IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 28740

ALYSSA BLACK BEAR AND KELSEY WALKING EAGLE-ESPINOSA

Plaintiffs and Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit; AMERICAN INDIAN INSTITUTE FOR INNOVATION; a Non-Profit Corporation, JOANNE FARKE; BRANDON YORK; PAMELA HAUKAAS; NICOLE BAMBERG; TIM NEUGEBAUER; DAVID SHOEMAKER; TODD REINISH; BILL MATHIS; DAVE MERRILL; TESS STARR; LLOYD PERSSON; CARMEN WEBER; JAMES MUNSEN; RICHARD PETERSON; CHRIS VANDER WERFF; TAMMY OLSON; TONYA VANEYE; SHIRLEY PEDERSON; RYAN YOUNGSTROM; TANYA ALDRICH; JOHN B. HERRINGTON; CHRIS EYRE; CARLOS RODRIGUEZ; STACY PHELPS; DANIEL GUERICKE; AND THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representative, FIRST DAKOTA NATIONAL BANK; and THE ESTATE OF NICOLE WESTERHUIS, by and through its Personal Representatives GEORGE FISH AND KAREN FISH.

Defendants and Appellees.

Appeal from the Circuit Court, First Judicial Circuit
Charles Mix County, South Dakota

The Honorable Bruce Anderson
Circuit Court Judge

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Notice of Appeal filed on the 24th day of September, 2018.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 5

STANDARD OF REVIEW 7

ARGUMENT 8

I. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT CONGRESS HAS IMPLICITLY PREEMPTED APPELLANT'S STATE-LAW CLAIMS. 8

A. The circuit court's ruling. 8

B. The circuit court's weighing of the second *Cort* factor was inconsistent with its earlier determination that the United States Department of Education's enforcement mechanism is not exclusive of private actions. 9

C. The circuit court's weighing of the third *Cort* factor in favor of Appellees was erroneous, because Appellants' state law claims will not interfere with a congressional scheme under the HEA and is therefore consistent with the purpose of the underlying scheme 12

D. The circuit court's weighing of the fourth *Cort* factor was in error, because an exclusive federal remedy would infringe on State's rights and the rights of private litigants. 17

II. The circuit court correctly determined that there is no explicit preemption of Appellants' claims under the HEA. 19

REQUEST FOR ORAL ARGUMENT 22

CERTIFICATE OF COMPLIANCE 23

APPENDIX 24

TABLE OF AUTHORITIES

Cases

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) ..... passim
Bowman v. Mich. Higher Educ. Assistance Auth., No. 313444, 2014 WL 129332 (Mich. Ct. App. Jan. 14, 2014) 22
Cannon v. University of Chicago, 441 U.S. 677 (1979) 2, 11
Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) ..... passim
Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080 (1975) 1, 9, 11
Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 20
Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016) 14
Johnson v. Hayman & Associates, Inc., 2015 S.D. 63, 867 N.W.2d 698 8
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 17
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 23
Weitzel v. Sioux Valley Heart Partners, 2006 S.D. 45, 714 N.W.2d 884 8

Statutes

20 U.S.C. § 1234i 20, 21
20 USC § 1070a-21 5

STATEMENT OF ISSUES

Whether Plaintiffs have private causes of action or their claims are pre-empted by the federal Higher Education Act.

- The circuit court ruled that Appellants' claims were preempted by the federal Higher Education Act and granted summary judgment in favor of Appellees.
- Authorities:
  - Higher Education Act of 1965, 20 U.S.C. ch. 28 § 1001, *et. seq.*
  - Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP), 20 U.S.C. Ch. 28 § 1070a-21, *et. seq.*
  - *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975)
  - *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, (1981)
  - *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981)
  - *Cannon v. University of Chicago*, 441 U.S. 677 (1979)

STATEMENT OF THE CASE

Appellants Alyssa Black Bear and Kelsey Walking Eagle Espinosa (hereinafter "students") filed a complaint in the First Judicial Circuit Court for Charles Mix County, the Honorable Bruce Anderson presiding, on May 19, 2016. *CR p. 1, et. seq.* On January 12, 2017, Students filed an amended complaint. *CR p. 170, et. seq.* Students' amended complaint made claims of breach of contract and various torts and sought class-action certification. *Id*. The various Appellees answered the amended complaint *CR p. 96, et.*

seq. Students filed a Motion to Maintain Class Action on January 19, 2017. *CR p. 215, et. seq.* Appellees filed various motions for summary judgment

Appellee Mid-Central Educational Cooperative (hereinafter "MCEC") filed a motion for summary judgment on January 26, 2017, making the following arguments:

- That students were not third-party beneficiaries of the contracts that they alleged were breached;
- That SDCL 53-2-6 precluded students' suit;
- That SDCL 3-21-2 prohibited students' tort claims;
- That MCEC is not vicariously liable for the torts allegedly committed by Scott and Nicole Westerhuis.

CR p. 230, et. seq.

Appellees Joanne Farke; Brandon York; Pamela Haukaas; Nicole Bamberg; Tim Neugebauer; David Shoemaker; Todd Reinish; Bill Mathis; Dave Merrill; Tess Starr; Lloyd Persson; Carmen Weber; James Munsen; Richard Peterson; Chris Vander Werff; Tammy Olson; Tonya Vaneye; Shirley Pederson; Ryan Youngstrom; and Tanya Aldrich (hereinafter collectively referred to as "MCEC Directors") filed a motion for summary judgment on February 16, 2017, arguing that SDCL 3-21-2 prohibited students' tort claims. *CR p. 272, et. seq.*

Appellee American Indian Institute for Innovation (hereinafter "AIII") filed a motion for summary judgment on March 22, 2017, making the following arguments:

- That students lacked standing to bring their claims;
- That students are not third-party beneficiaries of any contract;
- That SDCL 53-2-6 precluded students' suit;
- That AIII was not vicariously liable for torts alleged to have been committed by Scott and Nicole Westerhuis;

CR p. 475, et. seq.

Appellee Daniel Guericke filed a motion for summary judgment on May 2, 2017, arguing that students' claims were barred by SDCL 3-21-2 and that students lacked standing. *CR p. 650, et. seq.*

The circuit court presided over a hearing on the various motions on June 26, 2017. *CR p. 1569, et. seq.* At the hearing, the Circuit court denied the summary judgment motions with regard to the issues of SDCL 53-2-6, SDCL 3-21-2, vicarious liability, and students' status as third-party beneficiaries. *See generally id.* The Trial court took the issue of standing and the motion to maintain class action under advisement. *Mot. Hr'g Tr. at 116:24-25; 130:19-21, June 26, 2017.*

On December 21, 2017, the Circuit court entered a memorandum decision granting Plaintiff's Motion to Maintain Class Action and denying the remaining motions for summary judgment on the issue of standing. *CR p. 2208, et. seq.*

On December 29, 2017, the Circuit court entered findings of fact, conclusions of law, and an order denying the motion for summary judgment with regard to SDCL 3-21-2, 2017, with regard to whether students were third-party beneficiaries, and with regard to the vicarious liability issue. *CR p. 2219, et. seq.*

On February 20, 2018, the Circuit court entered Findings of Fact and Conclusions of Law denying the MCEC and MCEC directors' motions for summary judgment on the issue of standing. *CR p. 2361, et. seq.*

On December 21, 2017, the various appellees filed a Joint Motion for Summary Judgment, raising the following issues:

- Whether there exists any evidence that GEAR UP funds are missing or were misappropriated;
- Whether students' causes of action are preempted by federal law;
- Whether students have standing to bring their claim.

CR p. 1829, et. seq.

The circuit court presided over a hearing on this joint motion on March 19, 2018. *CR p. 2740, et. seq.* The Circuit court denied summary judgment on the standing issue, as that matter had been decided in the December 21, 2017, memorandum decision. *Mot. Hr'g Tr., Dec. 21, 2017.* The Circuit court also denied summary judgment in a ruling from the bench on the issue of whether evidence exists that GEAR UP funds are missing or misappropriated. *Id. pp. 25-26.*

On July 20, 2018, the Circuit court issued a memorandum decision reiterating its order denying summary judgment on the issues of standing and whether GEAR UP funds are missing or were misappropriated. *CR p 2368, et. seq.* In that decision, the Circuit court granted summary judgment on Defendant's assertion that students' claims are preempted by federal law. *Id.*

On July 25, 2018, the Circuit court signed Plaintiff's proposed Findings of Fact, Conclusions of Law and Order Granting students' Motion to Maintain Class Action and students' proposed Findings of Fact, Conclusions of Law, and Order Denying Defendants' Motion for Summary Judgment on the Grounds of Standing. *CR p. 2385, et. seq.*

On September 12, 2018, the circuit court entered an order denying summary judgment on the issues of whether students lacked standing and whether GEAR UP funds were misappropriated as alleged by students, but granting summary judgment on the grounds that students "do not have a private or their claims are otherwise pre-empted by the Higher Education Act." *CR p. 2553, et. seq.* The order incorporated by reference the

circuit court's July 20, 2018, memorandum decision. *Id. p. 2554.* It is from this order that students appeal.

Students filed their notice of appeal on September 24, 2018, *Cr p. 2579, et. seq.* The various appellees filed notices of review of the issues that they had raised in the various summary judgment motions denied by the circuit court. Those notices are pending before this Court in appeal nos. 28741, 28745, 28746, 28747, 28748, and 28753.

STATEMENT OF FACTS

As students are appealing only the circuit court's granting of summary judgment on the issue of whether their claims are prohibited by federal law, they will confine their Statement of Facts to a those matters relevant to that issue. *SDCL 15-26A-60(5).* Students reserve the right to address facts relevant to Appellees' various notices of review when those matters are briefed.

The Gaining Early Awareness and Readiness for Undergraduate Program (hereinafter "GEAR UP") is a United States Department of Education grant created by Congress and intended to accomplish the following:

> [E]stablish a program that encourages eligible entities to provide support, and maintain a commitment, to eligible low-income students, including students with disabilities, to assist the students in obtaining a secondary school diploma (or its recognized equivalent) and to prepare for and succeed in postsecondary education[.]"

20 USC § 1070a-21.

The South Dakota Department of Education (hereinafter "DOE") applied for and was awarded the GEAR UP grant in order to benefit a cohort of underprivileged students who would attend schools that would be served by a program funded by the grant. *CR p. 2220 at ¶ 1.* Students Black Bear and Walking Eagle Espinosa were members of the

cohort that was to be served by, and benefit from, the grant program. *CR pp. 2231 ¶5; 2387 ¶ 4.*

DOE entered into a series of Partnership Agreements with MCEC for the purpose of administering the grant. *CR pp. 295 at ¶¶ 4-5; 2199 at ¶ 3.* MCEC, in turn, entered into contracts with AIII and other entities in order to spend the GEAR UP money and operate the program. *CR p. 4 ¶ 4.* Both of these sets of contracts were also intended to benefit the cohort of students that were to be served by the grant. *CR pp. 2220-21 at ¶¶ 2-5; 2230-31 at ¶¶ 2-5.*

On September 16, 2015, Dr. Melody Schopp, Secretary of the South Dakota Department of Education called MCEC's executive director, Daniel Guericke, and told him that DOE was considering terminating the Partnership Agreements with MCEC. *CR pp. 2200-01 at ¶ 13.* The next day, MCEC's business manager, Scott Westerhuis killed his wife and assistant MCEC business manager, Nicole Westerhuis; their children; and himself. *Cr p. 2201 ¶ 14.*

On September 21, 2015, Secretary Schopp sent a letter to MCEC notifying them that DOE was terminating the Partnership Agreements for administration of the GEAR UP program, effective immediately. *CR pp. 297 at ¶ 16; 2363 at ¶ 1.*

Based upon the information disclosed by the investigation into the Westerhuis family's tragic deaths, students brought this lawsuit against the various Appellees. *CR p. 1, et. seq.* Students sued the estates of Scott and Nicole Westerhuis for civil theft for misappropriating GEAR UP grant funds.[1] *CR p. 184.* Students sued MCEC for breaching its contract with DOE, of which students were the third-party beneficiaries. *CR pp. 184-*

[1] The circuit court granted summary judgment in favor of the estates, which order students do not appeal. *CR pp. 1554-55.*

85. Students sued AIII for breaching its contract with AIII, of which students were the third-party beneficiaries. *CR p. 186-87.* Students also sued MCEC and AIII for civil theft, alleging that they were vicariously liable for their employees' actions. *CR p. 189.* Students sued MCEC's directors, AIII's directors, Stacy Phelps, and Daniel Guericke for negligent supervision; and MCEC's and AIII's directors for breach of their duty to control their agents and employees. *CR pp. 184-91.*[2] After the circuit court granted summary judgment on behalf of the various defendants, this appeal followed.

STANDARD OF REVIEW

This Court's review of a circuit court's decision regarding summary judgment is well established:

> We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the [circuit] court, affirmance of a summary judgment is proper.

Johnson v. Hayman & Associates, Inc., 2015 S.D. 63, ¶ 11, 867 N.W.2d 698, 701-701 (citations omitted). "The circuit court's conclusions of law are reviewed de novo." *Id.* (quoting *Weitzel v. Sioux Valley Heart Partners*, 2006 S.D. 45, ¶ 16, 714 N.W.2d 884, 891).

[2] Students ultimately voluntarily dismissed their claims against AIII's directors. *CR p. 111, et. seq.*

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY CONCLUDED THAT CONGRESS HAS IMPLICITLY PREEMPTED APPELLANT'S STATE-LAW CLAIMS.

A. The circuit court's ruling.

The circuit court's memorandum decision granting summary judgment against students arrived at three legal conclusions: 1) that the Higher Education Act does not expressly preempt state involvement in or private enforcement of students' claims (*CR p. 2377*); 2) that the Higher Education Act does not implicitly preempt state involvement in or private enforcement of students' claims, because Congress had not occupied the field to the extent that private enforcement was precluded (*CR pp. 2376-77*); and 3) that three of the four factors set forth in the United States Supreme Court decision, *Cort v. Ash*, for determining whether Appellant's claims were impliedly permitted weighed in favor of preemption (*CR pp. 2378-82*). *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080 (1975). As a result of its third conclusion, the circuit court granted summary judgment against students.

In *Cort* , the United States Supreme Court created a four-factor test for determining whether a private cause of action can be implied in a federal statute not already expressly providing for one: 1) whether the plaintiff is one of the class for whose special benefit the statute was enacted; 2) whether there is any evidence that Congress intended to create or deny a private right of action; 3) whether implying a private right of action would be consistent with the purposes of the legislative scheme; and 4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law. *Id*.

The circuit court concluded that the first *Cort* factor weighed in favor of Black Bear and Walking Eagle-Espinosa, and that the remaining three weighed in favor of the defendants. *CR pp. 2378-82.* Black Bear and Walking Eagle-Espinosa assert that the circuit court erred when it weighed these three factors against them.

Black Bear and Walking Eagle-Espinosa assert that the circuit court's analysis under *Cort* is in error, because that analysis is only appropriate if they seek to enforce a right under the Higher Education Act. Instead, the issue before the circuit court was whether Black Bear and Walking Eagle-Espinosa's claims would have interfered with or undermined a congressional scheme of regulation. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, (1981); *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

However, assuming *in arguendo* that analysis under *Cort* is appropriate because students' claims are deemed to arise under the Higher Education Act, this brief will address the circuit court's rulings with respect to those factors that it found weighed in favor of preemption.

B. The circuit court's weighing of the second *Cort* factor was inconsistent with its earlier determination that the United States Department of Education's enforcement mechanism is not exclusive of private actions.

The circuit court concluded in its memorandum decision that the second *Cort* factor weighed in favor of the appellees because "there is no indication in the legislative act of an intent to create a private remedy." *CR p. 2379*. The circuit court noted that this case differed from *Cannon v. University of Chicago*, 441 U.S. 677 (1979), in which "there is a strong implication of legislative intent because Title IX was written similar to the Civil Rights Act." *CR p. 2379.* In addition, the circuit court determined that the

myriad of federal regulations which grant the Secretary various powers regarding enforcement of grant programs constituted a "strong indication that Congress intended the Secretary of USDOE to take enforcement action about misappropriated federal grant funds." *Id.*

There are two primary issues with the circuit court's determination on this second prong. First, "in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is *not necessary* to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling.'" *Cannon*, 441 U.S. at 694 (emphasis in original) (quoting *Cort*, 422 U.S. at 82). The fact that the circuit court determined at the first prong of *Cort* that the GEAR UP portion of the HEA was enacted for the benefit of a special class, and then weighed the second prong against students due to a lack of indication of an intent to create a private remedy is inconsistent with the established law on congressional intent. students are not required to show an intent to create a private cause of action; rather, it must be shown that there is no explicit purpose to deny a cause of action. Herein lies the second issue with the circuit court's *weighing* of this prong.

The circuit court essentially equated its determination that Congress intended the Secretary of Education to take enforcement action regarding misappropriated federal grant funds to an explicit purpose to deny a private cause of action to those in students' position, and thus weighed the second prong in Appellees favor. However, this is inconsistent with the circuit court's earlier determination that "the existence of these regulatory mechanisms is not necessarily exclusive of private actions by intended beneficiaries." *CR p. 2377.* The circuit court, having determined that there was *not* an

explicit purpose to deny private causes of action in its earlier analysis, should have weighed the second prong in students' favor.

In addition, the circuit court's comparison of this case to *Cannon* is inapposite. The Plaintiff in *Cannon* sought to bring a claim under Title IX for gender discrimination. That is, the cause of action itself was derived from the federal law at issue. In contrast, Students here do not seek to bring a claim pursuant to any provision of the HEA, but are instead seeking to bring purely state law claims founded in contract and tort against Appellees. Thus the more appropriate cases to look to for comparison are *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) and *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), where the central question was whether state law causes of action brought in state court would undermine a congressional scheme of regulation.[3] This analysis is akin to the third prong of *Cort*, where the circuit court erroneously weighed that prong in favor of Appellees.

[3] In fact, the *Cort* factors are not employed by the Supreme Court in either *Ark. La. Gas* or *Kalo Brick*. As the Court explained in *Touche Ross & Co. v. Redington*, the four factors in *Cort* are those "it considered 'relevant' in determining whether a private remedy is implicit in a statute *not expressly providing one*." 442 U.S. 560, 575 (1979) (emphasis added). Plaintiffs suggested to the circuit court that the *Cort* analysis was the correct one to employ assuming *arguendo* that Plaintiffs' claims were actually brought pursuant to the HEA. However, Plaintiffs' claims are not based on any rights derived from the HEA; they are purely matters of state law. Therefore, the correct analysis in determining this preemption question is that employed in *Ark. La. Gas* and *Kalo Brick*, where the primary question is whether Plaintiffs' claims would undermine a congressional scheme of regulation. Importantly, the circuit court determined that Congress, through the HEA, had not occupied the field to the extent that it left no room for state involvement or private enforcement, and only found Plaintiffs' claims implicitly preempted by employing the *Cort* factors. *See CR p. 2377*. Thus, while the *Cort* factors are not directly on point, it is analytically useful to discuss the circuit court's weighing of those factors, and necessary because it was on those factors that the circuit court based its decision to grant summary judgment in favor of Appellees.

C. The circuit court's weighing of the third *Cort* factor in favor of Appellees was erroneous, because students' state law claims will not interfere with a congressional scheme under the HEA and is therefore consistent with the purpose of the underlying scheme.

The circuit court determined that allowing students' state law causes of action to proceed would frustrate the underlying federal scheme which "allows for enforcement by USDOE concerning mishandling of GEAR UP funds" because it would result in both students and the Department of Education attempting to recover the same federal funds. *CR p. 2381*. Consequently, the circuit court weighed the third *Cort* factor in favor of Appellees. However, the fact that the Department of Education has authority to reclaim federal grant funds from the state of South Dakota does not mean that students are interfering with a congressional scheme by seeking to enforce their contractual rights with parties who happen to have received federal funds. Thus the circuit court erred in weighing this factor in favor of Appellees.

The United States Supreme Court's decisions in *Ark. La. Gas* and *Kalo Brick* both demonstrate the high degree of direct interference with federal law required to warrant preemption. In *Ark. La. Gas*, the respondent-natural gas company had a contract with the petitioner-customer for the sale of natural gas which included a favored nations clause. 453 U.S. at 573. That clause provided that the respondents would be entitled to a higher price for their natural gas sales to the petitioners if the petitioners purchased natural gas from another supplier at a higher rate. The respondents subsequently filed the contract and rates with the Federal Power Commission [now the Federal Energy Regulatory Commission] and received a certificate authorizing the sale of gas at the rates specified in the contract. *Id.* at 573–74.

Upon learning that respondents were making certain lease payments to the United States, the petitioner sought to enforce the favored nations clause by bringing a contract claim in Louisiana state court. The Louisiana Supreme Court eventually determined that the lease payments had triggered the favored nations clause and that petitioners were entitled to damages, notwithstanding the filed rate doctrine. *Id.* at 575–76.

On appeal, the United States Supreme Court vacated the award of damages as precluded by the filed rate doctrine. In doing so, the Court noted that under federal law, the Federal Power Commission alone was empowered to determine what rates were "just and reasonable" and that no regulated seller of natural gas could collect a rate other than the one on file with the Commission without a waiver. *Id.* at 577. In addition, the Court noted that the Commission itself could not alter a rate retroactively. *Id.* at 578. Because of the comprehensive authority of the Commission to set rates for natural gas sellers, the Court found that "[i]t would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [Natural Gas] Act." *Id.* at 579. *See also Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297–1299 (2016) (holding that an order from the Maryland Public Service Commission impermissibly set "an interstate wholesale rate" which intruded on the Federal Energy Regulatory Commission's "exclusive jurisdiction" over interstate wholesale rates).

Similarly, *Kalo Brick* dealt with a claim against a rail carrier regulated by the Interstate Commerce Commission (ICC) where the petitioner sought to bring claims under Iowa state law for damages arising from the cessation of rail service which had been approved by the ICC. The Supreme Court noted that the ICC had "exclusive and

plenary" authority "to rule on a carrier's decision[] to abandon lines." 450 U.S. at 321. The petitioner sought to bring a claim for improper failure to furnish cars on the rail line in question, and a number of claims regarding the general maintenance of the line. However, the ICC had determined that the respondent had abandoned the line due to conditions beyond its control and granted authorization permitting the abandonment. *Id.* at 314–15.

The Supreme Court held that the petitioner's state law claims were preempted by federal law and the ICC's "exclusive jurisdiction over abandonment" issues when the ICC had reached the merits of the matter sought to be raised in state court. *Id.* at 328, 331–32. In essence, the Court found that allowing the case to proceed in Iowa's courts would undermine Congress's attempt to create a uniform system of regulation for interstate rail carriers. *See id.* at 326 ("A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act.").

Importantly, the Court noted that its decision "does not leave a shipper in respondent's position without a remedy if it is truly harmed." *Id.* at 331. There were multiple avenues the respondent could have but did not pursue, such as challenging the abandonment in front of the ICC before the abandonment application had been filed; presenting evidence in front of the ICC during the pendency of the abandonment application; and seeking appropriate judicial review in a federal appellate court. *Id.*

In contrast to the stark clashes of federal regulatory authority and state-law causes of action presented in *Ark. La. Gas* and *Kalo Brick*, no such conflict exists here. The

circuit court based its *weighing* of this factor on the apparent dispute that would arise from students and the Department of Education "attempting to recover the same funds." *CR p. 2381*. However, students seek monetary damages from Appellees based on breach of contract, and it is not necessarily the case that students seek the federal dollars that the Department of Education may be seeking to recover. Appellees have contractual obligations to students and they have breached those obligations; students now seek to be made whole as if the contract had been performed by seeking monetary damages, but the source of the funds that would supply those monetary damages is irrelevant. Appellees can and should be required to pay damages whether or not they have federal grant dollars. To allow students' claims to proceed in state court in no way interferes with or undermines a congressionally contemplated scheme of regulation. The Department of Education is free to exercise its regulatory authority to enforce compliance with federal grant guidelines and seek to claw back funds; the exercise of that authority on the part of the federal government should not relieve Appellees of liability arising out of their conduct which violated state contract and tort law.

The circuit court also noted that the third factor "does not weigh in favor of the Plaintiffs" because this is an action for damages and the GEAR UP program was to deliver services—not money—to the beneficiaries of the program. *CR p. 2380 n.3.* It is true that the GEAR UP program is intended to provide services for members of the students' class, but the circuit court wrongly classifies this action as one derived in some manner from the HEA. It is not. Students do not seek to enforce a federal right arising out of the HEA, rather they seek to enforce their rights as they exist under the laws of the state of South Dakota. Thus, the circuit court's comparison of the present case to the

Civil Rights Act and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) is inapposite. The common remedy for a breach of contract claim is monetary damages, not specific performance. As this is an action seeking to enforce rights under state, not federal, law, that remedy is wholly appropriate.

Students' claims can proceed concurrently with any action taken by the Department of Education pursuant to its regulatory authority without interference. As opposed to *Ark. La. Gas* and *Kalo Brick*, it is not the case that students' claims will cause South Dakota's courts to "usurp[] a function that Congress has assigned to a federal regulatory body." *Ark. La. Gas*, 453 U.S. at 581. Students' claims do not contradict a directive, policy, doctrine, or action of the Department of Education or Congress; Students' claims do not interfere with the Department of Education's authority to seek to claw back mishandled federal funds; and students do not seek a remedy for wrongs arising from conduct whose subject matter Congress has chosen to place solely within the Department of Education's purview.

Lastly, to hold that the HEA preempts students' state law claims would "leave [individuals] in [students'] position without a remedy if [they are] truly harmed." *Kalo Brick*, 450 U.S. at 331. The trial court identified a number of federal regulations, many of which are broadly applicable to all federal agencies and not just the Department of Education, and determined that the authority under those regulations which allows the Department of Education to collect federal dollars constitutes a scheme of regulation which preempts students' state law claims. If the regulations allowing a federal agency to recover federal dollars preempts state law causes of action, then recipients of those federal grant dollars would be allowed to breach contracts and engage in tortious conduct

with impunity. This is not the situation envisioned by the Supremacy Clause. Both *Ark. La. Gas* and *Kalo Brick* demonstrate that preemption comes into play when Congress has placed the subject matter at the center of the dispute squarely within the realm of a federal regulatory agency. However, that is not the case here. The underlying subject matter of this dispute is the violation of state contract and tort law, not a federal appropriation. Preemption will unjustly deprive students and all similarly situated individuals of a remedy when they are wronged by a party who receives federal funds.

D. The circuit court's weighing of the fourth *Cort* factor was in error, because an exclusive federal remedy would infringe on State's rights and the rights of private litigants.

The trial court was mistaken when it determined that this case was about education rather than contracts. In its decision, the trial court noted that while education is an area of primary concern to the states, "this case involves a special federal appropriation to assist students who are enrolled in tribal schools located on Indian reservations" and thus imposing an exclusive federal remedy "is not inappropriate." *CR p. 2382*. However, this case is about Appellees' various breaches of contract and tortious conduct; education policy is a peripheral concern only.

Once again, *Ark. La. Gas* demonstrates why this is so. That case also involved a contract dispute, but set against the backdrop of the comprehensive authority of the Federal Power Commission to regulate natural gas rates. As explained above, the Supreme Court of the United States vacated the decision of the Louisiana Supreme Court because the interpretation of the contract in question so strongly implicated federal concerns. Because the filed rate doctrine precluded the sale of natural gas at any rate other than the one on file with the Federal Power Commission, the Supreme Court

determined that enforcement of the favored nations clause at issue in that case "would give inordinate importance to the role of contracts between buyers and sellers in the federal scheme for regulating the sale of natural gas." *Ark. La. Gas*, 453 U.S. at 582. The Court determined that enforcing damages under the favored nations clause would "[p]ermit[] the state court to award what amounts to a retroactive right to collect a rate in excess of the filed rate" which even the Federal Power Commission had no authority to grant. *Id.* at 578, 584. In short, the claim in *Ark. La. Gas*, while premised upon a breach of contract, was in truth about what rate a regulated seller of natural gas could collect from its customer. That was a purely federal issue, and thus federal preemption precluded the enforcement of the state law cause of action. Likewise, *Kalo Brick* involved state law claims which directly interfered with the ICC's ability to regulate interstate rail carriers, authority which Congress had vested exclusively in the ICC. *Kalo Brick*, 450 U.S. at 331–32.

In contrast, federal education policy is simply not implicated by students' claims in this case. There is no interference with the Department of Education's ability to exercise its authority under federal statute or regulation to enforce compliance with federal grant guidelines or to seek recovery of misused federal funds. The enforcement of students' state law causes of action does not impact the terms and conditions set by the Department of Education regarding the use of GEAR UP funds. Federal education policy is involved in this case at best on the periphery, and that minor presence cannot be a basis for the substantial infringement on states' rights which federal preemption would constitute. *See Kalo Brick*, 450 U.S. at 317 ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons-either that the nature of

the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963))).

There is no overriding federal law or policy which is in conflict with state law in this case. The circuit court erred in *weighing* the second, third, and fourth *Cort* prongs in favor of Appellees and holding that students' claims were preempted by federal law. Contract and common law are the province of the states, and South Dakota should not be required to cede authority over its laws to accommodate what amounts to a peripheral concern regarding federal education policy.

II. The circuit court correctly determined that there is no explicit preemption of students' claims under the HEA.

In its analysis, the circuit court correctly determined that while the Department of Education "has an enforcement mechanism with respect to the grants at issue, . . . the existence of these regulatory mechanisms is not necessarily exclusive of private actions by intended beneficiaries." *CR p. 2377*. The circuit court correctly determined that students' claims are not explicitly preempted by the HEA, and rejected Appellees' theory that the Department of Education's subpoena power under the HEA constitutes an exclusive enforcement mechanism. *Id*. Two aspects of the circuit court's analysis warrant additional discussion.

First, the circuit court noted that it could find only one decision where a court disposed of state claims asserted in state court on issues under the HEA. The facts of that case demonstrate why preemption is not applicable here. The plaintiff in that case brought, among other things, a breach of contract claim against the guarantor of his loans

through the Federal Family Education Loan Program (FFELP), on the basis that the guarantor had failed to adhere to the provisions of the promissory note which mandated notice and an opportunity for administrative review of the enforceability of the loan obligation. *Bowman v. Mich. Higher Educ. Assistance Auth.*, No. 313444, 2014 WL 129332, *4 (Mich. Ct. App. Jan. 14, 2014) (per curiam) (unpublished). The Court of Appeals of Michigan determined that the breach of contract claim was preempted by federal law, and cited to 34 C.F.R. § 682.410(b)(8) which *expressly preempts* state law that conflicts with the provisions of the FFELP regulations. *Id.* at *4–5; *see also* 34 C.F.R. § 682.410(b)(8) ("The provisions of paragraphs (b)(2), (5), and (6) of this section preempt any State law, including State statutes, regulations, or rules, that would conflict with or hinder satisfaction of the requirements of these provisions."). Thus, the court in *Bowman* had regulations specifically promulgated for the FFELP program which expressly preempted state law causes of action. In contrast, there is no similar preemption provision under any relevant regulation governing the GEAR UP program. The absence of such a provision militates strongly in favor of a finding that state law claims like the ones brought by Plaintiff presently are not preempted under the HEA.

Second, the circuit court noted that neither party briefed the issue of whether application of the General Education Provisions[4] Act (GEPA) preempted students' claims. *CR p. 2375. n. 1.* The circuit court nevertheless concluded that that 20 U.S.C. § 1234i excludes GEAR UP from the GEPA. *CR p. 2375.* As an initial matter, students dispute that application of the GEPA would preempt private, state law causes of action,

[4] The circuit court references the "General Education **Practices** Act" in its Memorandum Decision. 20 U.S.C. § 1221(a) provides that "[t]his chapter may be cited as the "General Education Provisions Act."

and the circuit court does not cite to any authority in its Memorandum Decision which provides further explanation of its assertion that GEPA may do so. However, because 20 U.S.C. § 1234i specifically excludes programs authorized by the HEA from the enforcement subchapter of the GEPA, students agree with the circuit court's determination that the GEPA is not applicable here. *See* 20 U.S.C. § 1234i(2).

The remainder of the circuit court's decision discusses the importance of congressional intent in determining if a private action is implied under a federal law in the absence of express language. The decision discusses *Ark. La. Gas* and *Kalo Brick*, as well as *Cannon*, *Touche Ross*, and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). In examining these cases, the circuit court ultimately determined that Congress has not "occupied the field to the extent that it left no room for state involvement or private enforcement" and thus moved on to an evaluation of the *Cort* factors to determine if students' claims were implicitly preempted. *CR p. 2377*. As discussed above, *Ark. La. Gas* and *Kalo Brick* demonstrate why federal preemption is not applicable in this case. However, *Cannon*, *Touche Ross*, and *Transamerica Mortg.* are all cases examining whether a private cause of action existed under a federal statute that was silent on that question. Because students do not seek to bring a cause of action under the HEA, these cases are inapplicable. Rather, the primary question here, just as it was in *Ark. La. Gas* and *Kalo Brick*, is whether students' state law causes of action would undermine a valid congressional scheme of regulation. As explained above, that is not the case and federal preemption is inapplicable here.

CONCLUSION

Students respectfully urge the Court to rule that students' state law causes of action are not preempted by federal law and enter an order reversing the circuit court's granting of summary judgment against students.

REQUEST FOR ORAL ARGUMENT

Students respectfully requests the opportunity for oral arguments before the Court.

Dated this 17th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word 2016 and contains 6228 words from the Statement of the Case through the Conclusion. I have relied on the word count of Microsoft Word 2016 in order to prepare this certificate.

Dated this 17th day of December, 2018.

BY_____
John R. Hinrichs

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 28740

ALYSSA BLACK BEAR AND KELSEY WALKING EAGLE-ESPINOSA

Plaintiffs and Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit; AMERICAN INDIAN INSTITUTE FOR INNOVATION; a Non-Profit Corporation; JOANNE FARKE; BRANDON YORK; PAMELA HAUKAAS; NICOLE BAMBERG; TIME NEUGEBAUER; DAVID SHOEMAKER; TODD REINISH; BILL MATHIS; DAVE MERRILL; TESS STARR; LLOYD PERSSON; CARMEN WEBER; JAMES MUNSEN; RICHARD PETERSON; CHRIS VANDER WERFF; TAMMY OLSON; TONYA VANEYE; SHIRLEY PEDERSON; RYAN YOUNGSTROM; TANYA ALDRICH; JOHN B. HERRINGTON; CHRIS EYRE; CARLOS RODRIGUEZ; STACY PHELPS; DANIEL GUERICKE; THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representative FIRST DAKOTA NATIONAL BANK; and THE ESTATE OF NICOLE WESTERHUIS, by and through its Personal Representatives GEORGE FISH AND KAREN FISH.

Defendants and Appellees.

Appeal from the Circuit Court, First Judicial Circuit
Charles Mix County, South Dakota

The Honorable Bruce Anderson
Circuit Court Judge

Notice of Review filed October 9, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE LEGAL ISSUE 1

Whether the Circuit Court erred in finding Ms. Black Bear and Ms. Walking-Eagle Espinosa have standing to bring their claims.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 6

ARGUMENT ……..7

I. JOINDER ……..7

II. THE CIRCUIT COURT ERRED IN DETERMINING STUDENTS HAVE STANDING TO BRING THEIR CLAIMS ……..7

A. The Circuit Court erred in determining Students have suffered an injury in fact……...8

B. The Circuit Court erred in determining Students have shown a causal connection between the alleged injury and conduct of which they complain……..10

C. The Circuit Court erred in determining Students have shown their alleged injuries are redressable……..13

CONCLUSION.....16

REQUEST FOR ORAL ARGUMENT……..17

CERTIFICATE OF COMPLIANCE.....18

CERTIFICATE OF SERVICE 19, 20

APPENDIX.....APP 001-221

TABLE OF AUTHORITIES

CASES

Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) 11, 12, 13

Arnoldy v. Mahoney, 2010 S.D. 89 6

Benson v. State, 2006 S.D. 8 ..... 2, 7, 13, 14

Cable v. Union Cty. Bd. of Cty. Comm'rs, 2009 S.D. 59 ..... 2, 7, 8, 10, 11, 13

Chem-Age Indus., Inc. v. Glover, 2002 S.D. 122, ¶ 20, 652 N.W.2d 756, 766)) 15

First Am. Bank & Tr., N.A. v. Farmers State Bank of Canton, 2008 S.D. 83 15

Fritzmeier v. Krause Gentle Corp., 2003 S.D. 112 6

Lewis & Clark Rural Water Sys., Inc. v. Seeba, 2006 S.D. 7 6

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) 2, 7, 8, 10

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86, 118 S. Ct. 1003, 1008 (1998).. 14

Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. at 669) 10

Underhill v. Mattson, 2016 S.D. 69 15

United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973)) 8

Winter Bros. Underground Inc. v. City of Beresford, 2002 S.D. 117, ... 7

JURISDICTIONAL STATEMENT

Plaintiffs/Appellants Ms. Black Bear and Ms. Walking Eagle-Espinosa (hereinafter "Students") appeal from the Circuit Court's Order Granting Defendants' Motion for Summary Judgment, entered on September 12, 2018, finding that Students do not have a private right of action, or that their claims are otherwise preempted by the Higher Education Act. Students filed their Notice of Appeal on September 24, 2018. Appellee, American Indian Institute for Innovation ("AIII") filed its Notice of Review on October 9, 2018, seeking review of the Circuit Court's denial of summary judgment regarding the issue of standing in that same September 12, 2018 Order.

The Order is one that may be appealed pursuant to SDCL § 15-26A-3. Notice of Appeal was filed within the time limits set forth in SDCL § 15-26A-6. Notice of Review was filed within the time limits set forth in SDCL § 15-26A-22. Therefore, this Court has jurisdiction to consider the issues raised on appeal.

PRELIMINARY STATEMENT

"CR" refers to the certified record. "APP" refers to the attached Appendix. "Hr. Tr." refers to the hearing transcript with the relevant date cited.

STATEMENT OF THE LEGAL ISSUE

Whether Ms. Black Bear and Ms. Walking Eagle-Espinosa have standing to bring their claims.

- The Circuit Court ruled that Students had standing to bring their claims in its September 12, 2018 Order, denying AIII's Motion for Summary Judgment on that issue (but granting summary judgment in favor of the various Defendants on a different issue).

- Authorities:
    - *Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 21
    - *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)
    - *Benson v. State*, 2006 S.D. 8, ¶ 22

STATEMENT OF THE CASE

This is an appeal from the Circuit Court, First Judicial Circuit, the Honorable Bruce Anderson, Circuit Court Judge, presiding. The case was brought by Students and alleged multiple counts against the various Defendants, including civil theft, breach of contract, negligent supervision, respondeat superior, and duty to control. (*CR* p. 170). Students also sought certification as a class-action. (*CR* p. 215).

Appellee AIII has filed multiple dispositive motions throughout this litigation. Because the Order from which AIII has filed its notice of review takes into account the previous Motion for Summary Judgment and Order from the Circuit Court, AIII will provide a procedural background to provide clarification concerning the issues at hand.

On March 22, 2017, AIII filed its first Motion for Summary Judgment arguing, in pertinent part, that Students lack standing to assert their claims against AIII. (*APP* 103-105). This Motion was heard by Judge Anderson (amongst many others filed by the other Appellees/Defendants) on June 26, 2017. The Court denied AIII's Motion with regard to the claims of breach of contract and respondeat superior, but took AIII's Motion as to standing under advisement. *Mot. Hr. Tr. at 116:24-25*.

Shortly after the hearing, on July 7, 2017, Students filed two affidavits (one of Ms. Black Bear and one of Ms. Walking Eagle-Espinosa) to attempt to overcome the standing issue raised in AIII's first Motion for Summary Judgment. (*APP* 216-218; 219-

221). No other pleading, correspondence, or other support was filed to accompany the affidavits. AIII promptly objected to the filings as being untimely, asking the Court to deny the attempt to supplement the record and alternatively asking for leave to submit a responsive affidavit or memorandum for the Circuit Court's review as well. (*CR* 1565). The Circuit Court did not rule on AIII's objection.

On December 21, 2017, at roughly 10:45 am, AIII and various other Defendants filed a second Motion for Summary Judgment arguing that there was no evidence that any GEAR UP funds were missing or misappropriated, that Students had no private cause of action and that state claims are pre-empted by federal law, and again raising the issue of Students' lack of standing as the Circuit Court had yet to provide a decision from the first Motion for Summary Judgment and June 26, 2017 hearing. (*APP* 028-030). Roughly two hours later, the Circuit Court emailed a Memorandum Opinion denying AIII's First Motion for Summary Judgment on the issue of Students' standing, as well as findings with regard to Students' request for certification as a class action. (*APP* 094-102). A formal Findings of Fact, Conclusions of Law, and Order Denying Defendants' Motion for Summary Judgment on the Grounds of Standing was not entered until July 25, 2018. (*APP* 090-093). This Order did not formally incorporate the December 21, 2017 Memorandum Opinion from the Circuit Court. *Id.*

After a hearing on March 19, 2018, the Circuit Court provided a Memorandum Opinion (which has been incorporated into the Order being appealed in this case) dealing with the second Motion for Summary Judgment. (*APP* 011-027). This document was provided to counsel and filed by the clerk on July 20, 2018. *Id.* In that Memorandum Opinion, the Circuit Court denied Defendants' Motion on the grounds that no GEAR UP

funds were misappropriated and granted the Defendants' Motion, finding that Students did not have a private right of action, or that their claims were otherwise preempted by the Higher Education Act. *Id*. Finally, the Circuit Court denied Defendants' Motion on the issue of standing, stating:

> This Court has ruled on this matter previously. The Court considers this motion as a motion for reconsideration. Nothing the Court has seen in the most recent motion changes its mind or leads the Court to believe that a mistake was made when it initially found that the two Plaintiffs here have standing as class plaintiffs or that the other members of the cohort would have standing.

(*APP* 026-027).

The Circuit Court entered its final Order Regarding Defendants' Motions for Summary Judgment on September 12, 2018. (*APP* 008-010). Shortly thereafter, on September 24, 2018, Students filed their Notice of Appeal. AIII filed its Notice of Review on October 9, 2018.

STATEMENT OF THE FACTS

AIII is a non-profit corporation with its principal place of business in Rapid City, South Dakota. AIII was organized for the purposes of encouraging Native American students to pursue education in the STEM fields with the original plan to build a STEM based school in South Dakota. (*APP* 126 at ¶ 1). The focus of AIII shifted when support could not be garnered for the building of a school and AIII began providing services related to numerous grants, including the Teacher Quality grant and the GEAR UP grant. *Id.* at ¶ 2.

The South Dakota Department of Education ("SDDOE") obtained a six-year GEAR UP Grant from the United States Department of Education. The GEAR UP grant was to be used to prepare low-income students for postsecondary education. *Id.* at ¶ 4. In

order to administer the GEAR UP grant in South Dakota, the SDDOE contracted with Mid-Central for the administration of the grant purpose. *Id.* at ¶ 5. Mid-Central then contracted with AIII to provide personnel as needed by Mid-Central to assist in providing services in various areas of the SD GEAR UP Grant (the "Service Agreement"). *Id.* at ¶ 6.

The GEAR UP funds were at all times controlled by the SDDOE. (*APP* 127 at ¶ 9). Mid-Central and/or AIII would expend their own funds and then submit receipts for expenses related to the GEAR UP program to the SDDOE for reimbursement. *Id.* at ¶ 10. Receipts of expenditures by AIII were submitted directly to Mid-Central and Mid-Central would then send these receipts to the SDDOE for review, approval and reimbursement. *Id.* at ¶ 11. If expenses submitted by either AIII or Mid-Central were not approved by the SDDOE as GEAR UP expenditures, no GEAR UP funds were paid and AIII and Mid-Central would not receive reimbursement. *Id.* at ¶ 14. No GEAR UP funds were ever paid directly to students. *Id.* at ¶ 15.

Stacy Phelps is the former CEO of AIII as well as an employee of Mid-Central. (*APP* 127 at ¶ 16). Scott and Nicole Westerhuis were employees of AIII as well as Mid-Central. (*APP* 128 at ¶ 17). During his employment with AIII, Scott improperly used AIII funds on a monthly basis for his personal gain. *Id.* at ¶ 18. Nicole was aware of Scott's activities and actively consented to and participated in such activity. *Id.* at ¶ 19.

Following an annual audit of Mid-Central, SDDOE identified conflict of interest issues within Mid-Central which would not allow Mid-Central to continue providing GEAR UP services; as a result, the SDDOE terminated its contract with Mid-Central on September 21, 2015. (*APP* 128 at ¶ 22). At the time Scott Westerhuis was made aware of

the findings of the SDDOE regarding conflicts of interest within Mid-Central, he murdered Nicole Westerhuis and their four children, set fire to their home, and committed suicide. (*CR* 170 at ¶ 44). After Mid-Central received notice from the SDDOE regarding the GEAR UP program, Mid-Central terminated its agreements with AIII. (*APP* 128 at ¶ 23). AIII continued to service its contracts directly with tribal schools until the end of the 2015- 2016 school year when AIII ceased all operations. *Id.* at ¶ 24.

In the Amended Complaint, Students raise four claims against AIII. First, they allege that AIII breached its Service Agreement with Mid-Central alleging AIII failed to prevent its employees from stealing GEAR UP funds. (*CR* 170 at ¶ 79). Second, Students allege AIII's Directors negligently supervised AIII employees, which allegedly resulted in damages. *Id*. at ¶¶ 87 - 88. Third, Students allege AIII is liable for the civil theft actions of Scott and Nicole Westerhuis or liable for negligently permitting or failing to stop the civil theft actions of Scott and Nicole Westerhuis. *Id.* at ¶ 103. Finally, they allege that the AIII Directors failed to control Scott Westerhuis, which allegedly caused damage to the Students. *Id.* at ¶ 112.

This appeal follows the Circuit Court's grant of summary judgment on behalf of the various defendants.

STANDARD OF REVIEW

Whether a party has standing to maintain an action is a question of law which the South Dakota Supreme Court reviews *de novo. Arnoldy v. Mahoney*, 2010 S.D. 89, ¶ 12, (citing *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶38; *Fritzmeier v.*

Krause Gentle Corp., 2003 S.D. 112, ¶10; *Winter Bros. Underground Inc. v. City of Beresford*, 2002 S.D. 117, ¶13).

ARGUMENT

I. Joinder.

In the interests of judicial economy, and pursuant to SDCL § 15-26A-67, AIII joins in the arguments and authorities advanced by Appellees MCEC Directors, MCEC, Guericke, Westerhuis Estates, and Phelps as to whether the trial court erred in denying the summary judgment motions on the grounds that Students were not intended third-party beneficiaries, whether AIII can be held vicariously liable for the tortious conduct of employees Scott and Nicole Westerhuis, and in MCEC Directors' arguments and authorities regarding Students' lack of private right of action and that their claims are otherwise preempted by the Higher Education Act.

II. The Circuit Court erred in determining Students have standing to bring their claims.

A plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction: (1) he or she has suffered an injury in fact; (2) there exists a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains; and (3) redressability. *See Cable v. Union Cty. Bd. of Cty. Comm'rs*, 2009 S.D. 59, ¶ 21 (citing *Benson v. State*, 2006 S.D. 8, ¶ 22; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)).

Because Students have not made an adequate showing of each of the three required elements, the Circuit Court erred when it found that Students had standing in its September 12, 2018, Order.

A. The Circuit Court erred in determining Students have suffered an injury in fact.

In order to establish standing, Students must show that they suffered an "injury in fact." *Cable*, 2009 S.D. 59 at ¶ 21. This injury must be "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citing *Lujan*, 504 U.S. at 560) (internal marks and citations omitted). Standing is not "an ingenious academic exercise in the conceivable," but "requires, at the summary judgment stage, a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973)).

Prior to submitting these affidavits, in responding the AIII's first Motion for Summary Judgment, Students failed to provide any evidence that either of them had suffered any sort of injury as a result of the alleged deprivation of funds. However, even taking into account the affidavits filed by Students shortly after the first summary judgment hearing, Students have still failed to establish they suffered an injury in fact necessary to satisfy the requirements of standing.

This is evidenced by the language of the affidavits themselves, as well as the Circuit Court's Memorandum Opinion of December 21, 2017. In the affidavits, neither Student provides any evidence of an injury. In Ms. Walking Eagle-Espinosa's affidavit, she states that she "was able" to receive GEAR UP services for all four years of her high school career. (*APP* 221 at ¶ 8). She then goes on to describe various programs, outlined in the "Project Narrative" to the Partnership Agreement between Mid Central Educational Cooperative and the State of South Dakota, which she allegedly did not receive (or was not aware that she received.) (*APP* 220 at ¶¶ 3- 7). However, at no point in her affidavit

does she provide any evidentiary support that she was (1) even eligible for those programs or (2) that her school was one of the schools that even provided those programs. *Id.* Thus, there is no indication that she would have participated had those programs been available, and importantly, no evidence to support that the alleged deprivation of those programs was caused by or related to any of the alleged issues giving rise to this litigation (or evidence that she was somehow "injured" as a result.)

Ms. Black Bear's affidavit suffers from the same deficiencies. In a like token, Ms. Black Bear states that she "do[es] not remember" being given the opportunity to participate in certain GEAR UP programs. (*APP* 217 at ¶ 3). Then, like Ms. Walking Eagle-Espinosa, she outlines the various programs that she did not receive during her time in high school. (*APP* 217-218 at ¶¶ 4-7). She, too, fails to provide any evidentiary support that she was eligible for those programs, that the programs even existed at her school, or that the alleged deprivation of those programs was caused by the alleged issues giving rise to this litigation. In fact, Ms. Black Bear states that at one point, she was not eligible to participate in one program due to her familial income, stating "I believe the denial was based on the income of my mother." (*APP* 217 at ¶ 5). Thus, Ms. Black Bear's own affidavit controverts her contention that her alleged deprivation of programing was caused by AIII.

Finally, both Ms. Walking Eagle Espinosa and Ms. Black Bear are both enrolled in college, which was the fundamental purpose of the GEAR UP program. To argue that the deprivation of GEAR UP funding prevented them from obtaining the ultimate goal of GEAR UP—to attend college—is in direct contradiction to their own testimony under oath. Neither Student has established anything more than a "conjectural or hypothetical"

injury, which is not enough to satisfy the requirements of standing. *See Cable*, 2009 S.D. 59 at ¶ 21.

The hypothetical nature of Students' alleged injuries is further shown by the Circuit Court's Memorandum Opinion, dated December 21, 2017. (*APP* 094-102). To come to its conclusions, the Circuit Court relied heavily upon the untimely affidavits submitted by Students. (*APP* 098-099). Throughout the Opinion, the Circuit Court's own language highlights the speculative nature of the alleged injuries, stating in part, "there is a great probability [Students] may have been denied at least some services. . ." and that the alleged harm was "de minimis" or "minimal in degree." (*APP* 099) (emphasis added).

However, contrary to the findings of the Circuit Court, the harm allegedly suffered by Students is not de minimis; instead, it is non-existent, as is evidenced by the lack of evidence provided by Students. At the summary judgment stage of the litigation, Students must make "a factual showing of perceptible harm" and provide evidence of an injury that is actual, concrete, and particularized injury in fact. *Lujan*, 504 U.S. at 566 (quoting *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. at 669). Students have not done so and are unable to meet the requirements of standing, either as individuals or as representatives of a class. Therefore, the Circuit Court erred in finding in its September 12, 2018, Order that Students have standing.

B. The Circuit Court erred in determining that Students have shown there to be a causal connection between the alleged injury and the conduct of which they complain.

Much like "injury in fact" requirement of standing, Students cannot satisfy the second required element of standing—the "causal connection."

To meet the causal connection requirement for standing, Students must show that the injury complained of is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Cable*, 2009 S.D. 59 at ¶ 21 (internal citations omitted). The "fairly traceable" prong examines the "causal connection between the assertedly unlawful conduct and the alleged injury." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984).

Students cannot make the required showing that their alleged injuries are "fairly traceable" to AIII's actions. In its Memorandum Opinion of December 21, 2017, the Circuit Court broadly states:

> [Students] have shown that there is evidence they were denied some services from the various federal grants which is fairly traceable to the collective action of the Defendants, whether intentionally or negligently accomplished, in this case and not the result of some independent action of a third party not before the Court.

(*APP* 099). However, the Circuit Court provides no rational for this finding. *Id.* In fact, to the contrary, Students have failed to provide adequate support for this element of the standing requirements.

As argued previously, Students have failed to elucidate the injury which they allegedly received as a result of AIII's actions. They have also failed to provide any insight to support the theory that AIII caused this undefined injury, other than making broad conclusory statements to oppose AIII's arguments. In doing so, Students conveniently disregard the multiple other factors which play into a Native American student's decision and ability to participate in postsecondary education.

The purpose of the GEAR UP program was to assist "low income students in obtaining a secondary school diploma (or its recognized equivalent) and to prepare for

and succeed in postsecondary education[.]" (*APP* 126 at ¶ 4). Both Students have achieved that goal and are currently enrolled in college. In the affidavits provided, neither Student provides any evidentiary support for the contention that they were in any way actually affected by the allegations giving rise to this lawsuit, nor do they provide any evidence that AIII or any other Defendant caused their alleged injuries.

For example, while Ms. Black Bear states, "during my time at Todd County Middle School, I did not meet with a counselor one-on-one to review my grades and assessment scores and make adjustments to my personal learning plans and obtain tutoring. . ." (*APP* 217 at ¶ 4). However, she does not provide any evidence that there is a connection of any sort between the alleged unlawful conduct and her supposed injury. *See Allen,* 468 U.S. at 753 n.19. There is no evidence to suggest that this lack of a counselor was caused by the alleged embezzlement of funds, contributed to whatever injury she alleges to have sustained, or that she would have even taken advantage of such a service (or even if these were services under the GEAR UP grant). She also does not allege that there was no counselor there—just that she did not meet with him or her. *Id.* The same is true with regard to the remainder of the allegations in her affidavit—she provides no evidence that the actions of the Defendants/Appellees caused the alleged deprivations about which she complains. Finally, she undercuts any causation argument that might be present by stating she believes at least one of the alleged deprivations was caused by something wholly unrelated to the issues giving rise to this litigation—her mother's income being too high. (*APP* 217 at ¶ 5).

The same is true for Ms. Walking Eagle-Espinosa. Like Ms. Black Bear, her affidavit is devoid of any evidence of a connection between the alleged unlawful conduct

and the injury of which she complains. She alleges that she took the SAT and ACT exams, but does not allege that the lack of preparatory courses caused her injury or that this injury was actually caused by the alleged embezzlement of grant funds. (*APP* 221 at ¶ 6). She also fails to provide evidence that she was eligible for this sort of preparatory course or that it would have been offered at her school absent the alleged embezzlement (or again, whether these were even service under the GEAR UP grant.)

Finally, Students disregard the infinite other factors which could cause any student to choose not to obtain a postsecondary education, as pointed out by Students in their Response to the first Motion for Summary Judgment. As they acknowledge, Students faced "massive challenges" including "a high percentage of alcohol and drug abuse, a large percentage of single parent families, a high infant mortality rate, poor housing conditions, high suicide rates, high juvenile arrest rates, low household incomes, high unemployment, and limited health services." (*APP* 189-190). Any number of these factors could cause a student not to seek a postsecondary education, regardless of whether they received GEAR UP programming, and could constitute "independent action of some third party not before the court." *Cable*, 2009 S.D. 59 at ¶ 21.

Because Students have failed to provide any evidence to satisfy the causation element of the standing analysis, the Circuit Court erred in determining Students had standing in its September 12, 2018 Order.

C. The Circuit Court erred in determining that Students have shown their alleged injuries are redressable.

Redressability examines the causal connection between "the alleged injury and the judicial relief requested." *Allen,* 468 U.S. 753 at n.19. To meet this requirement, a plaintiff "must show it is likely, and not merely speculative, that the injury will be

redressed by a favorable decision." *Cable*, 2009 S.D. 59, ¶ 21 (citing *Benson*, 2006 SD 8, ¶ 22). If the relief sought will not remedy the alleged injury, a plaintiff lacks standing to bring his or her claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86, 118 S. Ct. 1003, 1008 (1998) (finding that the plaintiffs failed to meet the redressability requirement of standing because none of the relief sought would compensate the plaintiffs for their losses).

In its December 21, 2017 Memorandum Opinion, the Circuit Court stated, "[Students] have further established that it is likely and not merely speculative that the injury will be redressed should they obtain a favorable decision as to the Defendant's [sic] liability for the loss," and cited to *Benson* for support. (*APP* 099) (citing 2006 SD 8, ¶ 22). However, there is no analysis accompanying the Circuit Court's broad statement as to Students having satisfied the redressability requirement of the standing analysis.

Much like the prior prongs, there is no evidence in the record to suggest a favorable ruling from this Court will redress Students' alleged injury. Initially, in the Amended Complaint, Students request "actual, compensatory, and consequential damages in an amount the jury deems just and proper under the circumstances." (*CR* 214). AIII responded, reminding Students that GEAR UP was not a program which provided money to students. (*APP* 117). Instead, GEAR UP's purpose was to provide programs and services during summer vacation and the school year to encourage Native American youth to become interested in higher education. *Id.* In an attempt to controvert this, Students provided various exhibits attached to the affidavit of their counsel. (*CR* 778). However, none of these exhibits provide any evidence to show that GEAR UP

provided money to students. Thus, this evidence is inadequate to overcome AIII's argument regarding the lack of redressability of Students' alleged injury.

Students also resisted the first Motion for Summary Judgment by asking the Circuit Court to consider "the detriment caused by the wrongful conversion of personal property. . ." (*APP* 193). This argument is both irrelevant and unsupported by the facts of this case and South Dakota Supreme Court precedent. In order to have a valid claim for conversion, a plaintiff must have title to the property at issue. *See Underhill v. Mattson*, 2016 S.D. 69, ¶ 19 ("[c]onversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right") (quoting *First Am. Bank & Tr., N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 38 (emphasis added) (quoting *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 20, 652 N.W.2d 756, 766)). Again, because it is undisputed that GEAR UP did not provide any funds directly to any students, Students never would have gained title to the funds to be able to make a valid claim for conversion. Thus, this argument should be disregarded.

An analysis of the injury claimed by Students will help to clarify why it cannot be redressed by a money judgment from any court. Students allege they were deprived of certain GEAR UP programing as a result of the alleged embezzlement of funds. However, as previously noted, the purpose of GEAR UP was to get Native American students interested in postsecondary education. Both Ms. Black Bear and Ms. Walking Eagle-Espinosa are currently enrolled in college. A money judgment would not redress any alleged injury for not being exposed to the GEAR UP program or assistance during Students' time in middle and high school. A monetary award will not help Students (or

any other Native American student in their cohort) obtain higher test scores, college credit, or scholarship funds.

This is especially true when considering the various factors analyzed with regard to the causation prong of the standing analysis. Even had Students, or anyone else in their cohort, had the benefit of GEAR UP programs or services, any number of those other factors could have impacted their ability to obtain a postsecondary education. Thus, it is purely speculative that a favorable ruling from this Court would redress Students' alleged injuries, which does not satisfy the requirements of this prong of the standing analysis.

Therefore, because Students have failed to provide any evidence to satisfy the redressability requirement of the standing analysis, the Circuit Court erred in its September 12, 2018 Order when it found Students have standing.

CONCLUSION

Students have failed to provide sufficient evidence to resist AIII's motions for summary judgment arguing Students lack standing. First, Students have failed to show they suffered a concrete, particularized injury as a result of AIII and the various Defendants' actions. Second, Students have failed to provide evidence that the alleged injuries were actually caused by the actions of the various Defendants. Finally, Students have failed to provide evidence that a favorable ruling from this Court would adequately redress the alleged injuries.

For these reasons, AIII respectfully requests this Court find that the Circuit Court erred in its September 12, 2018, Order when it found Students have standing and enter an

order reversing the Circuit Court's denial of summary judgment against AIII and the other Defendants/Appellees on the issue of standing.

REQUEST FOR ORAL ARGUMENT

AIII respectfully requests the opportunity for oral argument before the Court.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word 2016 and contains 4394 words from the Statement of the Case through the Conclusion. I have relied on the word count of Microsoft Word 2016 in order to prepare this certificate.

Dated this 31st day of January, 2019.

By _____
Quentin L. Riggins

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 31, 2019, the foregoing BRIEF OF APPELLEE, AMERICAN INDIAN INSTITUTE FOR INNOVATION was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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In the Supreme Court of the State of South Dakota

No. 28740

ALYSSA BLACK BEAR AND KELSEY WALKING EAGLE-ESPINOZA,
Plaintiffs and Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit; AMERICAN INDIAN INSTITUTE FOR INNOVATION, a Non-Profit Corporation; JOANNE FARKE; BRANDON YORK; PAMELA HAUKAAS; NICOLE BAMBERG; TIM NEUGEBAUER; DAVID SHOMAKER; TODD REINISH; BILL MATHIS; DAVE MERRILL; TESS STARR; LLOYD PERSSON; CARMEN WEBER; JAMES MUNSEN; RICHARD PETERSON; CHRIS VANDER WERFF; TAMMY OLSON; TONYA VANEYE; SHIRLEY PEDERSON; RYAN YOUNSTROM; TANYA ALDRICH; JOHN B. HERRINGTON; CHRIS EYRE; CARLOS RODRIGUEZ; STACY PHELPS; DANIEL GUERICKE; AND THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representative, FIRST DAKOTA NATIONAL BANK; and THE ESTATE OF NICOLE WESTERHUIS, by and through its Personal Representatives GEORGE FISH AND KAREN FISH,
Defendants and Appellees.

Appeal from the Circuit Court, First Judicial Circuit
Charles Mix County, South Dakota
The Honorable Bruce Anderson, Circuit Court Judge

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Appellee Guericke's Notice of Appeal was filed on the 10th day of October, 2018

TABLE OF CONTENTS

Table of Authorities iii

Jurisdictional Statement iv

Request for Oral Argument iv

Statement of Legal issues iv

Statement of the Case 1

Statement of the Facts 2

I. Guericke started as an MEC employee in 1992 and became MEC's director in 1994 2

II. In 2011, SDDOE entered into a partnership agreement with MEC to administered federal GEAR UP grant funds 3

III. In 2015, investigations into alleged misappropriation of GEAR UP funds by MEC employees began, and while they found MEC's own money to be missing, they accounted for all GEAR UP funds 3

IV. On April 21, 2016, Students' counsel sent a settlement demand to an attorney for MEC, indicating only that Students planned to bring a breach-of-contract claim against MEC 4

V. Students commenced this action against Appellees, alleging eleven causes of action, including tort claims against MEC Directors and Guericke that were not mentioned in the settlement demand letter 5

VI. Despite Students' admitted failure to provide 180 days' notice to MEC, MEC directors, or Guericke, the trial court denied their motion for summary judgment based on lack of notice under SDCL § 3-21-2 5

VII. The trial court granted summary judgment for Appellees and dismissed Students' claims as preempted under the Higher Education Act 6

Argument 7

I. Guericke adopts by reference Appellee's arguments 7

II. The circuit court erred in concluding that the 180-day notice period under SDCL § 3-21-2 was tolled and that Appellants had substantially complied with the notice requirement 7

A. The circuit court erred in finding that the 180-day notice period had been tolled 8

1. The circuit court erred by determining that minority class members extended the 180-day notice period where no minor class members were identified and no members requested an extension as required under the statute 9

2. The district court erred by finding fraudulent concealment tolled the 180-day period where there was no evidence that Appellees affirmatively deceived or that Appellants were actually deceived from discovering their claims 10

3. The circuit court erred by concluding that Appellants' ignorance of their claims tolled the 180-day notice period 11

B. The district court erred in concluding that Appellants substantially complied with the notice requirement when Appellants made no attempt to provide notice within the 180-day period and did not satisfy section 3-21-2 objectives 12

Conclusion 17

Certificate of Compliance 18

Certificate of Service 19

TABLE OF AUTHORITIES

Statutes

SDCL § 3-21-1 ..... 8, 15

SDCL § 3-21-2 ..... 1, 5, 7-17

SDCL § 3-21-4 9

SDCL § 13-5-31 ..... 2, 8

SDCL § 15-26A-67 ..... 2, 7

Cases

Anderson v. Keller, 2007 S.D. 89, 739 N.W.2d 35 ..... 13-14, 16

Budahl v. Gordon & David Assocs., 287 N.W.2d 489 (S.D. 1980) 14

Brandt v. Cnty. of Pennington, 2013 S.D. 22, 827 N.W.2d 871 7

Gakin v. City of Rapid City, 2005 S.D. 68, 698 N.W.2d 493 10-12

In re Kindle, 509 N.W.2d 278 (S.D. 1993) 9-10

Larson v. Hazeltine, 1996 S.D. 100, 552 N.W.2d 830 12

Myears v. Charles Mix Cnty., 1997 S.D. 89, 566 N.W.2d 470 12

Purdy v. Fleming, 2002 S.D. 156, 655 N.W.2d 424 ..... 8, 11

Smith v. Neville, 539 N.W.2d 679, (S.D. 1995) 14

Wolff v. Sec'y of S.D. Game, Fish & Parks Dep't, 1996 SD 23, 544 N.W.2d 531 .. 8

JURISDICTIONAL STATEMENT

On February 20, 2018, the trial court denied Appellees' motions for summary judgment based on the 180-day notice requirement under SDCL § 3-21-2.

On September 12, 2018, the trial court granted Appellees' summary judgment motion based on the argument that federal law preempts Appellants' state-law claims. The trial court also denied Appellees' motions for summary judgment based Plaintiff's lack of standing. On September 28, 2018, judgment was entered according to the trial court's summary judgment decision and dismissing Appellants' claims against Appellees.

On September 24, 2018, Appellants filed their notice of appeal, and on October 10, 2018, Guericke filed his notice of appeal.

REQUEST FOR ORAL ARGUMENT

Appellee Guericke respectfully requests the honor of appearing before this Court for oral argument.

STATEMENT OF LEGAL ISSUES

I. Does the federal Higher Education Act preempt Students' independent claims arising from alleged mishandling of GEAR UP program funds?

The trial court concluded that preemption applied and granted Appellees summary judgment and dismissed Students' claims accordingly.

II. Did Students fail to provide timely notice of their claims pursuant to SDCL § 3-21-2?[1]

[1] As stated below, this brief fully addresses the arguments for Issue II regarding SDCL § 3-21-2's notice requirement and adopts by reference Appellees' arguments regarding the remaining issues.

The trial court concluded that the circumstances tolled the notice period and that Students had effectively complied with the notice requirements.

SDCL § 3-21-1

SDCL § 3-21-2

SDCL § 3-21-4

SDCL § 13-5-31

Anderson v. Keller, 2007 S.D. 89, 739 N.W.2d 35

Gakin v. City of Rapid City, 2005 S.D. 68, 698 N.W.2d 493

Myears v. Charles Mix Cnty., 1997 S.D. 89, 566 N.W.2d 470

In re Kindle, 509 N.W.2d 278 (S.D. 1993)

III. Were Students intended third-party beneficiaries of the partnership agreement between the South Dakota Department of Education and MEC to administer GEAR UP funds?

The trial court found an issue of material fact regarding this issue and denied the summary judgment motion accordingly.

IV. Can MEC or Geuricke be held vicariously liable for the tortious conduct of Scott and Nicole Westerhuis?

The trial court denied summary judgment on this ground.

V. Do Plaintiffs have standing to bring their claims?

The trial court denied summary judgment on this ground.

STATEMENT OF THE CASE

This case arises from the First Judicial Circuit Court, County of Charles Mix, State of South Dakota. The Honorable Bruce Anderson presided.

In May 2016, Appellants Alyssa Black Bear and Kelsey Walking Eagle-Espinosa (collectively referred to herein as "Students") commenced this action. In November 2016, Students filed an Amended Complaint asserting eleven causes of action against an array of defendants. Students sued the Estates of Scott and Nicole Westerhuis ("the Estates") for civil theft; Mid-Central Educational Cooperatives ("MEC") for breach of contract and respondent superior liability for the conduct of Scott/Nicole Westerhuis; MEC's individual directors for negligent supervision and duty to control; American Indian Institute of Innovation ("AIII") for negligent supervision, breach of contract, and respondeat superior liability for the conduct of Scott/Nicole Westerhuis; AIII's individual directors for duty to control; Stacy Phelps for negligent supervision; and Daniel Guericke for negligent supervision. MEC later brought a third-party complaint against Schoenfish & Co., Inc., for indemnification and negligence.

MEC, the MEC Directors, and Guericke moved for summary judgment, arguing that Students had failed to provide 180 days' notice as required under SDCL § 3-21-2. On February 20, 2018, the trial court denied that motion, finding that the notice period had been tolled under the circumstances and that Students had effectively complied with the notice requirements.

Appellees later moved for summary judgment again, arguing that Students did not have an independent cause of action because the federal law Higher Education Act preempted their claims; that Students were not intended third-party beneficiaries of the partnership agreement between the South Dakota Department of Education and MEC; that MEC and Guericke cannot be held vicariously liable for the tortious conduct of Scott or Nicole Westerhuis; and that Students lacked standing to bring their claims. On September 12, 2018, the trial court granted Appellees summary judgment based on federal preemption and dismissed Students' claims accordingly. The trial court denied the remaining arguments for summary judgment. This appeal follows.

STATEMENT OF THE FACTS[2]

I. Guericke started as an MEC employee in 1992 and became MEC's director in 1994.

MEC is a cooperative educational service unit, *see* SDCL § 13-5-31, with its principal place of business in Platte, South Dakota. (CR 170 at ¶ 6; CR 133 at ¶ 6; CR660, Ex. 1.) In July 1992, Daniel Geuricke became an employee of MEC. (CR 1853, Ex. 5 at ¶ 8.a.) In 1994, Guericke became the Director of MEC. (*Id.* at ¶ 8.b.)

[2] The facts stated in this brief are limited to those relevant to the 180-day notice requirement, which is fully discussed in the argument section below. Because Guericke, pursuant to SDCL § 15-26A-67, adopts by reference others arguments from Appellees' briefs, *infra*, Guericke also adopts by reference the statements of fact from those briefs.

II. In 2011, SDDOE entered into a partnership agreement with MEC to administered federal GEAR UP grant funds.

In 2011, the United States Department of Education ("USDOE") awarded South Dakota Department of Education ("SDDOE") a six-year GEAR UP grant to be used to prepare low-income students to enter and succeed in postsecondary education. (CR 1853, Ex. 1 at pp. 55-56; CR 1853, Ex. 2 at p. 3.) Thereafter, SDDOE entered into a partnership agreement with MEC to administered the grant and carry out grant activities. (*Id.*) MEC then contracted with AIII to provide personnel services as needed to administer the GEAR UP grant. (CR 1853, Ex. 4.)

III. In 2015, investigations into alleged misappropriation of GEAR UP funds by MEC employees began, and while they found MEC's own money to be missing, they accounted for all GEAR UP funds.

On September 16, 2015, SDDOE Secretary Dr. Melody Schopp called Guericke and informed him that the department was considering terminating its partnership with MEC for the GEAR UP grant. (CR 1853, Ex. 5 at ¶ 58.)

On September 17, 2015, Scott Westerhuis, MEC's business manager, killed his wife, Nicole Westerhuis, who was an MEC assistant business manager, and their four children, set their house on fire, and killed himself. (CR 1853, Ex. 2 at p. 3.)

As a result of these events, MEC retained an independent account firm, Edie Bailly LLP, to conduct a forensic accounting examination of MEC, specifically to account for and examine MEC's GEAR UP expenditures and reimbursements and identify and potential questionable activity related to MEC and GEAR UP. (*Id.* at p. 1; CR 1853, Ex. 6.) Through reconciliation of records from SDDOE and MEC,

Eide Bailly accounted for all GEAR UP reimbursements paid to MEC from July 2013 to September 2015 and accounted for more than $6 million in expenditures submitted by MEC for GEAR UP reimbursement from October 2013 to August 2015. (CR 1853, Ex. 2 at pp. 1, 4, 9.)

The South Dakota Department of Legislative Audit ("SDDLA") also conducted a special review of MEC. (CR 1853, Ex. 7.) SDDLA concluded that nearly $1.4 million was missing from MEC's checking account due to financial improprieties by Scott Westerhuis. (*Id.* at p. 49.) No evidence was found of missing GEAR UP program funds. (CR 1853, Ex. 4 at pp. 57-58.) Indeed, SDDOE accounted for all GEAR UP dollars. (CR 1853, Ex. 1 at pp. 57-58.)

IV. On April 21, 2016, Students' counsel sent a settlement demand to an attorney for MEC, indicating only that Students planned to bring a breach-of-contract claim against MEC.

In a letter to an attorney for MEC dated April 21, 2016, Students' attorney stated that he represented Appellant Alyssa Black "and similarly situated plaintiffs in a potential class-action lawsuit against [MEC] regarding the mismanagement and possible misappropriation of funds from the federal [GEAR UP] grant." (CR 778, Ex. D.) The attorney stated that Black Bear and the other potential class members were intended third-party beneficiaries of the partnership agreement between SDDOE and MEC and that the GEAR UP funds managed by MEC were intended to aid them. (*Id.*) Students' attorney further alleged that MEC had breached the partnership agreement, as evidenced by legislative audits, criminal investigation and charges, and other claims arising out the situation, and that the breach "directly

caused the loss of grant money that should have been used to educate and assist" Black Bear and "other disadvantaged students at GEAR UP schools." (*Id.*) Lastly, the attorney stated that the letter was "intended as a good faith attempt to resolve any claims between our client and [MEC]." (*Id.*)

This was the only communication any Appellee received from Students or their counsel before litigation commenced. (*See* CR 303, Ex. 1.)

V. In November 2016, Students sued Appellees, alleging eleven causes of action, including tort claims against MEC Directors and Guericke that were not mentioned in the settlement demand letter.

On May 17, 2016, Students initiated this action against several defendants, but not Guericke. (CR 1.) Students' claims related to alleged misappropriation of funds from GEAR UP, a federal grant that MEC administered, by two now-deceased MEC employees, Scott and Nicole Westerhuis. (*Id.*)

On November 14, 2016, Students served an amended complaint, which added Guericke and others as defendants and asserted one claim against Guericke for negligent supervision. (CR 170 at ¶¶ 91-94.) Students alleged that Guericke, in his official capacity with MEC, had a duty to supervise MEC employees, including Scott and Nicole Westerhuis, and that he failed to adequately do so. (*Id.* at ¶ 92-94.)

VI. Despite Students' admitted failure to provide 180 days' notice to MEC, MEC directors, or Guericke, the trial court denied their motion for summary judgment based on lack of notice under SDCL § 3-21-2.

On December 13, 2016, in response to an inquiry from counsel for MEC, as to whether the notice required by SDCL § 3-21-2 when bringing a claim against a public entity had been provided, Students' counsel conceded that it had not, stating:

"We did not send a one-hundred eighty day notice to MEC, but we do not concede that we were required to do so under these circumstances." (CR 303, Ex. 1.)

Based on Students' admitted failure to comply with the statutory notice requirement, Guericke, MEC, and the MEC Directors moved for summary judgment. (*See, e.g.*, CR 652). The trial court denied that motion. (App'x 1; CR 2224.)

VII. The trial court granted summary judgment for Appellees and dismissed Students' claims as preempted under the Higher Education Act.

Appellees later moved for summary judgment again, arguing that Students did not have an independent cause of action because federal law, namely the Higher Education Act, preempted their claims; that Students could not assert a claim based on the Partnership Agreement between the South Dakota Department of Education and MEC because Students were not intended third-party beneficiaries of that agreement; that MEC and Guericke cannot be held vicariously liable for the tortious conduct of Scott or Nicole Westerhuis; and that Students lacked standing to bring their claims. (CR 1832.)

On September 12, 2018, the trial court granted the summary judgment motion based on the argument that federal law preempts Appellants' state-law claims. (App'x 6; CR 2553.) The trial court also denied remaining arguments for summary judgment. (*Id*.)

ARGUMENT

I. Guericke adopts by reference Appellee's arguments.

Pursuant to SDCL § 15-26A-67, Guericke adopts by reference the following arguments from other Appellees' briefs:

- Appellee MEC Directors' argument that the district court did not err in granting summary judgment for Appellees' based on its conclusion that the federal Higher Education Act preempts Students' claims based on the GEAR UP grant program;

- Appellee MEC's argument that students were not intended third-party beneficiaries of the partnership agreement between the South Dakota Department of Education and MEC;

- Appellee MEC's argument that vicarious liability does not apply to the tortious conduct of Scott and Nicole Westerhuis; and

- Appellee AIII's argument that Studnets lack standing to bring their claims.

II. The circuit court erred in concluding that the 180-day notice period under SDCL § 3-21-2 was tolled and that Appellants had substantially complied with the notice requirement.

Appellees contend that the circuit court erred as a matter of law in concluding that the 180-day notice requirement under SDCL § 3-21-2 was tolled, that Appellants substantially complied with the notice requirement, and that the statute does not bar their tort claims. (App'x 1; CR 2224 at p. 3, ¶ 4, p. 4, ¶¶ 1, 9.)

Under section 3-21-2, "[a]n action for damages cannot be maintained against a public entity unless timely written notice is given." *Brandt v. Cnty. of Pennington*, 2013 S.D. 22, ¶ 10, 827 N.W.2d 871 (quotation omitted). The statute provides, in relevant part:

> No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided in this chapter within one hundred eighty days after the injury.

SDCL § 3-21-2. In this context, "public entity" means "the State of South Dakota, all of its branches and agencies, boards and commissions" and "all public entities established by law exercising any part of sovereign power of the state, including, but not limited to . . . school districts." SDCL § 3-21-1(2). This includes MEC and its employees because MEC was established by school districts, which are indisputably public entities, pursuant to their own statutory authority. *See* SDCL § 13-5-31 (authorizing establishment of cooperative educational service units, such as MEC, and providing that such a unit is a "legal entity").

Section 3-21-2 applies to "all based causes of action sounding in tort," *Wolff v. Sec'y of S.D. Game, Fish & Parks Dep't*, 1996 SD 23, ¶ 20, 544 N.W.2d 531, and the 180-day period begins running on the date of the injury. *Purdy v. Fleming*, 2002 S.D. 156, ¶ 14, 655 N.W.2d 424.

A. The circuit court erred in finding that the 180-day notice period had been tolled.

There is no dispute that Appellants did not provide notice within 180 days as section 3-21-2 requires. Indeed, Appellants' counsel acknowledged they "did not send a one-hundred eighty day notice," although they also asserted that the notice was not required under the circumstances. (CR 660, Ex. 3; CR 1139 at ¶ 7.)

The circuit court found that the circumstances tolled the 180-day period under section 3-21-2, specifically: (1) "the minority of members of [Appellants'] class," (2) "the concealment of tortious conduct by" Appellees, and (3) Appellants' "excusable ignorance of the claims." (App'x 4-5; CR 2224 at p. 4, ¶ 2.) Because the record does not support those findings, the circuit court erred in tolling the 180-day notice requirement.

1. The circuit court erred by determining that minority class members extended the 180-day notice period where no minor class members were identified and no members requested an extension as required under the statute.

An exception to section 3-21-2's 180-day rule provides that, "[i]f the person injured is a minor . . . , the court may allow that person to serve the notice required by § 3-21-2 within a reasonable time after the expiration of disability." SDCL § 3-21-4. The minor must, however, apply to the court to make extended service "within two years of the event upon which the claim is based." *Id.* Two years is the maximum extension that can apply, if the required circumstances are present. *In re Kindle*, 509 N.W.2d 278, 280 (S.D. 1993).

Here, those circumstances were not present. Appellants were no longer minors by the time they commenced this action. Appellants did not identify any specific class members who were minors, and Appellees were not aware of any either. (CR 1746 at ¶ 6.) Moreover, any minor class member would have had to apply for an extension within two years of allegedly tortious conduct. No such request was made. On that record, the circuit court erred by concluding that the

minority members of Appellants' class tolled the 180-day notice requirement. *Kindle*, 509 N.W.2d at 284 (reversing order applying section 3-21-4 extension where record did not support incapacity finding).

2. The district court erred by finding fraudulent concealment tolled the 180-day period where there was no evidence that Appellees affirmatively deceived or that Appellants were actually deceived from discovering their claims.

This Court has previously held that fraudulent concealment may toll a notice of claim provision. *Gakin v. City of Rapid City*, 2005 S.D. 68, ¶ 18, 698 N.W.2d 493. Ordinarily, fraudulent concealment depends on a fiduciary relationship between parties. *Id.* at ¶¶ 19-20. "Absent a confidential or fiduciary relationship, fraudulent concealment consists of some affirmative act or conduct on the part of the defendant deigned to prevent, *and does prevent*, the discovery of the cause of action." *Id.* at ¶ 21 (quotations omitted).

The circuit court did not find, nor did Appellants argue, that a fiduciary relationship existed. (*See* App'x 1-5; CR 2224.) The circuit court also did not find any affirmative act by Appellees that was designed to prevent discovery of the cause of action or whether Appellants had actually been so deceived. (*See id.*) Given the insufficient findings, this Court should reverse the circuit court's conclusion that the 180-day period had been tolled due to fraudulent concealment. *See Gakin*, 2005 S.D. 68, ¶ 21 (affirming district court grant of summary judgment for lack of notice under section 3-21-2 where evidence did not show that defendant's fraudulent actions "in fact *prevented* the [plaintiffs] from discovering the claimed cause of action").

The evidence also did not support tolling the 180-day notice requirement. There is no evidence that Appellants were prevented from discovering their cause of action within the 180-day period, let alone that Appellees affirmatively acted to prevent Appellants' discovery. To the contrary, news of the South Dakota State Department of Legislative Audit's findings was first reported in May 2015.[3] Appellants apparently were fully aware of their claims, as their counsel stated in the demand letter on MEC after the 180-day notice period expired, and they commenced this action shortly after that letter. Absent any evidence that Appellants were actually deceived from discovering their claims within the time period, no tolling can have occurred. *See Purdy*, 2002 S.D. 156, ¶ 20 ("A limitations period is not tolled if the plaintiff knew the facts underlying the cause of action or failed to exercise due diligence to discover them.").

3. The circuit court erred by concluding that Appellants' ignorance of their claims tolled the 180-day notice period.

The circuit court also found that Appellants' "excusable ignorance of the claims" also tolled the 180-day notice period. (App'x 4; CR 2224 at p. 4, ¶ 2.) Appellants' purported ignorance is immaterial to this issue. This Court has held that, "[a]s to the 180-day notice rule, ignorance of the law is no excuse." *Gakin*, 2005

[3] *See, e.g.*, Bob Mercer, "SD Audit Finds Unusual Activities in GEAR UP," *Capital Journal* (May 19, 2015) (available at https://www.capjournal.com/news/sd-audit-finds-unusual-activities-in-gear-up/article_be27292e-fea6-11e4-a52d-13bf0a7950d6.html).

S.D. 68, ¶ 13. Thus, to the extent the circuit reasoned that Appellants' ignorance tolled the 180-day rule, the circuit court erred.

Because the record did not support any of the circuit court's reasons for concluding that the 180-day notice period was tolled, that ruling was in error. Appellants needed to provide notice, and this Court should reverse the circuit court's ruling to the contrary.

B. The district court erred in concluding that Appellants substantially complied with the notice requirement when Appellants made no attempt to provide notice within the 180-day period and did not satisfy section 3-21-2 objectives.

The circuit court concluded that Appellants "substantially complie[d]" with section 3-21-2's 180-day notice requirement. (App'x 4; CR 2224 at p. 4, ¶ 1.) Section 3-21-2 requires substantial, not strict, compliance. *Myears v. Charles Mix Cnty.*, 1997 S.D. 89, ¶ 13, 566 N.W.2d 470. "Substantial compliance" means "actual compliance in respect to the substance essential to every reasonable objective of the statute" and sufficient compliance "to carry out the intent for which [the statute] was adopted." *Id.* (quoting *Larson v. Hazeltine*, 1996 S.D. 100, ¶ 19, 552 N.W.2d 830).

As discussed above, the 180-day period should not have been tolled. Therefore, Appellants were required to provide notice by March 15, 2016—180 days from September 17, 2015, the date on which the circuit court found the allegedly tortious conduct ended. (App'x at 4; CR 2224 at p. 4, ¶ 9.) Appellants admitted that they did not even attempt to contact Appellees within that timeframe. (CR 660, Ex. 3.)

Given that inaction, Appellants cannot avail themselves of the substantial-compliance exception. In *Anderson v. Keller*, this Court considered whether a plaintiff substantially complied with section 3-21-2 by allegedly submitting an insurance form weeks after the underlying accident. 2007 S.D. 89, ¶10, ¶ 14, 739 N.W.2d 35. There was no evidence who asked the plaintiff to complete the form or to whom the form was submitted. *Id.* at ¶ 2 n.1, ¶ 16. Given that record, this Court reversed the circuit court's order denying summary judgment for lack of notice. *Id.* at ¶ 18. This Court recognized that, "for [the plaintiff] to claim there to have been *substantial compliance* on the basis of this record is a misnomer since it appears that *he did nothing* to comply with the statute during the 180-day notice period." *Id.* at ¶ 16. This Court also rejected the plaintiff's argument that the public entity "had actual notice," noting that this Court "do[es] not recognize actual knowledge as a substitute for adequate notice." *Id.* at ¶ 17. Because Appellants did not even attempt to comply with the notice requirement before the 180-day period expired, they cannot have substantially complied with section 3-21-2.

Likewise, Appellants cannot avail themselves of others' actions to establish their own compliance. The circuit court's reasoning largely depended on the fact that Secretary Schopp had informed Guericke and MCE that the Partnership Agreement would be terminated. (App'x at 4; CR 2224 at p. 4, ¶ 3.) However, Secretary Schopp's phone calls did not provide any notice that Appellants would be pursuing litigation or information about the nature of their claims. Nor did the subsequent audits and investigations. Moreover, Appellants failed to provide any

authority holding that the actions of a non-party entirely unrelated to the defendants—such as Secretary Schopp, the SDDLA, or law enforcement—can substitute for the statutorily required notice that Appellants undisputed failed to provide. *Cf. Smith v.* Neville, 539 N.W.2d 679, 681-82 (S.D. 1995) (public entity estopped from claiming lack of notice where entity's acts indicated receipt of proper notice). Thus, to the extent the circuit relied on others' conduct to decide that Appellants substantially complied with section 3-21-2, the circuit court erred.

Even if this Court determines that *Anderson* does apply, the record nonetheless establishes that Appellants did not substantially comply with section 3-21-2. To determine whether substantial compliance with the 180-day notice requirement occurred, courts consider the rule's seven objectives for public entities:

> (1) To investigate evidence while fresh;
>
> (2) to prepare a defense in case litigation appears necessary;
>
> (3) to evaluate claims, allowing early settlement of meritorious ones;
>
> (4) to protect against unreasonable or nuisance claims;
>
> (5) to facilitate prompt repairs, avoiding further injuries;
>
> (6) to allow the [public entity] to budget for payment of claims; and
>
> (7) to insure that officials responsible for the above tasks are made aware of their duty to act.

Anderson, 2007 S.D. 89, ¶ 13 (quoting *Budahl v. Gordon & David Assocs.*, 287 N.W.2d 489, 492 (S.D. 1980)).

The April 21, 2016 settlement demand letter from Students' counsel to MEC's attorney is the only arguable notice Students provided of their claims, but that letter does not satisfy section 3-21-2's objectives. (CR 778, Ex. D.) In the demand letter, Appellants' counsel made no express reference to section 3-21-2 or the 180-day notice requirement. (*Id.*) Students' counsel referenced an alleged breach of contract claim against MEC based on the theory that Students were third-party beneficiaries of MEC's partnership agreement with SDDOE, but the letter did not suggest any claims sounding in tort. (*Id.*) Yet Students' amended complaint alleged a vicarious liability tort claim against MEC based on the Westerhuises' conduct. (CR 170 at ¶¶ 95-98.)

Moreover, Students asserted in their Amended Complaint additional tort claims against public employees, as well as those against MEC. Students alleged that MEC Directors and Geuricke were liable for negligent supervision of the Westerhuises, and also that MEC Directors were liable for breach of a duty to control (CR 170 at ¶¶ 79-82, 91-94, 103-08.) Students did not merely claim that MEC was responsible for MEC Directors and Geuricke's alleged torts, but sued those persons in their individual capacities. (*See id.*) MEC Directors and Guericke were entitled to their own notice under section 3-21-2. *See* SDCL §§ 3-21-2 (precluding claims against "the public entity *or its employees*" unless proper notice is provided); 3-21-1(1) (defining "employee" to include "all current and former employees and elected and appointed officers of any public entity," including employees of "all branches of government").

The April 21, 2016 plainly failed to provide notice of any tort claims against MEC or any of its employees, including MEC Directors and Guericke. *See Anderson*, 2007 S.D. 89, ¶ 16 ("Substantial compliance requires that the person who receives the notice be someone who could take necessary action to ensure that the statutory objectives are met."). As such, those Appellees were deprived of a meaningful opportunity to timely investigate, evaluated, and defend against Students' tort claims. The letter only referenced a breach of contract claim against MEC alone, which is a materially different than their negligent supervision and duty to control claims against MEC Directors and Guericke in their individual capacities. *See id.* at ¶ 15 (concluding that, because plaintiff failed to provide notice of injury or claim, court cannot assume public entity "would have conducted an investigation through the same lens as it would have with such notice"). Based on the April 21, 2016 letter, MEC Directors and Guericke would have had no reason to expect that they would be sued individually for tort claims arising from allegations related to the GEAR UP grant program.

In all, the circumstances did not satisfy section 3-21-2's objectives. Appellants commenced their suit less than one month after the date of their demand letter. With that short amount of time between notice and litigation, Appellees could not reasonably evaluate Appellants' breach of contract claims, prepare their defense and protect their interests as the statute required. Because Appellants did not even attempt to notify Appellees of their claims before the 180-day period expired, and their subsequent actions were insufficient, the circuit court erred by concluding that

Appellants substantially complied. This Court should reverse that ruling and enter summary judgment for Appellees under section 3-21-2 on each of Appellants' tort claims.

CONCLUSION

For the reasons stated in Appellees' briefs, which Guericke adopts by reference, the Court should affirm the circuit court's grant of summary judgment for Appellees and dismissal of Appellants' claims. If the Court does not affirm the circuit court's decision, it should nonetheless affirm the dismissal of Appellants' claims because Appellants failed to provide 180 days' notice as required under section 3-21-2.

LIND JENSEN SULLIVAN & PETERSON
A Professional Association

Date: Jan. 31, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2013 and contains 4,074 words from the Statement of the Case through the Conclusion. I have relied on the word count of Microsoft Word 2013 in order to prepare this certificate.

Dated this 31st day of January, 2019. By: s/ Eric J. Steinhoff
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2019, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Appeal No. 28740

ALYSSA BLACK BEAR and KELSEY WALKING EAGLE-ESPINOSA,

Plaintiffs and Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit, AMERICAN INDIAN INSTITUTE FOR INNOVATION, a Non-Profit Corporation, JOANNE FARKE; BRANDON YORK; PAMELA HAUKAAS; NICOLE BAMBERG; TIM NEUGEBAUER; DAVID SHOEMAKER; TODD REINISH; BILL MATHIS; DAVE MERRILL; TESS STARR; LLOYD PERSSON; CARMEN WEBER; JAMES MUNSEN; RICHARD PETERSON; CHRIS VANDER WERFF; TAMMY OLSON; TONYA VANEYE; SHIRLEY PEDERSON; RYAN YOUNGSTROM; TANYA ALDRICH, JOHN B. HERRINGTON; CHRIS EYRE; CARLOS RODRIGUEZ; STACY PHELPS; DANIEL GUERICKE; and THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representative, FIRST DAKOTA NATIONAL BANK; and THE ESTATE OF NICOLE WESTERHUIS, by and through its Personal Representatives GEORGE FISH and KAREN FISH,

Defendants and Appellees.

Appeal from the Circuit Court, First Judicial Circuit,
Charles Mix County, South Dakota.

The Hon. Bruce Anderson presiding.

JOINDER OF APPELLEES ESTATE OF SCOTT WESTERHUIS AND ESTATE OF NICOLE WESTERHUIS

Come now Appellees Estate of Scott Westerhuis and Estate of Nicole Westerhuis by and through their undersigned counsel and, in the interests of judicial economy, file this *Joinder of Appellees Estate of Scott Westerhuis and Estate of Nicole Westerhuis* in the briefs and arguments of Appellees Mid-Central Educational Cooperative Directors, through counsel Samuel Kerr and Michael Luce, as to the issue of **whether the Trial Court correctly ruled in granting Defendants' motion for summary judgment on the grounds that Plaintiffs do not have a private cause of action or because their claims are otherwise preempted by the Higher Education Act**; in the briefs and arguments of Appellees Mid-Central Educational Cooperative, through counsel Ryland Deinert, as to the issue of **whether the trial court erred in denying Mid-Central's motion for summary judgment that sought a ruling that the Students were not intended third-party beneficiaries of the Partnership Agreement between Mid-Central and the South Dakota Department of Education**; and in the briefs and arguments of Appellees AIII, through counsel Quentin Riggins and Katelyn Cook, as to the issue of **whether the Circuit Court erred in determining that the Students have standing to bring their claims**.

Dated this 31st day of January, 2019.

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True and correct copies of this *Joinder of Appellees Estate of Scott Westerhuis and Estate of Nicole Westerhuis* in the above entitled appeal were, on the 31st day of January, 2019, were sent by email for electronic filing to the Clerk of the South Dakota Supreme Court at: scclerkbriefs@ujs.state.sd.us; and served upon counsel by electronic mail as noted below:

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Dated this 31st day of January, 2019.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28740
Notice of Review No. 28746

ALYSSA BLACK BEAR AND KELSEY WALKING EAGLE-ESPINOSA,

Plaintiffs / Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit, AMERICAN INDIAN INSTITUTE FOR INNOVATION, a Non-Profit Corporation, JOANNE FARKE, BRANDON YORK, PAMELA HAUKAAS, NICOLE BAMBERG, TIM NEUGEBAUER, DAVID SHOEMAKER, TODD REINISH, BILL MATHIS, DAVE MERRILL, TESS STARR, LLOYD PERSSON, CARMEN WEBER, JAMES MUNSON, RICHARD PETERSON, CHRIS VANDER WERFF, TAMMY OLSON, TONYA VANEYE, SHIRLEY PEDERSON, RYAN YOUNGSTROM, TANYA ALDRICH, JOHN B. HERRINGTON, CHRIS EYRE, CARLOS RODRIGUEZ, STACY PHELPS, DANIEL GUERICKE AND THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representative, FIRST DAKOTA NATIONAL BANK; and THE STATE OF NICOLE WESTERHUIS, by and through its Personal Representatives GEORGE FISH AND KAREN FISH,

Defendants / Appellees.

Appeal from the Circuit Court,
First Judicial Circuit
Charles Mix County, South Dakota
The Honorable Bruce V. Anderson, Presiding

BRIEF OF APPELLEES MCEC DIRECTORS

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE LEGAL ISSUES 1

1. Whether the circuit court erred in granting Appellees' motion for summary judgment on the grounds that Students do not have an independent cause of action or because their claims are otherwise preempted by the federal Higher Education Act. 1

2. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Students failed to provide timely notice of their claims pursuant to SDCL §3-21-1, et. seq.? 2

3. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Students were not intended third-party beneficiaries of the Partnership Agreement between the South Dakota Department of Education and Mid-Central? 2

4. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Mid-Central cannot be held vicariously liable for the tortious conduct of Scott/Nicole Westerhuis? 3

5. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Students do not have standing to bring their claims? 3

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

A. GEARUP Program in South Dakota 4

B. Students' Amended Complaint 6

ARGUMENT AND AUTHORITIES 7

I. The circuit court was correct in granting Defendants' motion for summary judgment on the grounds that Plaintiffs do not have a private cause of action or because their claims are otherwise preempted by the Higher Education Act. 7

A The Higher Education Act and the GEARUP Grant 7

B. The Circuit Court Correctly Concluded That Students Do Not Have a Private Right of Action or Their Claims are Otherwise Implicitly Preempted by the Higher Education Act 24

CONCLUSION 34

REQUEST FOR ORAL ARGUMENT 35

CERTIFICATE OF COMPLIANCE 36

CERTIFICATE OF SERVICE 36

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval,
532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)..... 23
American Airlines, Inc. v. Wolens,
513 U.S. 219, 115 S Ct 817, 130 L.Ed.2d 715 (1995)..... 30
Arkansas Louisiana Gas Co. v. Hall,
453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)..... 32
Bowman v. Michigan Higher Educ. Assistance Authority,
2014 WL 129332..... 24, 29, 30, 32
Cannon v. University of Chicago,
441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)..... 27, 30, 31
Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981)..... 32
Cort v. Ash,
422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)..... 2, 25
Graham v. Sec. Sav. & Loan,
125 F.R.D. 687 (N.D.Ind. 1989)..... passim
Hughes v. Talen Energy Mktg., LLC,
__ U.S. __, 136 S. Ct. 1288 (2016)..... 33, 34
Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.,
603 F.3d 365 (7th Cir.2010)..... 23
Jackson v. Culinary School of Washington,
788 F.Supp. 1233 (D.D.C.1992)..... 27
Karahalios v. National Federation of Federal Employees, Local 1263,
489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539..... 26
L'ggrke v. Benkuta,
966 F.2d 1346 (1992)..... passim
Labickas v. Ark. State Univ.,
78 F.3d 333 (8th Cir.1996)..... passim
Massachusetts Mut. Life Ins. Co. v. Russell,
473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)..... 25
McCulloch v. PNC Bank Inc.,
298 F.3d 1217 (11th Cir.2002)..... passim
McLaurin v. Prater,
30 F.3d 982 (8th Cir.1994)..... 25
St. Mary of the Plains College v. Higher Education Loan Program,
724 F.Supp. 803 (D.Kan.1989)..... 26, 27
Stokes v. Lokken,
644 F.2d 779 (8th Cir.1981)..... 25
Touche Ross & Co. v. Redington,
442 U.S. 560, 99 S.Ct. 2479..... 31, 32
Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979)..... 25, 26

U.S. v. Missouri Pac. R. Co.,
278 U.S. 269 (1929) 22
Williams v. Anthony,
2012 WL 6680320 (2012) ..... passim
Williams v. Wisconsin Department of Workforce Development,
728 Fed.Appx. 600 (2018) 23

Statutes

5 U.S.C. App. 3 19
20 U.S.C. ch. 28 8
20 U.S.C. ch. 31 10
20 U.S.C. §1001 ..... 8, 30
20 U.S.C. §1070a-2l ..... 9, passim
20 U.S.C. §1070a-21(c) 9
20 U.S.C. §§1070a-22-28 12
20 U.S.C. §1070a-23 12
20 U.S.C. §1070a-23(a)(2) and §1070a-24 12
20 U.S.C. §§1070a-23(a)(2)(E) and (H) 12, 19
20 U.S.C. §1070a-27(a) 12
20 U.S.C. §1070a-27(c) 13
20 U.S.C. §1070a-27(d) 13
20 U.S.C. §1070(b) 2, 9, 34
20 U.S.C. §1070(b) and 1070a-21(b) 13
20 U.S.C. §1221(b) 10
20 U.S.C. §1221(c)(1) 10
20 U.S.C. §1221e-3 ..... 2, 11, 14
20 U.S.C. §1221i 10
20 U.S.C. §§1226(b), 1226(f) 11
20 U.S.C. §1231a 11
20 U.S.C. §1681 30
20 U.S.C. §3401 10
20 U.S.C. §3474 ..... passim
29 U.S.C. §701 22
42 U.S.C. §§2000d 31

Pub.L.No. 105-244 9
Pub.L.No. 113-126 19
U.S. Constitution, art. VI, cl. 2 2
U.S.C. §§1070a-21 and 1070a-25 28

SDCL §3-21-1 2
SDCL §15-26A-3 1
SDCL §15-26A-6 1
SDCL §15-26A-22 1
SDCL §15-26A-67 2

Regulations

2 C.F.R. 200 17
2 C.F.R. part 200 14
34 C.F.R. part 74 ..... 15, 17
34 C.F.R. parts 74-75, 77, 79-82, 84-86, 97-98, and 99 15
34 C.F.R. parts 74-99 14
34 C.F.R. part 75 15
34 C.F.R. parts 75-99 and 694 22
34 C.F.R. parts 75, 76, 80 ..... 11, 34
34 C.F.R. parts 75, 77, 79, 80, 82, 84-85, 97-99, 694 31
34 C.F.R. parts 75, 77, 80, 82, 84-85, and 97-99 10
34 C.F.R. parts 75, 80 17
34 C.F.R. part 80 ..... passim
34 C.F.R. part 80, subparts C and D 16
34 C.F.R. part 694 ..... 13, 15
34 C.F.R. §74.1(c) 15
34 C.F.R. §75.1(b) 14
34 C.F.R. §75.100 15
34 C.F.R. §75.590 16
34 C.F.R. §75.700 16
34 C.F.R. §75.702 16
34 C.F.R. §75.730 17
34 C.F.R. §75.731 17
34 C.F.R. §75.732 17
34 C.F.R. §80.1 18
34 C.F.R. §80.22 16
34 C.F.R. §80.26 18
34 C.F.R. §80.3 18
34 C.F.R. §80.4 18
34 C.F.R. §80.43 ..... 19, 21, 32, 34
34 C.F.R. §80.43(a) 18
34 C.F.R. §81.2 17
34 C.F.R. §694 13
34 C.F.R. §§75.1-75.910 15
34 C.F.R. §§75.101-127 15
34 C.F.R. §§75.200(a) and (b) 9
34 C.F.R. §§75.200-264 (2011) 15
34 C.F.R. §§75.500-592 16
34 C.F.R. §§75.511-519 16
34 C.F.R. §§75.720 16
34 C.F.R. §§80.20, 80.22, 80.41, and 80.42 18
34 C.F.R. §§80.40 and 80.41 16
34 C.F.R. §§361.10 ..... 22, 23
34 C.F.R. §§694.22-23 13

Other Authorities

76 Fed.Reg. 676 15
76 Fed.Reg. 34676 (June 14, 2011) 15
80 Fed.Reg. 67261 (November 2, 2015) 14
Executive Order 12549 ..... 19, 20
Pub.L.No. 89-329 8
Pub.L.No. 96–88 10

PRELIMINARY STATEMENT

Plaintiffs-Appellants will be referred to as "Students." Defendant-Appellee MCEC Directors will be referred to as "MCEC Directors." Defendant-Appellee Mid-Central Educational Cooperative will be referred to as "MCEC." Defendant-Appellee American Indian Institute for Innovation will be referred to as "AIII." The remaining Defendants-Appellees will be referred to by their entity or last name. The certified Court Record will be referred to as "CR:" followed by the appropriate page number. The Appendix will be referred to as "App:" followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Students appeal from the circuit court's Order Regarding Defendants' Motions for Summary Judgment, signed on September 12, 2018, finding, in part, that Students do not have a private right of action or that their claims are otherwise preempted by the Higher Education Act of 1965. Students filed their Notice of Appeal to the South Dakota Supreme Court on September 24, 2018. Notice of Entry of Order of the September 12, 2018, circuit court Order and the circuit court's Memorandum Decision, dated July 20, 2018, was filed on September 28, 2018.

The Order may be appealed pursuant to SDCL §15-26A-3. Notice of Appeal was filed within the time limits set forth in SDCL §15-26A-6. Notice of Review was filed within the time limits set forth in SDCL §15-26A-22. Therefore, this Court has jurisdiction to consider the issues raised on appeal.

STATEMENT OF THE LEGAL ISSUES

1. Whether the circuit court erred in granting Appellees' motion for summary judgment on the grounds that Students do not have an independent cause of action or because their claims are otherwise preempted by the federal Higher Education Act.

The circuit court found Students do not have a private right of action on their claim or are otherwise preempted by federal law.

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975)

Labickas v. Ark. State Univ., 78 F.3d 333 (8th Cir.1996)

McCulloch v. PNC Bank Inc., 298 F.3d 1217 (11th Cir.2002)

Williams v. Anthony, 2012 WL 6680320 (2012)

U.S. Constitution, art. VI, cl. 2

20 U.S.C. 3474

20 U.S.C. 1070(b)

20 U.S.C. 1221e-3

20 U.S.C. 1070a21-28

This Brief addresses Issue 1. Issues 2 through 5 are before this Court on Notices of Review filed by MCEC Directors, MCEC, AIII, Guericke, Westerhuis Estates, and Phelps and identified as Notice of Review Numbers 28746, 28745, 28747, 28748, 28753, and 28741, respectively. In the interests of judicial economy, and pursuant to SDCL §15-26A-67, MCEC Directors join in the Briefs of Appellees MCEC, AIII, Guericke, Westerhuis Estates and Phelps, in their entirety, including Statements of Legal Issues, Statements of Facts, Arguments and Authorities.

2. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Students failed to provide timely notice of their claims pursuant to SDCL §3-21-1, *et. seq.*?

The circuit court found that Students did provide timely notice of their claims.

3. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Students were not intended third-party beneficiaries of the Partnership Agreement between the South Dakota Department of Education and Mid-Central?

The circuit court found that Students were intended third-party beneficiaries.

4. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Mid-Central cannot be held vicariously liable for the tortious conduct of Scott/Nicole Westerhuis?

   The circuit court found that MCEC can be held vicariously liable for the tortious conduct of its employees Scott Westerhuis and Nicole Westerhuis.

5. Whether the circuit court erred in denying Mid-Central's motion for summary judgment on the grounds that Students do not have standing to bring their claims?

   The circuit court found that Students do have standing to bring their clams.

STATEMENT OF THE CASE

Students sued the Westerhuis Estates for civil theft; MCEC for breach of contract and respondeat superior liability for the conduct of Scott/Nicole Westerhuis; MCEC Directors for negligent supervision and failure of their duty to control; AIII for negligent supervision, breach of contract, and respondeat superior liability for the conduct of Scott/Nicole Westerhuis; AIII's individual directors for failure of their duty to control; Phelps for negligent supervision; and Guericke for negligent supervision.

MCEC brought a third-party complaint against Schoenfish & Co., Inc., for indemnification and negligence.

The circuit court dismissed Students' claims against the Estates on May 24, 2017, except to the extent any liability insurance may provide coverage of those claims.

Students voluntarily dismissed their claims against the individual directors of AIII.

All of Students' remaining claims were disposed of in the circuit court's September 12, 2018, Order granting Appellees' motion for summary judgment, in part, from which Students now appeal. CR:2553.

STATEMENT OF THE FACTS

Because MCEC Directors have joined in all respects the Briefs of MCEC, AIII, Guericke, and Phelps, MCEC Directors will limit their Statement of the Facts in this Brief to Students' issue on appeal of whether Students have a private right of action or whether their claims are otherwise preempted by federal law.

A. GEARUP Program in South Dakota

In 2011, the South Dakota Department of Education ("SDDOE") made application for and was later awarded a six-year Gaining Early Awareness and Readiness for Undergraduate Programs ("GEARUP") grant in response to a notice from the U.S. Department of Education ("USDOE") inviting grant applications. CR:1869. The GEARUP grant is designed to assist in preparing low-income students to enter and succeed in postsecondary education. CR:1883, 2818. As part of its application, SDDOE provided numerous assurances to USDOE concerning the administration of the grant. CR:2810-11.

After it was awarded the GEARUP grant, SDDOE entered into a Partnership Agreement with MCEC to administer the grant and to carry out the South Dakota Gaining Early Awareness and Readiness for Under Graduate ("GUSD") grant program activities/responsibilities as described in the USDOE grant application and agreement. CR:1883, 1984. The agreement between SDDOE and MCEC was entered into each year. *See, e.g.*, CR:318, 1984. Each annual agreement also contained a Statement of Assurances. CR:2036-2038. These assurances were certified by MCEC using the same federal form SDDOE used in its grant application to USDOE. *Id.*

MCEC then contracted with AIII to provide personnel and services as needed to administer the GUSD grant. CR:1982-1983. AIII also provided assurances within the

services agreement. CR:1982. Specifically, AIII agreed to "comply with all federal, state, and local laws regulations, ordinances, guidelines, permits and requirements applicable to providing services" pursuant the agreement and "will be solely responsible for obtaining current information on such requirements." CR:1983.

GUSD is a reimbursement-based grant, and GEARUP funds were at all times controlled by SDDOE. CR:2063. In order to receive reimbursement for a GUSD expense, MCEC first incurred the expenditure, either directly or through a third-party, such as AIII, and then submitted supporting documentation for the expenditure to the SDDOE for reimbursement from the GEARUP grant program. *Id*.

On September 16, 2015, SDDOE Secretary Dr. Melody Schopp informed MCEC Executive Director Guericke, via telephone, that SDDOE was considering terminating the agreement with MCEC for the GUSD grant. CR:1883. On September 21, 2015, Secretary Schopp sent a letter to MCEC notifying MCEC of SDDOE's intent to terminate the Partnership Agreement between SDDOE and MCEC for administration of the GUSD program, gave the reasons therefore, and notified MCEC of the necessity of preserving all documents and data related to the GUSD Program. CR:14, 2226.

In June 28, 2017, the State of South Dakota initiated a lawsuit against MCEC to recover certain damages related to the GUSD grant program. CR:1872-73. The circuit court entered an Order granting summary judgment, in part, in favor of Appellees on September 28, 2018, disposing of the lawsuit in its entirety. This appeal commenced on September 24, 2018.

B. Students' Amended Complaint

Students filed their Amended Complaint on January 12, 2017, alleging causes of action directly related to alleged misappropriation and mismanagement of federal

education funds associated with a GEARUP grant awarded to the State of South Dakota in 2011. CR:170-193.

More specifically, Students' Amended Complaint alleges that, individually and on behalf of others, they are intended third-party beneficiaries of the GEARUP grant from USDOE.[1] CR:171. The Amended Complaint further states that "[t]his action stems from breach of contracts regarding the GEARUP grant and tortious conduct by Defendants." *Id*. Other factual allegations described in the Amended Complaint assert actions or inactions by various defendants in connection with the federal GEARUP grant from USDOE to SDDOE. CR:174-184. For example, with respect to MCEC and MCEC Directors, these allegations allege as follows:

Count 2 of the Amended Complaint alleges that MCEC breached the Partnership Agreement it had with the State of South Dakota by failing to carry out the GEARUP grant program in accordance with the grant application that the State of South Dakota had submitted to USDOE. CR:184-185.

Count 4 of the Amended Complaint alleges that MCEC Directors failed to adequately supervise the employees of MCEC and such failure proximately caused damage to Students (arising out of the GEARUP program). CR:187.

Count 8 of the Amended Complaint alleges that MCEC, at the time that MCEC administered GEARUP grant funds, employed Scott Westerhuis and Nicole Westerhuis and that employment relationship "aided Scott Westerhuis and Nicole Westerhuis in accomplishing the tort of civil theft (of GEARUP funds); or in the alternative, MCEC

[1] Appellees contend that Students are not third party beneficiaries. This Notice of Review issue is addressed in the Brief of MCEC, Notice of Review 28745.

was negligent in permitting or failing to stop the tortious conduct of Scott Westerhuis and Nicole Westerhuis." CR:189.

Count 10 of the Amended Complaint alleges that MCEC Directors were under a duty to exercise reasonable care to control the employees of MCEC so as to prevent them from causing harm to Students, and that Scott Westerhuis, Phelps, Guericke, Stephanie Hubers, and Nicole Westerhuis were employees of MCEC and "in possession of GEARUP funds." CR:190.

Again, all allegations against all Appellees arise directly from alleged actions or inactions in connection with the administration of the GUSD program. CR:171-193.

ARGUMENT AND AUTHORITIES

I. The circuit court was correct in granting Defendants' motion for summary judgment on the grounds that Plaintiffs do not have a private cause of action or because their claims are otherwise preempted by the Higher Education Act.

A. The Higher Education Act and the GEARUP Grant

In his January 1965 education message, President Lyndon Johnson articulated the need for more higher education opportunities for lower and middle income families, program assistance for small and less developed colleges, additional and improved library resources at higher education institutions, and utilization of college and university resources to help deal with national problems like poverty and community development.

In October 1965, both the U.S. House and Senate approved a final Higher Education Act bill. In passing this legislation, Congress stated that its intention was "(1) to strengthen the educational resources of our colleges and universities and (2) to provide financial assistance for students in postsecondary and higher education." *See* Higher Education Act of 1965, Pub.L.No. 89-329, 79 Stat. 1219 (referred to herein as "HEA").

With respect to the second stated Congressional intention, the HEA created grants, scholarships, and other student assistant programs. President Johnson signed the HEA bill into law on November 8, 1965. HEA is primarily codified at 20 U.S.C. §1001, *et. seq*.

The HEA consists of eight titles ranging from "General Provisions" in Title I to "New Programs" in Title VIII. *See generally,* 20 U.S.C. ch. 28. Of significance in this matter, Title IV (Student Assistance) of the HEA authorizes the federal government's major student assistance programs, which are the primary source of direct federal support to students pursuing postsecondary education. *See* 20 U.S.C. ch. 28, subch. IV. The nine "Parts" within Title IV (Parts A–I) contain various student assistance programs, including Pell Grants (Part A), Federal Family Education Loan (FFEL) Program (Part B), Federal Work Study Program (Part C), William D. Ford Direct Loan Program (Part D), and Perkins Loan Program (Part E).

With respect to Title IV, Part A, covering grants and other student assistance programs, the first statutory provision states the purpose of a grant program, like the GEARUP grant program, is to:

> assist in making available the benefits of postsecondary education to eligible students (defined in accordance with section 1091 of this title) in institutions of higher education by—
>
> ***
>
> (4) providing for special programs and projects designed (A) to identify and encourage qualified youths with financial or cultural need with a potential for postsecondary education, (B) to prepare students from low-income families for postsecondary education, and (C) to provide remedial (including remedial language study) and other services to students[.] 20 U.S.C. §1070(a).

The Secretary is required to carry out the purposes of Part A of Title IV and otherwise "shall, in accordance with subparts 1 through 9 of this part, carry out programs to achieve the purposes of this part." 20 U.S.C. §1070(b).

The 1998 amendments to the HEA added a new student assistance program within Title IV, Part A, known as the GEARUP grant program. *See* Amendments to the Higher Education Act of 1965, Pub.L.No. 105-244, Title IV, Part A, Subpart 2, Chapter 2 (20 U.S.C. §1070a-21, *et. seq.*). GEARUP is a federal direct, discretionary grant program that provides funding to states or "partnerships,"[2] as eligible entities defined within 20 U.S.C. §1070a-21(c), and has the Congressional intent to:

> [E]stablish a program that encourages eligible entities to provide support, and maintain a commitment, to eligible low-income students, including students with disabilities, to assist the students in obtaining a secondary school diploma (or its recognized equivalent) and to prepare for and succeed in postsecondary education[.] 20 U.S.C. §1070a-2l.[3]

As discussed below, the GEARUP program (Title IV, Part A), as with the other student assistance programs within Title IV of the HEA, falls within a complex statutory and regulatory scheme that provides the USDOE Secretary of Education ("Secretary") with broad powers to implement, control, monitor, evaluate, and, in some cases, suspend or terminate participation in student assistance programs.

In that regard, in 1979, when the federal government's role in education moved from the Department of Health, Education, and Welfare into a cabinet-level department,

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[2] 20 U.S.C. §1070a-21(c) defines "eligible entity" as either a state or a partnership. In the instant matter, the eligible entity was the State of South Dakota through the SDDOE.

[3] A "discretionary" grant, which is one of two kinds of USDOE direct grants, awards funds on the basis of a competitive process. USDOE reviews applications, in part through a formal review process, in light of the legislative and regulatory requirements and published selection criteria established for a program. The review process gives USDOE discretion to determine which applications best address the program requirements and are, therefore, most worthy of funding. *See* 34 C.F.R. §§75.200(a) and (b). App:101, 136.

Congress enacted the Department of Education Organization Act (signed into law by President Carter) establishing USDOE. *See* Department of Education Organization Act, Pub.L.No. 96–88, 93 Stat. 668, 20 U.S.C. §3401, *et. seq*. This new Act vested extensive authority in the new Secretary "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department." 20 U.S.C. §3474. Over the years, the Secretary has utilized this rule-making authority (and other rule-making authority discussed herein, including other federal agencies) extensively with respect to grant programs under Title IV, Part A, of the HEA, including the direct, discretionary grant program known as GEARUP. *See, generally,* 34 C.F.R. parts 75, 77, 80, 82, 84-85, and 97-99.

In addition to 20 U.S.C. §3474, the General Education Provisions Act (GEPA) is found in 20 U.S.C. ch. 31. The applicability of this Chapter, "[e]xcept as otherwise provided, applies to each *applicable program* of the Department of Education." 20 U.S.C. §1221(b)(emphasis added). The term "applicable program" means:

> [A]ny program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The term includes each program for which the Secretary or the Department has administrative responsibility under the Department of Education Organization Act or under Federal law effective after the effective date of that Act. 20 U.S.C. §1221(c)(1).[4]

[4] The circuit court erroneously concluded that the GEPA did not apply to the GEARUP grant program. The circuit court's conclusion was based on language contained in GEPA Subchapter IV (Enforcement), which defines "applicable program," to exclude programs authorized by the HEA. 20 U.S.C. §1221i. The circuit court failed to appreciate that GEPA Subchapter IV defines "applicable program" for Subchapter IV only. *Id*. As noted in the circuit court's Memorandum Decision, the circuit court would have concluded that had the provisions of GEPA applied, Congress would have completely "occupied the field with regard to enforcement of GEARUP and other federal grants, leaving no room for private causes of action." (Emphasis added.) CR:2376. As shown throughout this Brief, the Secretary, in fact, has enforcement authority over Title IV, Part A (Grants). *See generally*, 20 U.S.C. §§3474, 1070(b), Education Department General Administrative Regulations (EDGAR)(34 C.F.R.) parts 75, 76, 80; *see also*,

The general authority of the Secretary under the GEPA is described in Subchapter I, located at 20 U.S.C. §1221e-3, which provides that:

> *[t]he Secretary*, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, and subject to limitations as may be otherwise imposed by law, *is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department.* (Emphasis added.)

GEPA addresses appropriations, reporting, and evaluation functions within USDOE, including state reporting requirements in connection with the use of federal funds by a state. *See* 20 U.S.C. §§1226(b), 1226(f). GEPA also addresses the general requirements and conditions concerning operation and administration of education programs, including the Secretary's responsibilities to (1) prepare and disseminate to State and local educational agencies and institutions information concerning applicable programs, and cooperate with other federal officials who administer programs affecting education in disseminating information concerning such programs; (2) inform the public regarding federally supported education programs; and (3) collect data and information on applicable programs for the purpose of obtaining objective measurements of the effectiveness of such programs in achieving the intended purposes of such programs. 20 U.S.C. §1231a. Because HEA has its own enforcement authority and provisions, GEPA Subchapters I-III generally remain applicable to HEA programs. (*See* n.4.)

In turning to the GEARUP program, the enabling statutes provide that the Secretary:

Congressional Research Service, General Education Provisions Act (GEPA): Overview and Issues (May 2010). (App:001).

> is authorized, in accordance with the requirements of this division, to establish a program that encourages eligible entities to provide support, and maintain a commitment, to eligible low-income students, including students with disabilities, to assist the students in obtaining a secondary school diploma (or its recognized equivalent) and to prepare for and succeed in postsecondary education[.]

20 U.S.C. §§1070a-21. In making any GEARUP grant award, Congress established a number of requirements, including funding rules, coordination of grant activities, use of a cohort model, scholarships, and appropriations for the program. 20 U.S.C. §§1070a-22-28.

Because GEARUP is a discretionary grant, the SDDOE was required to submit an application to the Secretary for carrying out the grant program in South Dakota. 20 U.S.C. §1070a-23. The application was required to contain a number of elements ranging from a description of grant activities to a description of sources of matching funds. 20 U.S.C. §1070a-23(a)(2) and §1070a-24; *see also*, CR:2805-2989.

In addition, the grant application required that the SDDOE application contain "assurances that adequate administrative and support staff will be responsible for coordinating the activities," as well as such other "assurances as the Secretary determines necessary to ensure compliance with the requirements of [the grant]." 20 U.S.C. §§1070a-23(a)(2)(E) and (H); CR:2810-11.

Therefore SDDOE, in receiving a GEARUP grant, was required to "biennially evaluate the activities assisted under this division in accordance with the standards described in subsection (b) and shall submit to the Secretary a copy of such evaluation." 20 U.S.C. §1070a-27(a). The evaluation "shall permit service providers to track eligible student progress during the period such students are participating in the activities and shall be consistent with the standards developed by the Secretary." *Id.* In addition, 20 U.S.C. §1070a-27(c) outlines a separate federal evaluation requirement. Finally, the

Secretary "shall biennially report to Congress regarding the activities assisted under" the GEARUP program and "the evaluations conducted pursuant to this section." 20 U.S.C. §1070a-27(d).

Given the GEARUP statutory scheme, it is clear that Congress intended that any award of USDOE grant funds be strictly administered, monitored, evaluated, and enforced by the Secretary. *See* 20 U.S.C. §1070(b) and 1070a-21(b), *et. seq.*

The GEARUP federal regulations expand on the statutory requirements of 20 U.S.C. §§1070a-21 to 28. Provisions of 34 C.F.R. part 694 address required activities for GEARUP grants, as well as other activities permitted under the grant. 34 C.F.R. §§694.22-23. App:317-8. These GEARUP-specific regulations do not address evaluation and reporting requirements. 34 C.F.R. §694. However, the explicit authority of the Secretary to enforce the administration of the GEARUP grant program is discussed below and does not provide nor leave any provision for a private right of action to enforce noncompliance.

As indicated above, the Secretary has promulgated other federal regulations in connection with federal grant awards, applications, monitoring, evaluating, and suspending or terminating grants. In that regard, the Education Department General Administrative Regulations (EDGAR) specifically address the administration of grant programs.[5] *See generally* 34 C.F.R. parts 74-99.[6] As discussed in detail below, these

[5] EDGAR (34 C.F.R) parts 74-99 were established under various statutory authorities. *See, e.g.*, 20 U.S.C. §§1221e-3 and 3474. Also, Office of Management and Budget (OMB) Circular A-102 is an intragovernmental authority cited in these regulations. App:052. For example, among the most relevant parts of EDGAR for purposes of the case now before this Court, parts 75 and 80, cite to these statutes that provide the rule-making authority to the Secretary. EDGAR part 76 also addresses state-administered programs and contains numerous compliance and enforcement provisions. *Id*.

regulations contain very specific requirements for the award and administration of grant programs within USDOE. Further, the Secretary possesses broad authority in connection with compliance and enforcement of grant programs.

With respect to GEAR UP, 34 C.F.R. §75.1(b) defines a "direct grant program" to include "any grant program of the Department other than a program whose authorizing statute or implementing regulations provide a formula for allocating program funds among eligible States." App:037; *see also* n.2. Therefore, as a discretionary grant, the GEARUP grant program comes under the direct grant provisions of 34 C.F.R. part 75.[7] App:090, 124.

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[6] At the time USDOE awarded the GUSD grant to South Dakota in 2011, all parts of EDGAR (parts 74-99) applied to grant programs administered by USDOE. In 2015, toward the end of the six-year grant period for the GUSD program, the OMB issued uniform guidance for all federal agencies that award grant funding. *See* Federal Awarding Agency Regulatory Implementation of Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (December 19, 2014). App:062. This rule implemented for all federal award-making agencies the final Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) published by the Office of Management and Budget (OMB) on December 26, 2013. *Id*. The purpose of the Uniform Guidance is to reduce administrative burden and risk of waste, fraud, and abuse for the approximately $600 billion per year awarded in federal financial student assistance programs. *Id.; see also,* 2 C.F.R. part 200. USDOE adopted the OMB Uniform Guidance in November 2015. *See* 80 Fed.Reg. 67261 (November 2, 2015). App:048. There is no evidence in the record indicating that SDDOE provided notice to any subgrantee regarding the application of the Uniform Guidance to the 2011 GUSD grant program. *See* Questions and Answers Regarding 2 C.F.R. Part 200 at p. 5. App:064, 068. This Brief addresses EDGAR part 80, effective July 1, 2011, and other EDGAR provisions. While the two relevant editions (2011 and 2014) are essentially identical, any differences between EDGAR 2011 and EDGAR 2014 cited in this Brief are identified by the specific year. It is significant to note, however, that the provisions of EDGAR part 80, as well as other relevant parts of EDGAR, were incorporated into the Uniform Guidance. App:062. Therefore, ultimately, the enforcement mechanisms are the same.

[7] 34 C.F.R. part 74 addresses the awarding of partnership grants applications to higher education institutions (rather than states). *See* 34 C.F.R. §74.1(c).

EDGAR part 75, consists of five active subparts: (A–Regulations that Apply to Direct Grant Programs, C–How to Apply for a Grant, D–How Grants are Made, E–What Conditions Must be Met by a Grantee, F–What are the Administrative Responsibilities of a Grantee, and G–What Procedures Does the Department Use to Get Compliance?). 34 C.F.R. §§75.1-75.910. A number of sections within the 910 subsections of 34 C.F.R. part 75 covering the administration of direct grants are of particular note and relevant to the issues before the Court. In that regard, publication of a USDOE grant application notice, and the content of those notices, is provided through the Federal Register. 34 C.F.R. §75.100; *see, e.g.,* Applications for New Awards; Gaining Early Awareness and Readiness for Undergraduate Programs ("Notice"), 76 Fed.Reg. 34676 (June 14, 2011).[8] App:037. There are extensive regulatory provisions concerning the grant application process. *See, e.g.,* 34 C.F.R. §§75.101-127. The selection criteria for discretionary grants (such as the GEARUP grant) for funding purposes are set forth in 34 C.F.R. §§75.200-264 (2011).

Subparts E, F, and G of EDGAR part 75 set forth a number of conditions, monitoring, compliance, and evaluation powers the Secretary possesses to administer direct grant programs. Subpart E provides (1) that grantees may not discriminate in the administration of grants, (2) conditions/requirements on project staff, (3) conflict of interest requirements for grantees, (4) the general principles in connection with allowable

[8] The Notice described the GEARUP program as a "discretionary grant program that provides financial support for academic and related support services that eligible low-income students, including students with disabilities, need to enable them to obtain a secondary school diploma and to prepare for and succeed in postsecondary education." 76 Fed.Reg. at 34676. App:037. The Notice further identified the Applicable Regulations in connection with the GEARUP program, including: (a) EDGAR in 34 C.F.R. parts 74-75, 77, 79-82, 84-86, 97-98, and 99; and (b) the regulations for the GEARUP program in 34 C.F.R. part 694. 76 Fed.Reg. at 34676. App:037.

costs (specifically referencing 34 C.F.R. §80.22 for states), and outlines evaluation requirements by grantees. *See* 34 C.F.R. §§75.500-592.

In that regard, the Project Narrative section of the 2011 SDDOE GEARUP application contained a section on project staff in compliance with 34 C.F.R. §§75.511-519; CR:2847. Details regarding program evaluation, including performance measurement data collected and used for program evaluation, were also provided in the SDDOE GEARUP application, in compliance with 34 C.F.R. §75.590. *See, e.g.*, CR:2826.

Responsibilities of a grantee are outlined in EDGAR, part 75, subpart F. First, the SDDOE, as grantee of the GUSD grant program, "shall comply with applicable statutes, regulations, and approved applications, and shall use Federal funds in accordance with those statutes, regulations, and applications." 34 C.F.R. §75.700. Second, the SDDOE "shall use fiscal control and fund accounting procedures that insure proper disbursement of and accounting for Federal funds." 34 C.F.R. §75.702.[9] Annual financial and performance reports required with the SDDOE GUSD grant are referenced in 34 C.F.R. §§75.720, with cross-references to 34 C.F.R. §§80.40 and 80.41. Likewise, as a direct grant recipient, SDDOE "shall keep records to show its compliance with program requirements." 34 C.F.R. §75.731. These records must fully show: (a) the amount of funds under the grant, (b) how the grantee uses the funds, (c) the total cost of the project, (d) the share of that cost provided from other sources, and (e) other records to facilitate an effective audit. 34 C.F.R. §75.730. Recordkeeping requirements specifically related to project experiences and results for direct grant recipients, such as SDDOE, are covered

[9] This section cross-references to 34 C.F.R. part 80, subparts C and D, which subparts apply to the GUSD grant award given the grantee is a state.

in 34 C.F.R. §75.732. Procedures for compliance with direct grants are outlined in EDGAR, part 75, subpart G.[10]

The Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments is contained in 34 C.F.R. part 80.[11] App:238, 268. As with 34 C.F.R. part 75, part 80 is divided into subparts: A–General, B–Pre-Award Requirements, C–Post-Award Requirements, D–After-the-Grant Requirements.[12] Part A "establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments." 34 C.F.R. §80.1. The applicability of 34 C.F.R. part 80 to the GEARUP grant program is set out in 34 C.F.R. §80.4, which directs that "Subparts A through D of this part apply to all grants and subgrants to governments[.]" 34 C.F.R. §80.4. (It should be noted that the

[10] Subpart G discusses additional compliance requirements for grantees in connection with direct grants. However, the cross-reference to this subpart is exclusively to 34 C.F.R. part 74. As previously discussed, 34 C.F.R. part 74 relates to higher education institutions---not states. Therefore, the provisions of 34 C.F.R. part 80 address additional compliance requirements for state grantees, including enforcement.

[11] EDGAR part 81 does not apply to the GUSD grant program. *See* 34 C.F.R. §81.2. Other parts within EDGAR include: part 77 (Definitions); part 79 (Intergovernmental Review of Department of Education Programs and Activities); part 82 (New Restrictions on Lobbying); part 84 (Government-wide Requirements for Drug–Free Workplace (Financial Assistance)); part 85 (Debarment and Suspension); part 86 (Drug and Alcohol Prevention); part 97 (Protection of Human Subjects); part 98 (Student Rights in Research, Experimental Programs, and Testing); and part 99 (Family Educational Rights and Privacy). While these various parts to EDGAR are applicable to the GEARUP grant program, they do not directly impact the issues in this case. However, they are demonstrative of the Secretary's extensive regulatory authority in awarding, administering, and, ultimately, enforcing USDOE grant programs.

[12] EDGAR part 80 was removed from the EDGAR regulations in 2015 as its regulatory structure was integrated into 2 C.F.R. 200 (Uniform Guidance). *See* n.6. The Uniform Guidance applies to discretionary grants in the same way that former EDGAR part 80 did. *See* App:064. Because the record is devoid of any evidence from SDDOE after the USDOE implemented the Uniform Guidance indicating that SDDOE's GEARUP grant (awarded in 2011) was going to come under the Uniform Guidance, this Brief addresses 34 C.F.R. part 80. *See* n.6. Under either authority, the result is the same; the Secretary has exclusive authority over federal grants to states.

GEARUP grant program does not come under any of the exceptions provided in 34 C.F.R. §80.4.) As such, the award of the GUSD grant to SDDOE made SDDOE the grantee "accountable for the use of the funds provided." 34 C.F.R. §80.3.

Financial administration requirements for grantees and subgrantees, financial reporting, and records retention and access requirements are provided in 34 C.F.R. part 80. *See* 34 C.F.R. §§80.20, 80.22, 80.41, and 80.42.

Auditing requirements for grant awards are set forth in subpart C of 34 C.F.R. part 80. *See* 34 C.F.R. §80.26. Pursuant to these requirements, the GUSD grant program underwent numerous audits. *See, e.g.,* CR:1856, 1879, 2049, 2124.

More importantly, subpart C of 34 C.F.R. part 80 also contains the Secretary's exclusive authority for enforcement and remedies for noncompliance with grant requirements. "If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions." 34 C.F.R. §80.43(a). These actions include:

> (1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,
> (2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,
> (3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,
> (4) Withhold further awards for the program, or
> (5) Take other remedies that may be legally available.

Id. Further, the enforcement remedies identified in 34 C.F.R. §80.43, including suspension and termination, "do not preclude a grantee or subgrantee from being subject to 'Debarment and Suspension' proceedings."[13] *See* Executive Order 12549. App:031.

In addition to the regulatory requirements in EDGAR, other federal requirements apply to USDOE grant administration and enforcement. For example, as noted above, at the time of the SDDOE's application, OMB Circular A-102 applied to the GEARUP grant program. *See* App:052; *see also* 34 C.F.R. part 80, App:238, 268. The purpose of this Circular was to establish consistency and uniformity among federal agencies in the management of grants and cooperative agreements with state, local, and federally-recognized Indian tribal governments. App:052. As part of these OMB requirements, the SDDOE application included OMB Standard Forms with respect to assurances required by 20 U.S.C. §§1070a-23(a)(2)(E) and (H). The SDDOE application contained federal Standard Form 424B. CR:2810. In the first 3 assurances, SDDOE, as the grant applicant, certified that it:

1. Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to

[13] In addition to the extensive authority the Secretary possesses regarding enforcement of USDOE grant programs, the Office of Inspector General (OIG) from the USDOE serves as an independent entity within the USDOE and is responsible for identifying fraud, waste, abuse, and criminal activity involving USDOE funds, programs, and operations. The Inspector General Act of 1978 (IG Act) created Offices of Inspectors General (OIGs) to be independent and objective units that conduct activities "to promote economy, efficiency, and effectiveness of their agencies' programs and operations and to prevent and detect fraud and abuse." *See* Inspector General Act of 1978, Pub.L.No. 113-126 (as amended July 7, 2014), 5 U.S.C. App. 3. As part of its investigative and law enforcement authority, the USDOE OIG reviews grant programs. *See. e.g.,* Semiannual Report to Congress, No. 77 (April 1, 2018-September 30, 2018); App:300.

and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

Id. After grant application review, USDOE awarded SDDOE a GEARUP grant. *See* Gaining Early Awareness and Readiness for Undergraduate Programs (GEARUP) Project Abstracts for FY 2011 State Grants, App:298.

Pursuant to the Project Narrative in the SDDOE 2011 grant application, SDDOE subsequently entered into a Partnership Agreement with MCEC, "a local education agency authorized by the State of South Dakota that brings over 30 years of experience administering educational services to diverse schools across the state. . . [to] offer GUSD with a number of institutional resources, including meeting facilities and grant management and professional development experience." CR:1895, 1953, 2862. Attachment D of that Partnership Agreement contains federal Standard Form 424B as prescribed by OMB Circular A-102. CR:1953-1955. Within that form, MCEC provided the same assurances that SDDOE provided to USDOE.[14] *Id.*

MCEC subsequently entered into annual service agreements with AIII. *See, e.g.,* CR:1890, 1893, 1982. As referenced in the Statement of Facts, AIII agreed to "comply with all federal, state, and local laws regulations, ordinances, guidelines, permits and requirements applicable to providing services" pursuant to the agreement and "will be solely responsible for obtaining current information on such requirements." CR:1983.

[14] The agreements between SDDOE and MCEC were entered into annually. CR:308, 318, 323.

MCEC also entered into agreements with a number of local school districts who served as grant partners. CR: 1357, 1364.

When alleged issues arose in 2015 concerning the administration of the GUSD grant, the SDDOE Secretary, as grantee, contacted MCEC. CR:1875. The SDDOE Secretary expressed concerns regarding the administration of the South Dakota GEARUP grant. CR:1864, 1875-76. Ultimately, on September 21, 2015, the SDDOE terminated the agreement between SDDOE and MCEC. CR:14, 1865, 1874-75. *See also* 34 C.F.R. §80.43; App:265, 295.

As noted, Students' state law claims directly relate to the administration of the GUSD grant. The Amended Complaint states that "[t]his action stems from breach of contracts regarding the GEARUP grant and tortious conduct by Defendants." CR:171. Again, every allegation described in the Amended Complaint asserts actions or inactions by various appellees in connection with the federal GEARUP grant program. CR:174-184. These state law claims therefore relate directly to the GUSD grant program created and appropriated by Congress. As such, Students do not have a private right of action and their claims are otherwise preempted by federal law.

Given the extensive statutory and regulatory scheme covering all aspects of USDOE grants and grant programs, it is clear that Congress and the Secretary intended to limit any compliance and enforcement of the GEARUP grant awarded to SDDOE to the Secretary and USDOE. Therefore, Students' state law claims can not survive because the HEA does not create a private cause of action.[15] Congress provided the oversight and

[15] As the circuit court noted, "[w]here Congress has legislated upon a subject which is within its constitutional control and over which it has the right to assume exclusive jurisdiction and has manifested its intention to deal therewith in full, the authority of the states is necessarily excluded and any state legislation on the subject is void." 16A

enforcement it believed appropriate related to HEA student assistance programs. *See generally*, 20 U.S.C. §§3474, 1070b, 1070a21-28, 1221e-3, 1097a(a); *see also*, 34 C.F.R. parts 75-99 and 694.

By failing to list private causes of action or state-law claims as permissible, Congress divested private citizens of the right to enforce the HEA in both federal and state court. The U.S. Supreme Court has addressed the importance of respecting the plain meaning of federal statutes when determining their purpose. In the Court's words, "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *See U.S. v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929). It is also significant to note that Congress allocated federal HEA funds for the GEARUP grant program to state governments (or partnerships), not private citizens. 20 U.S.C. §§1070a-21, *et. seq.*

In *Williams v. Anthony*, 2012 WL 6680320 (2012), the district court held that no private right of action under HEA existed in connection with the plaintiff's claim against USDOE alleging USDOE violated the Rehabilitation Act of 1973, 29 U.S.C. §701, *et. seq.*, by failing to use its oversight and enforcement authority under 34 C.F.R. §§361.10 (DOE disapproval of state plan), 361.11 (withholding of funds), 80.40 (monitoring and reporting state program performance), and 80.43 (remedies for noncompliance with federal grants to states) to invalidate alleged unlawful state regulations and rules and to force the Illinois Division of Rehabilitation Services, the recipient of USDOE funds,

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Am.Jur.2nd Constitutional Law §232. Congress's authority to act within the scope of its power so as to displace state power is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature. CR:2369, 2373.

covered by 34 C.F.R. part 80, to give plaintiff the funds he sought.[16] *Id*. The court found that "no provision of the Rehabilitation Act authorizes a private individual to sue the Department to compel it to use its enforcement capabilities under 34 C.F.R. §§361.10, 361.11, *80.40, & 80.43*, which means that there is no private right of action for such a suit." *Id.* at 2 (emphasis added).

The *Williams* court further stated that its conclusion reflects the settled principle that "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); *see also Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 375 (7th Cir.2010)("Where the text and structure of a statute do not provide an indication that Congress intended to create new individual rights, there is no basis for a private suit."). *Williams*, 2012 WL 6680320 at 2; *see also New York Inst. of Dietetics, Inc. v. Great Lakes Higher Educ. Corp.*, 1995 U.S. Dist. LEXIS 13692 (holding under an analogous section of the HEA that "state-law claims . . . would undercut the exclusive administrative remedy provided by Congress."); *Graham v. Sec. Sav. & Loan*, 125 F.R.D. 687, 694 (N.D.Ind. 1989)("The Higher Education Act and its regulations do not provide the plaintiffs with . . . a remedy . . . [f]ederal law pre-empts state law remedies and [therefore, the] plaintiffs' state law claims for rescission and damages must fail.") *See also, McCulloch v. PNC Bank Inc*., 298 F.3d 1217 (11th Cir.2002); *L'ggrke v. Benkuta*,

[16] This case does not relate to assistance programs under the HEA; rather, the funds come under the USDOE through the Rehabilitation Act of 1973. However, the provisions of the USDOE EDGAR provisions do apply to such funds as indicated by the district court, specifically in reference to 34 C.F.R. part 80, addressing grants to states. This case was subsequently rendered moot when Congress later explicitly created a private right of action under the Rehabilitation Act. *See Williams v. Wisconsin Department of Workforce Development*, 728 Fed.Appx. 600 (2018). This is not the case with the HEA. Yet, the applicability of the Secretary's exclusive authority under the HEA to non-loan programs is relevant.

966 F.2d 1346 (1992); *Labickas v. Ark. State Univ*., 78 F.3d 333 (8th Cir.1996); and *Bowman v. Michigan Higher Educ. Assistance Authority*, 2014 WL 129332.

As there is no explicit provision under the HEA giving a private right of action related to the award of federal grants, Students' state law claims must fail.

B. The Circuit Court Correctly Concluded That Students Do Not Have a Private Right of Action or Their Claims are Otherwise Implicitly Preempted by the Higher Education Act.

Even if this Court were to find that state law claims are not expressly preempted by the HEA, they are implicitly precluded. Because Congress provided an extensive statutory and regulatory scheme over federal grants and grant programs, including enforcement mechanisms within the HEA to enforce compliance and recovery of federal grant money, Students' state law claims are implicitly preempted by federal law.

In *Labickas*, a student-borrower sued the University of Arkansas for violating the HEA, including state law claims, after his application for a student loan [under 20 U.S.C. Title IV, Part B] was denied. *Labickas*, 78 F.3d 333 (8th Cir.1996). The plaintiff claimed the university violated the HEA and asserted pendent state law claims of breach of fiduciary duty, outrageous conduct, and breach of contract. *Id.*

To determine whether a private remedy exists under the HEA, the *Labickas* court used four factors previously established by the U.S. Supreme Court: (1) is the plaintiff a member of the class for whose especial benefit the statute was passed, (2) was there a legislative intent to create or deny a private remedy, (3) is an implied remedy consistent with the purpose of the legislative scheme, and (4) is the cause asserted one that is traditionally relegated to state law. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087-88, 45 L.Ed.2d 26 (1975). The *Labickas* court indicated that the "critical inquiry … is

whether Congress intended to create a private cause of action." *Labickas,* 78 F.3d at 334, c*iting Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 24, 100 S.Ct. 242, 249, 62 L.Ed.2d 146 (1979). Thus, the "second and third *Cort* factors carry more weight in the analysis than do the other factors." *Labickas*, 78 F.3d at 334, *citing Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 145, 105 S.Ct. 3085, 3091-92, 87 L.Ed.2d 96 (1985).

In holding that no private right of action existed under the HEA, the *Labickas* court stated:

> We conclude that no private right of action is implied under the HEA for student borrowers. The HEA specifies that the Secretary of Education has the power to carry out the Act's purposes; the Secretary has promulgated numerous and comprehensive regulations that regulate educational institutions' compliance with the HEA; and the statute and legislative history do not otherwise suggest congressional intent to create a private remedy. *Labickas,* 78 F.3d. at 334.

In that regard, the *Labickas* court's holding provides that if a student did not get a loan and was allegedly "harmed" by not getting the loan, the HEA does not provide a private right of action. As to the plaintiff's state law claims, that court indicated that "although it was within the district court's discretion to dismiss Labickas's state law claims, *see McLaurin v. Prater,* 30 F.3d 982, 985 (8th Cir.1994), they should have been dismissed without prejudice. *Cf. Stokes v. Lokken,* 644 F.2d 779, 785 (8th Cir.1981)(construing order dismissing state law claims following summary judgment on federal claims as dismissal without prejudice because such procedure is the "normal practice")." *Labickas*, 78 F.3d at 334-335. This analysis would also apply to the instant case. *See Williams v. Anthony,* 2012 WL 6680320.

The 10th Circuit Court of Appeals in *L'ggrke v. Benkuta*, 966 F.2d 1346 (1992), also found that no private right of action exists under the HEA using the *Cort* four-factor test. In *L'ggrke*, a student-borrower brought an action against a higher education institution based on alleged wrongful retention of student financial assistance funds. *Id.* at 1346. Using the *Cort* factors, the court found that "no private right exists under the HEA" stating that "[w]here a statute provides an administrative enforcement mechanism, the presumption is that no private cause of action is intended." *Karahalios v. National Federation of Federal Employees, Local 1263*, 489 U.S. 527, 533, 109 S.Ct. 1282, 1287, 103 L.Ed.2d 539; *Transamerica Mortgage Advisors*, 444 U.S. at 19-20, 100 S.Ct. at 246-47. As noted earlier, the Secretary has extensive enforcement authority indicating that Congress intended this mechanism to be the exclusive means for ensuring compliance with the statutes and regulations. *See St. Mary of the Plains College v. Higher Education Loan Program*, 724 F.Supp. 803, 807 (D.Kan.1989); *see also*, 20 U.S.C. §§3474, 1070(b). The *L'ggrke* court further stated:

> The express language of the Higher Education Act, and the regulations promulgated thereunder, does not create a private cause of action, and there is nothing in the Act's language, structure or legislative history from which a congressional intent to provide such a remedy can be implied. No provision provides for student enforcement or entitlement to civil damages. Rather, [ ] Title IV's provisions demonstrate that Congress vested exclusive enforcement authority in the Secretary of Education. *To imply a private right on the part of a student would conflict with the enforcement powers of the Secretary and thus would be inconsistent with the underlying purpose of the statute*. *See Graham v. Security Savings & Loan*, 125 F.R.D. 687, 693-94 (N.D.Ind.1989), aff'd, 914 F.2d 909 (7th Cir.1990) (emphasis added); *St. Mary*, 724 F.Supp. at 808.

In a footnote, the *L'ggrke* court noted that "[a] contrary result here has the potential to occasion a floodwater of federal actions by students perceiving themselves to be

aggrieved, with consequent litigation costs not to be risked absent some showing of supporting Congressional intent." *L'ggrke*, 966 F.2d at 1348, n.4.

Likewise, in *McCulloch*, 298 F.3d 1217 (11th Cir.2002), the court of appeals applied the *Cort* factors and found that no private right of action exists under the HEA. In so finding, the *McCulloch* court noted, in analyzing the second *Cort* factor, that:

> even if Plaintiffs satisfied the first *Cort* factor, Plaintiffs fail to satisfy the second and most important of the *Cort* factors, as they have failed to provide any indication that Congress intended to allow students (or their parents) to sue under the HEA. As one court has noted, Congress' desire to enact the HEA to benefit students by making educational opportunities available to them is "not tantamount to an expression of legislative intent in favor of equipping students with a private right of action against ... participants in the [federal student loan] program." *Jackson v. Culinary School of Washington*, 788 F.Supp. 1233 at 1257, 1256-60 (D.D.C.1992), *remanded on other grounds*, 27 F.3d 573 (D.C.Cir.1994), *vacated on other grounds*, 515 U.S. 1139, 115 S.Ct. 2573, 132 L.Ed.2d 824 (1995).

See also Cannon v. University of Chicago, 441 U.S. 677, 688, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)(stating that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private right of action in favor of that person."). As to the third *Cort* factor, the *McCulloch* court likewise found that the HEA's legislative history is completely silent with respect to the issue of Congress' intent to create a right to sue for violations of the HEA. *McCulloch*, 298 F.3d at 1224.[17]

In the instant matter, the circuit court correctly found that *Cort* factors two through four prevent any state law claims Students' allege in their Amended Complaint.

[17] While the circuit court in the instant case was troubled that these cases, and other cases cited by the parties, addressed HEA loan programs, the holdings do find, in fact, that there is no private right of action exists under any section of the HEA—not just for HEA loan programs. *See, e.g., McCulloch*, 298 F.3d 1217 (11th Cir.2002); *New York Inst. of Dietetics*, 1995 U.S. Dist. LEXIS 13692; *Graham*, 125 F.R.D. at 694; *L'ggrke*, 966 F.2d 1346 (1992); and *Labickas*, 78 F.3d 333 (8th Cir.1996). *See, also, Williams*, 2012 WL 6680320 (2012).

CR:2369, 2383. As to the first factor, MCEC Directors agree with the circuit court that Congress clearly intended for the GUSD grant program services under the HEA to benefit students. 20 U.S.C. §1070a-21, *et. seq.*; Students' Brief, p. 9. Yet, Students wish this Court to completely ignore the Amended Complaint wherein their state law claims against Appellees specifically reference and relate alleged actions and inactions with respect to the GUSD program. *Id*. The Amended Complaint makes it very clear that "[t]his action stems from breach of contracts regarding the GEARUP grant and tortious conduct by Defendants." CR:171. Extensive detail is provided in the Amended Complaint describing the GEARUP program's creation through an act of Congress and further describes the inner workings of the GUSD grant program application, persons and entities involved in the GUSD program, specific grant fund amounts, and events leading up to the termination of the 2011 GUSD grant program with MCEC. CR:173-184. Again, every count in the Amended Complaint alleges actions or inactions directly related to the GUSD grant program. CR:183-191. Students' may not now seek to claim that their claims are merely state law claims for Appellees' alleged failures to provide services.

It is not disputed that the GUSD grant program derives from a federal grant appropriated by Congress. *See* U.S.C. §§1070a-21 and 1070a-25. Without the GEARUP program, Students would not have been subject to receiving the GEARUP benefits (services) which they allege not to have received. CR:171. Therefore, because Students' Amended Complaint alleges breaches of contract and tortious conduct specifically arising out of the GUSD grant program, Students may not circumvent federal law to recover

damages arising from GEARUP services that allegedly were not provided to them.[18] *See McCulloch*, 298 F.3d 1217 (11th Cir.2002); *New York Inst. of Dietetics*, 1995 U.S. Dist. LEXIS 13692; *Graham*, 125 F.R.D. at 694; *L'ggrke,* 966 F.2d 1346 (1992); *Labickas*, 78 F.3d 333 (8th Cir.1996); *Graham*, 125 F.R.D. 687 (1989); *Bowman*, 2014 WL 129332; and *Williams v. Anthony*, 2012 WL 6680320 (2012).

In *Graham*, the main thrust of plaintiffs' complaint was that they were "induced by fraudulent and deceptive practices of Adelphi Business College to enroll at the school." *Graham*, 125 F.R.D. at 689. Once enrolled, plaintiffs took out "various HEA loans and also *applied for federal grants* through the defendant." *Id*. (emphasis added). The plaintiffs asserted state law claims, including breach of contract by Adelphi; fraudulent misrepresentation by Adelphi; negligent misrepresentation by Adelphi; a violation of the HEA by Adelphi, the SSL lender, and the U.S. guarantor; a fraudulent breach of fiduciary duty by Adelphi; and a violation of the Indiana Deceptive Practices Act by Adelphi and the SSL lender. *Id*. *The Graham* court found that there was no private right of action under the HEA. *Id.* at 693. As to the state law claims, the court found:

> The Higher Education Act and its regulations do not provide the plaintiffs with such a remedy by means of this lawsuit against these defendants. Federal law pre-empts state law remedies and plaintiffs' state law claims for rescission and damages must fail. Further, no implied right of action exists under the Act.

Id. at 694. *See also, Bowman*, 2014 WL 129332 *6 (holding that alleged breaches of contract still involved conduct that is strictly related to defendant's duties under the HEA,

[18] Students' Amended Complaint alleges that they are third-party beneficiaries under the GUSD grant program. CR:171. Notice of Review on this issue is likewise before this Court. *See* n.1.

and thus plaintiff's state law claim would be preempted). *Id.*, *citing American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228–233, 115 S Ct 817, 130 L.Ed.2d 715 (1995).

As to the second *Cort* factor, the circuit court also correctly determined that there is a complete absence of any specific language within HEA, or any evidence of Congressional intent, to create a private remedy on behalf of Students to recover damages from GEARUP funds federally appropriated to the State of South Dakota related to providing various services. CR:2369, 2380. *See* Higher Education Act of 1965; s*ee also*, *McCulloch*, 298 F.3d 1217 (11th Cir.2002); *New York Inst. of Dietetics*, 1995 U.S. Dist. LEXIS 13692; *Graham*, 125 F.R.D. at 694; *L'ggrke*, 966 F.2d 1346 (1992); *Labickas*, 78 F.3d 333 (8th Cir.1996); *Bowman*, 2014 WL 129332; and *Williams v. Anthony*, 2012 WL 6680320 (2012).

Students' analysis of *Cannon v. University of Chicago*, 441 U.S. 677 (1979), 99 S.Ct. 1946, 19 Empl. Prac. Dec. P 9202, 60 L.Ed.2d 560, in conjunction with the circuit court's analysis in its Memorandum Decision, is misplaced. In *Cannon*, the U.S. Supreme Court found that a private right of action exists under what is commonly referred to as "Title IX." *See generally*, 20 U.S.C. §1681, *et. seq*.[19] In applying the *Cort* factors, the Court found that "[t]he first factor is satisfied here since Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted." *Cannon*, 441 U.S. at 677-678. The Court also analyzed the second *Cort* factor and found extensive Congressional intent that Title IX was to confer a private right of action because the Act was modeled after Title VI (42 U.S.C. §§2000d, *et. seq*.) stating, in part, that:

[19] Again, the matter before this Court relates to the HEA, 20 U.S.C. §1001, *et. seq.*

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes. *Id.* at 704.

As discussed in detail in this Brief, no similar circumstances exist under HEA, Title IV. *See, e.g., McCulloch,* 298 F.3d 1217, 1223 (11th Cir.2002)(finding under the second *Cort* factor that in view of the detailed enforcement scheme contemplated by Congress, the statutory text and structure of the HEA does not evidence an intent to create a private right of action in favor of parents or students); and *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479 (which requires some affirmative evidence of congressional intent to create a private right of action, and not just a lack of congressional intent to deny a cause of action).

The circuit court correctly found, under the third *Cort* factor, that implying a private remedy would be inconsistent with the underlying purpose of the legislative scheme. CR:2369, 2382. This Brief has described in detail the provisions in federal statute (20 U.S.C. §§3474, 1070(b) and 1070a-21) that extend broad authority to the Secretary to carry out the purposes of HEA student assistance grants and grant programs, and the Secretary's extensive authority to promulgate regulations to carry out those purposes. *See* 34 C.F.R. parts 75, 77, 79, 80, 82, 84-85, 97-99, 694. This scheme allows for enforcement by the Secretary concerning any allegations of mishandling of GEARUP funds. Therefore, application of a private remedy would be inconsistent with the federal scheme since both Students and USDOE (or grantee) would be attempting to recover the same funds. *See* 34 C.F.R. §80.43; App:265, 295. For example, "if a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a

federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more actions" under 34 C.F.R. part 80. *Id*. As the circuit court noted, allowing a third party to recover those mishandled funds is contrary to the federal legislative and regulatory scheme which "only accentuates the danger of conflict."[20] CR:2369, 2382; *see also*, *McCulloch*, 298 F.3d 1217 (11th Cir.2002); *New York Inst. of Dietetics*, 1995 U.S. Dist. LEXIS 13692; *Graham*, 125 F.R.D. at 694; *L'ggrke*, 966 F.2d 1346 (1992); *Labickas*, 78 F.3d 333 (8th Cir.1996); *Bowman*, 2014 WL 129332; *Graham*, 125 F.R.D. 687; and *Williams v. Anthony*, 2012 WL 6680320 (2012).

Students do not offer any authorities in which either state or federal courts have analyzed whether implying a private remedy would be inconsistent with the underlying purpose of the legislative scheme under the HEA. Students' Brief, p. 12. Instead, Students cite primarily to *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)(Ultimately holding that permitting the state court to award what amounts to a retroactive right to collect a rate in excess of the filed rate "`only accentuates the danger of conflict,' and no appeal to equitable principles can justify such usurpation of federal authority.") and *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981)(stating that "[a] system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act."). These cases do not serve to represent authorities contrary to statutory, regulatory, or case law

[20] *See also State of South Dakota v. MCEC, et al*., Hughes County, South Dakota, 32CIV17-140, referenced by the circuit court in its analysis. CR:2369, 2381.

authorities cited by the circuit court, or in this Brief, relating to the HEA specifically. Again, any assertion by Students that they can circumvent the HEA by merely claiming a state law claim in South Dakota for breach of contract and tort remedies arising out of services under the GUSD grant program flies in the face of their own Amended Complaint and extensive authorities holding that no such private right of action can be implied under the HEA. *See, e.g., Labickas*, 78 F.3d 333 (8th Cir.1996); *McCulloch*, 298 F.3d 1217 (11th Cir.2002). The thrust of Students' claims described in the Amended Complaint arise out of denial of services under the GUSD grant program. CR:171; *see also, Graham*, 125 F.R.D. at 689. Not only is it contrary to Congress's intent to allow private legal remedies whenever students perceive themselves entitled to federal grant money—allowing complaints based upon this belief creates "an obstacle to the accomplishment" of the "objectives of Congress." *See Hughes v. Talen Energy Mktg.*, LLC, __ U.S. __, 136 S. Ct. 1288, 1298 (2016).

As to the fourth *Cort* factor, the circuit court correctly determined that the benefits Students were allegedly deprived of consisted of services to be provided (mentors, tutoring, financial aid training and other services) through the GUSD program to assist [Students] in graduating from high school and obtaining access to and succeeding in post-secondary education. CR:2369, 2382. These benefits and services derive from the GUSD grant program funded through a federal appropriation. 20 U.S.C. §1070a-21, *et. seq*. Again, Congress authorized the Secretary to carry out the purposes of the GEARUP grant program. *Id*.; *see also*, 20 U.S.C. §§1070(b) and 3474. The Secretary's broad authority to impose conditions on the grant program and to pursue remedies for noncompliance, including suspension or termination, also provide for "other remedies that may be legally available." *See* 34 C.F.R. §80.43; *see generally*, 34 C.F.R. parts 75,

76, 80. All current cases in every jurisdiction that have considered the issue have determined that the HEA does not create a federal private cause of action. *See, e.g.*, *Labickas*, 78 F.3d at 334; *McCulloch*, 298 F.3d at 1224–25. To conclude that education policy is only peripherally related to the matter before this Court is, for all the reasons and grounds presented in this Brief, simply not true. Students' Brief, p. 17. As discussed above, Students' own Amended Complaint belies this statement. CR:171. Further, Students' failure to cite to authorities related to the HEA is telling. In that regard, their state law claims must fail for the reasons and grounds set forth in this Brief.

CONCLUSION

By creating a statutory and regulatory remedy, Congress considered the possibility that federal HEA funds may be misappropriated. Instead of granting private citizens express authority to pursue their rights under the HEA, Congress decided the HEA must be enforced by the Secretary. Therefore, the circuit court's grant of MCEC Directors' Motion for Summary Judgment should be upheld as Students do not have a private cause of action to sue to recover damages, or their state claims are otherwise preempted.

REQUEST FOR ORAL ARGUMENT

MCEC Directors respectfully request oral argument before the Court.

Dated this 31st day of January, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: */s/ Samuel D. Kerr*

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the requirements of SDCL §15-26A-66(b). Proportionally spaced font Times New Roman 12 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificates and appendix, Brief of Appellees MCEC Directors contains 9,824 words as counted by Microsoft Word.

/s/ Samuel D. Kerr
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CERTIFICATE OF SERVICE

Samuel D. Kerr, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 31st day of January, 2019, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to the following individuals:

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The undersigned further certifies that the original and two (2) copies of the Brief of Appellees MCEC Directors in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

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Samuel D. Kerr

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 28740

ALYSSA BLACK BEAR AND KELSEY WALKING EAGLE-ESPINOSA

Plaintiffs and Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit; AMERICAN INDIAN INSTITUTE FOR INNOVATION; a Non-Profit Corporation; JOANNE FARKE; BRANDON YORK; PAMELA HAUKAAS; NICOLE BAMBERG; TIME NEUGEBAUER; DAVID SHOEMAKER; TODD REINISH; BILL MATHIS; DAVE MERRILL; TESS STARR; LLOYD PERSSON; CARMEN WEBER; JAMES MUNSEN; RICHARD PETERSON; CHRIS VANDER WERFF; TAMMY OLSON; TONYA VANEYE; SHIRLEY PEDERSON; RYAN YOUNGSTROM; TANYA ALDRICH; CHRIS EYRE; STACY PHELPS; DANIEL GUERICKE; THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representative FIRST DAKOTA NATIONAL BANK; and THE ESTATE OF NICOLE WESTERHUIS, by and through its Personal Representatives GEORGE FISH AND KAREN FISH.

Defendants and Appellees.

Appeal from the Circuit Court, First Judicial Circuit
Charles Mix County, South Dakota

The Honorable Bruce Anderson
Circuit Court Judge

Notice of Review filed October 9, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE LEGAL ISSUES 2

Did the Circuit Court err in denying Mid-Central's motion for summary judgment that sought a ruling that the Students were not third-party beneficiaries of the Partnership Agreement between Mid-Central and the South Dakota Department of Education? 2

Did the Circuit Court err in denying Mid-Central's motion for summary judgment that sought a ruling that Mid-Central cannot be held vicariously liable for the Westerhuises' intentional torts? 2

Did the Circuit Court err in denying Mid-Central's motion for summary judgment that sought a ruling that the Students failed to comply with SDCL § 3-21-2? 2

Did the Circuit Court err in granting Mid-Central's motion for summary judgment finding that the Students' claims are pre-empted under federal law? 3

Did the Circuit Court err in denying Mid-Central's motion for summary judgment that sought a ruling that the Students had no standing to bring their claim? 3

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

STANDARD OF REVIEW 7

ARGUMENT 8

I. Students Are Not Intended Third Party Beneficiaries & Cannot Assert a Claim Against Mid-Central 8

II. SDCL § 53-2-6 Does Not Entitle Students to a Claim as Third Party Beneficiaries 13

III. Mid-Central Cannot Be Held Liable for Scott & Nicole Westerhuis's Torts 15

CONCLUSION 16

REQUEST FOR ORAL ARGUMENT 17

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

APPENDIX 20

TABLE OF AUTHORITIES

Cases:

South Dakota:

Bernie v. Catholic Diocese of Sioux Falls, 2012 SD 63, 821 N.W.2d 232 .....2, 15

Haas v. Wentzlaff, 2012 SD 50, 816 N.W.2d 963 .....2, 15

Keegan v. First Bank, 519 N.W.2d 607 (SD 1994) 7

Sisney v. State, 2008 SD 71, 754 N.W.2d 639.....2, 9, 10, 11, 12

Trouten v. Heritage Mut. Ins. Co., 2001 SD 106, 632 N.W.2d 856 .....2, 9

Other Jurisdictions:

Olson v. Etheridge, 686 N.E.2d 563 (Ill. 1997).....14

Orloff v. Metropolitan Trust Co., 110 P.2d 396, 398 (Cal. 1941) 13

Statutes:

SDCL § 3-21-2.....1, 2, 3, 7, 16

SDCL §§ 13-5-31 to 34.....4

SDCL § 15-26A-3.....1

SDCL § 15-26A-6.....1

SDCL § 15-26A-67.....2

SDCL § 53-2-6.....2, 9, 13, 14

Secondary Authority:

44 A.L.R.2d 1270, What Constitutes Reservation of Right to Terminate, Rescind, or Modify Contract, as Against Third-Party Beneficiary.....13

Black's Law Dictionary, 6th Edition, 1990 14

PRELIMINARY STATEMENT

"CR" refers to the certified record. "APP" refers to the attached Appendix. "SDDOE" refers to the South Dakota Department of Education. "Students" refers to Plaintiffs/Appellants. "Mid-Central" refers to Mid-Central Educational Cooperative. "AIII" refers to American Indian Institute for Innovation. The remaining parties will be referred to by their entity or last name.

JURISDICTIONAL STATEMENT

Students appeal from the Circuit Court's September 12, 2018 Order granting Appellees' motion for summary judgment finding that they do not have a private right of action because their claims are otherwise preempted by the Higher Education Act. Students filed their Notice of Appeal on September 24, 2018. Mid-Central filed its Notice of Review on October 9, 2018, seeking review of the Circuit Court's February 20, 2018 and September 12, 2018 Orders denying its motions for summary judgment regarding whether the Circuit Court erred in denying: 1) Mid-Central's motion on the grounds that Students failed to provide timely notice of their claims pursuant to SDCL §3-21-2; 2) Mid-Central's motion that Students were not intended third party beneficiaries of the Partnership Agreement between the SDDOE and Mid-Central; 3) Mid-Central's motion that Mid-Central cannot be held vicariously liable for the tortious conduct of Scott and Nicole Westerhuis; and 4) Mid-Central's motion on the grounds that the Students did not have standing to bring their claims.

The Orders are appealed pursuant to SDCL § 15-26A-3. Notice of Appeal was filed within the time limits set forth in SDCL § 15-26A-6. Notice of Review was filed

within the time limits set forth in SDCL § 15-26A-22. This Court has jurisdiction to consider the issues raised on appeal.

STATEMENT OF THE LEGAL ISSUES

1. Did the Circuit Court err in denying Mid-Central's motion for summary judgment that sought a ruling that the Students were not intended third-party beneficiaries of the Partnership Agreement between Mid-Central and the South Dakota Department of Education?

Yes. The Circuit Court erred in denying Mid-Central's motion for summary judgment.

Sisney v. State, 2008 SD 71, 754 N.W.2d 639

Trouten v. Heritage Mut. Ins. Co., 2001 SD 106, 632 N.W.2d 856

SDCL § 53-2-6

2. Did the Circuit Court err in denying Mid-Central's motion for summary judgment that sought a ruling that Mid-Central cannot be held vicariously liable for the Westerhuises' intentional torts?

Yes. The Circuit Court erred in denying Mid-Central's motion for summary judgment.

Bernie v. Catholic Diocese of Sioux Falls, 2012 SD 63, ¶8, 821 N.W.2d 232

Haas v. Wentzlaff, 2012 SD 50, ¶ 20, 816 N.W.2d 96, 102-03

This Brief addresses Issues 1 & 2. Issues 3 through 5 are before this Court and being argued/briefed by MCEC Directors, AIII, Guericke, Westerhuis Estates, and Phelps. Pursuant to SDCL § 15-26A-67, Mid-Central joins in the argument and the Briefs of Appellees Mid-Central Individual Directors, AIII, Guericke, Westerhuis Estates, and Phelps for the issues listed as Issues 3, 4, & 5.

3. Did the Circuit Court err in denying Mid-Central's motion for summary judgment that sought a ruling that the Students failed to comply with SDCL § 3-21-2?

Yes. The Circuit Court erred in denying Mid-Central's motion for summary judgment.

4. Did the Circuit Court err in granting Mid-Central's motion for summary judgment that sought a ruling that Students' claims are pre-empted under federal law?

No. The Circuit Court was correct in granting Mid-Central's motion for summary judgment.

5. Did the Circuit Court err in denying Mid-Central's motion for summary judgment asking for a ruling that Students had no standing to bring their claim?

Yes. The Circuit Court erred in denying Mid-Central's motion for summary judgment.

STATEMENT OF THE CASE

Students filed suit in Charles Mix County, First Judicial Circuit, asserting causes of action including but not limited to civil theft, breach of contract, negligent supervision, respondeat superior liability, and duty to control against the various defendants in their Amended Complaint. (APP 001-023.) Mid-Central brought a third party complaint against Schoenfish & Co., Inc. for indemnification and negligence. (CR 40-82.)

Mid-Central filed several dispositive motions throughout this litigation. Mid-Central's first motion for summary judgment sought dismissal of the claims against it because the Students' failed to comply with SDCL § 3-21-2, because the Students weren't intended third-party beneficiaries of the Partnership Agreement, and because Mid-Central cannot be held vicariously liable for the tortious conduct of Scott and Nicole Westerhuis. The Circuit Court denied that motion. (APP 024-030.) Mid-Central's second motion for summary judgment sought a finding that no GEAR UP funds were misappropriated, that federal preemption precludes the Students' claims, and that the

Students had no standing to bring their claims. The Circuit Court granted that motion in regard to the issue of federal preemption, but denied it regarding the remaining arguments. (APP 031-047.)

Students filed their Notice of Appeal on September 24, 2018. Mid-Central filed its Notice of Review on October 9, 2018. The Circuit Court's Orders regarding Mid-Central's motions for summary judgment were entered on September 28, 2018. (CR 2617-2618.)

STATEMENT OF THE FACTS

Mid-Central was an educational cooperative organized under SDCL §§ 13-5-31 through 13-5-34 with its principal place of business in South Dakota. (CR 172.) It was founded in 1977. (CR 315-317.) As an educational cooperative, Mid-Central is a public entity organized by school districts "in an effort to maximize educational excellence in [South Dakota] and to permit cooperative efforts between schools which are not adjacent to one another." SDCL § 13-5-31, et. seq. Mid-Central consisted of thirteen school districts from central South Dakota.

The SDDOE obtained a six-year GEAR UP Grant from the United States Department of Education ("USDOE") in 2004/05. (APP 003) The GEAR UP Grant was renewed between the SDDOE and USDOE in 2011. (APP 003) In turn, the SDDOE contracted with Mid-Central to administer the GEAR UP grant program in South Dakota for the SDDOE. (CR 308-312.) The contract took the form of a series of Partnership Agreements between Mid-Central and the SDDOE. (APP 005.) The contract between Mid-Central and the SDDOE required Mid-Central to carry out the grant activities and responsibilities as described in the grant application submitted to the USDOE by the

SDDOE. (APP 005.) Mid-Central began doing so while reporting back to the SDDOE on the activities it performed to the SDDOE. (CR 309.)

Scott Westerhuis was Mid-Central's business manager at all times relevant to the dispute in this matter. (APP 0009.) Scott Westerhuis, and his wife, Nicole Westerhuis, were both employees of Mid-Central in the business department, and involved in the concealing and misappropriating of funds from Mid-Central. (APP 011.) It is disputed that it was GEAR UP funds because the grant program was a draw down program. (CR. 2201-2203.) Nevertheless, the Westerhuises concealed their activities from Mid-Central by describing the transfer of funds to themselves as "void checks and journal entries." (APP 012-013.) Former Mid-Central employee Stephanie Hubers admitted to "helping conceal Scott and Nicole Westerhuis's misappropriation of funds" in exchange for $55,000.00. (APP 012.) Hubers concealed the misappropriation of funds by calling it "payroll" when funds were transferred from Mid-Central to Defendant AIII. (APP 012.)

The SDDOE began to realize that there appeared to be financial discrepancies with the administration of the GEAR UP grant program. The discrepancy is alleged by the Students to be that the Westerhuises "took GEAR UP funds for their own use." (APP 015.) "By taking GEAR UP grant funds for their own personal use, Scott and Nicole Westerhuis committed acts of civil theft or conversion by exercising dominion and control over the GEAR UP grant funds."[1] (APP 015.)

The SDDOE, on September 21, 2015, terminated the contract between it and Mid-Central for the administration of the GEAR UP grant program. (CR 313-314.) The

[1] It is disputed by Mid-Central and the SDDOE that the misappropriated fund were GEAR UP funds. It is believed the misappropriated funds were from the general operating funds of Mid-Central. (CR 2201-2203.)

termination was "immediate" as of September 21, 2015. (*Id.*) Daniel Guericke ("Guericke"), at-the-time executive director of Mid-Central, notified Scott Westerhuis that the contract between the SDDOE and Mid-Central was being terminated on or about September 15, 2015 after Guericke had a teleconference with the SDDOE Secretary – Dr. Melody Schopp. (APP 011.) In response, at least according to law enforcement, Scott Westerhuis murdered his wife and their four children in their home and set it on fire while simultaneously committing suicide. (APP 011.) After the death of the Westerhuises, the South Dakota Division of Criminal Investigation investigated the matter. The South Dakota Attorney General's Office eventually announced criminal charges against Stacy Phelps, Guericke, and Hubers for the theft of GEAR UP funds. (APP 012.) Those cases have since been tried to a jury, and they were found not guilty with the exception of Guericke, who took a plea bargain offer. However, Mid-Central is still a victim by at least the Westerhuises. (APP 015.)

Mid-Central received no benefit or furtherance of its function in the Westerhuises' concealment or misappropriation of any GEAR UP grant, or any other, funds. (APP 015.) In fact, Mid-Central filed suit against the Estates of Scott and Nicole Westerhuis, AIII, and others in the hopes of recovering funds that had been misappropriated. (CR 301-302.) That lawsuit is still pending. (CR 301-302.)

In their Amended Complaint against Mid-Central, Students allege that Mid-Central breached its contract (Count 2) in failing to carry out the GEAR UP program in accordance with the grant application that the SDDOE had submitted to the USDOE. (APP 015-016.) Students also allege that Mid-Central failed to set up safe guards and failed to prevent conflicts of interest in the administration of the GEAR UP grant

program for the SDDOE. (APP 015-016.) Students also allege that Mid-Central is vicariously liable "for the tort of civil theft" of the Westerhuises, or, in the alternative, was "negligent in permitting or failing to stop the tortious conduct of Scott Westerhuis and Nicole Westerhuis." (APP 020.)

It is undisputed that Students did not provide notice of these claims to Mid-Central as required by SDCL § 3-21-2. (CR 307.) Students are also not intended third-party beneficiaries of the contract and they never attempted to enforce the contract prior to its rescission. Mid-Central also cannot be held vicariously liable for Scott and Nicole Westerhuis's intentional torts as alleged in the Amended Complaint. As such, the Circuit Court erred in not granting Mid-Central's motions for summary judgment regarding these issues.

STANDARD OF REVIEW

In reviewing a grant or a denial of summary judgment, this Court must determine whether the moving party has demonstrated an absence of a genuine issue of material fact and showed entitled to judgment on the merits as a matter of law. The evidence is viewed in the favor of the non-moving party with any reasonable doubt being resolved against the moving party. However, the non-moving party cannot rest on the pleadings and must present specific facts showing that at genuine issue of material fact exists for trial. This Court's task on appeal is to determine whether there is a genuine issue of material fact and if the law was correctly applied. *See, Keegan v. First Bank,* 519 N.W.2d 607, 610-611 (SD 1994).

ARGUMENT

I. Students Are Not Intended Third-Party Beneficiaries and Cannot Assert A Claim Against Mid-Central.

Students argue that they are intended third-party beneficiaries of the Partnership Agreement ("Contract") between the SDDOE and Mid-Central. However, a closer look at the Contract and South Dakota case law provide otherwise.

First, in regard to the Contract between the SDDOE and Mid-Central, it is facially clear that the intended purpose of the Contract is for the benefit of the SDDOE.[2] The very first paragraph of the Contract provides,

> The State hereby enters into a Partnership Agreement with Mid Central Educational Cooperative (MCEC). The State will serve as the lead partner and will be responsible for ensuring that the project is carried out by the partnership group in accordance with Federal requirements. The MCEC agrees to carry out its partnership responsibilities as described in this agreement.

(CR 308.) The Contract also requires Mid-Central to perform various activities for the State including but not limited to: provide quarterly reports to the State, provide the State a budget proposal each year, and provide appropriate reporting data to the State and the State contracted evaluator. (CR 309-310.) It cannot be any clearer that the purpose of the Contract is for the benefit of the SDDOE in having Mid-Central administer the GEAR UP grant program on the SDDOE's behalf while the SDDOE "serves as the lead partner." (CR 308.) The Students agree as they aver in their Amended Complaint that "SDDOE contracted with [Mid-Central] to administer the [GEAR UP] program in South Dakota." (APP 005, ¶ 25.) Important to this analysis is that it wasn't Mid-Central that got the

[2] All of the contracts between the SDDOE and Mid-Central, renewed each year, contain the same language. (CR 318-327.)

GEAR UP grant to South Dakota, it was the SDDOE. Mid-Central simply contracted with the SDDOE to perform the administrative duties of the program for the SDDOE. The Students' claim, if they have one, is not against Mid-Central.

SDCL § 53-2-6 directly governs the right of a third-party beneficiary to enforce a contract in South Dakota. It provides that,

> A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

"This [statute] does not, however, entitle every person who received some benefit from [a] contract to enforce it." *Sisney v. State,* 2008 SD 71, ⁋ 10, 754 N.W.2d 639, 643. This Court, on at least two occasions, has stated in regard to SDCL § 53-2-6 that,

> The [third-party beneficiary] statute is not applicable to every contract made by one person with another for the performance of which a third person will derive a benefit; the intent to make the contract inure to the benefit of a third party must be clearly manifested. In the language of the statute, the contract must be "made expressly for the benefit of a third person."

Sisney at ⁋ 10 citing *Trouten v. Heritage Mut. Ins. Co.,* 2001 SD 106, ¶ 13, 632 N.W.2d 856, 858.

The South Dakota Supreme Court in *Sisney* went further when it stated that,

> Thus, the rule requires that *at the time the contract was executed,* it was the contracting parties' intent to *expressly* benefit the third party. And, even then, not all beneficiaries qualify; incidental beneficiaries are not entitled to third-party beneficiary status. North Dakota, in construing language similar to SDCL 53-2-6, explained that even the 'mention of one's name in an agreement does not give rise to a right to sue for enforcement of the agreement where that person is only incidentally benefited.' The party claiming third-party beneficiary status must show 'that the contract was entered into by the parties directly and primarily for his benefits.' 'The benefit must be more than merely incidental to the agreement.'

Sisney at ⁋10. (emphasis added by bolding and underlining.)

The contracts between Mid-Central and the SDDOE are contracts between governmental agencies for the administration of the GEAR UP grant program The contracts were entered into for the direct benefit of the SDDOE so it didn't have to directly administer the GEAR UP grant program. In *Sisney,* the Supreme Court looked at this exact type of relationship and further provided that,

> 'Government contracts … pose unique difficulties in the area of third-party beneficiary rights because, to some extent, every member of the public is directly or indirectly intended to benefit from such a contract.' *Clifton v. Suburban Cable TV Co., Inc.,* 434 Pa.Super. 139, 144, 642 A.2d 512, 515 (1994). Therefore, as a general rule, a private party who contracts with the public government entity does not open itself to liability at the hands of the public. Restatement (Second) of Contracts §302 (1981). A private third-party right of enforcement is not properly inferred because of the potential burden that expanded liability would impose. *See id.* The right of enforcement in public contracts can only arise from the plain and clear language of the contract. *See id.* Consequently, when a public contract is involved, private citizens are presumed *NOT TO BE THIRD-PARTY BENEFICIARIES. Drummond v. Univ. of Pa.,* 651 A.2d 572, 578-79 (PA.Cmwlth. 1994). The Pennsylvania court observed that "[t]here must be language evincing an intent that the party contracting with the government will be liable to third parties in the event of nonperformance.' *Id.* at 579.

Sisney at ¶ 11. (emphasis added in all capitals and bold.)

In this matter, the contracts are public contracts between the SDDOE and Mid-Central. The contracts do not expressly indicate that they were for the benefit or enforcement by Students. (CR 309-312 & 318-327.) While Students argue that they are intended third-party beneficiaries of the Contracts, this Court held in an analogous situation involving a contract similar to ones in this matter was not for the intended benefit of a third-party.

In *Sisney,* the State of South Dakota entered into a food vending contract with CBM to prepare meals for South Dakota inmates and staff. Sisney, a Jewish South

Dakota inmate, brought suit claiming that he was an intended third-party beneficiary under the contract because he was an intended recipient of the meals prepared by CBM. Sisney argued that he needed to follow a kosher diet as part of his religion and that CBM and the State were not providing him kosher meals. *Sisney* at ¶ 2. Under the contract in *Sisney*, the "services were to be provided 'to the State' in a manner that would meet the needs and concerns of the facilities' residents, inmates, and staff. The contract provided that '[t]he proposed menu … [was to] have an average caloric base of 2700 to 2500 calories per day.' The contract further provided that'[f]ood substitutions [were to] be available to accommodate food avoidances due to religious beliefs/practices/observances.[.]'" *Sisney* at ¶ 3. The contract in *Sisney* also included, which is not true with the contracts between the SDDOE and Mid-Central, a grievance procedure for inmates such as Sisney should they have a problem with the meals. *Sisney* at ¶4.

In *Sisney*, the contract certainly and directly benefitted inmates such as Sisney as the contract was about the providing of meals to inmates including meals that complied with their religious dietary needs. Sisney filed suit alleging that he was an intended third-party beneficiary under the contract and because the meals did not meet the requirements of his kosher diet. Sisney argued that "the contract directly affect[ed] him and his well-being." *Sisney* at ¶ 5. In this case, Students, like Sisney, allege that they were a member of the group to be served by the Contract between the SDDOE and Mid-Central. (CR 171.) Students, like Sisney, allege that they were "intended to be third-party beneficiaries" of the contract between SDDOE and Mid-Central. This is not true.

The contract in this case was a public contract between the SDDOE and Mid-Central. The contract did not expressly indicate that it was intended for Students' direct benefit or enforcement. To the contrary, the contract reflects that it was made for the express benefit of the SDDOE to help operate/run/administer the GEAR UP grant program. The contract specifically states that "[t]he State will serve as the lead partner and will be responsible for ensuring that the project is carried out by the partnership group in accordance with Federal requirements." (CR 308.) *See, Sisney* at ¶¶ 10-11. The contract is for the direct, express benefit of the SDDOE for Mid-Central to "administer the GUSD program in South Dakota" similar to the contract in *Sisney,* which was for the administration of the food/meal program at the South Dakota penitentiary. (APP 005.) The collective benefits that Students may receive "are only incidental to that of the State." *Sisney* at ¶ 13. While Students may have been *incidental* third-party beneficiaries of the contract, they were not *intended* third-party beneficiaries of the contract.

The contract in Sisney was for the benefit of the State of South Dakota to have a contracting party administer its meal program for the State of South Dakota penitentiary. The contract between the SDDOE and Mid-Central was for the benefit of the SDDOE to have Mid-Central administer the GEAR UP program for the State of South Dakota.

Because Students do "not have standing to sue under this public contract" because they are not *intended* third party beneficiaries, the Circuit Court erred in not granting summary judgment. *Sisney* at ¶15.

II. SDCL § 53-2-6 Does Not Entitle Students to a Claim as Third Party Beneficiaries.

Even if Students were intended third-party beneficiaries, which is denied, they are not entitled to make a claim on the Contract between the SDDOE and Mid-Central because of SDCL § 53-2-6 and their lack of status as third-party beneficiaries of the contract. SDCL § 53-2-6 provides in full that,

> A contract made expressly for the benefit of a third person *may be enforced* by him *at any time before the parties thereto rescind it*.

In this case, it is undisputed that the contract between the SDDOE and Mid-Central was rescinded prior to Students' attempt to enforce it. The contract was rescinded by the SDDOE on September 21, 2015. (CR 313-314 & APP 011.) Students did not bring their claim until May 17, 2016. (CR 1-13.) Students also did not provide notice to Mid-Central within 180 days of their claim. (CR 313.)

Students' "complaint pleads a rescission of the agreement by the parties to it long before any attempt was made by [them] to enforce its provisions, and, at least for that reason, does not state a cause of action." *Orloff v. Metropolitan Trust Co.,* 110 P.2d 396, 398 (Cal. 1941) and (CR 180.) California has a statute similar to SDCL § 53-2-6. The California Supreme Court, in *Orloff,* precluded an intended third-party beneficiary from presenting a claim on a contract because the contract had been rescinded prior to the plaintiffs' attempt to enforce it. This view is the majority view in the country. *See*, 44 A.L.R.2d 1270, What Constitutes Reservation of Right to Terminate, Rescind, or Modify Contract, as Against Third-Party Beneficiary("[I]t appears to be the majority view that

the parties to a contract for the benefit of a third person may vary, rescind, or abrogate[3] the terms of the contract without the consent of the third person, at any time before the contract has been accepted, adopted, or acted upon by the third person, and such rescission deprives the third person of any rights under the contract.") *See, also Olson v. Etheridge,* 686 N.E.2d 563 (Ill. 1997)(Rights of third-party beneficiary do not vest immediately upon execution of contract, so as to preclude original contracting parties from modifying or discharging their obligations to beneficiary except with beneficiary's assent; rather, absent language in contract making rights of beneficiary irrevocable, parties to the contract retain power to discharge or modify their obligations, without beneficiary's assent, at any time until beneficiary, without notice of discharge or modification, (1) materially changes position in justifiable reliance on promise, (2) brings suit on promise, or (3) manifests assent to promise at request of promisor or promisee.)

In this case, Students did not attempt to accept, adopt, or enforce the contract between the SDDOE and Mid-Central until after it was rescinded by the SDDOE. Students cannot bring a claim seeking to enforce the contract after it was rescinded because of SDCL § 53-2-6.

As such, even if Students were an intended third-party beneficiary in this case, which is still denied, SDCL § 53-2-6 precludes their claims against Mid-Central because the contract was rescinded prior to Students' attempt to now accept, adopt or enforce the terms of it. Summary judgment should have been granted in Mid-Central's favor.

[3] Abrogate is defined as: "to annul, cancel, revoke, repeal, or destroy." Black's Law Dictionary, 6th Edition, 1990.

III. Mid-Central Cannot Be Held Liable for Scott & Nicole Westerhuis's Torts.

Mid-Central cannot be held liable for the intentional torts of Scott and Nicole Westerhuis. In order for Mid-Central to be held liable for an intentional tort committed by one of its employees, the tort needs to have been "committed within the scope of the employment or agency." *Bernie v. Catholic Diocese of Sioux Falls,* 2012 SD 63, ⁋8, 821 N.W.2d 232 citing *Haas v. Wentzlaff,* 2012 SD 50, ¶ 20, 816 N.W.2d 96, 102-03.

In order to be determined within the scope of employment, this Court adopted a two-prong test. In regard to this test, this Court stated that,

> In determining whether an intentional tort is within the scope of employment, [this] Court uses a two-prong test: whether the purpose of the act was to serve the principal and whether the act was foreseeable. Under the first prong, a 'principal may be liable for an agent's acts where the agent's 'purpose, however misguided, is wholly or in part to further the [principal's] business[.] An act furthers the principal's business if it carries out the objectives of the employment.
>
> '[W]ithin the scope of employment] has been called vague but flexible, referring to 'those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.
>
> 'But if [the agent] acts from purely personal motives … he is considered in the ordinary case to have departed from his employment and the [principal] is not liable.' Therefore, it must first be determined whether the act was wholly motivated by the agent's personal interests. If the agent acted with intent to serve solely his own interest, the act is not within the scope of employment and the principal is not liable. Liability does, however, attach if 'the act had a dual purpose, that is, to serve the [principal] and to further personal interests.'

Bernie at ⁋ 9 (emphasis added).

In this case, Students specifically allege that Nicole and Scott Westerhuis misappropriated funds from the GEAR UP grant program. (CR 189.) According to

Students, Scott and Nicole Westerhuis stole funds in possession of Mid-Central "for their own use." (CR 184.). There is no dispute that Mid-Central gained any furtherance of its business with the civil theft and/or conversion by the Westerhuises. Mid-Central cannot, obviously, benefit in any way from the Westerhuises' misappropriation or civil theft of funds from Mid-Central. This is why the Westerhuises went out of their way to conceal what they were doing from Mid-Central. (CR 181-183.) Students cannot even meet prong one of the test. Students also cannot meet prong two as it was not foreseeable that the Westerhuises would have perpetrated such a scam as alleged by Students, which they agree, because the Westerhuises went to such great lengths to conceal it by bribing another employee to conceal their taking. (APP 012, ¶ 48.) There is no foreseeability of such conduct by the Westerhuises.

The Circuit Court erred in not granting summary judgment and dismissing Count 8 of the Students' Amended Complaint.

CONCLUSION

Students brought two causes of action against Mid-Central in their Amended Complaint. The first, breach of contract, (Count 2) and a respondeat superior claim (Count 8.) (APP. 001-23.) Students are not intended third party beneficiaries of the Contract between SDDOE and Mid-Central, and, as a result, the Circuit Court erred in not granting summary judgment and Count 2 should have been dismissed. Additionally, Students are not in compliance with SDCL § 3-21-2 and Count 8 should have been dismissed by the Circuit Court. The Westerhuises, as admitted by Students, were acting for purely personal motives in their civil theft, and, as a result, the Circuit Court erred in not dismissing Count 8 as against Mid-Central. Finally, the Students do not have any

standing to bring their claims and federal pre-emption prevents the Students from bringing any of their claims against Mid-Central, and all the other appellees, which was correctly decided by the Circuit Court.

REQUEST FOR ORAL ARGUMENT

Mid-Central respectfully request the honor of appearing before this Court for oral argument.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee Mid-Central Educational Cooperative's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,008, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, any addendum materials, and any certificates of counsel.

__/s/ Ryland Deinert
One of the attorneys for Appellee/Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2019, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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INDEX TO APPELLEE'S APPENDIX

Tab	Document(s)	App. Pages
1.	Amended Complaint.	001-023
2.	FOF & COL & Order Denying Mid-Central's Motion for Summary Judgment	024-030
3.	Email from Judge Bruce Anderson & Attached Memorandum Decision dated July 20, 2018	031-047
4.	Department of Education, State of South Dakota, Letter of Agreement for Consultant Services Between Mid-Central and the SSDDOE dated January 2015	048-052

IN THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28740

ALYSSA BLACK BEAR AND KELSEY WALKING EAGLE-ESPINOSA

Plaintiffs and Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit; AMERICAN INDIAN INSTITUTE FOR INNOVATION; Non-Profit Corporation, JOANNE FARKE; BRANDON YORK; PAMELA HAUKAAS; NICOLE BAMBERG; TIM NEUGEBAUER; DAVID SHOEMAKER; TODD REINISH; BILL MATHIS; DAVE MERRILL; TESS STARR; LLOYD PERSSON; CARMEN WEBER; JAMES MUNSON; RICHARD PETERSON; CHRIS VANDER WERFF; TAMMY OLSON; TONYA VANEYE; SHIRLEY PEDERSON; RYAN YOUNGSTROM; TANYA ALDRICH; JOHN B. HERRINGTON; CHRIS EYRE; CARLOS RODRIGUEZ; STACY PHELPS; DANIEL GUERICKE; AND THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representatives GEORGE FISH AND KAREN FISH.

Defendants and Appellees.

Appeal from the Circuit Court, First Judicial Circuit
Charles Mix County, South Dakota

The Honorable Bruce Anderson
Circuit Court Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

STATEMENT OF ISSUES. 1

STATEMENT OF THE CASE. 2

STATEMENT OF FACTS. 3

STANDARD OF REVIEW. 4

ARGUMENT. 5

I. WHETHER THE LOWER COURT CORRECTLY HELD THAT PLAINTIFFS HAVE NO PRIVATE CAUSE OF ACTION AND THEIR CLAIMS WERE PREEMPTED BY THE HIGHER EDUCATION ACT. 5

II. WHETHER STACY PHELPS WAS PROPERLY SERVED WITH WRITTEN NOTICE UNDER 3-21-2... 6

III. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT GEAR UP FUNDS WERE MISSING OR HAD BEEN MISAPPROPRIATED.. 7

IV. WHETHER PLAINTIFFS LAWSUIT SHOULD HAVE BEEN CERTIFIED AS A CLASS ACTION.. 12

V. WHETHER PLAINTIFFS LACKED STANDING TO BRING THEIR CLAIM AGAINST STACY PHELPS.. 17

REQUEST FOR ORAL ARGUMENT. 22

CERTIFICATE OF COMPLIANCE. 23

TABLE OF AUTHORITIES

Cases

Agar School Dist., No. 58-1 v. McGee, 527 N.W.2d 282 (SD 1995). 5

Allen v. Wright, 468 U.S. 737 (1984).. . . . . 2, 20, 21

Barnes v. Am. Tobacco Co., 161 F.3d 127 (3rd Cir. 1998).. 15

Beck v. City of Rapid City, 2002 SD 104, 650 N.W.2d 520. 17

Benson v. State, 2006 SD 8, 710 N.W.2d 131. . . . . 2, 17, 18

Brandt v. County of Pennington, 2013 SD 22, 827 N.W.2d 871.. . . . . 1, 6

Broussard v. Meineke Discount Muffler Shops, Inc.,

155 F.3d 331 (4th Cir. 1998).. 13

Cable v. Union County Bd. Of Cty. Comm'rs, 2009 SD 59, 769 N.W.2d 817. 18

City of Deadwood v. Summit, Inc., 2000 SD 29, 607 N.W.2d 22. 5

Cuka v. School Board of Bon Homme County, 264 N.W.2d 924 (SD 1978). 2, 19

Duran v. U.S. Bank Nat'l. Ass'n, 137 Cal. Rptr. 3d 391

(Cal. Ct. App. 2012).. 14

Estate of Juhnke v. Marquardt, 2001 SD 26, 623 N.W.2d 731. 4

Gakin v. City of Rapid City, 2005 SD 68, 698 N.W.2d 549. . . . . 1, 7

In re South Dakota Microsoft, 2003 SD 19, 657 N.W.2d 668.. . . . . 2, 13, 14, 15, 16

Johnson v. Hayman & Associates, Inc., 2015 SD 73, 867 N.W.2d 698. 4

Kankakee County Bd. Of Review v. Property Tax Appeal Bd.,

735 N.W.2d 1011(Ill. App. Ct. 2000). 5

Kelly v. Mid-Am Racing Stables, Inc., 139 FRD 405 (W.D. Okla. 1990). 15

Leo v. Adams, 208 N.W.2d 706 (1973).. . . . . 1, 11

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).. . . . . 2, 17, 18

McDonald v. School Bd. of Yankton Independent School Dist.,

90 S.D. 599, 246 N.W.2d 93 (1976). 19

Mulder v. Togue, 186 N.W.2d 884 (1971).. . . . . 1, 11

Musch v. H-D Coop., 487 N.W.2d 623 (SD 1992). 1, 11

O'Connor v. Boeing v. N. Am., Inc., 197 FRD 404 (C.D. Cal. 2000). 15

Olson v. Cass, 349 N.W.2d 435 (S.D. 1984).. 19

Parsons v. South Dakota Lottery Comm'n, 504 N.W.2d 593 (SD 1993). 5

Reiff v. Avon School Dist., 458 N.W.2d 358 (SD 1990). 19

Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668 (9th Cir. 1975). 5

Schirmer v. Citizens Prop. Ins. Co., 2013 WL 781878

(Fla. Cir. Ct., March 2, 2012). 14

Shangreaux v. Westby, 281 N.W.2d 590 (S.D. 1971). 2, 16

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). 18

Steel Co.v. Citizens for a Better Env't, 523 U.S. 83 (1998).. 21

Thorn v. Jefferson Pilot Life Ins. Co., 445 F.3d 311 (4th Cir. 2006). 15

Thurman v. CUNA Mut. Ins. Society, 2013 S. 63, 836 N.W.2d 611. . . . . 2, 15, 16, 17

Trapp v. Madera Pac., 390 N.W.2d 558 (SD 1986). 5, 13

Total Auctions & Real Estate, LLC v. South Dakota Dep't of Revenue & Regulation, 2016

SD 95, 888 N.W.2d 577.. . . . . 1, 11

Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011). 2, 13, 14, 15

Weitzel v. Sioux Valley Heart Partners, 2006 SD 45, 714 N.W.2d 884. 4

Witt v. Chesapeake Exploration, LLC., 276 FRD 458 (E.D. Tex. 2011).. 14

Wolff v. Secretary of S.D. Game, Fish & Parks,

1996 SD 23, 544 N.W.2d 531. . . . . 1, 7

Statutes

SDCL 3-21-2. . . . . 1, 2, 6, 7

SDCL 13-46-1. . . . . 18, 19

SDCL 15-6-23 (a)-(b). 13, 14

SDCL 53-2-6. 2

STATEMENT OF ISSUES

I. WHETHER THE LOWER COURT CORRECTLY HELD THAT PLAINTIFFS HAVE NO PRIVATE CAUSE OF ACTION AND THEIR CLAIMS WERE PREEMPTED BY THE HIGHER EDUCATION ACT.

II. WHETHER STACY PHELPS WAS PROPERLY SERVED WITH WRITTEN NOTICE UNDER 3-21-2.

Authorities:

Brandt v. County of Pennington, 2013 SD 22, 827 N.W.2d 871

SDCL 1967 3-21-2

Wolff v. Secretary of S.D. Game, Fish, & Parks, 1996 SD 23, 544 N.W.2d 531

Gakin v. City of Rapid City, 2005 SD 68, 698 N.W.2d 549

III. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT GEAR UP FUNDS WERE MISSING OR HAD BEEN MISAPPROPRIATED.

Authorities:

Total Auctions & Real Estate, LLC, v. S.D. Dep't of Revenu and Regulation, 888

2016 SD 95, N.W.2d 577

Leo v. Adams, 87 SD 341, 208 N.W.2d 706 (1973)

Musch v. H-D Coop., 487 N.W.2d 623 (SD 1992)

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IV. WHETHER PLAINTIFFS LAWSUIT SHOULD HAVE BEEN CERTIFIED AS A CLASS ACTION.

Authorities:

Wal-Mart Stores, Inc. V. Dukes, 131 S. Ct. 2451 (2011)

In re South Dakota Microsoft, 203 SD 19, 657 N.W.2d 668

Thurman v. CUNY Mut. Ins. Society, 2013 SD 63, 836 NW2d 611

Shangreaux v. Westby, 281 N.W.2d 590 (SD 1979)

V. WHETHER PLAINTIFFS LACKED STANDING TO BRING THEIR CLAIM AGAINST STACY PHELPS.

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Cuka v. School Board of Bon Homme County, 264 N.W.2d 924, (SD 1978)

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STATEMENT OF THE CASE

Appellee, Stacy Phelps, generally agrees with the statement of facts set forth in appellants' brief.

On February 24, 2017, Terry Pechota entered his notice of appearance on behalf of defendant, Stacy Phelps. CR 363. Shortly thereafter on March 1, 2017, Phelps served his answer to the amended complaint.

On June 13, 2017, Phelps joined in the motions filed by the other defendants concerning whether plaintiffs were third party beneficiaries, had standing, were precluded by SDCL 1967 53-2-6 and 3-21-2 from maintaining their suits, and vicarious liability of

defendants. CR 763

Phelps filed his opposition to the motion for class action. CR 771.

Phelps appeared and argued the motions considered on June 26, 2017. CR 1569.

On December 29, 2017, Phelps joined in the motion for summary judgment filed by AIII, MEC, MEC Directors, and Daniel Guericke, on the issue of whether there exists any evidence that GEAR UP funds were missing, whether the plaintiffs' cause of action were preempted by federal law, and whether students had standing. CR 2239. Phelps appeared and argued at the March 17, 2018, hearing on the motions filed by the defendants. CR 2740.

STATEMENT OF FACTS

Plaintiffs, Alyssa Black Bear and Kelsey Walking Eagle brought the present action for breach of contract and tortious conduct against numerous defendants, including Stacy Phelps, for misuse of monies provided by the United States Department of Education (USDOE) to the South Dakota Department of Education (SDDOE) under the federal Gaining Early Awareness and Readiness for Undergraduate Program (GEAR UP). CR 170, 2220. The SDDOE entered into a partnership agreement with defendant Mid-Central Education Cooperative (MEC) to administer the grant, CR 295, who in turn entered into a service agreement with defendant American Institute for Innovation (AIII) to provide services to MEC under the GEAR UP grant. CR 170, CR 4 ¶ 4. It is alleged in the amended complaint under count 6 that defendant Stacy Phelps was CEO of AIII and negligently supervised AIII employees, including Scott Westerhuis, causing plaintiffs damages. CR 170.

On September 16, 2015, Dr. Melody Schopp, Secretary of the SDDOE, called MEC's executive director, Daniel Guericke, and told him that she was considering terminating the partnership agreement with MEC, CR 2200 ¶ 13. The next day, MEC's business manager, Scott Westerhuis, took the life of his wife, Nicole Westerhuis, MEC's assistant business manager, and their children. CR 2201 ¶ 14.

On September 21, 2015, Secretary Schopp sent a letter to MEC notifying them that SDDOE was terminating the partnership agreement for administration of the GEAR UP program, effective immediately. CR 297 ¶ 16.

Based upon the information disclosed by the investigation into the Westerhuis family's deaths, plaintiffs brought the present lawsuit against appellee Stacy Phelps for negligent supervision and other defendants for civil theft, breach of contract, negligent supervision, and breach of duty to control their agents and employees. CR 170.

Other facts will be set forth in more detail under specific arguments hereafter.

STANDARD OF REVIEW

The standard of review on a circuit court's grant of summary judgment is well settled, "we will affirm only if all legal questions have been correctly decided and there are no genuine issues of material fact." *Estate of Juhnke v. Marquardt*, 2001 SD 26, ¶ 5, 623 N.W.2d 731, 732 (citations omitted); *Johnson v. Hayman & Associates, Inc*., 2015 SD 73, ¶ 11, 867 N.W.2d 698, 701 (citations omitted). "Conclusions of law are reviewed de novo." Id. (Quoting *Weitzel v. Sioux Valley Heart Partners*, 2006 SD 45, ¶ 16, 714 N.W.2d 884, 891).

Whether a party has standing is a legal conclusion, which is reviewed under the

de novo standard. *City of Deadwood v. Summit, Inc.,* 2000 SD 29, ¶ 9, 607 N.W.2d 22, 25; *Kankakee County Bd. Of Review v. Property Tax Appeal Bd.,* 735 NE2d 1011, 1014 (Ill. App. Ct. 2000). In general, a party establishes standing by showing "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Agar School Dist. No. 58-1 v. McGee,* 527 N.W.2d 282, 284 (SD 1995) (quoting *Parsons v. South Dakota Lottery Comm'n*, 504 N.W.2d 593, 595 (SD 1993). Therefore, to have standing some actual or threatened injury caused by a defendants must be shown.

The standard of review for determining whether the trial court properly certified the case as a class action is abuse of discretion. *Trapp v. Madera Pac.,* 390 N.W.2d 558, 560 (SD 1986). The determination to be made is whether the class action is superior to, not just as good as, other available methods for handling the controversy. *Rutledge v. Electric Hose & Rubber Company*, 511 F2d 668, 673 (9th Cir. 1975). The burden of establishing that Rule 23 is satisfied lies with the person seeking class action certification.

ARGUMENT

I. THE LOWER COURT'S GRANTING OF SUMMARY JUDGMENT TO THE DEFENDANTS ON THE GROUNDS THAT PLAINTIFFS DO NOT HAVE A PRIVATE CAUSE OF ACTION OR THEIR CLAIMS ARE OTHERWISE PREEMPTED BY THE HIGHER EDUCATION ACT SHOULD BE AFFIRMED.

Defendant Stacy Phelps joined in the motions of the other defendants for summary judgment on the grounds that plaintiffs had no cause of action and their claims were preempted by the Higher Education Act. CR 2239.

Defendant Phelps joins in the brief on this issue submitted by defendant Mid

Central Directors through their attorney, Samuel Kerr, and for the reasons set forth therein asks that the decision of the lower court dismissing this action be affirmed.

II. STACY PHELPS WAS NOT SERVED UNDER SDCL 1967 3-21-2 REQUIRING THAT HE BE DISMISSED FROM THIS ACTION.

The amended complaint at ¶ 37 alleged that Stacy Phelps "was a member of the South Dakota Board of Education until his resignation on October 1, 2015, was employed by MEC as the director of the GUSD program, and was the Chief Executive Officer of Defendant AIII." CR 170.

Phelps joined in the motions and briefs of the other parties which maintained that proper notice was not given under 3-21-2. CR 1569, pp. 18-19. Phelps received no notice of action as required by SDCL 1967 3-21-2. CR 1569, p. 18. Plaintiffs relied upon a letter sent to MEC but not to any individuals or employees of MEC. Id., 18-19. Additionally, Phelps' services were terminated by MEC prior to the April 21, 2016, letter upon which the plaintiffs rely for proper notice under 3-21-2. Id.

The lower court ruled at the hearing held on June 26, 2017, CR 1569, pp. 127-130, that the April 21, 2016, letter sent by plaintiffs to MEC constituted substantial compliance with 3-21-2 not only as to MEC but also as to certain individual defendants including Stacy Phelps. See also CR 2224, conclusions of law, ¶¶ 1-4.

Under South Dakota law, a party cannot maintain an action for damages against a public entity, or its employees, unless it provides timely written notice of the claim to the public entity. *Brandt v. County of Pennington*, 2013 SD 22, ¶ 10, 827 N.W.2d 871, 874. The statutory notice requirement provides, in full:

> No action for the recovery of damages for personal injury, property damage, error, or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place, and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury. Nothing in this chapter tolls or extends any applicable limitation on the time for commencing an action.

SDCL 1967 3-21-2. South Dakota courts have interpreted SDCL 3-21-2 to require such notice in all tort based causes of action. *Wolff v. Secretary of S.D. Game, Fish & Parks,* 1996 SD 23, ¶ 20, 544 N.W.2d 531, 534. A claimant's failure to give the notice required under the statute precludes an action for damages against both the public entity and its employees. See *Gakin v. City of Rapid City*, 2005 SD 68, ¶ 22, 698 N.W.2d 549, 500 (affirming district court's summary judgment dismissal of all tort based claims based on lack of notice under SDCL 1967 3-21-2).

Stacy Phelps is sued in one count for negligent supervision. See CR 170, amended complaint, count 6, ¶¶ 89-92. He is sued in his capacity as an employee of MEC. Plaintiffs did not serve Phelps with the notice required under 3-21-2. As such, the lower court should have dismissed plaintiffs' negligent supervision claim against Stacy Phelps.

III. THE LOWER COURT ERRED IN DETERMINING THAT THERE WAS EVIDENCE THAT GEAR UP MONEY WAS MISSING OR HAD BEEN APPROPRIATED BY STACY PHELPS.

In 2011, the SDDOE obtained a six year GEAR UP grant from the USDOE. The GEAR UP grant was to be used to prepare low income students to enter and succeed in postsecondary education. CR 2198, AIII's Statement of Undisputed Material Fact (SUMF), ¶¶ 1, 2.

After it was awarded, SDDOE entered into an partnership agreement with MEC to administer the grant and carry out grant activities. Id., SUMF ¶ 3. MEC then contracted with AIII to provide personnel and services as need to administer the GEAR UP grant. Id., SUMF ¶ 4.

GEAR UP is a reimbursement based grant and GEAR UP funds were at all times controlled by SDDOE. Id., SUMF ¶ 5. In order to receive reimbursement for a GEAR UP expense, MEC first incurred the expenditure, either directly or through a third party such as AIII, and then submitted supporting documentation for the expenditure to the SDDOE for reimbursement from the GEAR UP grant program. Id., SUMF ¶ 6. In other words, in order to be reimbursed for GEAR UP expenditures, MEC had to spend its money first and then submit eligible expenditures to SDDOE for reimbursement. Id., SUMF 7. MEC received a monthly payment of $50,000 from the SDDOE for salaries and other regular expenses associated with the GEAR UP program. Id., SUMF ¶ 8. These monthly payments were a recognition that reimbursement for expenses by SDDOE could take time, but MEC was required, either monthly or quarterly, to adjust these payments for its actual costs. Id., SUMF ¶ 9.

All expenses that were reimbursed to MEC were determined, by the SDDOE, to be allowable, reasonable, and allocable based on the GEAR UP grant requirements. Id., SUMF ¶ 10. If expenses submitted to SDDOE were not approved as GEAR UP expenditures, no GEAR UP funds were paid, and MEC would not receive reimbursement. Id., SUMF ¶ 11. SDDOE applied for, and received, a scholarship waiver for the GEAR UP Program and as a result, no GEAR UP funds were ever paid or available directly to

students. Id., SUMF ¶ 12.

On September 16, 2015, SDDOE Secretary, Melody Schopp informed MEC executive director, Dan Guericke, via telephone, that SDDOE was considering terminating the partnership with MEC for the GEAR UP grant. Id., SUMF ¶ 13. The following day, September 17, 2015, MEC's business manager, Scott Westerhuis, took the lives of his wife, MEC's assistant business manager, Nicole Westerhuis, along with their four children, and then set fire to the family's home before also taking his own life. Id., SUMF ¶ 14.

Due to SDDOE's consideration of terminating its GEAR UP partnership with MEC, as well as the timing of the Westerhuis deaths, questions regarding GEAR UP and MEC arose. Id., SUMF ¶ 15. Less than a week after the Westerhuis deaths, MEC retained independent accounting firm Eide Bailly LLP to conduct a forensic accounting examination of MEC. Id., SUMF ¶ 16. The purposes of Eide Bailly's forensic audit were to account for and examine expenditures submitted by MEC for reimbursement through GEAR UP, to account for GEAR UP reimbursements paid directly to MEC by SDDOE, and to identify any potential questionable activity related to MEC and GEAR UP. Id., SUMF ¶ 17.

In connection with its forensic audit of MEC, Eide Bailly examined thousands of records including bank statements and cancelled checks, check registers, credit card statements, monthly claim forms, vouchers, and other supporting documents to account for the receipt of GEAR Up reimbursements and expenditures submitted by MEC to SDDOE for reimbursement. Id., SUMF ¶ 18. Through reconciliation of information

from records of both SDDOE and MEC, Eide Bailly accounted for all GEAR UP reimbursements paid to MEC for the time period from July 2013 to September 2015. Id., SUMF ¶ 19. Specifically Eide Bailly accounted for each expenditure totaling $6,018,664.01 submitted by MEC for GEAR UP reimbursement between October 2013 and August 2015. Id., SUMF ¶ 20.

The South Dakota Department of Legislative Audit (DLA) also conducted a special review of MEC. Id., SUMF ¶ 21. As a result of the special review, DLA concluded that nearly $1.4 million was missing from Mid Central's checking account due to Scott Westerhuis' financial improprieties. Id., SUMF ¶ 22. In connection with DLA's evaluation of MEC, Auditor General Martin Guindon found no evidence to indicate that any of these missing funds were from the GEAR UP program. Id., SUMF ¶ 23. According to former Secretary of Education Dr. Melody Schopp, SDDOE is satisfied that all GEAR UP dollars have been accounted for by SDDOE. Id., SUMF ¶ 24. In that regard, any funds that have been determined to be missing from MEC are not funds from the GEAR UP grant. Id., SUMF ¶ 25.

In their amended complaint, plaintiffs Alyssa Black Bear and Kelsey Walking Eagle Espinosa allege various causes of action, including breach of contract against MEC and AIII; negligent supervision against the directors of MEC, Guericke, and Stacy Phelps; respondent superior against MEC and AIII; and breach of the duty to control against the directors of MEC. Id., SUMF ¶ 26. Plaintiffs' allegations are based on Scott Westerhuis and Nicole Westerhuis' alleged misappropriation of GEAR Up funds. Id., SUMF ¶ 27. Plaintiffs allege that they were damaged by the Westerhuis' misappropriation of funds

because, as a result of the misappropriation, they were deprived of GEAR UP services. Id., SUMF ¶ 28. Both plaintiffs were attending college. Id., SUMF ¶ 29.

Plaintiffs' claim against Stacy Phelps is for negligent supervision for allegedly not supervising AIII employees, including Scott Westerhuis. See CR 170, Count 6, ¶¶ 89-92, amended complaint. A negligence claim requires a plaintiff to demonstrate the existence of a duty, breach of that duty, proximate and factual cause, and actual injury. *Total Auctions & Real Estate, LLC v. South Dakota Dep't of Revenue & Regulation*, 2016 SD 95, ¶ 10, 888 N.W.2d 577. In the context of a tort claim, in order to be the legal cause of an alleged harm, "the damage, according to the usual course of events, must follow from the wrong... ." *Leo v. Adams*, 87 SD 341, 346, 208 N.W.2d 706 (1973). In other words, the harm allegedly suffered must result from the negligent act. *Musch v. H-D Coop.*, 487 N.W.2d 623, 625 (SD 1992). The South Dakota Supreme Court has also adopted substantial factor causation. In order to be actionable, the cause of the alleged harm must be a "substantial factor in bringing about the harm." *Mulder v. Togue*, 85 SD 544, 549-550, 186 N.W.2d 884 (1971) (citing Restatement of Torts, 2d ¶ 431).

Plaintiffs allege that they were damaged by being deprived of GEAR UP services as a result of the Westerhuis' misappropriation of funds. Here, any conceivable negligence on the part of Stacy Phelps, under any theory of law, based on the allegations of the amended complaint, simply cannot be the legal cause of plaintiffs' alleged harm of being deprived of GEAR UP Services because the undisputed material facts demonstrate that no GEAR UP funds are missing. All GEAR UP funds have been accounted for.

The above conclusion has been verified by multiple sources–the independente

account firm of Eide Bailly, the South Dakota DLA, and SDDOE–after careful scrutiny of thousands of documents relating to SDDOE and MEC's financial administration of the GEAR UP program. Because GEAR UP was a reimbursement based grant, expenditures that MEC, AIII, or another third party made, were expended before payment was made by SDDOE. All reimbursements were reviewed by SDDOE to ensure that they were appropriate and reimbursable expenditures under the grant. Eide Bailly, the South Dakota DLA, and SDDOE all agree that no GEAR UP funds were misappropriated. Because no GEAR UP funds are missing, any plausible negligent or tortious conduct on the part of Stacy Phelps could not possible have resulted in the deprivation of any services under the GEAR UP grant to plaintiffs.

IV. THE LOWER COURT ERRED IN DETERMINING THAT THE LAWSUIT SHOULD BE CERTIFIED AS A CLASS ACTION.

Plaintiffs filed a class action. The complaint alleges that defendants deprived the plaintiffs of their "interest in GEAR UP grant funds", CR 170, ¶ 67; "the services that those funds were supposed to provide", Id., ¶67; "intended benefit of the contract", Id., 73; "financial damages", Id., ¶ 73; "additional damage", Id., ¶ 73; "proximately caused damages", Id., ¶¶ 92, 96, 100, 104, 110, & 116, and "actual, compensatory, and consequential damages", Id., prayer. Not all damage claims in the complaint as to each defendant are the same.

Plaintiffs' motion to certify as a class action claims that defendants' wrongful actions "resulted in the denial of benefits to which the plaintiffs and the class that they seek to represent were entitled." Hinrichs' affidavit, CR 220, § 2 (f), page 4.

Defendants' objected to class action certification. A hearing was held on June 26, 2017, and the trial court ruled on December 21, 2017, that the lawsuit met the requirements of Rule 23 and should be certified as a class action. CR 2208.

A class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011). This Court has indicated that South Dakota Rule 23 is the same as Federal Civil Rule 23 and federal law is persuasive. To justify class action certification, plaintiffs must show that their claims can be and should be managed and tried on a class-wide basis. *In re South Dakota Microsoft*, 2003 SD 19, ¶ 7, 657 N.W.2d 668 (plaintiff's burden to meet class certification). The class action rule is merely a device for the joinder of multiple claims together in one proceeding. See SDCL § 15-6-23 (a)-(b). A class action does not excuse each class member from proving their case. It cannot be used to expand the substance of each class members' claims by eliminating required elements of their causes of action and cannot deprive defendants from litigating their defenses as to each class member. *See Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F3d 331, 345 (4th Cir. 1998). *See* also *Wal-Mart*, supra at 131 S.Ct. at 2561. The class action requirements, which must be rigorously analyzed and applied, are designed so that cases are certified only when a class action is superior to other available methods for the fair and efficient adjudication of the case. See SDCL § 15-6-23 (b). In deciding whether to allow a class action, the circuit court's discretion is "paramount" and the burden lies with the party seeking class action certification that all requirements of Rule 23 have been satisfied. *Trapp v. Madera Pac., Inc.,* 390 N.W.2d 558, 560 (SD 1986).

In order to obtain class certification, it is the plaintiff's burden to satisfy all the requirements of SDCL § 15-6-23 (a) and at least one provision of SDCL § 15-6-23 (b). Microsoft, supra ¶ 7. The party seeking class certification must affirmatively demonstrate compliance with all of the class action requirements: the party must prove "in fact" that the requirements are met. *Wal-Mart,* 131 S.Ct. at 2551. The party seeking class action certification must show "actual, not presumed conformance with class certification requirements." *Microsoft*, supra at ¶ 8. A court may only certify a class if, after rigorous analysis, it determines that each of the prerequisites for class certification have been met. Id. As part of the analysis, a court is to probe "behind the pleadings." *Wal-Mart*, 131 S.Ct. at 2551-2552.

In *Wal-Mart*, supra, the Supreme Court stated that "a class cannot be certified on the premise that (the defendant) will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart*, 131 S.Ct. at 2561 (rejecting lower court's decision to litigate a sample set of plaintiffs to determine entire class' reward of back pay and refusing to allow individualized proceedings on defendants' defenses). Subsequent to *Wal-Mart*, numerous courts have recognized the principle that class certification can be denied where to allow a defendant to properly litigate its defenses and accord defendant due process would require individual mini-trials. See, e.g., *Witt v. Chesapeake Exploration, LLC*, 276 FRD 458, 469 (E.D. Tex. 2011); *Duran v. U.S. Bank Nat'l. Ass'n*, 137 Cal. Rptr. 3d 391, 430-431 (Cal. Ct. App. 2012) (finding due process violation where defendant was prohibited by class action trial plan from litigating individual defenses), review granted, 275 P3d 1266 (Cal. 2012); *Schirmer v. Citizens Prop. Ins. Co.,* 2013 WL

781878 (Fla. Cir. Ct., March 2, 2012) (citing *Wal-Mart* for the proposition that the due process rights of class action defendants include the right to assert specific defenses to the claims of absent class members and must be respected).

Numerous courts have held that individual issues involved in a defense can be a bar, either in whole or in part, to class certification. E.g., *Thorn v. Jefferson-Pilot Life Ins. Co.,* 445 F3d 311, 322-329 (4th Cir. 2006); *Barnes v. Am. Tobacco Co.*, 161 F3d 127, 149 (3rd Cir. 1998); *O'Connor v. Boeing N. Am., Inc.*, 197 FRD 404, 410-411, 414 (C.D. Cal. 2000); *Kelly v. Mid-Am Racing Stables, Inc.*, 139 FRD 405, 411 (W.D. Okla. 1990).

SDCL 1967 15-6-23 (a) requires a plaintiff to show, *see In re South Dakota Microsoft Antitrust Litigation*, 2003 SD 19,¶¶ 7-8, 657 N.W.2d 668, in order to secure class action certification, that the class is so numerous that joinder of all member is impracticable; questions of law or fact common to the class; claims or defenses of the representative parties are typical of the claims or defenses of the class; the representative parties will adequately represent the interests of the class; and the suit is not a against the state for the recovery of a tax. A court is required to conduct a rigorous analysis to determine if the elements for class action certification have been met. *Thurman v. CUNA Mut. Ins. Society*, 2013 SD 63, ¶ 14, 836 NW2d 611.

There has been no showing that there is a class so numerous that joinder is impracticable. There has been no showing that other similarly situated plaintiffs in any number are interested in proceeding as plaintiffs given the fact that any plaintiff faces substantial obstacles in showing that they have standing to make any claims concerning any money allegedly wrongfully used or, even if wrongful use can be established, that any

plaintiff is entitled to any of the money since it would appear that if wrongfully used money is recovered it would have to be returned to the grantee, here the State of South Dakota. Under such circumstances, there is little reason to believe that any one but the present plaintiffs would desire to proceed in this action. Plaintiffs must show some evidence of number of class members and that other members have similar grievances. *Shangreaux v. Westby*, 281 N.W.2d 590 (SD 1979).

In order to be granted class action certification, plaintiffs must show that generalized damages can be calculated on a class wide basis. *In re South Dakota Microsoft Antitrust Litigation*, 2003 SD 19,¶ 12, 657 N.W.2d 668 (one viable method must be shown); *Thurman v. CUNA Mut. Ins. Society*, 2013 SD 63, ¶ 14, 836 N.W.2d 611 (common impact on class members must be shown). Plaintiffs must show, if they overcome the substantial standing and duty issues prevalent in this case, and they are allowed to proceed with a class action, that damages can be calculated on a class basis. This cannot be shown. Plaintiffs would have to show that they somehow were damaged by not being provided with services that were allegedly withheld from them because of the wrongful use of the monies in this case. This damage calculation would be nearly impossible and for certain different for each and every single plaintiff. There would be no common impact on class members. For example, if because of the lack of funds, a plaintiff only received one week of remedial mathematics, instead of two, how could you ever establish damage to any one plaintiff and even if you could, it would be different for each and every plaintiff. Many plaintiffs probably were not effected at all by any required reduction in services. Others might be greatly effected and with only a specific amount of

money allegedly wrongfully used, there would be an inherent conflict between those at opposite ends of the damage spectrum. There is no cohesion in the class. There is no damage calculation that could be applied on a class wide basis. For each plaintiff, you would have to have a separate trial on damages. A class action under the above circumstances would accomplish nothing. You will still have as many trials on damages as there are plaintiffs. Repetitious litigation would not be eliminated. *Thurman v. CUNA Mut. Ins. Society*, 2013 SD 63, ¶ 13, 836 N.W.3d 611. A class action is not superior to normal ligation for handling the controversy. *Beck v. City of Rapid City*, 2002 SD 104,¶ 8, 650 N.W.2d 520.

For all the above reasons, the present action should not have been certified as a class action under Rule 23.

V. THE PLAINTIFFS LACKED STANDING TO BRING THEIR CLAIMS AGAINST PHELPS.

A plaintiff must satisfy three elements in order to establish standing as an aggrieved person such that a court has subject matter jurisdiction. *Benson v. State*, 2006 S.D. 8, ¶ 22, 710 N.W.2d 131, 141; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). First, the plaintiff "must establish that he suffered an injury in fact – 'an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. at 2136, 199 L. Ed. 2d 351) (internal citations omitted).

Second, the plaintiff "must show that there exists a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains." *Benson*, 2006 S.D. 8,

¶ 22, 710 N.W.2d at 141). This causal connection requirement "is satisfied when the injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. at 2136; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926, 48 L. Ed. 2d 450 (1976).

Finally, the plaintiff "must show it is likely, and not merely speculative, that the injury will be redressed by a favorable decision." *Benson*, 2006 SD 8, ¶ 22, 710 N.W.2d at 141).

A. Injury in Fact

In order to show standing, the plaintiffs must show that they suffered an "injury in fact." *Cable v. Union County Bd. Of Cty. Comm'rs*, 2009 SD 59 at ¶ 21, 769 N.W.2d 817. This injury must be "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560) (internal marks and citations omitted). Standing is not "an ingenious academic exercise in the conceivable," but "requires, at the summary judgment stage, a factual showing of perceptible harm."

Under South Dakota law and the provisions of SDCL 1967 13-46-1, the remedy from a decision made by a school board or any special committee created under any provision of the school law relative to a school or school district matter or in any respect to any act or proceeding in which such officer, board or committee purports or assumes to act, an appeal may be taken to the circuit court by any person aggrieved, or by any party to the proceedings, or by any school district interested, within ninety days after the

rendering of such decision. Provided, however, that all legal actions relative to bond issues must be started within ten days." A taxpayer's only relief from any action by a school is by this statutory appeal and is limited to "any aggrieved person" and the taxpayer must show a special detriment in his individual or personal capacity. *Olson v. Cass*, 349 N.W.2d 435 (SD 1984); *Cuka v. School Board of Bon Homme County*, 264 N.W.2d 924 (SD 1978) (aggrieved person must show that they were aggrieved in sense that by action of school board they suffered denial of some claim of right, either of person or property, or imposition of some burden of obligation in their personal or individual capacity, as distinguished from any grievance suffered in their capacity as members of the public); *McDonald v. School Bd. of Yankton Independent School Dist.*, 90 SD 599, 246 N.W.2d 93 (administrative remedy available to compel school board to budget and make available textbooks to students); *Reiff v. Avon School Dist*., 458 N.W.2d 358 (SD 1990) (13-46-1 must be complied with in matters involving breach of contract and civil rights). From the above, it is clear that plaintiffs have no standing to bring any action against the defendants unless the provisions of 13-46-1 have been complied with, which provisions were never complied with in this case, and even if they were, plaintiffs would have no standing unless they show "some claim of right" or some burden in their personal or individual capacity, as opposed to any burden suffered by a member of the public, which burden was not established either by the plaintiffs.

Plaintiffs have never set out in this action a concrete and particularized injury to themselves, including the services of which they were deprived. There was never any showing made that GEAR UP funds were misappropriated or misused. GEAR UP funds

were never distributed directly to students. GEAR UP funds were not used to provide college expenses for students.

B. Causal Connection

Second, even if the plaintiffs could make some showing of a "concrete" injury caused by AIII's alleged conduct or inaction in connection with the GEAR UP program, the plaintiffs are unable to show the "causal connection" between that injury and Phelps' conduct or inaction.

To meet the casual connection requirement for standing, the plaintiffs must show that the injury complained of is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Cable*, 2009 SD 59 at ¶ 21 (internal citations omitted). The "fairly traceable" prong examines the "causal connection between the assertedly unlawful conduct and the alleged injury." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984).

Assuming that the plaintiffs are able to allege an injury, which Phelps denies is the case, the plaintiffs would also have to show that the claimed injury was caused by Phelps' alleged conduct. The plaintiffs are unable to do so. The purpose of the GEAR UP program was to assist "low income students in obtaining a secondary school diploma (or its recognized equivalent) and to prepare for and succeed in postsecondary education[.]" SMF at ¶ 4. In order to successfully show that they have standing, the Plaintiffs have to show that they were injured in that they were unable to obtain a secondary school diploma or unable to prepare for and succeed in postsecondary education, **and** that this failure was caused by Phelps. There are an infinite number of other factors affecting the plaintiffs and other students that

could cause these "injuries." To argue that Phelps' conduct was "fairly traceable" to this sort of injury is both speculative and unreasonable—especially considering the fact that both of the named plaintiffs are currently enrolled in college. *See* SUMF at ¶ 31.

C. Redressability

Finally, even if the plaintiffs were able to show the first two prongs of the standing requirements, which Phelps denies is the case, the plaintiffs are unable to show that their alleged injury is redressable by a ruling from this Court.

Redressability examines the causal connection between "the alleged injury and the judicial relief requested." *Allen,* 468 U.S. 753 at n.19. If the relief sought will not remedy the alleged injury, a plaintiff lacks standing to bring his or her claim. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86, 118 S. Ct. 1003, 1008 (1998) (finding that the plaintiffs failed to meet the redressability requirement of standing because none of the relief sought would compensate the plaintiffs for their losses).

In this matter, the plaintiffs request "actual, compensatory, and consequential damages in an amount that the jury deems just and proper under the circumstances." CR 170, amended complaint at p. 22. A judgment against Phelps for money damages will not redress any alleged injury caused by the plaintiff's inability to access GEAR UP programs. GEAR UP was not a program which provided money to students. CR 497, SUMF at ¶ 15. Instead, GEAR UP provided programs during the summer vacation and during the school year to encourage Native American youth to become interested and pursue higher education. CR 497, SUMF at ¶ 27. Money damages do not redress any alleged injury for not being exposed to this program or assistance during the plaintiffs'

youth.

Based on the foregoing reasons, the plaintiffs are unable to show that they have suffered an injury that was caused by Phelps alleged conduct and that this injury is redressable by the relief requested. Therefore, because the plaintiffs lack standing to bring their claims against Phelps, this Court should dismiss this action against him as it lacks subject matter jurisdiction to hear the plaintiffs' claims because they lack standing.

CONCLUSION

For all the above reasons, the decision of the lower court granting summary judgment dismissing this action should be affirmed. Stacy Phelps respectfully joins in the briefs submitted by any other defendants in this appeal.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested.

Dated: January 31, 2019.

/S/ Terry L. Pechota
Terry L. Pechota

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word Perfect 2017 and contains 5,640 words from the Statement of the Case through the Conclusion. I have relied on the work count of Microsoft Word Perfect 2017 in order to prepare this certificate.

Dated this 31st day of January, 2019.

/S/ Terry L. Pechota
Terry L. Pechota

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 28740

ALYSSA BLACK BEAR AND KELSEY WALKING EAGLE-ESPINOSA

Plaintiffs and Appellants,

v.

MID-CENTRAL EDUCATIONAL COOPERATIVE, a Cooperative Educational Service Unit; AMERICAN INDIAN INSTITUTE FOR INNOVATION; a Non-Profit Corporation, JOANNE FARKE; BRANDON YORK; PAMELA HAUKAAS; NICOLE BAMBERG; TIM NEUGEBAUER; DAVID SHOEMAKER; TODD REINISH; BILL MATHIS; DAVE MERRILL; TESS STARR; LLOYD PERSSON; CARMEN WEBER; JAMES MUNSEN; RICHARD PETERSON; CHRIS VANDER WERFF; TAMMY OLSON; TONYA VANEYE; SHIRLEY PEDERSON; RYAN YOUNGSTROM; TANYA ALDRICH; JOHN B. HERRINGTON; CHRIS EYRE; CARLOS RODRIGUEZ; STACY PHELPS; DANIEL GUERICKE; AND THE ESTATE OF SCOTT WESTERHUIS, by and through its Personal Representative, FIRST DAKOTA NATIONAL BANK; and THE ESTATE OF NICOLE WESTERHUIS, by and through its Personal Representatives GEORGE FISH AND KAREN FISH.

Defendants and Appellees.

Appeal from the Circuit Court, First Judicial Circuit
Charles Mix County, South Dakota

The Honorable Bruce Anderson
Circuit Court Judge

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Notice of Appeal filed on September 24, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF LEGAL ISSUES 1

STANDARD OF REVIEW 2

ARGUMENT 3

I. STUDENTS' STATE LAW CLAIMS ARE NOT PREEMPTED BY FEDERAL LAW. 3

A. Appellees incorrectly assert that Students' claims are explicitly preempted under the HEA. 3

B. Appellees' assertion that Students' claims are implicitly precluded ignores governing precedent and relies on inapplicable cases holding the HEA does not create a private right of action. 5

II. STUDENTS ARE INTENDED THIRD-PARTY BENEFICIARIES OF THE PARTNERSHIP AGREEMENTS BETWEEN MCEC AND SDDOE 10

III. MCEC SHOULD BE HELD LIABLE FOR ITS EMPLOYEES' TORTS 15

IV. AIII SHOULD BE HELD LIABLE FOR ITS EMPLOYEES' TORTS .. 18

V. STUDENTS HAVE STANDING TO BRING THEIR CLAIMS 19

VI. STUDENTS ESTABLISHED SUFFICIENT EVIDENCE SO AS TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER GEAR UP FUNDS WERE MISSING OR HAD BEEN MISAPPROPRIATED. 20

VII. STUDENTS' LAWSUIT WAS APPROPRIATELY CERTIFIED AS A CLASS ACTION 24

VIII. STUDENTS' CLAIMS ARE NOT BARRED BY THE NOTICE REQUIREMENT OF SDCL 3-21-2 26

A. The time period for notice is tolled SDCL § 3-21-4 as the members of Students' Class are minors. 26

B. Appellees' wrongful conduct continued through November 2015 thereby tolling the 180-day notice requirement. 26

C. Appellees wrongfully concealed their actions thereby tolling the 180-day notice requirement. 28

D. Students' Class substantially complied with SDCL § 3-21-2. 29

CONCLUSION 33

CERTIFICATE OF COMPLIANCE 34

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

Cases

Anderson v. City of Minneapolis, 138 Minn. 350, 165 N.W. 134, (1917) 30

Beck v. City of Rapid City, 2002 SD 104, 650 N.W.2d 520 24

Brandt v. County of Pennington, 2013 S.D. 22, 827 N.W.2d 871 27

Carifio v. Town of Watertown, 27 Mass.App.Ct. 571, 540 N.E.2d 1341 (1989) 30

Conway v. Conway, 487 N.W.2d 21 (S.D. 1992) 28

Cort v. Ash, 422 U.S. 66 (1975) 6

Dean v. Board of Educ. of Cecil Co., 71 Md.App. 92, A.2d 1059 (1987) 30

Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177 (S.D.1987) 16

Duerre v. Hepler, 2017 SD 8, 892 N.W.2d 209 ..... 18, 24, 25, 26

Elias v. San Bernardino County Flood Control Dist., 68 Cal.App.3d 70, Cal.Rptr. 621 (1977) 30

Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 4

Franklin v. City of Omaha, 230 Neb. 598, 432 N.W.2d 808 (1988) 30

Glad v. Gunderson, 378 N.W.2d 680 (S.D. 1985)..... 29
Gladstone, Realtors v. Bellwood, 441 U.S. 91, 99 S.Ct. 601 (1979)..... 19
Graham v. Security Savings and Loan, 125 F.R.D. 687 (N.D. Ind. 1989)..... 7, 8
Hall's Park Motel, Inc. v. Rover Constr., Inc., 194 W.Va. 309, 460 S.E.2d 444 (1995)..... 27
Hass v. Wentzlaff, 816 N.W.2d 96 (S.D.2012)..... 15, 19
Holland v. City of Geddes, 2000 S.D. 71, 610 N.W.2d 816..... 27
In re South Dakota Microsoft Litigation, 657 N.W.2d 668 (2003)..... 2, 25
Indiana State Highway Comm'n v. Morris, 528 N.E.2d 468 (Ind 1988)..... 30
Iverson v. NPC Intern, Inc., 2011 SD 40, 801 N.W2d 275 (2011)..... 16, 17, 18, 19
Johnson v. Hayman & Associates, Inc., 2015 S.D. 63, 867 N.W.2d 698..... 3
Johnson v. San Diego Unified Sch. Dist., 217 Cal.App.3d 692, 266 Cal.Rptr. 187 (1990)..... 30
Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436..... 15, 16, 17, 18
L'ggrke v. Benkula, 966 F.2d 1346 (10th Cir. 1992)..... 6
Labickas v. Arkansas State University..... 6
Martinmaas v. Engelmann, 2000 SD 85, 612 N.W.2d 600..... 14
McCullogh v. PNC Bank Inc., 298 F.3d 1217 (11th Cir. 2002)..... 7
Myears v. Charles Mix County, 1997 S.D. 89; 566 N.W.2d 470..... 29, 30, 31
New York Institute of Dietetics. Inc. v. Great Lakes Higher Education Corp., No. 94 Civ. 4858 (LLS), 1995 WL 562189 (S.D.N.Y. Sept. 21, 1995)..... 7
Orloff v. Metropolitan Trust Co., 110 P.2d 396 (Cal. 1941)..... 13
Purdy v. Fleming, 2002 S.D. 156, 655 N.W.2d 424..... 28
Shangreaux v. Westby, 281 N.W.2d 590 (SD 1979)..... 24
Sisney v. State, 2008 SD 639, 754 N.W.2d 639 (SD 2008)..... 10, 11
Strassburg v. Citizens State Bank, 1998 S.D. 72, 581 N.w.2d 510..... 29
Transp. Co. v. Kalo Brick, 450 U.S. 311 (1981)..... 4
Trapp v. Madera Pacific, Inc., 390 N.W.2d 558 (SD 1986)..... 24, 25
Vermeer v. Sneller, 190 N.W.2d 389 (Iowa 1971)..... 30
Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)..... 25
Weitzel v. Sioux Valley Heart Partners, 2006 S.D. 45, 714 N.W.2d 884..... 3

Williams v. Anthony, No. 12 C 4275, 2012 WL 6680320 (N.D. Ill. Dec. 21, 2012) .. 4

Statutes

SDCL § 15-6-23 25
SDCL § 3-21-2 ..... 29, 31
SDCL § 3-21-3 28
SDCL § 3-21-4 26
SDCL § 53-11-2 14
SDCL § 53-11-5 13
SDCL § 53-2-6 ..... 11, 12, 13, 14

Treatises

Black's Law Dictionary (6th ed. 1990) 12, 13

Regulations

34 C.F.R. § 80.43(a)(5) 9

PRELIMINARY STATEMENT

Citations to the certified record are to "CR" followed by the page number. Citations to Appellees' various briefs are as designated as such.

STATEMENT OF LEGAL ISSUES

I. WHETHER STUDENTS' STATE LAW CLAIMS ARE PREEMPTED BY FEDERAL LAW.

The Circuit Court held "Yes." See *Brief of Appellant* and § I, *infra.*

II. WHETHER STUDENTS WERE INTENDED THIRD-PARTY BENEFICIARIES BETWEEN SDDOE AND MCEC.

The Circuit Court held "Yes."

Sisney v. State, 2008 SD 639, 754 N.W.2d 639 (SD 2008)
SDCL § 53-2-6
SDCL § 53-11-5

III. WHETHER MCEC SHOULD BE HELD LIABLE FOR ITS EMPLOYEES' TORTS.

The Circuit Court held "Yes."

Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436
Hass v. Wentzlaff, 816 N.W.2d 96 (S.D.2012)
Iverson v. NPC Intern, Inc., 2011 SD 40, 801 N.W2d 275 (2011)

IV. WHETHER AIII SHOULD BE HELD LIABLE FOR ITS EMPLOYEES' TORTS.

The Circuit Court held "Yes."

Duerre v. Hepler, 2017 SD 8, 892 N.W.2d 209
Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436
Hass v. Wentzlaff, 816 N.W.2d 96 (S.D.2012)
Iverson v. NPC Intern, Inc., 2011 SD 40, 801 N.W2d 275 (2011)

V. WHETHER STUDENTS HAVE STANDING TO BRING THEIR CLAIMS.

The Circuit Court held "Yes."

Gladstone, Realtors v. Bellwood, 441 U.S. 91, 99 S.Ct. 601 (1979)

VI. WHETHER STUDENTS HAVE ESTABLISHED SUFFICIENT EVIDENCE SO AS TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER GEAR UP FUNDS WERE MISSING OR HAD BEEN MISAPPROPRIATED.

The Circuit Court held "Yes."

SDCL § 15-6-23(a)
SDCL § 15-6-23(b)

V. WHETHER STUDENTS' LAWSUIT WAS APPROPRIATELY CERTIFIED AS A CLASS ACTION.

The Circuit Court held "Yes."

SDCL § 15-6-23(a)
SDCL § 15-6-23(b)
Trapp v. Madera Pacific, Inc., 390 N.W.2d 558, 569-61 (SD 1986)
Duerre v. Hepler, 2017 SD 8, ¶ 28; 892 N.W.2d 209, 220
In re South Dakota Microsoft Litigation, 657 N.W.2d 668, 675 (2003)

VI. WHETHER STUDENTS' CLAIMS ARE BARRED BY THE NOTICE REQUIREMENTS OF SDCL § 3-21-2.

The Circuit Court held "No."

SDCL § 3-21-2
Purdy v. Fleming, 2002 S.D. 156, 655 N.W.2d 424
Myears v. Charles Mix County, 1997 S.D. 89, 566 N.W.2d 470

STANDARD OF REVIEW

The Honorable Court's review of a circuit court's decision regarding summary judgment is well established:

> We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the [circuit] court, affirmance of a summary judgment is proper.

Johnson v. Hayman & Associates, Inc., 2015 S.D. 63, ¶ 11, 867 N.W.2d 698, 701-701 (citations omitted). "The circuit court's conclusions of law are reviewed de novo." *Id.* (quoting *Weitzel v. Sioux Valley Heart Partners,* 2006 S.D. 45, ¶ 16, 714 N.W.2d 884, 891).

ARGUMENT

I. STUDENTS' STATE LAW CLAIMS ARE NOT PREEMPTED BY FEDERAL LAW.

Appellees' argument that Students' state law claims are preempted by federal law misses the mark. Appellees first mischaracterize the issue before this Court by arguing that Students seek to enforce a right under the Higher Education Act (HEA), rather than state law claims. Appellees then suggest that Students' claims are implicitly preempted because they would usurp the authority of the Secretary of the United States Department of Education (USDOE) to regulate GEAR UP programs. Appellees reach this conclusion by mischaracterizing Students' claims as an attempt to enforce GEAR UP and failing to engage in the proper analysis to determine if these claims are preempted.

A. Appellees incorrectly assert that Students' claims are explicitly preempted under the HEA.

Part I.A of Appellees' brief provides this Court with an exhaustive review of federal statutes and regulations to establish what has never been disputed in this case: that the Secretary of USDOE has comprehensive authority regarding eligibility criteria, monitoring, evaluating, and enforcing compliance with USDOE grants, including GEAR UP grants. Appellees then erroneously assert that Students' claims are an attempt to force compliance with the GEAR UP program. *Br. of Appellees MCEC Directors* (hereinafter *Br. of MCEC Directors*).

Were Appellees' contentions that Students' seek to enforce compliance with federal regulations correct, Students would agree that their claims are preempted. But that is not the case; Students claims are not brought to enforce compliance with GEAR UP grants, but to vindicate Students' rights under state contract and tort law. Part I.A of Appellees' brief culminates in the assertion—stated without authority—that "[b]y failing to list private causes of action *or state-law claims* as permissible, Congress divested private citizens of the right to enforce the HEA in both federal and state court." *Br. of MCEC Directors* at 22 (emphasis added). Students are not attempting to enforce the HEA in state court, and there is no authority to support the proposition that the absence of state law claims in the HEA indicates a Congressional intent to preempt such claims. In fact, precedent of the United States Supreme Court suggests the opposite. *See Chi. & Nw. Transp. Co. v. Kalo Brick*, 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963))).

Appellees' contention that *Williams v. Anthony*, No. 12 C 4275, 2012 WL 6680320 (N.D. Ill. Dec. 21, 2012), supports their argument that Students' claims are explicitly preempted is incorrect. In *Williams*, the district court determined there was no private cause of action under the Rehabilitation Act to allow the plaintiff—who alleged that a state agency receiving federal funds under that act was violating federal law—to sue the USDOE to compel it to use its enforcement authority granted by various regulations. 2012 WL 6680320 at *2. *Williams* is completely inapplicable to the issue in

this case, and Appellees' mischaracterization of the nature of Students' claims does not render such authority persuasive. Students do not seek to compel USDOE to exercise its authority as the plaintiff in *Williams* did, and the fact that the relationship between Students and Appellees arises pursuant to a federal grant does not transform Students' state law causes of action into an attempt to usurp USDOE's authority to regulate the GEAR UP program.

Appellees also assert that subchapters I–III of the General Education Provisions Act (GEPA) do apply to GEAR UP grants, but concede that Subchapter IV (Enforcement) does not. *Br. of MCEC Directors* at 10 n.4. As noted in Students' initial brief, the circuit court stated in its memorandum decision that if GEPA applied to GEAR UP it would have found that Congress had occupied the field with regard to enforcement of GEAR UP and other federal grants. The circuit court provided no authority for this stated proposition, and as Students do not seek to enforce compliance with GEAR UP regulations, the applicability of GEPA to GEAR UP is irrelevant. More tellingly, the enforcement subchapter of GEPA does not apply to GEAR UP, as Appellees concede. Thus any argument that the applicability of the other GEPA subchapters to GEAR UP somehow preempts Students' claims is without merit. Students do not seek to place themselves in USDOE's shoes, they merely seek redress in state court for the harms they suffered as a result of Appellees' breach of contract and tortious conduct.

B. Appellees' assertion that Students' claims are implicitly precluded ignores governing precedent and relies on inapplicable cases holding the HEA does not create a private right of action.

Appellees also contend that Students' claims are implicitly precluded by the statutory and regulatory scheme over federal grants, and relies on a number of

inapplicable cases where the claims were brought pursuant to federal statutes or to enforce provisions of federal statutes. Despite Appellees' vehement contentions to the contrary, none of Students' claims are for the enforcement of the HEA or any other federal statute.

Students first cite to *Labickas v. Arkansas State University*, where the plaintiff sued the defendants on both a federal claim to enforce Title IV of the Higher Education Act (HEA) and pendent state claims for breach of fiduciary duty, outrageous conduct, and breach of contract. 78 F.2d 333, 334 (8th Cir. 1996). In that matter, the Court did hold that the plaintiff's claims under the HEA were barred, but ruled that the state common law claims could only be dismissed by the federal court without prejudice. Id. The state law claims were not preempted or barred by the federal statute.

Students rely on *L'ggrke v. Benkula*, 966 F.2d 1346 (10th Cir. 1992) to suggest that allowing Students' state law claims to proceed in state court would undermine the Secretary's authority over GEAR UP grants. However, the plaintiff student-borrower in *L'ggrke* sought to bring claims under Title IV of the HEA against the educational institution which had received student loan dollars from the USDOE to which he believed he was entitled. 966 F.2d at 1347. After engaging in the four-factor analysis under *Cort v. Ash*, 422 U.S. 66 (1975), the Tenth Circuit determined there was no private cause of action under Title IV of the HEA and affirmed the district court's dismissal of those claims. 966 F.2d at 1348. Importantly, the district court had declined to retain jurisdiction over the plaintiff's state law claims, and the Tenth Circuit did not disturb that determination.

Reference to *McCullogh v. PNC Bank Inc.*, 298 F.3d 1217 (11th Cir. 2002) (per curiam) is equally inapposite in this case. The *McCullogh* court determined there was no Congressional intent to create a private right of action under section 428(H) of the HEA authorizing federally insured unsubsidized Stafford loans for certain borrowers, and dismissed the claims brought under that section. 298 F.3d at 1222–25. But as in *Labickas*, the court declined to exercise supplemental jurisdiction over the plaintiffs' state law causes of action and dismissed those claims without prejudice. *Id.* at 1227.

Appellees' reliance on *New York Institute of Dietetics. Inc. v. Great Lakes Higher Education Corp.*, No. 94 Civ. 4858 (LLS), 1995 WL 562189 (S.D.N.Y. Sept. 21, 1995), is similarly misplaced. In *New York Institute* the plaintiff, a post-secondary school, sued the Secretary of USDOE to regain its eligibility to participate in the federal student loan program. 1995 WL 562189 at *13–14. The district court ruled that the plaintiff had failed to exhaust its administrative remedies required by the HEA, and held that those administrative procedures were the exclusive remedies available to the plaintiff. *See generally id.* In contrast, Students have no such administrative remedies, and their state law claims do not threaten to "undercut the exclusive administrative remedy provided by Congress." *Id.* at *5.

The only case discussed in Appellees' brief which deals with preemption of state law causes of action by the HEA is *Graham v. Security Savings and Loan*, 125 F.R.D. 687 (N.D. Ind. 1989).[1] However, Appellees' suggestion that *Graham* establishes a blanket rule that any state cause of action is preempted by the HEA is incorrect. In

[1] Appellees' brief cites to, but does not discuss, *Bowman v. Michigan Higher Education Assistance Authority*, No. 313444, 2014 WL 129332 (Mich. Ct. App. Jan. 14, 2014). Students' initial brief discusses that case and why it demonstrates the inapplicability of federal preemption to the case at hand. *Br. of MCEC Directors* at 19–20.

Graham, the plaintiffs' state law claims sought rescission of their federal student loans based on fraud. However, the court determined that "federal law governs the remedies upon default of" the student loans at issue and "pre-empts plaintiffs' state law remedy of rescission." *Id.* at 692–93.

In short, because the regulations governing federal student loans included methods of discharging student loan obligations, state law causes of action which would have resulted in a discharge of such obligations were preempted. The court further noted that "a state law claim for rescission conflicts with federal objectives" by deterring commercial lenders from participating in the guaranteed student loan program. *Id.* at 693 n.7. Thus, the court found that the state law causes of action were preempted because Congress had left no room for supplementary state regulation, and because the state law causes of action in question would have undermined the Congressional purpose behind the guaranteed student loan program. Notably, the Court only mentioned the *Cort* factors when it had moved on to its analysis that the HEA itself did not provide a private right of action, and that determination was also specific to the student loan program. *See id.* at 694 ("Plaintiffs simply have no remedy under the [HEA] for relief from the obligation to repay their student loans."). In contrast to *Graham*, Students' do not seek a remedy in state court which undermines the Congressional scheme of regulation surrounding the GEAR UP program, as discussed at length in Students' initial brief. Students' claims do not seek a remedy which is provided for in those regulations, nor do their claims run counter to the objectives of the HEA and the GEAR UP program.

Various statutes and regulations vest USDOE and the Secretary with comprehensive authority to establish eligibility criteria for federal grants, to administer

those grants, monitor compliance of those grants, evaluate programs funded by those grants, and to take action against non-compliers by revoking eligibility and seeking to claw back federal funds. But there is no enforcement power of the Secretary which occupies the same space as the claims brought by Students; the closest these regulations come to that is by granting the Secretary authority to "[t]ake other remedies that may be legally available." 34 C.F.R. § 80.43(a)(5). But Students' claims do not overlap with or undermine this regulation because the Secretary could not bring Students' claims against Appellees because it was Students—not the Secretary—who was harmed by Appellees' conduct. Thus, a determination that Students' claims are preempted would effectively immunize any contractor receiving federal grant funds from being held accountable for conduct which violates state law.

Appellees assert that "[Students'] failure to cite to authorities related to the HEA is telling." *Br. of MCEC Directors* at 34. What is far more telling is Appellees' inability to engage in the correct analysis for the issue before this Court: do Students' state law causes of action brought in state court undermine a Congressional scheme of regulation? The answer is no. Authorities holding that there is no private right of action under the HEA are inapplicable and unpersuasive. Appellees attempt to breach this analytical barrier by asserting that Students' state claims are an end-run method of enforcing compliance with GEAR UP regulations. That is not true; Students seek redress for the violation of state law which has caused them harm. Because these claims do not conflict with the authority of the Secretary or undermine the purpose of the GEAR UP grant program, there is no basis for South Dakota to cede authority over its own laws to the federal government.

II. STUDENTS ARE INTENDED THIRD-PARTY BENEFICIARIES OF THE PARTNERSHIP AGREEMENTS BETWEEN MCEC AND SDDOE

Appellees' assertion that Students were not the intended third-party beneficiaries of the partnership agreements between MCEC and SDDOE is without merit. MCEC conceded that "the person or class of persons who were intended to benefit from MCEC's administration of the GEAR UP program at any time since MCEC began to administer the GEAR UP program" are "Native American students who hoped to attend post-secondary education institutions." *CR 787* at ¶ 22. Further, the language of the Partnership Agreements themselves indicates that Students were the intended beneficiaries of the agreements. *Appendix to Br. of Appellee MCEC* at 048-52. That agreement states that the purpose of the agreement is to:

> Carryout the South Dakota Gaining Early Awareness and Readiness for Under Graduate Programs grant activities/responsibilities as described in the grant application which was submitted to the United States Department of Education. (Attachment A).

Id at 048. MCEC omitted Attachment A from its Appendix, but that Attachment – the application submitted by SDDOE for the GEAR UP grant -- specifically described Native American students in South Dakota as the beneficiaries of the grant. *CR 789 et. seq.* The trial court found as a matter of fact that Students were the intended beneficiaries of the agreements. *Appendix to Br. of Appellee MCEC* at 027, ¶¶ 7-9. MCEC has not presented any argument or evidence that contradicts its own interrogatory answer, the Partnership Agreements and grant application, or the trial court's finding.

Sisney v. State, 2008 SD 639, 754 N.W.2d 639 (SD 2008) is distinguishable from the present case. In *Sisney*, the contract at issue was between a vendor, CBM, Inc., and the party that hired it, the vendee State of South Dakota. 754 N.W.2d at 641-42. In the present case, SDDOE did not hire MCEC to administer the grant. Rather, the parties

entered into a Partnership Agreement and became partners in a project to, ostensibly, benefit the Native American students who were the subject of the GEAR UP grant. *Appendix to Br. of MCEC* at 048; *CR 789 et. seq.*

The *Sisney* decision is also inapplicable to the present case because it dealt with a contract between the state and a private entity. 754 N.W.2d at 641-42. The rationale of the *Sisney* decision rests on the principle that holding otherwise would cause "a private party (CBM Inc.) who contracts with the public government entity" to "open itself to liability at the hands of the public." *Id*. at ¶ 11. Since MCEC is not a private party, that rationale does not apply to the present case.

Finally, *Sisney* is distinguishable because it concerned a ministerial duty – providing food to state inmates. 754 N.W.2d at 641. CBM's services directly benefitted the state. In the present case, SDDOE had no ministerial obligation to offer the GEAR UP program to Students. MCEC partnered with SDDOE to provide certain services to Students, but if it did not, there would be no harm to SDDOE. In addition, SDDOE only benefitted from the Partnership Agreement if the intended beneficiaries of the agreement, Students, benefitted first. In that regard, the benefits to Students are the agreements' primary concern. It is actually the benefit of SDDOE that is incidental to the agreements.

MCEC is also incorrect for three reasons when it cites SDCL § 53-2-6 to argue that Appellees cannot seek to enforce the Partnership Agreements: 1) SDDOE and MCEC did not rescind the agreements; rather, SDDOE terminated and elected not to renew the agreements; 2) SDDOE acted unilaterally, so the "parties" did not rescind the contract; and 3) Students are seeking damages for breach of contract that occurred before

the termination of agreements, rather than specific performance of the agreement after it was no longer in effect.

SDCL § 53-2-6's requirement that "the parties . . . rescind" the contract is not met, because the contract was terminated, rather than rescinded. In its Statement of Undisputed Material Facts, MCEC itself asserted that SDDOE unilaterally terminated the contract. *CR 349* at ¶ 16 ("The SDDOE, on September 21, 2015, terminated the contract between it and Mid-Central for the administration of the GEAR UP grant program"). SDDOE's September 21, 2015, letter to MCEC states that it constitutes "formal notice of non-renewal and termination of the Partnership Agreement 2015A-306 effective immediately." *CR 843*.

SDCL § 53-2-6 deals with the rescission, rather than termination of a contract. "Rescission" and "termination" are not synonyms. "Termination" is defined as follows (in relevant part):

> With respect to a lease or contract . . . refers to an ending, usually before the end of the anticipated term of the . . . contract, which termination may be by mutual agreement or may be by exercise of one party or one of his remedies due to the default of the other party. As regards a partnership, term refers to a winding up and cessation of the business as opposed to only a technical ending (as upon the death of a partner) which is a dissolution.

Termination, Black's Law Dictionary (6th ed. 1990). Contrast this definition with the relevant definition of "rescission of contract":

> To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party. *To declare a contract void in its inception and to put an end to it as though it never were. . . . A 'rescission amounts to the unmaking of a contract, or an undoing of it from the beginning,* ***and not merely a termination . . .***

Rescission of contract, Black's Law Dictionary (6th ed. 1990) (emphasis added).

SDDOE's letter to MCEC clearly states that it is unilaterally terminating, rather than

rescinding, the contract, so SDCL § 53-2-6 is not implicated. *CR 843*. Furthermore, there is no evidence in the record that the parties complied with SDCL § 53-11-5[2], which would have been necessary to effectuate a rescission.

The case that MCEC relies upon, *Orloff v. Metropolitan Trust Co.*, 110 P.2d 396 (Cal. 1941) is distinguishable from the present matter, and actually illustrates that rescission requires the consent of all the parties to the contract. In *Orloff*, the third-party beneficiary of an escrow agreement was precluded from seeking to enforce the agreement after the parties to the agreement terminated it. 110 P.2d at 398.

Distinguishing between termination and rescission of a contract when third-party beneficiaries are implicated makes sense. Third-party beneficiaries should not be allowed to enforce rights under a contract after it has been rescinded, because after a contract has been rescinded, it is "as though [the contract] never [was]." *Rescission of contract*, Black's Law Dictionary (6th ed. 1990). If the contract was void from inception, then the third-party beneficiary had no rights under the contract.

On the other hand, third-party beneficiaries should not be prohibited from seeking damages for breach of a contract that has been terminated. A contract that has been terminated did in fact exist at one time, unlike the rescinded one. Therefore, rights under the contract accrued, benefits were owed, and obligations were in place. Interpreting SDCL § 53-2-6 so as to disallow a third-party beneficiary from claiming damages from breach of a contract after it has been terminated would create an absurd result, in that it would allow parties to a contract to collude to terminate a contract after receiving their

[2] 53-11-5. Rescission not effected by consent--Restoration of everything of value by party rescinding

The party rescinding a contract must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

respective benefits, before fulfilling their obligations to third-party beneficiaries, and the third-party beneficiaries would have no remedy. *Martinmaas v. Engelmann*, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611 ("[I]t is presumed that the legislature did not intend an absurd or unreasonable result when enacting a statute").

SDCL § 53-2-6 also does not apply because the plain language of the statute requires *all* of the "parties" to the contract to agree to rescind the contract. SDCL § 53-2-6 is informed by SDCL § 53-11-2, which provides for the circumstances in which a party may rescind a contract, one of which is if both parties consent.

Assuming *arguendo* that the Partnership Agreement was actually rescinded rather than terminated by SDDOE's letter, it is undisputed that SDDOE acted unilaterally. *CR 1168* at ¶ 16. SDCL § 53-2-6 requires all parties to the contract to agree to rescind the contract in order for the time limitation to go into effect. This requirement is consistent with SDCL § 53-11-2, which calls for all parties to consent to rescission. There is no evidence in the record that MCEC consented to rescission of the Partnership Agreement. Therefore, giving the words in the statute their "plain meaning and effect" means that SDCL § 53-2-6 cannot be applied to prohibit Students' claim. *Martinmaas*, 2000 SD 85, ¶ 49, 612 N.W.2d at 611. In addition, if SDDOE's unilateral rescission of the Partnership Agreement was based upon some ground provided for in SDCL § 53-11-2 other than consent of all of the parties, then SDCL § 53-2-6 cannot apply.

Students are not seeking to enforce the Partnership Agreement pursuant to SDCL § 53-2-6. Students are suing to recover damages for breach of contract. It would be absurd for Students to sue MCEC to enforce the Partnership Agreement after MCEC's blatant mismanagement of the GEAR UP program and grant funds.

III. MCEC SHOULD BE HELD LIABLE FOR ITS EMPLOYEES' TORTS

It is well established under South Dakota law that an employer or principal can be held liable for an employee's or agent's wrongful acts committed within the scope of the employment or agency. *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 12, 758 N.W.2d 436, 444. Under South Dakota law the phrase "within the scope of employment" is flexible and refers to "acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, enough though quite improper ones, of carrying out the objectives of the employment." *Id.* at 444. It is generally a question of fact for the jury whether a tort was committed within the scope of employment. *Id.* Most respondeat superior cases from the South Dakota Supreme Court involve attempts by third parties to impose liability upon an employer for injuries caused by an employee's intentional torts. Although this case involves negligent conduct, the intentional tort cases are instructive on the test for determining when an employee's acts are within the scope of employment. *See, e.g., Hass v. Wentzlaff,* 816 N.W.2d 96 (S.D.2012) (insurance agent's theft of annuitant's funds); *Kirlin,* 758 N.W.2d at 456 (S.D.2008) (assault by contractor's employee).

In *Hass,* the South Dakota Supreme Court stated: "We apply a two-part test when analyzing vicarious liability claims. The fact finder must first determine whether the [act] was wholly motivated by the agent's personal interests or whether the act had a dual purpose, that is, to serve the master and to further personal interests." 816 N.W.2d at 103.

Throughout its investigation, law enforcement uncovered excessive waste of GEAR UP funds during trips by MCEC employees and through regular overspending. *CR 889-94; 995-1037.* In addition to waste of GEAR UP funds, the employees of MCEC

also helped facilitate employment contracts with family members and close friends that caused inherent conflicts with the handling of GEAR UP funds. *See generally CR 843-44; 847-70; 995-1037.* It is for the jury to determine whether these actions were done within the scope of the employees' employment and were done for a dual purpose.

If the jury finds that MCEC employees had a dual purpose, then they must also determine whether the employees' conduct was foreseeable. *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 180 (S.D.1987) (court holds that foreseeability test applies to case involving non-intentional tort where employee had a dual purpose).

Count 8 of the Students' Amended Complaint alleges that MCEC failed to control the actions of Scott and Nicole Westerhuis. "Generally, the law imposes no duty to prevent the misconduct of a third person." *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 30. The Supreme Court has recognized an exception to the general rule if the plaintiff can show that (1) a special relationship exists between the parties and (2) the third party's injurious act was foreseeable. *Iverson v. NPC Intern, Inc.*, 2011 SD 40, ¶ 16, 801 N.W2d 275, 280 (2011).

A special relationship existed between Scott and Nicole Westerhuis and MCEC. A special relationship is established by MCEC's power to discipline the Westerhuises or terminate their employment. *Id.* at 280-81. Scott and Nicole Westerhuis served as the MCEC business manager and assistant business manager respectively, while also working for Defendant AIII. *See generally CR 847-870; 995-1037*. The MCEC board members had oversight and disciplinary power over both of the Westerhuises. *CR 847-70*. This power extended to discipline or termination, and therefore special relationship existed between MCEC and Scott and Nicole Westerhuis.

Once a special relationship is established, there must also be foreseeability. Wrongful activity can be foreseeable upon common experience. *Id*. (citing: *Kirlin,* 2008 S.D. 107, ¶ 38, 758 N.W.2d at 451). In evaluating foreseeability, the court must look at "totality of circumstances test." *Id.* "Liability is not contingent upon foreseeability of the extent of the harm or the manner in which it occurred. This means that the *exact harm* need not be foreseeable. Rather, the harm need only be *within the class* of reasonably foreseeable hazards that the duty exists to prevent." *Id.*

The MCEC board is tasked with overseeing the organization's finances and tracking the spending trail of the GEAR UP grant money. Lloyd Persson's admission that the board noticed discrepancies in MCEC's month end balance sheets and discussed the discrepancies during board meetings establishes that MCEC was aware or should have been aware of the misconduct. *CR 871 et. seq.* at 171:22-172:4; 173:13-16; 173:20-180:22.

Scott and Nicole Westerhuis's personal wealth was widely apparent to the public at large. Despite both working for non-profit organizations, the Westerhuises owned a 7,600-square foot home worth nearly $1.9 million dollars, as well as a large gym facility worth nearly $900,000. *See generally CR 847-870; 995-1037.* A jury should determine whether the financial discrepancies paired with the Westerhuises' vastly growing wealth made it foreseeable that the Westerhuises were mishandling the GEAR UP grant money.

Money was spent by AIII and MCEC employees in excess on food, lodging and transportation. *CR 895-903; 995-1037.* MCEC a failed to prevent or stop employees from overspending and misappropriating funds. A jury should determine whether it was foreseeable to MCEC that employees, when given access to credit cards, would

mishandle funds. Similarly, a jury should also determine whether it was foreseeable to MCEC that employing and contracting with the employees' family members created conflicts of interest, which ultimately led to damages to Students.

Although the duty to control and the duty to supervise are similar, a failure to supervise stems from the employer's inadequate or defective management in directing or overseeing its employees. *Iverson*, 801 N.W.2d at 283. Under negligence supervision, the employer must exercise a duty of ordinary care, which depends on the foreseeability of the injury. *Id.*

As the governing organization, MCEC had a duty to supervise its employees. Unfortunately, MCEC provided its employees with unrestricted and unsupervised access to MCEC's finances. As a result, the employees began using MCEC and AIII like a bank to fund their lavish lifestyles and overspending on work-related trips and office supplies. It is for a jury to determine whether the theft of GEAR UP grant funds was foreseeable.

IV. AIII SHOULD BE HELD LIABLE FOR ITS EMPLOYEES' TORTS

AIII joined MCEC in MCEC's arguments as to "whether AIII can be held vicariously liable for the tortious conduct of employees Scott and Nicole Westerhuis." *Br. of Appellee, American Indian Institute for Innovation* (hereinafter *Br. of AIII*) at p. 7, § I. However, MCEC's arguments do not deal with AIII's vicarious liability. *Br. of MCEC* at 15-16. MCEC's arguments on its own behalf do not describe how the alleged torts of AIII's employees were not committed within the scope of their employment by AIII. *Kirlin*, 758 N.W.2d at 444. "It is well-settled that the failure to brief an issue and support an argument with authority waives the right to have this Court review it." *Duerre v. Hepler*, 2017 SD 8, ¶ 28; 892 N.W.2d 209, 220.

To the extent that it is necessary for Students to respond to AIII's assertion that they are not vicariously liable for the torts of their employees, Students point out that it is for the finder-of-fact to decide whether the tortious acts in this case served a dual purpose of serving both AIII and the tortfeasor. *Hass*, 816 N.W.2d at 103. Evidence existed that AIII failed to properly supervise Stacy Phelps and Scott Westerhuis and their spending of GEAR UP monies. *CR 889-903; 995-1037.* A finder-of-fact should determine whether it was foreseeable that AIII's employees were stealing GEAR UP money. *Iverson*, 801 N.W2d at 283.

V. STUDENTS HAVE STANDING TO BRING THEIR CLAIMS

In order to have standing to pursue their claims, Students must "show that [they] personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant[s]." *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 601, 1608 (1979). In the present case, Students established that they were members of the class that was supposed to benefit from the GEAR UP grant and its resulting contracts and agreements amongst the various Appellees. *Appendix to Br. of AIII* at APP 004, ¶¶ 7-9. In addition, the trial court made the following findings of fact on the issue of standing:

1. Plaintiffs have presented evidence of actual, perceptible harm suffered from the alleged embezzlement, theft, or mismanagement of GEAR UP grant funds.
2. Plaintiffs have presented evidence that they may have been denied at least some services due to the alleged theft or mishandling of GEAR UP grant money, and Plantiffs' claims are not conjectural or hypothetical.
3. Plaintiffs have presented evidence that the denials of services are fairly traceable to the collective actions of Defendants, and not as a result of some third-party not before the Court.

Id. at APP 0091-92, ¶¶ 1-3. Appellees have not presented any facts in the record that would contradict the trial court's findings. *See generally Br. of AIII.*

Students established that they suffered an actual injury in that, as members of the cohort to be served by the GEAR UP grant, misappropriation of GEAR UP grant funds by any means harmed them. To illustrate their injuries, Students submitted affidavits documenting their participation in the GEAR UP program and the services of which they were unable to take advantage. *CR 1559* et. seq. They also submitted evidence of theft and misuse of GEAR UP grant funds in general that were earmarked to benefit them and all other members of their class. *CR 895-903; 995-1037.* Students also elicited testimony that SDDOE did nothing to audit the performance of the GEAR UP program, meaning that the effect of the loss of GEAR UP funds due to Appellees' actions and omissions on the efficacy of the GEAR UP program cannot be known, but can be assumed. *CR 1278* et. seq. at 31:3-32:11. Instead, SDDOE relied on MCEC to submit Annual Performance Reports that were submitted to the federal government. *Id*. at 17:17-20; 33:3-6. The Annual Performance Reviews did no "independent verification of that data" submitted by MCEC that was supposed to evaluate the GEAR UP program's performance. *Id*. at 19:22-25. The evidence that GEAR UP grant funds were stolen or misused, combined with the lack of oversight and verification of MCEC's data, and the affidavits of Students, establishes an actual injury to the class represented by Students sufficient to grant standing.

VI. STUDENTS ESTABLISHED SUFFICIENT EVIDENCE SO AS TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER GEAR UP FUNDS WERE MISSING OR HAD BEEN MISAPPROPRIATED.

Students do not dispute that the GEAR UP program was supposed to operate as a reimbursement-based grant. In fact, Students discuss that arrangement in their Amended Complaint. *CR 170* et. seq. at ¶ 29; *Br. of Appellee Stacy Phelps ("Phelps Br.")* at p 8.

Appellee's argument rests on the premise that, because Eide Bailly and DLA were able to reconcile SDDOE's payments of GEAR UP funds to MCEC with MCEC's documentation of expenditures, then it follows that no GEAR UP funds were misappropriated. *Phelps Br.* at 9-10. However, this premise fails for three important reasons: 1) the issues identified with MCEC's relationship with AIII call into question the veracity of MCEC's documentation; 2) Eide Bailly's audit and DLA's Special Review were limited in scope; and 3) SDDOE's payments to MCEC were not simply a dollar-for-dollar reimbursement of MCEC's claimed expenses.

The suspicious activity surrounding the relationship between MCEC and AIII calls into question the veracity of MCEC's reporting to SDDOE. DLA concluded that MCEC mischaracterized its relationship with AIII as a contractor, rather than a subrecipient, thereby shielding AIII from DLA audits. *CR 864-66.* There was evidence that Scott Westerhuis was complicit, along with Daniel Guericke and Stacy Phelps, in this effort to prevent AIII from being audited. *CR 1019-1023; 1034-1038.* Law enforcement identified expenditures of funds by Stacy Phelps that appear to be misuse of GEAR UP funds, as well as communications between Scott Westerhuis and Phelps in which they appear to be conspiring to hide their activity from AIII board members. *Id*. at 1040-1046. Taken as a whole, the conduct of Westerhuis, Phelps, and Guericke is sufficient to create a genuine issue of material fact as to whether GEAR UP funds were being diverted from their true purpose.

The audits of Eide Bailly and DLA were limited in scope, and would not necessarily reveal misappropriation of funds. Eide Bailly's audit was limited to

comparing documentation submitted by MCEC with SDDOE's resulting payments to MCEC:

> The examination was limited to MCEC's financial and accounting records and information from the SDDOE regarding GEAR Up reimbursements to MCEC. It is important to note that we did not have access to financial and/or accounting records for any other businesses or individuals.

CR 1879. DLA's Special Review was limited to a review of MCEC's financial records and some of AIII's records with respect to funds received from MCEC:

> Our work for this report involved reviewing selected MCEC financial records from January 2007 through September 2015. We did not conduct financial audits of each of these periods or specifically audit all of the various State, local and federal programs administered by MCEC during this period. Rather, based on risks that we observed, we selectively reviewed MCEC financial records related to certain programs. As we deemed necessary and to the extent possible, we also reviewed AIII's financial records related to the expenditure of State and federal funds received from MCEC.

CR 849. Because of the limited scope of these two audits, Appellees' reliance on them for the proposition that no GEAR UP money was stolen is misplaced. As discussed above, there is evidence that some parties worked to hide the activities of AIII from auditors. *See generally CR 995-1037.* Law enforcement has identified suspicious expenditures by Stacy Phelps. *Id*. The fact that SDDOE's payments to MCEC matched the expenditures reported by MCEC to SDDOE is no surprise. It is also no surprise that SDDOE paid MCEC for expenditures that SDDOE deemed to be "allowable, reasonable and allocable." *Phelps Br.* at 8. It is more relevant that SDDOE apparently relied only on documentation submitted by MCEC when determining whether to reimburse MCEC. *CR 2200* at ¶¶ 6-7. That documentation was apparently supplied by Stephanie Hubers, Scott Westerhuis, and Nicole Westerhuis, since they received training from SDDOE regarding the documentation of expenditures. *CR 1862* at 27:3-28:4. Of course, Scott and Nicole

Westerhuis were ultimately accused of theft, and Stephanie Hubers was accused of criminal activity involving MCEC. *CR 995-10110*; *CR 2198* et. seq. at ¶ 22.

It is also important to note that there was no independent evaluation by SDDOE, DLA, or Eide Bailly of the efficacy or efficiency of MCEC and AIII's GEAR UP expenditures. *CR 2081* at 130:25-131:7; *CR 1868* at 31:2-19; *CR 1879-1889*. SDDOE's decision that a claimed expenditure was "allowable, reasonable, and allocable" was based solely on the representations made by MCEC. *CR 1870* at 57:21-5. The involvement of Scott Westerhuis and other persons accused of crimes in the reimbursement process undermines SDDOE's confidence in MCEC's submissions.

Appellees' assertion that because SDDOE's payments to MCEC matched MCEC's documentation to SDDOE, that no GEAR UP funds were misspent, misappropriated, or wasted, has no merit. SDDOE did not simply add up MCEC's receipts and invoices and pay MCEC the amount claimed. The GEAR UP grant included an indirect cost cushion that could amount to as much as $200,000 per year that was not subject to the matching or documentation requirement. *CR 2080-81* at 127:12-130:3. These payments for indirect costs, above and beyond reimbursement for receipts and invoices submitted by MCEC, provided opportunity for embezzlement. Finally, Appellees' assertion that the only theft that occurred was after SDDOE paid MCEC flies in the face of the evidence that led to allegations that Scott Westerhuis and Phelps misused or wasted funds in connection with AIII, and tried to hide that misuse by shielding AIII from audits. *See generally CR 995-1037*.

VII. STUDENTS' LAWSUIT WAS APPROPRIATELY CERTIFIED AS A CLASS ACTION

"[O]n review of an order denying or granting a motion to maintain a class, the lower court may be reversed only for an abuse of discretion." *Trapp v. Madera Pacific, Inc.*, 390 N.W.2d 558, 569-61 (SD 1986). "Great discretion is usually given to the trial judge in certification cases, and certification itself is favored by courts in questionable cases." *Beck v. City of Rapid City*, 2002 SD 104, ¶ 12, 650 N.W.2d 520, 525 (Per Amundson, J. with one justice concurring and two justices concurring in the result). Appellee Stacy Phelps asserts that Students failed to establish that their class is so numerous that joinder is impracticable. *Br. of Appellee Stacy Phelps* (hereinafter *Phelps Br.*) at 15. However, the trial court made specific findings regarding the constitution of the cohort of students that were to be served by the GEAR UP grant. *CR 2385-86* at ¶¶ 1-5. Phelps offers no argument as to how any of those findings were erroneous. *Phelps Br.* at 15-16. The record clearly indicates that the class consists of a large number of students attending various South Dakota schools over the course of several years. *CR 2385-86.* The trial court's findings reflect "that there [is] at least some evidence of the number of class members[.]" *Shangreaux v. Westby*, 281 N.W.2d 590, 593 (SD 1979). Since "specific numbers are not required" to determine the numerosity of the class, the trial court's findings are more than adequate to justify the numerosity prong of SDCL 15-6-23. *Duerre v. Helper*, 2017 SD 8, ¶ 18, 829 N.W.2d 209.

Phelps also argues that there is "little reason to believe that any one but the present plaintiffs would desire to proceed in this action." *Phelps Br.* at 16. However, SDCL 15-6-23(a) and (b) do not require such a showing. It is true that Students bore the burden of showing that all of the class members have some questions of law or fact in

common, and that Students' claims are typical of the class. SDCL § 15-6-23(a)(2) and (3). "However, not all questions of law or fact raised need be in common." *Trapp v. Madera Pacific, Inc.*, 390 N.W.2d 558, 561 (SD 1986). There may be some differences in how various members of the class would have taken advantage of, or benefitted from, the GEAR UP funds that were misappropriated, but all members of the class have the same claim. "The commonality factor, however, does not require a class of clones, identical in all respects." *Duerre*, 17 SD 8 at ¶ 20. The common question asserted by Students must be "of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (quoted by *Duerre*, 2017 SD 8 at ¶ 21). The common questions asserted by Students in their amended complaint – the liability of the various Appellees for misused or misappropriated funds, and the aggregate amount of those funds - are capable of classwide resolution. *CR 170* et. seq.

Phelps's argument that Students cannot show that damages can be calculated on a class basis is without merit. Phelps attempts to redefine the class members' damages as something other than the aggregate amount of money that was taken from the GEAR UP program. *Phelps Br.* at 16-17. However, in order to qualify for class action certification, Students "need no calculate each class member's damages individually. Instead damages can be calculated in the aggregate for the class." *In re South Dakota Microsoft Litigation*, 657 N.W.2d 668, 675 (2003) (*quoting* trial court's ruling).

VIII. STUDENTS' CLAIMS ARE NOT BARRED BY THE NOTICE REQUIREMENT OF SDCL 3-21-2

A. The time period for notice is tolled SDCL § 3-21-4 as the members of Students' Class are minors.

The GEAR UP grant was intended to benefit high school students through 2015. Consequently, when Students brought their action, a number of students within the class intended to benefit from the GEAR UP funds were still minors. *CR 1 et. seq.* Under SDCL § 3-21-4, "[i]f the person injured is a minor or is mentally or physically incapacitated, the court may allow that person to serve the notice required by § 3-21-2 within a reasonable time after the expiration of the period of disability." Due to the age of the class members, under SDCL § 3-21-4 the time period for notice had not expired when Students sent their notice to MCEC's attorney or when the complaint was filed. *CR 1, et. seq.; CR 845-46.*

Appellees do not cite to any legal authority to support their contention that Students were required to "identify any specific class members who were minors." *Br. of Appellee Daniel Guericke* (hereinafter *Guericke Br.*) at 10. "It is well-settled that the failure to brief an issue and support an argument with authority waives the right to have this Court review it." *Duerre v. Hepler,* 2017 SD 8, ¶ 28; 892 N.W.2d 209, 220.

Appellees' argument that Students or class members did not serve their notice "within two years of the event upon which the claim is based" is also without merit. *Guericke Br.* at 10. As discussed in § VIII. B. *infra.*, the letters from SDDOE to MCEC and from Students' counsel to MCEC's counsel were well within the two years necessary to satisfy the tolling afforded minors in the class. *CR 843-44, 1047-48.*

B. Appellees' wrongful conduct continued through November 2015 thereby tolling the 180-day notice requirement.

"A continuing tort tolls the statute of limitations and the 180–day notice period does not begin until the wrong is terminated." *Brandt v. County of Pennington,* 2013 S.D. 22, ¶ 11, 827 N.W.2d 871, 875. (citing *Holland v. City of Geddes,* 2000 S.D. 71, ¶ 5, 610 N.W.2d 816, 818 Id. ¶ 9, *Hall's Park Motel, Inc. v. Rover Constr., Inc.,* 194 W.Va. 309, 460 S.E.2d 444, 449 n. 3 (1995)).

"To constitute a continuing tort, . . . all elements of the tort must be continuing, including breach of duty and damages." A continuing tort suspends the running of the statute of limitations "when no discrete occurrence in continually wrongful conduct can be singled out as the principal cause of damage, the law regards the cumulative effect as actionable, and allows the limitations period to begin when the wrongful conduct ends." *Id.*

After entering into a partnership with SDDOE, the employees of Defendant MCEC began using the funds like a bank. Ms. Hubers stated to law enforcement that as far back as 2005 AIII would take money from Defendant MCEC's general fund accounts and directly deposit the funds into their employees' accounts. *CR 1008-11*. She also stated that Defendant MCEC began mismanaging funds on trips related to GEAR UP by paying for lavish lodging, transportation and food accommodations. As the spending continued to spiral out of control, Ms. Hubers began changing documents and called them "reconciliations." *Id.* at 1010.

Instead of investigating the discrepancies or disciplining the employees in charge of Defendant MCEC's finances, the board turned a blind eye to the discrepancies. *CR 871-888* at 171:22-172:4; 173:13-16; 173:20-180:22. By failing to fix the financial

misappropriations, Defendant MCEC created an ongoing atmosphere tolerant of misconduct.

Knowing that AIII was not audited, Defendant MCEC employees funneled GEAR UP grants bi-monthly through AIII, where the grant money could not be traced. *See generally CR 995-1037*; *CR 1059-61* at ¶¶ 31-37. Despite being given notice by SDDOE of the egregious mishandling of the GEAR UP funds, payments from Appellees MCEC to AIII continued until the end of November 2015. *Id.* It wasn't until April 4, 2016, that MCEC took affirmative action to stop the wrongful conduct of its employees and recoup the misappropriated funds. *Id.* Thus, Defendant MCEC's wrongful conduct continued until the end of November 2015 and quite possibly until April 2016. At the earliest, the time period for the individuals above the age of majority to provide notice under SDCL § 3-21-3 began at the end of November 2015.

C. Appellees wrongfully concealed their actions thereby tolling the 180-day notice requirement.

Even if the wrongful conduct had been stopped in September 2015, the actions of Defendant MCEC were fraudulently concealed from the Students' class. The South Dakota Supreme Court has previously held that fraudulent concealment may toll the statute of limitations. *Conway v. Conway*, 487 N.W.2d 21, 23 (S.D. 1992); *Purdy v. Fleming*, 2002 S.D. 156, ¶ 18, 655 N.W.2d 424, 431. In *Purdy*, the Supreme Court extended this doctrine to the 180-day notice of claim provisions. 2002 S.D. 156, ¶ 18, 655 N.W.2d at 431. In applying this doctrine, the court "must first determine whether a fiduciary relationship existed between the parties." *Id.* In the absence of a fiduciary relationship, a fraudulent concealment claim may also exist "when the defendant affirmatively prevents discovery[ ]" of the cause of action. *Id.* 2002 S.D. 156, ¶ 20, 655 N.W.2d at 431. The limitation period

is not tolled, however, "if the plaintiff knew the facts underlying the cause of action or failed to exercise due diligence to discover them." *Id.; see also Strassburg v. Citizens State Bank,* 1998 S.D. 72, ¶ 13, 581 N.w.2d 510, 515; *Glad v. Gunderson,* 378 N.W.2d 680, 682-83 (S.D. 1985).

Students' Class exercised their due diligence to discover the facts of this underlying cause of action in an attempt to timely place Appellees on notice of its potential claim of damages. It wasn't until Students' obtained the probable cause documents filed by the Attorney General's office against Daniel Guericke, Stacy Phelps and Stephanie Hubers, that Students learned of the Appellees' ongoing conduct, which had been concealed from the Students. *CR 995-1037*. Approximately one month later, Students' class put Defendant MCEC on notice of their claims against the organization. *CR 845-46*. The concealed actions of Defendant MCEC's employees thereby tolled the time frame for notice under SDCL § 3-21-2.

D. Students' Class substantially complied with SDCL § 3-21-2.

Defendant MCEC retained counsel as a result of the ongoing criminal investigation. Students provided notice to Defendant MCEC's legal counsel of their intention to file a claim on behalf of the Students' Class on April 21, 2016. *CR 845-46*. As the Students had just learned of Defendant MCEC's tortious conduct and due to the fact that Defendant MCEC had already retained legal counsel, Students delivered their 180 day notice to Defendant MCEC's legal counsel. *Id.*

SDCL 3-21-2 requires substantial compliance, not strict compliance. *Myears v. Charles Mix County,* 1997 S.D. 89, ¶ 10; 566 N.W.2d 470, 473. "[C]laims statutes which are designed to protect governmental agencies from stale and fraudulent claims, provide

an opportunity for timely investigation and encourage settling meritorious claims [but] should not be used as traps for the unwary when their underlying purposes have been satisfied." *Id.* at ¶ 12 (citing *Johnson v. San Diego Unified Sch. Dist.*, 217 Cal.App.3d 692, 266 Cal.Rptr. 187, 190 (1990) (holding substantial compliance sufficient if it causes no prejudice to defendant). *See also Life v. County of Los Angeles*, 227 Cal.App.3d 894, 278 Cal.Rptr. 196, 199 (1991) (substantial compliance sufficient); *Elias v. San Bernardino County Flood Control Dist*., 68 Cal.App.3d 70, 135 Cal.Rptr. 621, 624 (1977) (although claim was lodged with and denied by improper county board, substantial compliance with statute enough); *Indiana State Highway Comm'n v. Morris*, 528 N.E.2d 468, 471 (Ind 1988) (substantial compliance acceptable if the investigatory purpose of the notice requirement is satisfied); *Vermeer v. Sneller*, 190 N.W.2d 389, 394 (Iowa 1971)(substantial compliance sufficient); *Dean v. Board of Educ. of Cecil Co.*, 71 Md.App. 92, 523 A.2d 1059, 1062 (1987), *cert. denied*, 310 Md. 490, 530 A.2d 272 (1987) (purpose of notice requirement is timely investigation); *Carifio v. Town of Watertown*, 27 Mass.App.Ct. 571, 540 N.E.2d 1341, 1344 (1989), *review denied*, 405 Mass. 1205, 545 N.E.2d 43 (1989) ("The statute is not intended to afford an arbitrary or trick means of saving the governmental entities from their just liabilities."); *Anderson v. City of Minneapolis*, 138 Minn. 350, 165 N.W. 134, 134 (1917) (substantial compliance adequate); *Franklin v. City of Omaha*, 230 Neb. 598, 432 N.W.2d 808, 809 (1988)(substantial compliance permissible if no prejudice to political subdivision and opportunity to investigate)).

In *Myears* the South Dakota Supreme Court examined substantial compliance of the 180-statute adopting the following standards:

> "Substantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.

1997 S.D. 89, ¶ 13. The Court identified seven objectives for notice to public entities:

> (1) To investigate evidence while fresh; (2) to prepare a defense in case litigation appears necessary; (3) to evaluate claims, allowing early settlement of meritorious ones; (4) to protect against unreasonable or nuisance claims; (5) to facilitate prompt repairs, avoiding further injuries; (6) to allow the [public entity] to budget for payment of claims; and (7) to insure that officials responsible for the above tasks are aware of their duty to act.

Id. Students' April 21, 2016, meets all seven of the objectives identified by the Court in *Myears*. The April 21, 2016, letter was sent within a reasonable timeframe after the exposed scandal. The letter documented the outstanding legal issues and to sought settlement of the Students' claims. The letter also sought to remedy the loss of scholarship funds and educational resources. *CR 845-46*.

In addition to the notice provided by Students in April 2016, Defendant MCEC received notice of potential litigation in the State of South Dakota's termination letter sent on September 21, 2015. *CR 843-44*. In the letter Defendant MCEC was notified that they had breached eight duties. *Id.* The letter instructed Defendant MCEC to preserve all documentation and turn over all data collected by the program, as well as to cease destruction of any data. *Id.* Significantly, the letter directly placed Defendant MCEC on notice that it would be "responsible for repayment of any funds for expenses determined to not be allowable." *Id.* This letter meets the seven objectives of providing notice to public agencies, as well as carries out the intent of SDCL § 3-21-2 on behalf of the Students' Class. *Id.*

CONCLUSION

For the foregoing reasons, Students respectfully urge the Court to grant Students' appeal and deny the various Appellees' Notices of Review.

Dated this 12th th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Word 2016 and contains 9303 words from the Preliminary Statement through the Conclusion. I have relied on the word count of Microsoft Word 2016 in order to prepare this certificate.

Dated this 12th day of April, 2019.

BY */s/ John R. Hinrichs*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Reply Brief of Appellant was filed by sending the original and two copies to the Clerk of the South Dakota Supreme Court by first class mail, postage prepaid, on April 12, 2019.

The undersigned further certifies that a true and correct copy of the Reply Brief of Appellant were served upon counsel for each of the Appellees by sending a copy by first class mail, postage prepaid, on April 12, 2019.

Dated this 12th day of April, 2019.

BY */s/ John R. Hinrichs*
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