

IN THE
SUPREME COURT OF MISSOURI

No. SC90912

CRAIG DYDELL

Appellant

V.

BERNARD TAYLOR, JR.

Respondent

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
SIXTEENTH JUDICIAL CIRCUIT
HONORABLE W. BRENT POWELL, JUDGE

BRIEF OF AMICUS CURIAE
MISSOURI SCHOOL BOARDS' ASSOCIATION AND
NATIONAL SCHOOL BOARDS ASSOCIATION

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STATEMENT OF INTEREST

MSBA

The Missouri School Boards' Association is a non-profit association of member districts representing more than 800,000 of the more than 920,000 public school students in the state of Missouri. The mission of the MSBA is to help public school boards succeed. In furtherance of this mission the MSBA provides education and support to member districts and advocates on behalf of Missouri public schools. The issue of immunity and liability protection for the thousands of employees of Missouri's schools is important to MSBA member districts. MSBA speaks to this court about those concerns on behalf of those members. The MSBA files this brief on behalf of its members and the National School Boards Association with the permission of both Plaintiff/Appellant and Defendant/Respondent.

NSBA

The National School Boards Association (NSBA) is a non-profit federation of state associations of school boards, representing the 95,000 school board members who govern nearly 15,000 local school districts across the United States. These local public school districts serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. NSBA is committed to supporting and encouraging school boards and hundreds of thousands of local administrators in their efforts to promote safe and effective learning environments that consistently reinforce the academic lessons and civic values it is their duty to impart. NSBA strongly believes that local school

boards and administrators should be able to make and enforce reasonable and appropriate policy decisions for their schools in fulfilling this duty without undue fear of legal liability. NSBA supports an interpretation of the Coverdell Act that helps to reduce litigation and allows schools to focus on their educational mission.

STATEMENT OF JURISDICTION

This action involves an appeal of a grant of summary judgment by the Circuit Court of Jackson County (the “Trial Court”) in favor of defendant/respondent Dr. Bernard Taylor by plaintiff/appellant Dydell based on the applicability of federal law, specifically the Paul D. Coverdell Teacher Liability Protection Act (“Coverdell Act”). Plaintiff/Appellant Dydell challenges the constitutional validity of the Coverdell Act. This Court, therefore, has

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN GRANTING TAYLOR SUMMARY JUDGEMENT UNDER THE COVERDELL ACT BECAUSE THE COVERDELL ACT PROVIDES IMMUNITY TO TEACHERS IN THAT DR. TAYLOR IS A TEACHER AS DEFINED BY THE ACT.

II. THE TRIAL COURT DID NOT ERR IN GRANTING TAYLOR SUMMARY JUDGEMENT UNDER THE COVERDELL ACT BECAUSE THE COVERDELL ACT BOTH PREEMPTS AND SUPPLEMENTS STATE LAW TO

ARGUMENT

**I. THE TRIAL COURT DID NOT ERR IN GRANTING TAYLOR
SUMMARY JUDGEMENT UNDER THE COVERDELL ACT BECAUSE THE**

- Did not cause harm by his or her “willful or criminal misconduct, gross negligence, reckless misconduct or a conscious flagrant indifference to the rights or safety of the individual harmed¹.”

20 U.S.C. § 6736(a).

At no point does plaintiff/appellant claim that Taylor was not acting within the scope of his employment, that Taylor’s negligence was not related to the maintenance of order or control in the classroom or school, that Taylor was not properly licensed, or that he caused harm through his willful or criminal misconduct, gross negligence, reckless misconduct or a conscious flagrant indifference to the rights or safety of the individual harmed.

Plaintiff/Appellant does contend, however, that Taylor was not acting in accordance with “federal, state and local laws” based on his alleged failure to follow a district policy mischaracterized as the “dangerous student regulation” because he did not cause a student’s Individualized Educational Plan (IEP) to contain a section describing the student’s alleged violent tendencies.

Defendant/Respondent’s Supplemental Legal File SLF439. Policy JGF, Discipline Reporting and Records, is not a “federal, state or local law,” it is a policy adopted by the Board of Education that implements state laws regarding the sharing of information between various law enforcement and child welfare

¹ Another limitation of the Act involves operation of a motor vehicle, which is not germane to this argument.

agencies and the school district. *See, e.g.*, §§ 160.261, 167.020, 167.115, 167.117, 210.865, RSMo (2000 and Supp. 2009). However, even if this court determines that Policy JGF is a “law” for purposes of the Coverdell Act, defendant/respondent Taylor did not violate it by failing to cause a student’s IEP to include a section describing the student’s violent tendencies. Policy JGF only requires that *if* the IEP has information about violent tendencies, then that information must be shared with teachers and other employees with a need to know. SLF L440. Because the IEP did not include such information, Policy JGF was not violated by anyone, much less Dr. Taylor.

Other than the alleged failure to follow federal, state and local law, plaintiff/appellant has shown no other reason why the immunity provided by the Coverdell Act is not available to Taylor. In determining whether to deny immunity protections to defendants, other courts have required the plaintiffs to plead and prove either that an exception applied which removed the immunity shield or that defendants engaged in gross negligence, misconduct or conscious indifference. Neither is true here. In *C.B v. Sonora School Dist.*, the court succinctly explained how immunity rules such as the Coverdell Act work: “Immunity is the rule. Exceptions are, by definition, exceptions to the rule. The rule applies unless and until Plaintiff can plead facts demonstrating that an exception applies to the facts of the case.” 621 F. Supp. 2d 1123, 1150 (E.D. Cal. 2009). In *K.R. v. School Dist. of Philadelphia*, the court concluded that the defendants were entitled to “absolute immunity”

when the plaintiff failed to show that the conduct of any of the individual defendants amounted to gross negligence, misconduct or conscious indifference to the rights or safety of K.R. 2008 WL 2609810 at *1, 8 (E.D. Pa. 2008).

B. Respondent Taylor is a teacher as defined by the Coverdell Act.

The Coverdell Act's definition of teacher is purposefully broad and includes teachers, instructors, principals, administrators, school board members or other educational professionals who work in schools; as well as any professional or nonprofessional employee who works in a school and, as part of his/her job, maintains discipline or ensures safety. 20 U.S.C. § 6733 (6). To be a teacher covered by the Act, one must hold one of the listed positions and, as part of their job, maintain discipline or ensure safety.

Taylor is a teacher as he was superintendent of schools, an administrative position. See Missouri School Improvement Program Standards and Indicators Manual, Fourth Cycle, Standard 4.1 (Incorporated by Reference into 5 C.S.R. 50-345.10) available at:
<http://www.dese.mo.gov/divimprove/sia>

RSMo, (2000). As an administrator, Dr. Taylor is a teacher under the Coverdell Act.

Dr. Taylor maintained order and discipline as a part of his job. Several statutory provisions empower superintendents in Missouri to maintain order and discipline. See § 160.261(Superintendents authorized to modify suspensions for weapons violations); § 167.020, (Superintendents authorized to convene hearing to determine if student applying for a waiver is dangerous); and §167.115, (Superintendent charged with receiving information about students who have committed certain acts). RSMo (2000 and Supp. 2009).

Finally, the conclusion that Taylor is a teacher is supported by the case *K.R. v. School Dist. of Philadelphia*, 2008 WL 2609810 (E.D. Pa. 2008) where a CEO², principal, assistant principal and even a school psychologist were found to be teachers pursuant to the Coverdell

misconduct, gross negligence, reckless misconduct or a conscious flagrant indifference to the rights or safety of the individual harmed.

II.

School administrators are professional educators charged by their states and communities with day-to-day responsibility for educating the nation's children. The U.S. Supreme Court has described education as "perhaps the most important function of state and local governments...the very foundation of good citizen

of promoting safe schools and the difficulties that school employees may encounter in their efforts to maintain disciplined and orderly learning environments. To allow professional educators to carry out these duties without undue fear of legal liability, most states provide some sort of statutory or common law immunity for school employees, but there is little consistency among the states as to the form or extent of that protection.

In a study of all state laws pertaining to governmental and official immunity for school districts, the authors reveal that most states provide some sort of statutory or common law protection for teachers and administrators; however, the form and manner of providing such immunity, and the extent of such immunity, varies somewhat from state to state. Peter Maher, Kelly Price & Perry A Zirkel, *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 Kan. J.L. & Pub. Pol’y 234 (2010). This particular study used the label “governmental immunity” to describe immunity to common law negligence liability of school districts and “official immunity” to describe the law applicable to specific district employees. *Id.* at 238. The study was limited to state statutes and common law that related to immunity of K-12 public schools and their employees. *Id.* at 238-39. An adaptation of the table summarizing the status

of official immunity is attached as Appendix A.⁴ Even a cursory glance at Appendix A reveals that the clear majority of states provide immunity to teachers and administrators, including Missouri, which provides a form of discretionary or “official immunity” to school officials. *See, e.g. Boever v. Special Sch. Dist. of St. Louis County*, 296 S.W.3d 487 (Mo. Ct. App. 2009); *Davis v Bd. of Educ. of City of St. Louis*, 963 S.W.2d 679, 688-89 (Mo. Ct. App. 1991). However there are variances between states as to the form and extent of immunity, including whether there are exceptions to the immunity. For example, Ohio provides broad immunity for school employees acting within the scope of their employment while Kentucky, like Missouri, provides immunity for discretionary acts. App. A. Some states protect employees by substituting the district as the defendant. *See e.g.,* Massachusetts, Oklahoma, Oregon and South Carolina, *Id.*). North Carolina offers broad immunity but only to a limited class of employees, with one of those being the superintendent. *Id.*

By preempting state law, the Coverdell Act establishes a baseline of immunity for teachers and thereby resolves some of the variances between

⁴ The information from the article’s table has been transferred to a more easily readable format and included in Appendix A. The information in each cell is taken from the footnotes provided in the original document. Shading is provided only to ease reading and has no contextual significance.

the states with regard to immunity for teachers and administrators. As discussed in the first point, immunity under the Coverdell Act is only available for an “act or omission” when a properly licensed “teacher” was acting within the scope of his or her employment; in accordance with federal, state and local laws and not causing harm through his or her “willful or criminal misconduct, gross negligence, reckless misconduct or a conscious flagrant indifference to the rights or safety of the individual harmed.” 20 U.S.C. § 6736 (a). In this way, the Coverdell Act provides a minimal or baseline amount of protection to teachers in all states in support of their efforts to maintain an environment conducive to learning. In addition, the Act recognizes that some states provide immunity protection beyond that provided in Coverdell Act and specifically exempts those laws from preemption. Together, these two explicit instructions from Congress fill the gaps that exist in current state laws, establish a basic level of immunity in every state, and permit states to retain or add other immunity protections if they choose.

This uniform grant of immunity to school administrators, as well as to teachers, is crucial to the operation of more than 15,000 school districts and the 225,000 school administrators across this nation charged with creating safe and disciplined learning environments for students in these districts. Fear of personal liability should not deter administrators and school leaders from making decisions regarding the disciplining of students in many situations in which regulation is proper and needed. A national survey, based on a random

sample of middle and high school teachers and parents, shows almost unanimous support for the position that schools need good discipline and

these positions already do so at great personal sacrifice⁵

See also House Bill 2 (2010). Any state that receives federal education funds, as Missouri does, is subject to the Coverdell Act. 20 U.S.C. § 6734. As a “teacher” in the State of Missouri, Taylor is entitled to protection of the Coverdell Act.

D. Conclusion

Without the Coverdell Act providing protection to all employees defined as teachers, educational professionals would be subject to varying degrees of liability from no liability to full liability for their acts or omissions in establishing and maintaining school discipline, depending on the state in which the teacher works. Given the focus of NCLB on attracting highly qualified professional educators, it is not surprising that Congress chose to include uniform immunity rules that protect school employees in carrying out their educational mission.

CONCLUSION

For the foregoing reasons, the Missouri School Boards’ Association and the National School Boards Association pray this Court uphold the trial court’s grant of summary judgment for respondent Taylor.

RULE 84.06 CERTIFICATION

I hereby certify that this brief complies with the limitations contained in Rule 84.06(b) and contains 3679 words and 459 lines. The disk submitted with this brief has been scanned for viruses and to the best of my knowledge is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2010, I served a copy of the foregoing pleading
via first class mail upon the following counsel of record:

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Appendix A (Part 1)
Official Immunity State by State
Key: X = An exception to the general rule of immunity or liability

Appendix A (Part 1) Official Immunity State by State				
Key: X = An exception to the general rule of immunity or liability X* = State insurance statute waives immunity granted as an exception to the general rule of immunity [X] = Entry based solely on case law (X) = Partial or weaker exception				
State	Exceptions to General Rule of Immunity			
	Multiple Items	Insurance	Other Single Item	Marginal Item(s)
	property conditions			
CT				
DE Same immunity applies to schools as for public employees but some statutes limit the primary exceptions to school districts. See Del. Code Ann. tit. 10 §§ 4011-12 & 4013 (2008)		(X) Del. Code Ann. tit. 10 § 4013		
FL Legislation provides negligence immunity for public school employees acting within the scope of their employment by providing an exclusive remedy. Fla. Stat. § 768.28(9)(a) (2008)				
GA				

Appendix A (Part 1)

Official Immunity State by State

Key: X = An exception to the general rule of immunity or liability

X* = State insurance

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State	Exceptions to General Rule of Immunity			
	Multiple Items	Insurance	Other Single Item	Marginal Item(s)

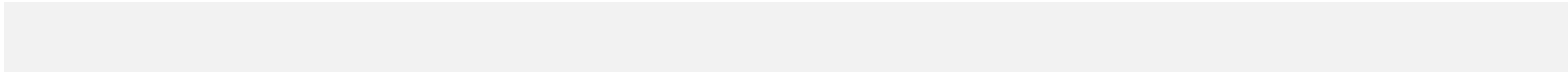
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State	Exceptions to General Rule of Immunity			
	Multiple Items	Insurance	Other Single Item	Marginal Item(s)
suits against employees acting within the scope of their employment to the district SD		X S.D. Codified Laws § 21-32A-2 Statute waives immunity to the		

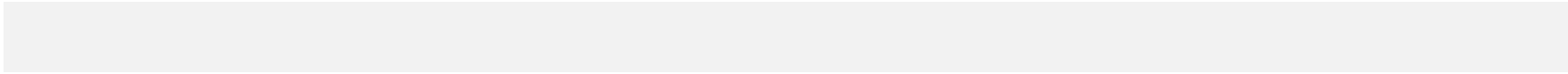
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Official

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State	Exceptions to General Rule of Immunity			
	Multiple Items	Insurance	Other Single Item	Marginal Item(s)
				of their employment
WI				
WY				

Appendix A (Part 2) Official Immunity State by State				
Key: X = An exception to the general rule of immunity or liability X* = State insurance statute waives immunity granted as an exception to the general rule of immunity [X] = Entry based solely on case law (X) = Partial or weaker exception				
State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
AL		[X] Public employees have immunity for discretionary acts within the scope of their employment.	X Ala. Code § 6-1-24.1(g) (2008) Except in the case of excessive force or cruel & unusual punishment, no employee of any local board of education shall be civilly liable for any action carried out in conformity with is y qualified in terms of scope of employment & good faith.	

Appendix A (Part 2) Official Immunity State by State				
Key: X = An exception to the general rule of immunity or liability X* = State insurance statute waives immunity granted as an exception to the general rule of immunity [X] = Entry based solely on case law (X) = Partial or weaker exception				
State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
			measures.	
AR				
CA Statutes & court decision in CA are particularly complex. Legal assistance is needed to navigate them.	X Cal. Gov't Code §830.6 (West 2009) & Cal. Educ. Code § 44808 (West 2008) Plan, design & construction of public property, listing condition of property, Injury to students off school property	X Cal. Gov't Code §820.2		
CO				
CT		X Conn. Gen. Stat. § 52-557n(a)(2)(B) (2008) Typical exceptions such as motor vehicles & dangerous property conditions		
DE Same immunity				





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State	

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State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
MI Mich. Comp Laws Ann. § 691.1409 Waiving immunity within scope of employment				
MN		[X] Anderson v. Anoka Hennepin Indep. Sch. Dist., 678 N.W.3d 651 (Minn. 2004)		
MS Miss. Code Ann. § 11-46- 7(2) (West 2008)				
MO		[X] Immunity for school officials in their discretionary acts		
MT				X Mont. Code Ann. § 2-9-305 (5)

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State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal

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State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
	Failure to supervise public recreational activities & plan or design of public property			
NM				
NY	X N.Y. Gen. Mun. Law § 50-b (McKinney 2008) & N.Y. Educ. Law § 3028-a (McKinney 2008) Districts assume liability and hold employee harmless for motor vehicle negligence & immunity for staff who report suspected drug or alcohol abuse by students under 21 to parents or to school officials.			
NC				
Very strong immunity for a i	public	m	u	n i r

Appendix A (Part 2) Official Immunity State by State				
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State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
employees do not have immunity				
OH Ohio Rev. Code Ann. § 2722.03 (A)(6) (West 2008) Broad immunity for negligence within the scope of employment				
OK Okla. Stat. tit. 51 § 153 (2008) Immunity for employees acting within the scope of their duties by		X Okla. Stat. tit. 51 § 160 (2008) Judgment against district constitutes complete bar against employee Claim.		

Appendix A (Part 2) Official Immunity State by State				
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State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
establishing suit against districts as the exclusive remedy.				
OR Or. Rev. Stat. § 30.265(1) (2008) Allocates defendant status in negligence suits against employees acting within the scope of their employment to the district				
PA				X 42 Pa. Cons. Stat. § 8557 Judgment against district completely bars claim against employee .

Appendix A (Part 2)

Official Immunity State by State

Key: X = An exception to the general rule of immunity or liability

X* = State insurance statute waives immunity

Appendix A (Part 2)
Official Immunity State by State

Key: X = An

Appendix A (Part 2)

Official Immunity State by State

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X* = State insurance statute waives immunity granted as an exception to the general rule of immunity

[X] = Entry based solely

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State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
legislatively abrogated governmental immunity for school districts so the possible summation is that liability is the general rule for employee negligence in the course of their employment. However a new general statute could be interpreted to provide an exclusive remedy.				

Appendix A (Part 2) Official Immunity State by State				
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State	Exceptions to General Rule of Liability			
	Multiple Items	Discretionary	Other Single Item	Marginal Item(s)
WI		X Wis. Stat. Ann. § 893.80(4) (West 2008)	X Wis. Stat. Ann. § 895.525(4m)(a) (West 2008) Exception for recreational activities that includes physical contact which court has held applies to cheerleading.	
WY				X Wyo. Stat. Ann. § 1-39-1116(b) (2008)

Appendix A (Part 3) Official Immunity State by State			
Key: X = An exception to the general rule of immunity or liability X* = State insurance statute waives immunity granted as an exception to the general rule of immunity [X] = Entry based solely on case law (X) = Partial or weaker exception			
State	Other Limitations		
	Indemnification	Attorney Representation	Damages Cap(s)
AL			
AK			
AZ			
AR			
CA Statutes & court decision in CA are particularly complex. Legal assistance is needed to navigate them.		X Cal. Gov't Code §995	
CO	(X) Colo. Rev. Stat. § 24-10-110(1)(b)	X Colo. Rev. Stat. § 24-10-110(1)(a) & 24-10-110 (1.5)	X Colo. Rev. Stat. § 24-10-114 & 24-10-118
CT	X Conn. Gen. Stat. § 10-235(a)		
DE Same immunity applies to schools as for public employees but some statutes limit the primary	X Del. Code Ann. tit. 14 § 1095 & tit. 10 § 4003	X Del. Code Ann. tit. 14 § 1095	X Del. Code Ann. tit. 10 § 4013

Appendix A (Part 3) Official Immunity State by State			
Key: X = An exception to the general rule of immunity or liability X* = State insurance statute waives immunity granted as an exception to the general rule of immunity [X] = Entry based solely on case law (X) = Partial or weaker exception			
State	Other Limitations		
	Indemnification	Attorney Representation	Damages Cap(s)
exceptions to school districts. See Del. Code Ann. tit. 10 §§ 4011-12 &			
FL Legislation provides negligence immunity for public school employees acting within the scope of their employment by providing an exclusive remedy. Fla. Stat. § 768.28(9)(a) (2008)		X Fla. Stat. § 1012.26 (2008) Mandatory reimbursement for successful defenses	
GA	(X) Ga. Code Ann. §§ 45-9-21 & 45-9-20 (2008) Authorizes school districts to purchase insurance for purposes of indemnification.		

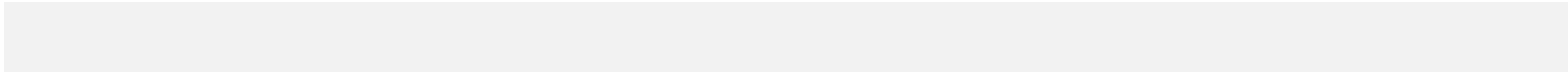
HI

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Appendix A (Part 3)
Official Immunity State by State

Key:

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State	Other Limitations		
	Indemnification	Attorney Representation	Damages Cap(s)
ME	(X) Me. Rev. Stat. Ann. tit. 14 8112(1)-(3) (2008) District may indemnify employees for acts or omissions when the district is not liable		



Appendix A (Part 3)

Official Immunity State by State

Key: X = An exception to the general rule of immunity or liability

X* = State insurance statute waives immunity granted

Appendix A (Part 3) Official Immunity State by State	
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State	Other Limitations

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State	Other Limitations		
	Indemnification	Attorney Representation	Damages Cap(s)
employees acting within the scope of their employment to the district			
PA	X 42 Pa. Cons. Stat. § 8548	X 42 Pa. Cons. Stat. § 8547	
RI	X R.I. Gen. Laws § 9-1-31 (2008)		
SC S.C. Code Ann. § 15-78-60(5a) (2008) Allocates defendant status in negligence suits against employees acting within the scope of their employment to the district		(X) S.C. Code Ann. § 1-7-50 (2008)	
SD	(X) S.D. Codified		

Appendix A (Part 3)
Official Immunity State by State
Key: X = An exception to the general rule of immunity

Appendix A (Part 3)
Official Immunity State by State
Key: X = An exception to the general rule

Appendix A (Part 3) Official Immunity State by State	
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State	Other Limitations