitzgerald v. Barnstable School Committee*, 129 S.Ct. 788 (2009), is misplaced. Neither of these cases has anything to do with the question at hand. Although *Paralyzed Veterans* held that airlines are not bound to follow the anti-discrimination provisions of the Rehabilitation Act because they are not "recipients" of federal funds, that has nothing to do with whether state common law is

preempted (and thus the causes of action available to individual litigants affected) when a state agrees to a federal spending condition. *Fitzgerald* is even more inapposite—that case held that individual employees of educational institutions are not "recipients" of federal funds and therefore cannot be sued in their individual capacity for violating Title IX. Again, this has nothing to do with the question of whether state common law has been preempted through Missouri's acceptance of funds under the Coverdell Act.[11]

3. The Coverdell Act does not set a precedent for Congress to displace all state law.

Having no legal authority for his arguments, Mr. Dydell resorts to the apocalyptic prediction that "[i]f 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 laws and procedure become acceptable to the political party that controls Congress at that particular time." This is not true. First, Congress does not have

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[11] Mr. Dydell's reliance on *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), is similarly misplaced. That case merely held that a private citizen only has a cause of action under Title IX against an educational institution that receives federal funds. *Id.* at 641. Rather than supporting Mr. Dydell's argument, *Davis* proves that Congressional action under the Spending Clause may have collateral effects on the rights of individual litigants; individual students are not direct recipients of federal funds, yet the Court expressly held that Title IX *grants* them a private cause of action. *Id.*

unbridled authority to effect whatever changes it wants through the Spending Clause. It must legislate in conformity with the requirements set forth in *Dole*, which it did with regard to the Coverdell Act.

Second, *no State is required to accept federal funds.* Indeed, the Missouri Legislature is free to reject federal education funding at any time. If it does, the Coverdell Act will not apply in Missouri. However, the Missouri Legislature obviously concluded that the hundreds of millions of dollars the state receives each year in federal education funding are worth the conditions imposed by the Coverdell Act. This Court must defer to that legislative judgment.[12]

G. The Coverdell Act Does Not Directly Regulate State Courts

Throughout his Point 1, Mr. Dydell eludes to the argument that the Coverdell Act is unconstitutional because it "directly" regulates Missouri Courts, which do not receive funds under the Coverdell Act. In this Point, Mr. Dydell never explains how the Coverdell Act "directly" regulates Missouri Courts. To the extent Mr. Dydell claims it is improper for the federal government to require Missouri courts to hear new claims or adjudicate existing claims that are altered by federal law, he is wrong. *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 371 (1990) ("The Supremacy Clause forbids

[12] Incidentally, if this Court were to declare that the Coverdell Act's conditions are unconstitutional, the State of Missouri would, ostensibly, lose all federal education funding (hundreds of millions of dollars per year), receipt of which is conditioned on the state's compliance with the Coverdell Act.

state courts to dissociate themselves from federal law because of disagreement with its content or refusal to recognize the superior authority of its source.").

To the extent Mr. Dydell claims the Coverdell Act alters the Missouri Rules of Civil Procedure, he does not explain how.[13] Although the Coverdell Act may *affect* Missouri procedural law because it necessitates that courts alter MAI instructions and/or create new instructions that are non-MAI, this is true whenever a federal law creates a cause of action not recognized in MAI or, for that matter, whenever a Missouri court is called upon to determine a cause of action under the substantive law of some other state or foreign nation. The Coverdell Act only imposes *substantive* changes on state law by immunizing teachers and school administrators from certain claims of ordinary negligence, imposing comparative fault and comparative damages, and heightening the standard for punitive damages. *See, e.g.*, *King v. McMillan*, 594 F.3d 301, 313 (4th Cir. 2010) (standard for punitive damages an element of "substantive" state law); *Ryan v. McDonough Power Equip., Inc.*, 734 F.2d 385, 387 (8th Cir. 1984) (comparative fault scheme is substantive law for diversity case); *Hayfield v. Home Depot U.S.A., Inc.*, 168 F. Supp.2d 436, 451 (E.D. Pa. 2001) (joint and several liability is "substantive" state law); *Butler Mfg. Co. v. Wallace & Tiernan Sales Corp.*, 82 F. Supp. 635, 635-37 (D.C.

[13] In any event, the Supremacy Clause allows federal law to preempt and alter state court procedures. *See Howlett*, 496 U.S. at 372 ("States may apply their own neutral procedural rules to federal claims, *unless those rules are pre-empted by federal law*.") (emphasis added).

Mo. 1949) (joint and several liability a "substantive" provision of Missouri law); *Wise v. Pottorf*, 987 S.W.2d 407, 410 (Mo. App. W.D. 1999) (comparative fault scheme is substantive under conflicts of law analysis).

II. RESPONSE TO MR. DYDELL'S POINT II: THE COVERDELL ACT IS A LEGITIMATE EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

A. Standard Of Review

Because Point II also challenges the Coverdell Act's constitutionality, the same standard of review from Point I applies to Point II.

B. The Scope Of The Commerce Clause Power

It is unnecessary for this Court to determine the constitutionality of the Coverdell Act under the Commerce Clause because, as discussed *supra* at Section I, Congress' enactment of the Coverdell Act is supported under the Spending Clause. *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003). Nevertheless, the Coverdell Act is also constitutional under the Commerce Clause.

The Commerce Clause grants 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. Congress may promulgate three types of laws under its Commerce Clause power: (1) Congress can regulate "the channels of interstate commerce"; (2) Congress can "regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and (3) Congress can regulate "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

Contrary to Mr. Dydell's argument, since 1942, the United States Supreme Court has not distinguished between activities that "directly" or "indirectly" affect interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942) ("But even if . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this is irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"). Rather, Congress can regulate activities that directly or indirectly affect interstate commerce, as long as Congress has a *rational basis* to believe the activities affect interstate commerce in a substantial way. *Gonzales*, 545 U.S. at 22. The Court has *routinely* upheld statutes that regulate purely *intrastate* activities because those intrastate activities have an indirect effect on interstate commerce that is substantial. *United States v. Lopez*, 514 U.S. 549, 559-60 (1995) (discussing cases upholding regulation of *intrastate* activities).

C. The Coverdell Act Is Valid Under The Commerce Clause

Relying principally on *United States v. Lopez*, 514 U.S. 549 (1995), Mr. Dydell argues that the Coverdell Act exceeded the scope of Congress' Commerce Clause power. In *Lopez* the United States Supreme Court struck down the Gun-Free School Zones Act because there was no evidence that possession of guns in school zones substantially affected interstate commerce. *Id.* at 562. The Court also found that Congress could not have rationally believed the regulation of guns on school grounds substantially affected interstate commerce because to do so would have required Congress to "pile inference

upon inference." *Id.* at 567. *Lopez* does not standard for the proposition that Congress cannot regulate any aspect of schools under its Commerce Clause power.

Unlike the Gun Free School Act at issue in *Lopez*, the Coverdell Act regulates activities that Congress reasonably concluded have a "substantial affect" on interstate commerce. Along with other No Child Left Behind reforms, Congress enacted the Coverdell Act as part of a broad scheme designed to improve schools so that, among other things, the nation will have a more educated and prosperous population and work force. Ensuring that capable teachers and school administrators are not driven from education by the threat of lawsuits could certainly have a substantial impact on interstate commerce by improving the education and productivity of all students. Further, ensuring that all states provide a uniform system of immunity and liability for teachers and administrators facilitates the movement of teachers across interstate lines to those jurisdictions that need them most. This too could have a substantial impact on interstate commerce by improving the education and productivity of students in areas with teacher shortfalls. Given that this Court must "resolve all doubt in favor of the act's validity" and "may make every reasonable intendment to sustain the constitutionality of the statute," *Reproductive Health Servs.*, 185 S.W.3d at 688, these rational bases are sufficient to bring the Coverdell Act within the scope of Congress' Commerce Clause power.

While Mr. Dydell complains that there is "no evidence in the Trial Court [record]" that would support these arguments, Dr. Taylor does not have the burden to establish the Coverdell Act is within the scope of the Commerce Clause power. Rather, as the party challenging the constitutionality of a duly enacted federal statute, *Mr. Dydell* bears the

heavy burden to show that the Coverdell Act is *not* authorized by the Commerce Clause power. The Coverdell Act is *presumed* constitutional, unless Mr. Dydell proves that it "clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution." *Richard*, 298 S.W.3d at 531. The absence of congressional findings or other evidence is not determinative. *Gonzales*, 545 U.S. at 21 (citing *Lopez*, 514 U.S. at 562; *Perez v. United States*, 402 U.S. 146, 156 (1971)). Therefore, Mr. Dydell has not met his burden to show that the Coverdell Act is beyond the scope of Congress' Commerce Clause power.

III. RESPONSE TO MR. DYDELL'S POINT 3: THE COVERDELL ACT DOES NOT VIOLATE THE TENTH AMENDMENT

A. Standard Of Review

Because Point III also challenges the Coverdell Act's constitutionality, the same standard of review from Points I and II applies to Point III.

B. The Tenth Amendment Is Not An Independent Bar To Congressional Spending Clause Power

The Tenth Amendment to the United States Constitution states: "The 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. The United States Supreme Court has expressly held that, when a state agrees to be bound by conditions imposed on receipt of federal funding under the Spending Clause, *the Tenth Amendment is not violated*. *See Dole*, 483 U.S. at 210 (Tenth Amendment does not "limit the range of conditions legitimately placed on federal grants"). This is because

when a state elects to be bound by conditions imposed on receipt of federal funding, the state actually retains its sovereignty and makes a choice. *See New York*, 505 U.S. at 167-69 (distinguishing between laws of general application (which may violate the Tenth Amendment) and spending conditions (which do not)); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 142-43 (1947) (Tenth Amendment does not bar conditions on federal spending); *see also Gorrie v. Bowen*, 809 F.2d 508, 519 (8th Cir. 1987) (Tenth Amendment not a separate limitation on Spending Clause power).

Because, as discussed *supra* at Section I, the Coverdell Act is within the scope of the Spending Clause, the Coverdell Act does not violate the Tenth Amendment.

C. The Tenth Amendment Is Not An Independent Bar To The Commerce Clause Power

Similarly, the United States Supreme Court has held that the Tenth Amendment does not serve as a separate, substantive check on federal law duly enacted pursuant to the Commerce Clause power. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."); *United States v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001) ("Our holding that the statute is within the commerce power suffices also to dispose of defendant's Tenth Amendment argument.").

Therefore, because the Coverdell Act was duly enacted pursuant to Congress' Commerce Clause power (as discussed *supra* at Section II), the Tenth Amendment only bars application of the Coverdell Act if the State of Missouri was somehow barred from

participating in Congress' decision to enact the legislation. *See Nevada v. Skinner*, 884 F.2d 445, 452 (9th Cir. 1989) (Tenth Amendment only serves as bar on statute enacted pursuant to Commerce Clause if state was "excluded from the national political process" or was "singled out in a way that left it politically isolated"). The State of Missouri was not isolated, nor was it prohibited from participating in Congress' decision to pass the Coverdell Act. In fact, eight out of nine Missouri Representatives and both Missouri Senators voted in favor of the No Child Left Behind Act, which contained the Coverdell Act. GovTrack.us, *House Vote on Passage: H.R. 1 [107th]: No Child Left Behind Act of 2001* (2001), http://www.govtrack.us/congress/vote.xpd?vote=h2001-145. Thus, the Tenth Amendment does not bar application of the Coverdell Act in the State of Missouri.

D. The Coverdell Act Does Not Otherwise Interfere With Missouri Courts In A Manner That Violates The Constitution

While Mr. Dydell essentially concedes the Coverdell Act does not violate the Tenth Amendment if it is supported by the Spending Clause or the Commerce Clause, he nevertheless makes a vague argument that the Coverdell Act is unconstitutional because it "invades Missouri's sovereignty over its own courts." Mr. Dydell's argument is deficient on its face, as Missouri Courts are routinely called upon to administer federal laws in the manner prescribed by Congress and the United State Supreme Court, with cases under 42 U.S.C. § 1983 being the most common example.

At bottom, Mr. Dydell appears to argue it is unconstitutional for Congress to enact any federal law that affects the rights of individual litigants in state court and would thus require state courts to reject individual claims on the basis of federal law. As discussed

supra at Section I.F.2, the United States Supreme Court has held precisely the opposite; *Easterwood* and *Shanklin* both held that conditions attached on receipt of federal funds can *preempt and defeat* an individual plaintiff's negligence claims under state law, requiring dismissal of those state law claims. *Easterwood* and *Shanklin* are not exceptional—they are based on the common and well-understood principle that federal law is controlling under the Supremacy Clause and displaces all state law to the contrary.

Indeed, the argument that Congress impermissibly interferes with state courts by passing a law that state courts are required to apply under the Supremacy Clause is wholly without merit. The last time such an argument was presented to the United States Supreme Court, it was rejected in a unanimous and strongly worded opinion. In *Howlett By and Through Howlett v. Rose*, 496 U.S. 356 (1990), a local school board was sued in Florida state court under 42 U.S.C. § 1983 by a student who alleged he was wrongfully suspended. *Id.* at 359. Under Florida law, the school board enjoyed sovereign immunity. *Id.* at 360. Thus, it argued the federal government could not force it to be subject to liability under 42 U.S.C. § 1983 in state court. *Id.* The state trial court agreed, and dismissed the plaintiff's claim. *Id.* The Florida Court of Appeals affirmed, holding that the question of sovereign immunity in state courts was "purely a question of state law." *Id.* The Florida Supreme Court denied certiorari. *Id.*

In a unanimous opinion, the United States Supreme Court reversed. As the Court explained:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state

> courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce the law according to their regular modes of procedure.

Id. at 367.

Based on this understanding that federal law *is* state law by operation of the Supremacy Clause, the Court explained that "[t]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.* at 317. The Court held the school board could not assert the state defense of sovereign immunity to a claim under 42 U.S.C. § 1983 because federal law recognized no such defense and therefore preempted state law. *Id.* at 375. The Court closed with the comment that the Florida trial court's decision "flatly violates the supremacy clause." *Id.* at 381. Thus, *Howlett* stands for the clear proposition that federal law may affect the defenses and claims available to private litigants in state courts, and state courts are required to take cognizance of that federal law and apply it *as if it were simply the law of the state itself.* This is the same reasoning that compelled dismissal of the plaintiff's claims in *Easterwood* and *Shanklin*.

While Mr. Dydell cites to *New York v. United States*, 505 U.S. 144 (1992), and *National League of Cities v. Usery*, 426 U.S. 833 (1976), neither of these cases involved an allegation that federal law improperly interfered with state courts. *New York* dealt

with a federal attempt to force states to take title to, and dispose of, nuclear waste. 504 U.S. at 177. Thus, its subject matter is wholly inapposite. In any event, *New York* actually defeats Mr. Dydell's argument because it holds that the Tenth Amendment is not a bar to federal law enacted pursuant to the Spending Clause because a state is free to decline the federal funds and thus avoid federal conditions. *See id.* at 167-69, 173.

National League of Cities dealt with a federal attempt to subject state agencies to the requirements of the Fair Labor Standards Act. 426 U.S. at 855. *National League of Cities* was expressly overruled by the United States Supreme Court in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 557 (1985). In any event, *National League of Cities* involved mandatory federal requirements, rather than conditions on receipt of federal funds. Thus, apart from the fact that is it no longer good law, *National League of Cities* is also inapposite.

To the extent Mr. Dydell claims the Coverdell Act "essentially regulates Missouri's judicial machinery," he does not explain how this is so. The Coverdell Act merely works substantive changes to state law, which in turn may require state courts to deviate from how they would adjudicate certain cases absent the Coverdell Act. *See supra* at Section I.G. This is permissible. *See Jinks v. Richland County, S.C.*, 538 U.S. 456, 464 (2003) (rejecting argument that Congress violated "principles of state sovereignty" by requiring state courts to toll the applicable state-law statute of limitation for the period during which a plaintiff's state law claim was previously pending in federal court); *Pierce County v. Guillen*, 537 U.S. 129, 146-147 (2003) (upholding a federal statute that created an evidentiary privilege in information compiled or collected in

connection with federal highway safety programs).[14] Therefore, Mr. Dydell failed to satisfy his heavy burden to establish that the Coverdell Act is unconstitutional.

IV. RESPONSE TO MR. DYDELL'S POINT IV: THE COVERDELL ACT FULLY APPLIES ON THE FACTS OF THIS CASE

A. Standard Of Review

Because Point IV does not involve the constitutionality of the Coverdell Act, this Court reviews the Circuit Court's analysis *de novo*. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

B. The Coverdell Act's "Conformity With Federal, State, And Local Laws" Requirement Does Not Apply To Internal School District Policies

In Point 4, Mr. Dydell argues that summary judgment in favor of Dr. Taylor was not proper because Dr. Taylor failed to establish that his conduct was 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 in the classroom or school." *See* 20 U.S.C. § 6736(a)(2). Specifically, Mr.

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[14] Mr. Dydell cites *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 705 (4th Cir. 2000), and claims the Fourth Circuit overturned federal law because it conflicted with "the will of Nottaway County, Pennsylvania," (whatever that means). This is not so. The portion of the case cited by Mr. Dydell is a concurring opinion that is not controlling even in the Fourth Circuit.

Dydell claims that Dr. Taylor's conduct was not in conformity with Policy JGF. Although he provides no analysis or authority in support of his argument, Mr. Dydell claims that Policy JGF is a local "regulation" of the type encompassed by the phrase "local laws." To further his argument, Mr. Dydell summarily renames Policy JGF, giving it the self-serving title "Dangerous Student Regulation."[15] However, the Coverdell Act's reference to "local laws (including rules and regulations)" clearly refers to rules and regulations enacted by municipalities (such as cities and counties) that have the force and effect of law. The phrase does not refer to internal school district policies.

The Coverdell Act does not expressly define the phrase "local laws (including rules and regulations)" therefore this Court must construe the phrase according to the "language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009). When interpreting the plain meaning of words in federal statutes, courts often turn to dictionary definitions. *See, e.g., United States v. Robertson*, 474 F.3d 538, 541 (8th Cir. 2007). Black's Law Dictionary defines the phrase "local law" as: "A statute that relates to or operates in a particular *locality* rather than the entire state." Black's Law Dictionary at 950 (7th ed. 1999) (emphasis added).

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[15] Mr. Dydell claims that the Policy JGF was referred to in the Circuit Court as the "Dangerous Student Regulation." However, Mr. Dydell was the only party that used this self-serving title.

Similarly, federal courts interpreting the phrases "local law," "local laws," and "local regulation" have interpreted the phrases to refer to those laws and regulations applying in a particular *geographic* region. *See, e.g.*, *Gray v. Taylor*, 227 U.S. 51, 56 (1913) ("The phrase 'local law' means, primarily, at least, a law that in fact, if not in form, is directed only to a specific spot."); *Brock v. United States*, 601 F.2d 976, 979 (9th Cir. 1979) (equating "local law" with the "law of the place" and "the locale of the injury or damage"); *Solano Garbage Co. v. Cheney*, 779 F. Supp. 477, 488 (E.D. Cal. 1991) (defining "local regulation" as a regulation enacted by a "local governmental unit . . . within its geographic limits").

Therefore, the most straightforward and ordinary interpretation of the Coverdale Act's reference to "local laws (including rules and regulations)," is that the Act refers to those laws, rules, and regulations created by political subdivisions that have the power to enact laws enforceable in a local, geographic region. Under Missouri law, counties and cities have the power to enact laws that apply in a local, geographic area. *See, e.g.*, Mo. Rev. Stat. § 49.650 (governing authority of county has power to "adopt ordinances and resolutions"); Mo. Rev. Stat. § 71.010 (cities have power to "pass ordinances" confined to their jurisdiction). However, there is no provision of Missouri law authorizing the School District to enact laws or regulations that apply to all persons in a geographic area. At most, Missouri law authorizes the Board of Directors of the School District to adopt rules and regulations for the internal management of the School District, its employees, and its students. *See* Mo. Rev. Stat. § 171.011 (school board may make "needful rules and regulations for the organization, grading and government in the school district").

Such policies, rules, and regulations, however, *do not have the general force of law* and do not apply to all persons in a geographic jurisdiction. Thus, school district policies are not "local laws." Therefore, even if Dr. Taylor failed to act in conformity with Policy JGF (which is not the case), Coverdell Act immunity still applies.

C. Mr. Dydell Misstates The Actual Requirements Of Policy JGF

Regardless of whether Policy JGF is the type of "local law" referred to by the Coverdell Act, there is no question that Dr. Taylor acted in conformity with the policy. First, it is necessary to refer to the actual language of Policy JGF to determine what, if anything, it required Dr. Taylor to do. According to Mr. Dydell, Policy JGF 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.

See Appellant's Brief at 39-40.

However, Mr. Dydell improperly paraphrases and misconstrues the actual language of Policy JGF. With respect to special education students, Policy JGF *actually states* as follows:

> *[A]ny portion of a student's Individualized Education Program (IEP)* that is related to demonstrated or potentially violated behavior shall be provided to any teacher and other district employees with a need to know the information.

See LF at 241. Thus, Policy JGF did not require administrators to inform teachers of special education students with "demonstrated or potentially violent behavior." Rather, Policy JGF only required that any portion of a special education student's IEP "that is related to demonstrated or potentially violent behavior" be provided to teachers with a need to know.

Further, Policy JGF did not require *Dr. Taylor* to inform teachers "of any act committed or allegedly committed by a student in the district that is reported to the district by [law enforcement personnel]." Rather, Policy JGF actually states:

> Teachers and other school district employees who have a need to know will also be informed by the superintendent *or designee* of any act committed by a student in the district that is reported to the district by [law enforcement personnel] in accordance with state law.

See LF at 241. Thus, Policy JGF actually allowed Dr. Taylor to *delegate* responsibility for reporting such acts to a "designee." Further, the "act" referred to by this provision of Policy JGF has a precise meaning—it is an "act of school violence/violent behavior," which is required to be reported under the Safe Schools Act and is defined by Policy JGF as:

> The exertion of physical force by a student with the intent to do serious physical injury to another person while on school property, including while on school transportation in service on behalf of the district, or while involved in school activities.

LF at 240.

D. Dr. Taylor's Conduct Was In Conformity With Policy JGF

With the actual requirements of Policy JGF now in mind (rather than Mr. Dydell's misconstruction of the Policy) it is clear, based on the facts *alleged by Mr. Dydell*, that Dr. Taylor's conduct was in conformity with the Policy.

1. J.W.'s IEP did not contain anything related to J.W.'s "demonstrated or potentially violent behavior."

First, by its clear terms, Policy JGF did not require Dr. Taylor to ensure that information concerning J.W.'s "demonstrated or potentially violent behavior" was contained in the IEP. Quite differently, the Policy states that *if such information is contained* in the IEP, then it "shall be provided" to those with a need to know. Even assuming the passive tense "shall be provided" refers to an obligation on Dr. Taylor's part (which the Policy does not indicate), Mr. Dydell *admits* that J.W.'s IEP contained "no mention of his criminal record, his dangerous psychiatric conditions and his documented violent behavior." *See* Appellant's Brief at 40. Because J.W.'s IEP contained no information related to "demonstrated or potentially violent behavior," there was nothing that had to be provided to those with a "need to know," regardless of who might have had the obligation to provide the information.

To the extent Mr. Dydell implies that Dr. Taylor had an obligation to regulate the *content* of Mr. Dydell's IEP, he cites no federal or state statute or regulation, nor any School District policy or regulation, that required Dr. Taylor to ensure that information concerning J.W.'s "demonstrated or potentially violent behavior" was included in his IEP. This is not surprising because federal law prohibits Dr. Taylor from regulating the content of a student's IEP, which is determined exclusively by the IEP team. *See* 20 U.S.C. § 1414(d)(1)(B).

By way of background, an IEP is a written document that governs the education of students with certain learning disabilities. *See* 20 U.S.C. § 1414(d)(1)(A)(i). Among other things, an IEP includes a statement of the child's present levels of educational performance; a statement of measurable annual goals, including benchmarks or short-term objectives; a statement of special education services to be provided to the child; and an explanation of the extent to which the child will not participate with non-disabled children. *See generally* 20 U.S.C. § 1414(d)(1)(A). Pursuant to the federal IDEA, an IEP is developed solely by the IEP Team. 20 U.S.C. § 1414(d)(1)(B). The IEP Team is required to review each child's IEP at least annually and revise it appropriately. 20 U.S.C. § 1414(d)(4). The procedure by which an IEP Team is required to develop an IEP, and the factors that the IEP Team is to consider, are expressly enumerated in the federal IDEA. *See* 20 U.S.C. § 1414(d)(3). Nothing in the IDEA allows a superintendent to by-pass the federal procedure for creating an IEP. Therefore, any argument by Mr. Dydell that Dr. Taylor had an obligation to regulate the content of J.W.'s IEP is simply wrong. Further, to the extent such an obligation did exist under School District

policies (which is not the case), that obligation would clearly be preempted by the IDEA.[16] To the extent Mr. Dydell believes it was negligence for the IEP team not to include certain information in J.W.'s IEP, his claim does not lie against Dr. Taylor.

2. Dr. Taylor did not have a duty to report J.W.'s criminal conduct to those with a need to know.

Mr. Dydell also argues that Policy JGF imposed some general duty on Dr. Taylor to disclose J.W.'s criminal conduct to those with a need to know. This is incorrect. First, Policy JGF did not require Dr. Taylor to disclose J.W.'s criminal conduct to those with a need to know. Rather, Policy JGF expressly states that notice should be given "by the superintendent *or designee*." Policy JGF at 2 (emphasis added). Thus, Policy JGF allowed Dr. Taylor to delegate any reporting duty that did exist. It is uncontroverted that Dr. Taylor delegated this duty to the Student Hearing Office and School District's Legal Counsel. LF at 304. This was entirely appropriate.

Second, Mr. Dydell presented no evidence to support the assertion that J.W.'s criminal conduct was actually "reported to Taylor under the Missouri Safe Schools Act." *See* Appellant's Brief at 40. In fact, the portion of the Legal File cited by Mr. Dydell merely shows that juvenile officers submitted a "request for clearance to enroll" form to the School District's Student Hearing Office. This form indicated that J.W. had been

[16] Further, it is nonsense to suggest that Dr. Taylor had the obligation (or ability for that matter) to review and regulate the thousands of IEP's prepared each year in a School District that had an enrollment of nearly 20,000 students.

previously arrested for "possession of a weapon." *See* LF at 317. In his brief, Mr. Dydell cites no evidence establishing that this form was disclosed to Dr. Taylor. In fact, another of the forms cited by Mr. Dydell, completed by the School District's Student Discipline Officer (Dawn Patterson) in response to receiving the "request for clearance to enroll form," indicates J.W.'s criminal conduct *was not* the type of criminal offense that was reportable to the Superintendent under the Safe Schools Act. *See* LF at 319.

The form completed by Ms. Patterson[17] is correct—under the Safe Schools Act, and at the time a criminal petition is filed, law enforcement officers are required to report certain crimes to "the superintendent, or the superintendent's designee," of the school district in which the student is enrolled. *See* Mo. Rev. Stat. § 167.115.1. The specific crimes that must be reported to "the superintendent, or the superintendent's designee," are set forth in the statute. The only crime listed in the statute that even comes close to J.W.'s criminal conduct is "the possession of a weapon under chapter 571, RSMo." *See* Mo. Rev. Stat. § 167.115.1(18). Chapter 571, however, only criminalizes the possession of a "switchblade knife." *See* Mo. Rev. Stat. § 571.020; *see also* Mo. Rev. Stat. § 571.010(18) (defining a "switchblade knife" in part as a knife that opens automatically by pressure applied to a button . . . .). But, as Mr. Dydell himself admits, the knife J.W. attempted to bring into Westport Charter School was essentially a butcher knife—seven and a half inches long. *See* Appellant's Brief at 2. Therefore, law enforcement was not required to report J.W.'s crime to Dr. Taylor. Because Dr. Taylor did not receive the information concerning J.W.'s arrest, he clearly had no duty to disclose it.

[17] Ms. Patterson is an attorney. LFS at 235.

Third, even if Dr. Taylor could not delegate reporting duties under Policy JGF, and even if he had received information concerning J.W.'s arrest, he had no duty to disclose it under Policy JGF. Policy JGF implements reporting requirements under the Safe Schools Act. Under the Safe Schools act, *if* a superintendent or his designee receives information from a law enforcement officer, the Safe Schools Act requires that "administrators report acts of school violence to teachers and other school district employees with a need to know." Mo. Rev. Stat. § 160.261.1. The provision of Policy JGF stating that: "Teachers and other school district employees who have a need to know will also be informed by the superintendent *or designee* of any act committed by a student in the district that is reported to the district by [law enforcement personnel]," implements this reporting requirement from the Safe Schools Acts. Like Policy JGF, the Safe Schools Act defines an "act of school violence" as including "the exertion of physical force by a student with the intent to do serious physical injury." Mo. Rev. Stat. § 160.261.1. J.W.'s conduct at Westport Charter School was not an "act of school violence" under the Safe Schools Act because it did not involve the use of physical force with intent to do serious physical injury, and therefore did not have to be reported by Dr. Taylor or anyone else. Moreover, and as noted above, J.W's conduct in bringing a butcher knife into Westport Charter School was beyond the reporting requirements of the Safe Schools Act, and therefore was not reported to the School District "in accordance with state law." Thus, J.W.'s conduct was not reportable under Policy JGF by Dr. Taylor or anyone else.

Finally, Mr. Dydell makes several bombastic allegations that Dr. Taylor "did absolutely nothing" to implement Policy JGF, that he failed to give any guidance to the Special Education Department regarding the placement of students, that Dr. Taylor's conduct was a "complete and utter failure," and that Dr. Taylor was "incompetent and dangerously-detached." These allegations of Dr. Taylor's alleged negligence are *irrelevant*. As long as Dr. Taylor acted in conformity with "Federal, State, and local laws (including rules and regulations)" he is immune from Mr. Dydell's claims under the Coverdell Act. In any event, and as discussed *infra* at Section V.C.5.d, Mr. Dydell's allegations that Dr. Taylor did nothing are simply unsupported and false.

E. <u>The Remaining Provisions Of The Coverdell Act Stand Alone</u>

In the Circuit Court, Dr. Taylor argued in the alternative that, if he was not entitled to immunity under the Coverdell Act, he nonetheless benefited from the Coverdell Act's separate provisions governing comparative fault, comparative damages, and punitive damages. Relying on speeches from two politicians (Senators Greg and Miller), Mr. Dydell ignores the plain language of the Coverdell Act and claims that Dr. Taylor must first show that he is entitled to immunity under the Coverdell Act before he can benefit from its provisions imposing comparative fault, comparative damages, and a heightened standard of punitive damages. Of course, this makes no sense on its face, as a defendant who has immunity never faces liability and has no need of the Coverdell Act's remaining provisions.

While Mr. Dydell relies on speeches given by politicians, this Court must interpret the Coverdell Act under "the assumption that the ordinary meaning of [the Act's]

language accurately expresses the legislative purpose." *Gross*, 129 S.Ct. at 2350. This Court "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005). "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991). This Court must focus on the plain language of the Act, rather than selected portions of legislative history. *See, e.g., Snider v. United States*, 468 F.3d 500, 511 n.6 (8th Cir. 2006) (where plain language of statute controls, the court "need not resort to legislative history").

The provision of the Coverdell Act abolishing joint and several liability and imposing comparative fault and comparative damages for "non-economic" damages applies "[i]n any civil action against a teacher, based on an act or omission of a teacher acting within the scope of the teacher's employment or responsibilities." 20 U.S.C. § 6737(a). Similarly, the Coverdell Act's provision heightening the standard for punitive damages applies when damages are sought "against a teacher in an action brought for harm based on the act or omission of a teacher acting within the scope of the teacher's employment or responsibilities." 20 U.S.C. § 6736(c)(1). These provisions of the Coverdell Act expressly state in what cases and for what types of claims they apply. Application of these sections is *not* contingent on a finding of immunity.

Ignoring the plain language of these provisions, Mr. Dydell asks this Court to hold that the comparative fault, comparative damages, and punitive damages provisions of the Coverdell Act only apply when the five-part test for immunity contained in 20 U.S.C.

§ 6736(a) is satisfied. However, this interpretation of the Act is entirely impermissible because it would render much of the language in the comparative fault, comparative damages, and punitive damages sections meaningless. *See Corley v. United States*, 129 S. Ct. 1558, 1566-67 (2009) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). Rather, under the plain language of these provisions, they apply apart from a finding of immunity.

Nonetheless, Mr. Dydell feigns shock at this argument, claiming that "[u]nder 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." This is true. A teacher who commits an intentional tort does enjoy *some* protection under the Coverdell Act—protection from joint and several liability and the imposition of punitive damages under a lenient standard. However, such a teacher does not enjoy *immunity*. Such a teacher would face comparative fault and comparative damages relating to his or her conduct and would be subject to punitive damages in the event the Coverdell Act's standard for punitive damages is met. There is nothing wrong with this outcome. Congress was certainly free to make a policy decision that imposing comparative fault, comparative damages, and a heightened standard for punitive damages in all claims brought against teachers is, on the whole, a better policy decision than allowing teachers to be sued and found liable under the less strict common-law standards. Mr. Dydell provides no rational argument, no statutory analysis, and no case law to establish why this Court should blindly ignore the Coverdell Act's plain language.

V. DR. TAYLOR IS PROTECTED BY OFFICIAL IMMUNITY UNDER MISSOURI COMMON LAW (ALTERNATIVE GROUND FOR AFFIRMING)

A. Standard Of Review

Because this Point does not involve the constitutionality of the Coverdell Act, this Court reviews the Circuit Court's analysis *de novo*. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. "In sustaining a motion for summary judgment, a trial court may state its theory or reasons for so doing. When no grounds are stated, the trial court is presumed to base its decision on the grounds specified in the motion." *Grisamore v. State Farm Mut. Auto Ins. Co.*, 306 S.W.3d 570, 573 (Mo. App. W.D. 2010). Because this Court's review of summary judgment is "essentially de novo," the "trial court's order may be affirmed in this Court on an entirely different basis than that posited at trial, and this Court will affirm the grant of summary judgment under any appropriate theory." *Turner v. Sch. Dist. of Clayton* __S.W.3d__, 2010 WL 2812864, at *2 (Mo. 2010) (en banc).

B. Dr. Taylor Raised The Defense Of Official Immunity As An Additional Ground For Summary Judgment

Throughout this case, Dr. Taylor has asserted that he is protected by official immunity under Missouri common law. Dr. Taylor first raised official immunity in the Circuit Court in a Motion For Judgment On The Pleadings filed on May 14, 2008. After that motion was denied, Dr. Taylor sought a writ of prohibition from the Missouri Court of Appeals, Western District (which was denied) and, subsequently, from this Court.

Although this Court granted the writ on a provisional basis, the writ was quashed after oral argument and no opinion was issued.[18]

During the pendency of the writ proceedings, the parties completed briefing on Dr. Taylor's first Motion For Summary Judgment, which was filed on May 23, 2008. *See* LF at 10. In his first Motion For Summary Judgment, Dr. Taylor again raised the defense of official immunity. LFS at 4-47. After this Court quashed the provisional writ on January 27, 2009, the Circuit Court below denied Dr. Taylor's first Motion For Summary Judgment on February 25, 2009. *See* LF at 19.

On November 13, 2009, Dr. Taylor sought leave to amend his answer to include the Coverdell Act as an affirmative defense. *See* LF at 21. The Circuit Court granted this motion. *See* LF at 23. After rejecting Mr. Dydell's Motion To Strike The Coverdell Act Defense, *see* LF at 29, the Circuit Court held a telephone conference with the parties on January 4, 2010. LF at 28. During the telephone conference, the Circuit Court expressed its desire to vacate the trial setting and entertain summary judgment briefing on the Coverdell Act. During this telephone conference, and for the purpose of preserving the appellate record, counsel for Dr. Taylor requested that Dr. Taylor be allowed to

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[18] This Court's quashing of the writ does not constitute a ruling on whether Dr. Taylor is in fact entitled to official immunity. *See Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. 1999) (en banc) (stating "[t]he mere denial of a petition for writ of prohibition where the appellate court issues no opinion *is not a conclusive decision* on the merits of the issue presented").

incorporate by reference in this final round of briefing, the summary judgment arguments he previously made in May 2008, including specifically, his summary judgment arguments regarding official immunity. The Circuit Court granted Dr. Taylor's request. After the telephone conference, the Circuit Court entered an Amended Scheduling Order (stipulated to by Mr. Dydell) that expressly stated: "The parties acknowledge and have agreed that the arguments previously raised by Defendants in their Motion for Summary Judgment previously filed on May 23, 2008, and suggestions and reply suggestions in support thereof are preserved for any appeal and need not be repeated." LF at 54-55.

When Dr. Taylor subsequently filed his Motion For Summary Judgment On The Basis Of The Paul D. Coverdell Teacher Liability Protection Act ("Coverdell Act Motion"), he incorporated by reference "the grounds for summary judgment raised in the Motion For Summary Judgment previously filed on May 23, 2008, and suggestions and reply suggestions in support thereof." LF at 76. The Circuit Court granted Dr. Taylor's Coverdell Act Motion on April 8, 2010, in a summary order. LF at 468. The Circuit Court did not articulate any rationale for its grant of the Coverdell Act Motion and is therefore presumed to have granted the motion on all bases raised by Dr. Taylor, including those incorporated by reference. *Grisamore*, 306 S.W.3d at 573; *see also*

Fonseca v. Collins, 884 S.W.2d 63, 68 (Mo. App. W.D. 1994).[19]

C. Dr. Taylor Is Entitled To Official Immunity

Even if this Court concludes that the Circuit Court did not rest its decision on the basis of official immunity, this Court may affirm on that ground. *See Turner*, 2010 WL 2812864, at *2; *ITT Commercial*, 854 S.W.2d at 388.

1. The absolute defense of official immunity extends to public employees exercising discretionary authority.

In *Southers v. City of Farmington*, 262 S.W.3d 603 (Mo. 2008) (en banc), this Court clearly stated the standard for official immunity in the State of Missouri: "This judicially-created doctrine protects public employees from liability for alleged acts of negligence committed during the course of their official duties for the performance of discretionary acts." *Id.* at 610. As this Court explained, "[o]fficial immunity is intended to provide protection for individual government actors who, despite limited resources and imperfect information, must exercise judgment in the performance of their duties." *Id.* "Its goal is also to permit public employees to make judgments affecting public safety and welfare without concerns about possible personal liability." *Id.*

[19] While Mr. Dydell may contend that the Circuit Court expressly granted summary judgment only on the basis of the Coverdell Act, that is not what the Circuit Court's order indicates. The order simply restated the title of the motion and indicated that it was granted, without reference to any particular basis. LF at 475.

Cases decided since *Southers* illustrate that the *Southers* standard is a simple and clear, two-part test: (1) Is the defendant a public employee? and (2) Were the alleged acts of negligence committed during the course of the defendant's official duties for the performance of discretionary acts? *See Boever v. Special Sch. Dist. of St. Louis County*, 296 S.W.3d 487, 491 (Mo. App. E.D. 2009); *Lingo v. Burle*, 2008 WL 2787703, at *7 (E.D. Mo. 2008); *King v. Vessell*, 2008 WL 2559424, at *4 (E.D. Mo. 2008).

2. <u>There is no "public official" element to official immunity.</u>

Throughout this case, Mr. Dydell has argued that Dr. Taylor is not entitled to official immunity because he is not a "public official." To be sure, in some opinions prior to *Southers*, this Court did state that "[o]fficial immunity protects public officials from liability for alleged acts of ordinary negligence committed during the course of their official duties for the performance of discretionary acts." *See, e.g.*, *Davis v. Lambert-St. Louis Intern. Airport*, 193 S.W.3d 760, 763 (Mo. 2006) (en banc). But in *Southers*, this Court removed the "public official" language, substituting into the test the words "public employees."

Following *Southers*, the Missouri Court of Appeals, Eastern District, recently held in *Boever v. Special School District of St. Louis County*, 296 S.W.3d 487 (Mo. App. E.D. 2009), that a school *teacher and teacher's aid* were entitled to official immunity from wrongful death claims brought by the parents of a student who choked to death in a classroom. *Id.* at 492. Because the defendants were public employees, and the plaintiff's claim arose from the performance of these employees' discretionary acts (managing a classroom), the court held the defendants were entitled to official immunity. *Id.*

As *Boever* illustrates, this Court's revision of the official immunity test in *Southers* is a tremendous step toward clarifying the doctrine of official immunity in this State. According to Mr. Dydell, to invoke official immunity prior to *Southers* a defendant had to show: (1) that he was a public official; (2) that he was performing discretionary acts; and (3) that he was performing discretionary acts in the course of his official duties. But the first and third elements of this alleged pre-*Southers* test are redundant—in other words, if a defendant has official duties to perform, he is, by definition, a public official. This redundancy caused some lower courts to apply the "public official" element in an *ad hoc* and unpredictable fashion—deciding on a case-by-case basis whether particular job categories (like school superintendents) are "public officials." If the court determined that a particular job category was not a "public official," then the official immunity analysis ended and the court did not evaluate whether the defendant was engaging in discretionary acts in the performance of his or her official duties.

Mr. Dydell's official immunity test is a bad one because it applies official immunity on an *ad hoc* basis depending on the court's determination of whether a particular job category constitutes a "public official." But the law is meant to create general principles and standards that can be applied through judicial reasoning to arrive at an answer. Mr. Dydell's test provides no such principles or standards. There are *thousands*, if not *tens of thousands* of job categories of public employees in the State of Missouri. Under Mr. Dydell's view of the law, a public employee would only be entitled to argue for official immunity if she could first point to a previous Missouri case where a

court held the exact job category to constitute a "public official." Indeed, Mr. Dydell's principal argument throughout this case illustrates the point: He claims that, because there is no Missouri case holding school superintendents are entitled to official immunity (which is not even true), Dr. Taylor is not entitled to official immunity and, consequently, there is no need to analyze whether Dr. Taylor was performing discretionary acts.

Mr. Dydell's arbitrary and unpredictable standard cannot be the law. As this Court stated in *Southers*, "[o]fficial immunity is intended to provide protection for individual government actors who, despite limited resources and imperfect information, must exercise judgment in the performance of their duties." 263 S.W.3d at 611. "Its goal is also to permit public employees to make judgments affecting public safety and welfare without concerns about possible personal liability." *Id.* The key to official immunity is not where a public employee falls on some hierarchy of governmental authority—the key is whether she is forced to exercise judgment in difficult situations for the public benefit.

In some cases, this means that first-line government employees like teachers, teacher's aids, police officers, social workers, and computer programmers may be entitled to official immunity. *See, e.g.*, *Boever*, 296 S.W.3d at 492 (teacher and teacher's aid); *Conway v. St. Louis County*, 254 S.W.3d 159, 164 (Mo. App. E.D. 2008) (police officers); *Brummitt v. Springer*, 918 S.W.2d 909, 912 & n.2 (Mo. App. S.D. 1996) (social workers); *Edwards v. McNeill*, 894 S.W.2d 678, 681-83 (Mo. App. W.D. 1995) (computer programmer). In other cases, this means that official immunity may extend to high-level governmental officers like the heads of state agencies. *See, e.g.*, *Cox v. Dep't of Nat. Resources*, 699 S.W.2d 443, 448 (Mo. App. W.D. 1985) (director of the

Department of Natural Resources). The decisive question in all such cases is what type of power the public employee was exercising when she committed the acts giving rise to the plaintiff's claims—discretionary or ministerial—not whether she is at the top or bottom of the bureaucratic food chain.

Missouri courts have always granted official immunity to a wide variety of public employees in varied job categories, illustrating that the nature of a job category is not decisive. Missouri courts have granted official immunity to members of school boards and employees of the Missouri Board of Chiropractor Examiners alike because a decision regarding the manner in which to accept a bond is discretionary, as is a decision about how to conduct a chiropractor's disciplinary investigation. *Edwards v. Gerstein*, 2006 WL 3770819, at *4 (Mo. App. W.D. 2006)[20]; *George Weis Co., Inc. v. Dwyer*, 956 S.W.2d 335, 338 (Mo. App. E.D. 1997). A director of a school district's department of transportation may be immune, just as a director or superintendent of a state mental health facility is—making decisions ensuring the safe transport of thousands of Missouri children and formulating policies to care for thousands of Missouri residents suffering from mental illness or retardation are both discretionary functions that require expertise and judgment. *Webb v. Reisel*, 858 S.W.2d 767, 770 (Mo. App. E.D. 1993); *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761, 764 (Mo. App. E.D. 1981).

[20] Reversed in part on other grounds by *Edwards v. Gerstein*, 237 S.W.3d 580 (Mo. 2007) (en banc).

Neither does the magnitude of a public employee's decision factor into the official immunity analysis: whether the action is a mere administrative decision affecting subordinate employees' placement or duties or a prison safety policy that could mean life or death to inmates, prison guards, and citizens, such difficult, discretionary judgments are protected by official immunity. *Charron v. Thompson*, 939 S.W.2d 885, 887 (Mo. 1996) (en banc) (assistant prison superintendent's decision concerning how to dispose of seized contraband was an exercise in discretion based on prison safety concerns); *Bates v. State*, 664 S.W.2d 563, 565-66 (Mo. App. E.D. 1983) (administrative policy decisions in developmental disability treatment center are "discretionary decisions which go to the essence of governing.").

Applying Mr. Dydell's "public official" test leads to absurd results. Under this test, teachers, teacher's aids, police officers, social workers, computer programmers, and doctors,[21] are "public officials" and are thus entitled to official immunity, but school superintendents, who supervise 20,000-plus students and thousands of employees at a public school district are not "public officials" and are categorically barred from receiving official immunity in any case. There is no rational or principled explanation for this disparate treatment. The policies behind official immunity articulated in *Southers* apply equally to all public employees exercising discretionary authority—not just to a few job categories chosen on an *ad hoc* basis.

[21] *Sherill v. Wilson*, 653 S.W.2d 661 (Mo. 1983) (en banc).

3. Even if there is a "public official" test, Dr. Taylor was a public official because he supervised the School District.

Even if this Court determines that there is still a "public official" element to official immunity, Dr. Taylor was clearly a public official at the time of the acts giving rise to Mr. Dydell's claims. As Superintendent, Dr. Taylor was obligated by the laws of Missouri and the regulations and policies of the School District to supervise the operations of the School District, its staff, and its students.

The Missouri Court of Appeals described the test for whether an individual is a "public official" in *Webb v. Reisel*, 858 S.W.2d 767 (Mo. App. E.D. 1993):

> A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.

Id. at 768.

In this case, it is uncontroverted that Dr. Taylor was the chief administrative officer and administrative head of all divisions and departments of the School District. LF at 193. Dr. Taylor was the School Board's representative through which all directives from the School Board to its employees or students were communicated. LF at 193. Dr. Taylor's duties included making internal operational decisions regarding the School District and the various functions of the School District. LF at 193, 219-220. Mr. Dydell's Amended Petition further alleged that these duties were imposed upon

Dr. Taylor, *inter alia*, by "the laws of the State of Missouri, policies and regulations of the District, [and] duties arising from his position as Superintendent of the District." LF at 37. Thus, Dr. Taylor had a "right, authority and duty" to supervise and control these various departments and individuals, and that such power and duty was "conferred by law." *See Webb*, 858 S.W.2d at 768. Dr. Taylor is clearly a "public official."

Moreover, because the School District is a "political subdivision" of the State of Missouri, and the School Board that hired Dr. Taylor is an "instrument, or arm, of the state government," there is no question that Dr. Taylor was delegated some portion of the sovereign functions of the government. *See Hughes v. Civil Serv. Comm'n of City of St. Louis*, 537 S.W.2d 814, 815 (Mo. App. 1976) ("School directors, members of boards of education *and their employees* owe their official existence to and derive their election, appointment or employment from the authority of the laws of the state, and perform *duties prescribed by the laws of the state*.") (emphasis added).

Indeed, prior to *Southers* (and before *Boever* extended official immunity to teachers and teacher's aids) several Missouri Court of Appeals cases had explicitly or implicitly held that school superintendents are "public officials" for purposes of official immunity. *See Davis v. Bd. of Educ. of City of St. Louis*, 963 S.W.2d 679, 688-89 (Mo. App. E.D. 1998) (affirming dismissal of case against superintendent based on doctrine of official immunity); *Stevenson v. City of St. Louis Sch. Dist.*, 820 S.W.2d 609, 611 (Mo. App. E.D. 1991) (affirming dismissal of case against superintendent and principal); *see also Webb*, 858 S.W.2d at 769-70 (holding school district's director of pupil transportation to be a "public official" protected by the doctrine of official immunity

because he was exercising authority delegated from the superintendent, who also had official immunity). Moreover, there is no case from either the Missouri Supreme Court or the Missouri Court of Appeals holding that a school superintendent is not a public official for purposes of official immunity.

The analysis in *Davis* is particularly instructive. The plaintiff in *Davis* was a tenured physical education teacher who was alleged to have sexually abused certain students. *Davis*, 963 S.W.2d at 682. As a result of these allegations, the school superintendent temporarily reassigned the plaintiff to a non-teaching position pursuant to school board regulations. *Id.* After conducting additional investigation, the superintendent suspended the plaintiff without pay and submitted a formal list of charges to the school board, recommending the plaintiff's termination. *Id.* at 683. The school board conducted a hearing and concluded that the plaintiff had not engaged in the alleged abuse. *Id.* at 683. The plaintiff then filed suit against the superintendent for malicious prosecution. *Id.* at 684. On summary judgment, the trial court found the superintendent was protected from suit by official immunity, and the plaintiff appealed. *Id.*

The court affirmed, noting that "[u]nder the doctrine of official immunity, public officials acting within the scope of their authority are not liable for injuries arising from their discretionary acts or omissions." *Id.* at 688. In concluding the superintendent was a public official, the court relied on an affidavit in which the superintendent stated that he had general supervisory authority over the school district and statutory authority to present written charges seeking a teacher's termination. *Id.* at 689.

Webb goes beyond *Davis*, holding that official immunity extends to school superintendents, *as well as* department heads who have been delegated authority by a school superintendent. The plaintiff in *Webb* was injured when he was struck by an automobile after stepping off a school bus. 585 S.W.2d at 768. The plaintiff sued the director of pupil transportation for the school district, alleging that the director failed to adequately specify a safe "debussing" location, failed to adequately supervise the debussing of passengers, failed to establish guidelines for the supervision of debussing, and failed to have passengers debus on a sidewalk. *Id.* The director filed a motion for summary judgment on the basis of official immunity, which the trial court granted. *Id.*

The court concluded the director was a public official and that his choice of debussing procedures was a discretionary act. *Id.* at 770. The court noted that state law vests each school district with the general authority to manage and supervise the public schools and their employees. *Id.* Some of that broad authority, noted the court, is delegated by the school board to a school superintendent who "possesses general supervision powers over the school system, including its various departments and physical properties, course of instruction, discipline and conduct of the schools . . . ." *Id.* (citing Mo. Rev. Stat. § 168.211.2 (1986)). The superintendent is in turn empowered to delegate authority to other officers of the district. *Id.* The court noted:

> [The] Director was necessarily acting on behalf of the *superintendent* and board in exercising that power delegated to them and is immunized from liability to the same extent as the officials on whose behalf he acts.

Id. (emphasis added). The court went on to hold that the director engaged in a discretionary function in selecting debussing procedures because the "Director's responsibilities primarily required the exercise of his professional judgment, rather than the performance of routine tasks." *Id.*

Like the defendants in *Davis* and *Webb*, Dr. Taylor was vested with authority, both by state law and by the relevant policies and regulations of the School District to supervise the operation of the School District, its schools, its students, its teachers, its security staff, and its special education staff. Dr. Taylor engaged in these duties on behalf of and for the benefit of the public in his position as Superintendent. *Boever*, of course, goes further than *Davis* or *Webb*, extending official immunity to a teacher and teacher's aid, who were vested with authority by the school district to supervise students in a classroom. *Boever*, 296 S.W.3d at 491. If a teacher and teacher's aid are entitled to official immunity based on their responsibility to manage a classroom, there is no question that Dr. Taylor is entitled to official immunity based on his responsibility to manage an entire school district.

Contrary to the argument that Mr. Dydell has made throughout this case, *no Missouri court has ever held that school superintendents are not entitled to official immunity*. The Missouri state cases cited by Mr. Dydell are inapposite and all pre-date *Southers*, as well as *Boever*. The first, *Spearman v. University Public School District*, 617 S.W.2d 68 (Mo. 1981) (en banc), involved claims by two teachers that they were entitled to sovereign immunity. *Lehmen v. Wansing*, 624 S.W.2d 1 (Mo. 1981) (en banc) also involved the defense of sovereign immunity. *Kersey v. Harbin*, 591 S.W.2d 745

(Mo. App. S.D. 1979) dealt with a claim of immunity based on the fact that the defendant superintendent was performing a "governmental function," not that he was exercising discretionary authority. Thus, *Kersey* also involved a claim for derivative sovereign immunity, rather than official immunity. *Jackson v. Roberts,* 774 S.W.2d 860 (Mo. App. E.D. 1989), held that a school teacher and assistant principal[22] were not public officials for purposes of official immunity. It never addressed whether a superintendent is entitled to official immunity.[23] In light of *Davis, Stephenson, Webb,* and now *Boever*, the Missouri Court of Appeals has obviously concluded that the cases cited by Mr. Dydell are irrelevant to the issue of official immunity, because the Missouri Court of Appeals cases finding teachers, teacher's aids, superintendents, and principals to be protected by official immunity are more recent.

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[22] Based on *Southers* and *Boever*, *Jackson* is now clearly bad law. Principals, teachers, and even teacher's aids may be entitled to official immunity, depending on whether their acts are discretionary or ministerial.

[23] Mr. Dydell has also relied on the federal cases *S.B.L. v. Evans*, 80 F.3d 307 (8th Cir. 1996), and *Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Mo. 1996). Obviously, these cases pre-date *Southers* and are not controlling in any event. Moreover, more federal cases expressly hold that school superintendents are entitled to official immunity. *See, e.g.*, *Padilla v. S. Harrison R-II Sch. Dist.*, 1995 WL 244405, at *4 (W.D. Mo. 1995); *Brenner v. Sch. Dist. 47,* 1987 WL 18819, at *4 (E.D. Mo. 1987) ; *Doe A. v. Special Sch. Dist. of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986) .

4. There is no requirement that a public employee must be a statutory employee to receive official immunity.

Throughout this case, Mr. Dydell has also suggested that official immunity only extends to public employees whose job duties are expressly defined by statute. Mr. Dydell has argued that Missouri law vests control over the School District exclusively in a school board of six directors and, therefore none of the school board's agents or delegates is entitled to official immunity. Based on this argument, Mr. Dydell attempted to distinguish *Webb* and *Davis*, because both involved the superintendent of the St. Louis School District, whose duties as superintendent of a metropolitan school district are expressly defined by Mo. Rev. Stat. § 168.211. Of course, Mr. Dydell's arguments are completed rejected by *Boever*, which extended official immunity to a teacher and teacher's aid, neither of whom have statutorily defined duties that were pertinent to the plaintiff's claims in that case.

Further, Mr. Dydell forgets that official immunity is a judicially created doctrine designed to protect all public employees from liability in negligence for the performance of discretionary acts in the course of their official duties. *See Southers*, 263 S.W.3d at 610 (noting that official immunity is a "judicially-created" doctrine). Thus, official immunity is not limited by whether the Missouri legislature expressly defines a public employee's job description by statute. The policies behind official immunity are not furthered by granting immunity to superintendents of the St. Louis School District, while categorically denying it to every other superintendent in the state.

No Missouri case holds that a public employee's job description must be defined by statute to be eligible for official immunity. This Court's previous decision in *State ex rel. Howenstine v. Roper*, 155 S.W.3d 747, 752-53 (Mo. 2005) (en banc)[24], illustrates the point. In *Howenstine* this Court held that a medical doctor supervising a public health clinic was entitled to official immunity from a claim that she failed to set adequate protocols for training and supervision of the clinic's nursing staff. *Id.* at 749. As this Court explained, "Dr. Howenstine's position as medical director existed to discharge the city, county, and state obligations to improve the health of the public. The health department was delegated this authority by law." *Id.* at 751 (citing Mo. Rev. Stat. § 205.050) (emphasis added). Dr. Howenstine's position was not created by statute, but by an agreement between the City of Columbia and the University of Missouri. Nonetheless, this Court held that fact to be "not consequential to the determination" of whether Dr. Howenstine was entitled to official immunity. *Id.* Under the holding in *Howenstine*, even if Missouri statutes vest control over the School District in the hands of the School Board, Dr. Taylor, as the School Board's agent and delegate, is entitled to claim official immunity because his position was created to "discharge" the duties of the School Board. *Id.* at 751.

Unlike in *Howenstine*, however, Missouri law *does* expressly authorize school boards to hire superintendents and delegate their authority to them. Mo. Rev. Stat. § 168.201 states:

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[24] *Abrogated on other grounds by Southers*, 2008 263 S.W.3d at 614.

> The board of education in all districts except metropolitan districts may employ and contract with a superintendent for a term not to exceed three years from the time of making the contract, and employ such other servants and agents as it deems necessary, and prescribe their powers, duties, compensation and term of office or employment which shall not exceed three years.

Mo. Rev. Stat. § 168.201 (emphasis added). Thus, there is no question that Dr. Taylor was exercising authority "created and conferred by law." *Webb*, 858 S.W.2d at 768.

5. <u>Mr. Dydell's claims arise from Dr. Taylor's performance of discretionary duties.</u>

This Court identified three factors that courts must consider in determining whether an act is ministerial or discretionary: (1) the nature of the duties; (2) how much policymaking or professional expertise and judgment the act involves; and (3) the consequences of withholding immunity. *See Davis*, 193 S.W.3d at 763. All three factors indicate that Dr. Taylor's actions were discretionary.

a. <u>As a Superintendent, Dr. Taylor exercised policymaking authority that required specialized training and expertise.</u>

The nature of maintaining safety and supervision in a large urban school district is a highly specialized and important responsibility. To be assigned responsibility for a task of this nature, an individual is required to have substantial education and experience in the field. There are no statutes, regulations, or guidebooks to tell an official how to keep a school safe; rather, each school is unique and requires application of general principles

and experience to the individual needs of that particular school, necessitating that school officials exercise considerable discretion in weighing a host of relevant factors. *See Webb*, 858 S.W.2d at 770 (concluding that the director of transportation's duties were discretionary because "[p]erformance of these duties in a safe and efficient manner necessarily involved the consideration of many factors").

b. Maintaining the safety of an urban school district requires a great deal of policymaking and professional expertise.

Similarly, maintaining safety in an urban school district involves substantial policymaking judgment and professional expertise. Part of that judgment and experience relates to when and to what extent a chief executive, such as a superintendent, should delegate responsibilities to those with greater expertise and more time to deal with them. Indeed, it would have been foolish, not to mention reckless, for Dr. Taylor to attempt to be responsible for all administrative functions in the School District. Through his experience and expertise, Dr. Taylor exercised reasonable judgment and chose to set up a cabinet structure consisting of associate and assistant superintendents, who, in turn, supervised specific departments, which, in turn, were primarily responsible for managing the day-to-day administrative functions of the School District, including the receipt and reporting of information relating to students with criminal records. There is no question Dr. Taylor's actions in this regard were discretionary.

In a similar case, the Missouri Court of Appeals noted that the allegations in the petition illustrated the discretionary nature of the defendants' actions inasmuch as they were required to "exercise[e] their professional judgment in determining how or whether

they should act and in attempting to determine what course of action should be pursued." *Brummit,* 918 S.W.2d at 913. Indeed, as the Missouri Court of Appeals stated in *Jackson v. Wilson*, 581 S.W.2d 39 (Mo. App. W.D. 1979):

> At first blush it might appear that the duty to keep the school grounds 'safe' is ministerial in character, but it is apparent on closer analysis that a great many circumstances may need to be considered in deciding what action is necessary to do so, and such decisions involve the exercise of judgment or discretion rather than the mere performance of a prescribed task.

Id. at 44 (quoting and citing with approval *Meyer v. Carman*, 73 N.W.2d 514, 515 (Wis. 1955)); *see also Cox*, 699 S.W.2d at 448 (concluding that the duties of various park administrators to keep portions of the state park system "safe" are discretionary duties).

In *Boever*, the Missouri Court of Appeals held that the management of student safety in a single classroom includes discretionary duties. 296 S.W.3d at 492. In so doing, the *Boever* court stressed that *the failure to act* may be an exercise of discretion as well. *Id.* In other words, "[t]he doctrine of official immunity applies not only to discretionary acts, but also to omissions." *Id.* Clearly, Dr. Taylor's duties relating to school safety, and in particular how to deal with students like J.W., were discretionary in nature. His choice to delegate primary responsibility for such issues to the Student Hearing Office and the School District's Legal Counsel are clearly within that discretion.

c. Withholding official immunity in this case would have disastrous policy consequences on public schools.

The consequences of withholding immunity in a case like this also weigh heavily in favor of Dr. Taylor. This is not a case in which Dr. Taylor is alleged to have directly harmed Mr. Dydell. This is not even a case in which an employee of the School District is accused of directly harming Mr. Dydell. Rather, this is a case in which a special education student at Central High School used a concealed weapon to injure Mr. Dydell on School District premises. The attack was unprovoked and unexpected.

Withholding immunity in cases such as this places school officials at risk of being sued every time there is a physical altercation at school—indeed, in the case of a superintendent like Dr. Taylor—any time there is a physical altercation at any school, be it an elementary, middle, or high school anywhere in the sprawling school district. It will be open season for filing negligence claims against school officials for every act of student-on-student violence. School officials cannot possibly be expected to perform their jobs with the proverbial Sword of Damocles (in the form of a lawsuit) dangling above their heads. Moreover, because School Districts enjoy sovereign immunity, plaintiffs will do precisely what Mr. Dydell is attempting to do here—sue school administrators as proxy defendants, seeking to hold them personally liable for alleged *institutional* failings over which they have little control.

d. Even if Dr. Taylor had a tort-law duty to supervise Mr. Dydell, that duty was discretionary.

In another effort to avoid the discretionary nature of Dr. Taylor's duties, Mr. Dydell has argued that because Dr. Taylor had a duty to supervise[25] Mr. Dydell under tort law, Dr. Taylor's supervision was, by definition, ministerial. This is the tail wagging the dog. Mr. Dydell conflates the common-law "duty" element of negligence with the analysis of whether a duty is discretionary or ministerial. This Court articulated the distinction in *Southers*:

> A finding that a public employee is entitled to official immunity does not preclude a finding that he or she committed a negligent act because the official immunity does not deny the existence of the tort of negligence, but instead provides that an officer will not be liable for damages caused by his negligence.

Southers, 263 S.W.3d at 611.

In other words, every public employee that has official immunity also has some duty that subjects the public employee to claims for negligence; otherwise the public employee would have no need of official immunity in the first place. *Boever* clearly illustrates this point. Some Missouri case law suggests that school employees that personally interact with students may have a tort law duty to supervise. *See Smith v.*

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[25] Dr. Taylor does not concede that he had a tort-law duty to supervise Mr. Dydell and J.W. *See* LFS at 35-42.

Consolidated Sch. Dist. No. 2, 408 S.W.2d 50, 55 (Mo. 1966). Thus, if any school employees had a tort law duty to supervise, the teacher and teacher's aid in *Boever* had such a duty. Yet, the Missouri Court of Appeals held that the teacher and teacher's aid exercised discretionary duties in managing the classroom and thus were entitled to official immunity. *Boever*, 296 S.W.3d at 492.

Mr. Dydell's attempt to claim that Dr. Taylor "did absolutely nothing" when it came to implementing School District regulations does not change the equation; official immunity clearly applies in cases of *nonfeasance* as well as misfeasance. *See, e.g.*, *State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536, 537 (Mo. 1988) (en banc) (failure to prevent plaintiffs from swimming in dangerous part of river, failure to post warning signs, and failure to remove dangerous conditions); *Kanagawa v. State*, 685 S.W.2d 831, 836-37 (Mo. 1985) (en banc) (failure to ensure that prison was adequately secured). In any event, Dr. Taylor clearly did take action with respect to student safety. For example, Dr. Taylor made the decision to delegate responsibility for receipt and distribution of information concerning students with criminal records to the Student Hearing Office and the School District's Legal Counsel. This is doing *something*—Dr. Taylor delegated responsibility to those who had more expertise and time than he to carry out the tasks.

Further, Mr. Dydell's claim that Dr. Taylor gave absolutely no guidance to the Special Education Department is also wholly unsupported. The handbook for special education instructors that was in place during Dr. Taylor's tenure specifically referenced the federal IDEA and Missouri state regulations that govern the placement of *all* special education students, regardless of whether they have a criminal history. By relying on

federal law and Missouri regulations implementing that law, Dr. Taylor exercised his discretion. In fact, it would have been an abuse of discretion for Dr. Taylor to do anything else, as these laws are the exclusive sources of procedure for placing special education students. To the extent policy updates were required to identify changes in these laws, Dr. Taylor made the conscious decision to delegate the task of monitoring and revision to the School District's Legal Counsel.

Moreover, Dr. Taylor clearly took other action to protect Mr. Dydell's safety—the Amended Petition itself alleges that Central High School had metal detectors and security procedures in place. *See* LF at 35. The Amended Petition also alleges that the School District had an entire department responsible for student safety—the Security Department. *See* LF at 37. It is totally appropriate, and common, for superintendents of huge school districts to delegate responsibility for student safety to employees like assistant principals, school security officers, and teachers, all of whom see students on a daily basis and directly interact with them. Thus, Mr. Dydell's claim that Dr. Taylor did nothing is patently false.

D. The Safe Schools Act Did Not Abolish Official Immunity For Teachers

In previous briefing in this case, Mr. Dydell claimed that the Missouri Legislature included language in the Safe Schools Act stating that educators are not immune "from their negligent acts." Mr. Dydell purported to quote Section 160.261.8, of the Safe Schools Act, but there is no support for Mr. Dydell's assertion in the language of the statute. The pertinent portion of Section 160.261.8 actually states:

> Teachers and other authorized district personnel in public schools responsible for the care, supervision, and discipline of schoolchildren, including volunteers selected with reasonable care by the school district, shall not be civilly liable when acting in conformity with the established policy of discipline developed by each board under this section. . . . *Nothing in this section shall be construed to create a new cause of action against such school district, or to relieve the school district from liability for the negligent acts of such persons.*

Mo. Rev. Stat. § 160.261.8 (emphasis added).

Mr. Dydell redrafts the last sentence of this section, claiming it imposes liability on "educators" for "their" negligent acts. However, the language in question clearly refers to a "school district" as an entity and not to any individual "educator." Earlier language in the same section provides an additional basis of immunity to teachers when they act in conformity with a written discipline policy.[26] The language identified by Mr. Dydell merely indicates that the Safe Schools Act does not prohibit a plaintiff from bringing a negligence action against a school district that otherwise falls within an exception to the school district's *sovereign immunity*.

[26] As noted below, *see* LFS at 23-28, this sentence of the Safe Schools Act could actually create yet another basis of immunity for Dr. Taylor, given that his actions were in conformity with Policy JGF. This Court could affirm on this alternative basis as well.

E. Cases From Other Jurisdictions Explicitly Recognize That School Administrators Are Entitled To Official Immunity From Claims Resulting From A Failure To Prevent Student-On-Student Violence.

Contrary to Mr. Dydell's arguments, the notion that Dr. Taylor is protected by official immunity is unremarkable. A substantial body of authority from other jurisdictions holds that school administrators are immune from negligence claims resulting from a failure to prevent student-on-student violence. For example, where a student died from injuries sustained after another student attacked, beat, and violently kicked him in the school's hallway, the Georgia Court of Appeals affirmed the grant of summary judgment on the ground of official immunity in favor of a school principal and a teacher. *Guthrie v. Irons*, 439 S.E.2d 732 (Ga. Ct. App. 1993).

In *Carroll ex rel. Slaught v. Hammet*, 744 So.2d 906, 908 (Ala. 1999), the court held that an assistant principal enjoyed "discretionary immunity" against the negligence claim of a plaintiff who was threatened, ambushed, and repeatedly kicked in the face and head by another student *Id.* The court held "it is well established that the supervision of students is a discretionary function." *Id.* at 911.

In *Truitt v. Diggs*, 611 P.2d 633 (Okla. 1980), the Oklahoma Supreme Court held that the individual members of a school board, a school principal, a vice principal, the chief of school security, and school security guards were all immune from wrongful death claims in a case where a student was shot to death by another student on school grounds during school hours. *Id.* at 634.

There are numerous other cases holding that school officials and teachers are immune from claims arising from student-on-student violence, either on the basis of "official immunity," "discretionary immunity," or derivative sovereign immunity. *See, e.g., Castaldo v. Stone*, 192 F. Supp.2d 1124, 1163-66 (D. Colo. 2001) (immunity for administrators and teachers relating to the Columbine shootings); *Burns v. Bd. of Educ. of City of Stamford*, 638 A.2d 1, 3-4 (Conn. 1994) (superintendent eligible for qualified immunity); *Durso v. Taylor*, 624 A.2d 449, 459-60 (D.C. 1993) (discretionary immunity for school principal); *M.W. ex rel. T.W. v. Madison Bd. of Educ.*, 262 F. Supp.2d 737, 746-47 (E.D. Ky. 2003) ("good faith" discretionary immunity for principal); *Kirschner v. Carney-Nadeau Pub. Schs.*, 436 N.W.2d 416, 418-19 (Mich. Ct. App. 1989) (discretionary immunity for superintendent and principal); *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 662 (Minn. 2004) (official immunity for shop teacher); *Gunter v. Anders*, 441 S.E.2d 167, 170-71 (N.C. Ct. App. 1994) (official immunity for superintendent and principal); *Vandriest v. Midlem*, 1982 WL 2943, at *3 (Ohio Ct. App. 1982) (derivative sovereign immunity for superintendent); *Tucker v. Kershaw County Sch. Dist. and Bd. of T.*, 279 S.E.2d 378, 379 (S.C. 1981) (derivative sovereign immunity for superintendent, principal, and teacher)[27]; *Gasper v. Freidel*, 450 N.W.2d 226, 230-34 (S.D. 1990) (derivative sovereign immunity for superintendent and coaches); *Russell v. Edgewood Indep. Sch. Dist.*, 406 S.W.2d 249, 251-52 (Tex. Ct. App.

[27] *Overruled on other grounds by McCall v. Andrews v. Batson*, 329 S.E.2d 741, 743 (S.C. 1985).

1966) (derivative sovereign immunity for superintendent); *Ledfors v. Emery County Sch. Dist.*, 849 P.2d 1162 (Utah 1993) (junior high principal and teacher); *Burnham v. West*, 681 F. Supp. 1169, 1174-75 (E.D. Va. 1988) (derivative sovereign immunity for principal and teachers); *Knight v. Wood County Bd. of Educ.*, 489 S.E.2d 1 (W.Va. 1997) (school principal).

This Court should apply *Southers*, follow the lead of other courts that have granted official immunity to school officials in similar circumstances, and hold clearly that Dr. Taylor and other school employees like him are entitled to official immunity.

CONCLUSION

For all of the foregoing independent reasons, this Court should affirm the Circuit Court's grant of summary judgment in favor of Dr. Taylor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Respondent's Brief complies with the provisions of Rule 55.03 of the Missouri Rules of Civil Procedure; that it contains 25,060 words and does not contain monospaced type 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 Respondent's Brief were mailed this 31st day of August, 2010, to:

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APPENDIX

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