OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2125

TITLE TERREL H. BELL, SECRETARY OF EDUCATION, Petitioner
v. NEW JERSEY AND PENNSYLVANIA

PLACE Washington, D. C.

DATE April 18, 1983

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IN THE SUPREME COURT OF THE UNITES STATES

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TERREL H. BELL, SECRETARY OF EDUCATION,

Petitioner

v. No. 81-2125

NEW JERSEY AND PENNSYLVANIA

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Washington, D.C.

Monday, April 18, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:51 a.m.

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MARGARET HUNTING, ESQ., Deputy Attorney General of Pennsylvania, Harrisburg, Pennsylvania; on behalf of the Respondent.

MICHAEL R. COLE, ESQ., Assistant Attorney General of New Jersey, Trenton, New Jersey; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Geller, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF THE PETITIONER

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

In 1965, Congress passed Title I of the Elementary and Secondary Education Act for the purpose of expanding and improving programs designed to meet the special educational needs of educational deprived children in low income areas.

Congress chose to accomplish this purpose by use of grants of federal funds to state educational agencies or SEA's which in turn would distribute the money to needy local educational agencies or LEA's, generally school districts.

The respondents in this case, Pennsylvania and New Jersey, have each received over $1 billion in Title I federal funds since the start of this program.

Now, in return for obtaining these massive amounts of federal funds, states must agree to abide by certain conditions written into the Title I statute and regulations. These conditions are designed to insure that only eligible children receive Title I services and that Title I funds are not used to provide general aid to schools or to replace state and local funds that would otherwise have been spent for participating

children.

The issue in this case concerns the authority of the Secretary of Education to recoup federal funds paid to the states under the Title I program in instances where the funds were used in violation of the assurances provided by the states when they received the federal money and contrary to the conditions imposed by the statute.

The facts here can be briefly stated. As I noted a moment ago, the respondents have participated in the Title I program since its inception in 1965. In the early 1970's, the Department of Health, Education and Welfare, which then enforced Title I, performed audits of the New Jersey program for fiscal years 1971 through 1973 and of the Pennsylvania program for fiscal years 1968 through 1973.

In the final audit reports, which were issued in 1975, HEW found that both states had misapplied significant amounts of Title I funds. Specifically the auditors found that New Jersey and Pennsylvania had improperly approved LEA applications for use of Title I funds in school attendance areas that didn't contain a sufficiently high percentage or number of children from low income families and that in a few instances Title I funds had been spent for general aid purposes rather than targeted to meet the special educational needs of educationally deprived children.

Both states challenged these findings by filing

applications for review with the administrative boards set up in HEW to consider Title I claims and after extensive administrative hearings, the Educational Appeal Board sustained the auditors' findings in large part and ordered New Jersey to repay about $1 million and Pennsylvania about $400,000.

QUESTION: At least with respect to Pennsylvania the sum was substantially cut down?

MR. GELLER: Oh, yes. The initial audit report was something like $10 million, I believe, but after Pennsylvania had pursued its rights through the various levels of review, the final recoupment decision was to recoup $422,000 and to pay that money to the Office of Education.

To put that into perspective, by the way, Justice Rehnquist, during the period of the audit here, 1968 through 1973, for Pennsylvania, Pennsylvania received $365 million in Title I funds.

Respondents then sought review of the Education Appeal Board's decision in the Court of Appeals which vacated the Board's decision. The Third Circuit held that the Secretary lacked statutory authority to order the repayment of this misspent funds because the only express authorization to recoup was included in the 1978 amendments to Title I and relying on what the Court of Appeals called the overarching principle of this Court's decision in Pennhurst State School against Halderman; that is that the terms and conditions of a federal

grant must be clearly set forth in the statute and regulations authorizing the grant, based on what it called the overarching principle, Pennhurst case. The Court of Appeals found that the Secretary could not recoup funds misspent prior to the effective date of the 1978 amendments.

QUESTION: Mr. Geller, before you get into your argument, could you help me on one thing? How do you view the order that was entered by the Secretary here? Was it an order to pay or an order defining the amount that was due to be paid?

MR. GELLER: It was an order essentially defining the amount that was due to be paid.

QUESTION: Because they end us saying this is how much should be paid.

MR. GELLER: Yes. The Secretary hasn't yet decided what the most appropriate way would be to collect these monies. Whether if Pennsylvania or New Jersey didn't simply send the check or a portion of the check, a portion of the total amount over several years; whether some sort of administrative recoupment would be feasible. That question -- That is one of the questions that I think remains to be resolved on remand.

QUESTION: There really isn't any order outstanding requiring anybody to pay anybody else any money, is there?

MR. GELLER: Well, there is an order requiring New Jersey and Pennsylvania to pay, but the Secretary hasn't yet --

QUESTION: Well, I thought you said it did not require

them to pay.

MR. GELLER: Well, it sets the amount and obviously --

QUESTION: It sets the amount, right.

MR. GELLER: It sets the amount and obviously the Secretary would be most delighted if the states would pay that full amount, but --

QUESTION: Well, what happens if they just say, well, that is very nice, we owe you that money, but --

MR. GELLER: Well, I think that the Secretary would have the authority under the Federal Claims Collection Act either to use administrative offset, if that would be feasible, and we submit that it would be feasible under Title I, or to bring an action in District Court for suit on the prior judgment to recover that amount of money.

QUESTION: But, neither of those actions is before us now, is that correct?

MR. GELLER: That is correct. This is an appeal from the administrative determination of liability.

QUESTION: And surely the Secretary could terminate the state's participation in the program I suppose?

MR. GELLER: Well, it is not so clear under the statute. The state can only have its application disapproved if it is currently not in compliance with the statute and not for past non-compliance.

QUESTION: Part of its duty though is to repay and

it refuses to repay.

MR. GELLER: Well, whether in theory that is a possibility --

QUESTION: What if the state just says, well, if this is the way you are going to interpret the statute and our agreement, we just want to quit. I suppose they could quit.

MR. GELLER: The states can --

QUESTION: And then the Secretary would have to sue.

MR. GELLER: Would have to sue because there would be no offset possible presumably in that situation.

QUESTION: I take it your position is that whether or not -- whether or not the states' position is arguable in the sense that arguably and reasonably it might have believed it was not violating the statute; that you have the right to recoup if you decide retrospectively that is what the contract means or that statute means.

MR. GELLER: Well, yes. This is not a penalty. This is just a restitution. But, it is not simply our decision. There are a number of safeguards in the system to make certain that our decision is a correct one. There is an initial audit report which the states can challenge and then there is a final audit report which the states can challenge and then there is an appeal to the Education Appeal Board which is a neutral administrative agency composed in large part by non-government personnel.

QUESTION: Is this the kind of program where the state initially submits a plan and it is approved?

MR. GELLER: It submits an application simply saying that it will abide by the assurances -- It will abide by the conditions in the statute and regulations. All of the money in this program comes from the federal government.

QUESTION: Another thing, would you think that, to put it crudely, would any fool have known that the state was not in compliance or is it a close case? Is it ia gray area?

MR. GELLER: Well, in this case particularly I don't think there are any gray areas as to the states' non-compliance. Pennsylvania, for example --

QUESTION: So, you say the states should have known.

MR. GELLER: Well, there are two separate questions here. One is should the state have known that it was violating the statute? That is not an issue that is before the Court right now. Pennsylvania didn't even challenge in the Court of Appeals that it had violated the statute.

The issue before this Court is should the states have known that if they were found, after administrative and judicial proceedings, to have violated the statute, should they have known that a remedy that the Secretary could have pursued was to recoup the misspent funds?

QUESTION: Well, what if it just so happened that a majority of the Court thought that if the state should have known

why then it should pay the money back? But, if it was just arguable, it may not have ever participate in the program if it had known those were the conditions. What if the majority of the Court felt that way? I guess that issue just --

MR. GELLER: That issue is not -- The substantive issue of whether the states of New Jersey and Pennsylvania violated the statute is not before the Court. In fact --

QUESTION: I understand that. And, neither is, I guess, whether or not the states should or should not have known that it was violating the statute.

MR. GELLER: That is correct. The only question as the case comes to this Court is whether if the state has, in fact, violated the statute, does the Secretary have available to him the remedy of recoupment?

Let me say that these -- We are not dealing here with obscure or arcane provisions of the statute or regulations that the states couldn't possibly have known they were violating, although I understand that the states attempt to paint that picture in their brief. We are dealing here with requirements in the statute and regulations that go to the very heart of the Title I program.

As I said, New Jersey conceded before the Education Appeals Board that it had, in fact, violated the statute by miscalculating the amount of eligible -- number of eligible school attendance areas. And, Pennsylvania didn't even

challenge the finding of violation by the Court of Appeals.

QUESTION: If I understand what you are arguing now, you wouldn't take it in this then if the Court -- Suppose we held for you in this case --

MR. GELLER: Yes.

QUESTION: -- what if we reserved the question -- What if we said this is the kind of a case where the state knew or should have known that it was violating the statute and they admitted they violated the statute?

MR. GELLER: They have admitted they have violated it here. But, we think that these are issues that remain to be litigated on remand, whether the state violated the statute, if they could reraise that issue not having raised it the first time around.

QUESTION: Well, is it any part of your position that the state would have a defense to repayment of the money if, in fact, they were found to have violated the statute but neither knew or should have known that they did? Do you think there is some sort of an intent element?

MR. GELLER: No, there certainly is no intent element, but there is an element of discretion on the part of the Secretary in determining whether to pursue his recoupment remedy and there have been instances, including one that is cited in the Education Appeal Board's decision in this case, in which a state may have relied on certain program directives of

the Secretary in doing certain thing. And, even if that might have violated the statute, the Secretary would not be allowed to recoup. But, that is --

QUESTION: Do you think the Secretary's discretion in that regard is reviewable by the courts?

MR. GELLER: I would think that the Secretary's discretion to recoup would be reviewable like any other administrative decision on an arbitrary or carpricious basis. But, if there has been a clear statutory violation, especially if one of the conditions of the statute that goes to the heart of the whole Title I program, I can't imagine how any decision to recoup would be considered arbitrary.

QUESTION: Is there anything, Mr. Geller, to prevent the states when it approaches some project involving expenditure of these funds and they think they might be in the gray zone, is there anything to prevent them from submitting the question to the secretary in charge of the grants and saying, may we spend the money for this project or this program?

MR. GELLER: No, there certainly is nothing and that is to be encouraged. In fact, the Third Circuit, in its opinion, refers to the fact that LEA's and SEA's frequently do that and the Secretary is only too happy. This is not a penalty program. Everyone is trying to accomplish the same goal here. We are not trying to catch the SEA's and LEA's in slip-ups. We are dealing here with a situation in which

it has been determined that the state and local educational agencies in the past have misapplied substantial amounts of federal funds which they received for a particular purpose but didn't use for that purpose. The only question here is what are the Secretary's remedies?

QUESTION: Well, MR. Geller, it is a little hard to understand. If the Secretary thinks setoff is available and if the states concede that it is available, and at least one of them has, why isn't that a solution and why are we here?

MR. GELLER: Well, we are here -- I think there is some confusion on the part of one of the states at least as to what its concession is. Pennsylvania does not concede that prior to 1978 any --

QUESTION: New Jersey does.

MR. GELLER: Well, New Jersey has in its brief a very peculiar suggestion as to what setoff is. Let me give the Court some round numbers so we can all understand what we are talking about. Let's assume that the state in an upcoming fiscal year was entitled to receive $1 million in Title I funds and let's assume that the Secretary has determined on the basis of substantial evidence that in the past that state has misused $10,000 of Title I funds. What New Jersey is suggesting in its brief is that the Secretary should simply only give the state $990,000 of Title I funds for the upcoming fiscal year and that is all they would have to spend. Well, that is not a setoff at

all. The government is simply repaying itself for misused money. That penalizes Title I beneficiaries, the low-income children, twice. It penalizes them once when the funds were originally misspend and it penalizes them a second time when the amount of money being provided for the program in the upcoming fiscal year is lower than it should be.

That is precisely the sort of setoff that the Third Circuit, we think quite correctly, said would be inconsistent with the goals of the Title I program. That is not how the Secretary views his setoff authority.

What the Secretary would propose to do, if it ever came to an administrative setoff, would be to give that state $990,000, but to extract a commitment from the state to spend $1 million that year in the Title I program.

New Jersey has never conceded that that is what it is willing to do. If it would, then we would not be here as to New Jersey.

QUESTION: Thank you, that helps clarify it. Is it your position that Section 415 of the General Education Provisions Act, which provides that there can be adjustments for overpayments, provides explicit authority for setoff?

MR. GELLER: We have argued that Section 414, which provides the audit authority, and Section 415, which is the section to which you have just referred, together do provide explicit authority. And, in the legislative history of the 1970

amendments to the statute which put those sections into the statute. Congress quite clearly said that this will facilitate the Secretary's use of his administrative audit and recoupment authority under the Education statutes.

QUESTION: Mr. Geller, in analyzing New Jersey's setoff position a little further, what if the Secretary followed your advice and said we are going to give New Jersey $990,000 this year on the condition that New Jersey puts up $10,000 of its own and New Jersey says, no, we won't put up $10,000 of our own. Then what does the Secretary do?

MR. GELLER: Well, first of all, let me say the situation never come to that.

QUESTION: Well, but --

MR. GELLER: I understand, Justice Rehnquist. There have been several dozen occasions in the past in which the Secretary has determined that a state has misspent past grant funds and they have always paid up, but in the situation that you posited, the Secretary would not do anything that would jeopardize the Title I program in that state. What the Secretary would probably do in that situation is bring a suit in District Court to recover on the judgment. It would not be a de novo action to reconsider what --

QUESTION: To recover on what judgment?

MR. GELLER: The judgment of the Education Appeals Board which presumably would have been an appeal to a court of

appeals and affirmed such as in this case.

QUESTION: Well, do you think that is something that simply can be filed in a district court or registered and sued on like a judgment on other states?

MR. GELLER: Yes, I think it can. And, in fact, that happens all the time under a great many federal programs, the Occupational Safety and Health Act, the Child Labor Act, which provide for civil penalties through an administrative process and if the defendant refuses to pay, what the government will do is bring a civil action for recovery of that judgment. That is very common administrative procedure.

QUESTION: Mr. Geller, I still am not clear in my mind why the Secretary couldn't do exactly what you suggested in answer to Justice O'Connor, namely, say you want to stay in the program we are sure and you are just going to have to pay $1 million to get $990,000. That still is a pretty favorable offer to the state. Why do you have to litigate it when you have got the chips in your hands?

MR. GELLER: I would assume that it would never come to that. That is the point I was trying to make.

QUESTION: Well, why doesn't that answer the whole lawsuit? I really don't understand. If you assert you have a right to do that --

MR. GELLER: Yes, but the Third Circuit found that prior to 1978 we had no right to do that and that is why this

case is here and why this case is of tremendous importance.

QUESTION: And, Judge Higginbotham in dissent, as I understood him, said, well, that issue really isn't presented because you haven't tried it yet. He said your future remedies are not before us.

MR. GELLER: I think that the Third Circuit misunderstood what the Secretary was trying to do.

QUESTION: I think they misread the Secretary's orders. The Secretary's orders say this amount should be paid and they read them as orders saying they must be paid.

MR. GELLER: Well, I think -- The Third Circuit said that the Secretary could not use his common law recoupment authority in this class of case for two reasons.

QUESTION: But, why isn't all that dicta as Judge Higginbotham said?

MR. GELLER: I think it is not dicta because Judge Higginbotham assumed that the Secretary was not proceeding under his common law recoupment authority.

QUESTION: And they clearly weren't. They weren't using the common law recoupment power before --

MR. GELLER: I believe they were, Justice Stevens. I believe the Secretary has used his common law authority as codified in the Federal Claims Collection Act.

QUESTION: He didn't enter an order requiring any payment.

MR. GELLER: Well, that is because the Federal Claims Collection Act requires the Secretary to consider a number of options in determining how to recovery the money and that was the question that the Secretary hadn't yet decided -- Hadn't yet had to reach because the states had not yet said that they were not going to pay the money if, after they had had their administrative proceedings, it was found that they owed it.

QUESTION: Mr. Geller, isn't this like collecting on an I.O.U. which I always thought you couldn't collect on?

MR. GELLER: It is more than an I.O.U. I think it is like collecting on a contract that has been breached.

QUESTION: I thought that the only ruling was was that you owe this money, not that you must pay it.

MR. GELLER: No, I think the Secretary --

QUESTION: Am I wrong?

MR. GELLER: The Secretary's administrative ruling obviously was a ruling that this money had to be paid. The question that hadn't yet been reached is whether, for example, it would be paid in installments, it would be paid by administrative recoupment from the upcoming Title I funding, whether if none of those were feasible, whether it would be the subject of a lawsuit in District Court.

QUESTION: That to me is an I.O.U.

MR. GELLER: I am not certain, Justice Marshall, what you mean by an I.O.U. There has been an administrative

determination here after full evidentiary proceedings that the money was owed and what the states have done is taken an appeal of that administrative ruling to the Court of Appeals under the statutory procedure that Congress set up in 1978. And, this is a review. This case is here on certiorari from the Third Circuit's decision that the administrative proceedings were erroneous because the Secretary had essentially no cause of action prior to 1978 to proceed either administratively, either under his statutory authority or under his common law authority administratively.

QUESTION: Mr. Geller, the order that the Secretary entered was that New Jersey should make the following payments and lists dollar amounts. Surely they could review the accuracy of the dollar amounts, but there wasn't anything in the administrative proceeding as to how the amount should be paid, by what mechanism payment should be enforced.

MR. GELLER: I understand that, Justice Stevens, but there had been a final administrative ruling that the amounts were owed and --

QUESTION: That the amounts were owed, right.

MR. GELLER: And that is what we are reviewing here, whether, in fact, the Secretary had any power to order these states --

QUESTION: To decide how much was owed. The Distrct Court of Appeals didn't disagree with their power to decide how

much was owed.

MR. GELLER: Well, as an audit matter, but certainly not as a matter of power to order a recoupment of that amount of money and that is what is before the Court at the moment.

QUESTION: Well, Mr. Geller, the Court of Appeals' opinion certainly can be interpreted as holding that it permits that offset against perspective grants is permissible under Section 415. And, that is a reasonable interpretation of the holding.

MR. GELLER: Yes. The Third Circuit held that that is impermissible in the context of the Title I program. It did, I think, on the basis of two misconceptions. One is --

QUESTION: I said that direct recoupment was impermissible, but it indicated that the offset would be all right.

MR. GELLER: No, I believe not, Justice O'Connor. What the Third Circuit did not reach but suggested that the Secretary might be able to do is to bring a civil action, a de novo civil action to recover this money, although even there they left the suggestion open that prior to 1978 there would be no authority, no cause of action in effect to bring such an action.

QUESTION: What is the difference between direct recoupment and offset as it has been used by the various parties to these conversations?

MR. GELLER: Well, I think -- There are really two questions here and they are separate. I think the Court has to keep them separate as it analyzes this case. The first question is prior to 1978 did the Secretary have, in effect, a cause of action to recover this money at all? Respondents are quite adamant that prior to 1978 there was no cause of action available to the Secretary to recover this money.

The second question is if there was a cause of action to recover the money prior to 1978, how did the Secretary have to pursue his cause of action? In other words, could he do it through administrative procedures or offset? The Third Circuit clearly answers that question in the negative.

QUESTION: What is the difference between offset and recoupment?

MR. GELLER: I think offset is just one manner of achieving a recoupment.

It is our principal submission that the federal government, when it makes a grant subject to express conditions such as those in Title I, has an inherent right to recover monies expended by the grantee in violation of the express conditions of the grant and that the government may exercise its right of recoupment by offsetting the amounts involved against sums otherwise due to the grantee.

We believe that conclusion adheres to the very nature of the grant which, as this Court said in Pennhurst, is

very much like a contract.

It is well settled in cases dating back more than a century in this Court that the government may recover monies without resort to express statutory authority when it is paid for services that were never provided.

The use of grant funds for purposes not authorized by Congress constitutes precisely such an instance of non-performance of the terms of an agreement.

QUESTION: Suppose a state has received all of the money, has it in hand, has spent it and has misspent some of it and then informs the Secretary that they want to withdraw from the program. What is the remedy on the part of the federal government then?

MR. GELLER: Well, at that point, offset would not be available because no future funds would be going to the state under the program. And, I assume that the Secretary, as I said earlier, would have to bring a civil suit to recover on the judgment, enter in the administrative proceedings. But, that would not be a de novo review. The court would not be reconsidering whether the statute had been violated.

Now, let me just briefly in the short time remaining explain the number of the legislative developments which we think make it quite clear that the Secretary had this authority prior to 1978. First of all, as I alluded to a moment ago, there was a long history of administrative recoupment upheld by

this Court even in the absence of express statutory authority. But, we have much more than that here. We have, first of all, the 1966 Federal Claims Collective Act which was passed well before any of the monies in this case were misexpended which clearly codifies the common-law principles and says that the federal government can use all means including administrative offset to recoup debts owed to it.

We have after that in 1970 the statutes that Justice O'Connor alluded to, Sections 414 and 415 of the General Education Provisions Act. The legislative history of those provisions make it clear once again that Congress was aware that the Secretary had been exercising his audit and recoupment authority since the very outset of the program in 1965.

Two years later in 1972 the Secretary set up the Title I Audit Hearing Board to consider Title I claims. The regulations setting up that Board, which are reprinted in the Joint Appendix beginning at page 158, quite clearly explain that the Secretary will be engaging in audit and recoupment functions.

And, on page 160 and 161, it is made quite clear that -- For example, no action will be taken by the Office of Education with respect to the collection of the amounts due to be owing if there has been a claimed filed. This is in 1972, once again a clear indication of the Secretary's audit and collection authority.

Two years after that, in 1974, Congress passes 20 USC 884, a statute of limitations for the Title I program, saying that no funds can be recovered unless they have been misspent less than five years before a final audit determination.

There would have been absolutely no reason for Congress to have passed the statute of limitations in 1974 for purposes of the Title I program if respondents were right that until 1968, 1978 the Secretary had absolutely no authority to recover any funds under the Title I program. Respondents have never given any convincing explanation of what the 1974 statute of limitations was intended to do if they are right as to what the Secretary's powers are.

QUESTION: Mr. Geller, does the Secretary audit every single program?

MR. GELLER: The Secretary audits every state.

QUESTION: Every year?

MR. GELLER: Every three years.

QUESTION: Every three years.

MR. GELLER: Every three years.

QUESTION: So that a state may not even know that it is in violation until there is an audit which may be three years?

MR. GELLER: That may well be although the provisions of the statute and regulations are not as obscure as the respondents would have the Court believe.

QUESTION: I understand in this case --

MR. GELLER: Yes.

QUESTION: But what if they really were obscure?

MR. GELLER: I don't -- Well, let me say this. Despite the impression that the respondents would give --

QUESTION: And, I don't suppose every auditor has the same view as another auditor.

MR. GELLER: I understand that Justice White, but it is important to understand, especially in light of the submission respondents have made to this Court, that there really are very, very few requirements, important requirements, imposed on the states by Title I in the statute and regulations and even as to those requirements, there are very few that the auditors are concerned about and the violation of which would lead to a recoupment.

Now, all of these obscure requirements they refer to, recordkeeping and all the rest, those are not the sort of requirements we are concerned about here. The Title I statute is intended to supplement the regular school programs of educationally deprived children in low-income areas. All that the auditors are concerned about are whether Title I funds are being used to supplement rather than supplant regular school programs, whether they are going to the schools that were intended by Congress and whether the programs are being targeted to educationally deprived children.

It is somewhat ludicruous in a case like this where

New Jersey's errors in failing to comply with the statute were purely mathematical, miscomputations, or in a case which Pennsylvania did not even challenge in the Court of Appeals that they had violated the statute. For the respondents to make a primary submission to this case that Title I grant recipients just have no way of knowing what the requirements of the statute here are.

Finally, in just going through this legislative history, in 1978, when Congress finally put expressed recoupment authority in the statute, in part I think because Congress was concerned that the Secretary hadn't been adamant enough in pursuing his recoupment authority, the legislative history again makes it quite clear that they were not giving the Secretary any new powers. We quote from the House report in our brief. They were simply reiterating what the powers were that the Secretary already had, putting in a new procedural framework in which to exercise those powers and granting certain additional due process rights to the grantees.

So, we think it is inconceivable, when one looks at the history of the entire Title I program from 1965 on, for any grantee at any point to have come to the conclusion that it was free to misspend grant funds and would not have to -- would not run any risk of having to account to the federal government for the amount of the misused funds.

QUESTION: Mr. Geller, I do have one more inquiry, if

I may, because I still don't understand what it was that CA-3 was talking about. In its opinion it said, "We are at a loss to understand the department's arguments concerning the operative effect of Section 415. It is clear that whatever adjustments are authorized under this provision, they are to be accomplished by means of an offset against current or perspective grant disbursements. The department's actions in this case are very much different and it can't, therefore, invoke the authority."

MR. GELLER: Yes. I think the Third Circuit -- I had trouble with that portion of the Third Circuit's opinion as well, Justice O'Connor. I think what the Third Circuit must have meant is that Section 415 was intended for the situation where the federal government accidentally sends more money to the state in one year than they were entitled to under the Title I program. It has nothing to do with misspending of money by the states, just in the following year the federal government might be able to make that up.

The Third Circuit gave a very bizarre interpretation of Section 414 and 415, saying that those were just informational provisions in order for the federal government to be able to gather information. It is quite inconsistent with the legislative history of those provisions which explicitly refers to the Secretary's audit and recoupment authority from 1965 onward.

If there are no further questions, I would like to reserve --

QUESTION: Mr. Geller, suppose the Third Circuit had said that you could recoup by offset? You probably wouldn't be here, would you?

MR. GELLER: It depends what they mean by recoup. As long as they didn't mean what New Jersey meant.

QUESTION: Suppose they had held that you could recoup by offsetting these misspent funds against future funds?

MR. GELLER: As long as the offset is what New Jersey takes the offset to mean which is simply to reduce the amount of Title I funding in the future but not requiring the states to make up the difference.

QUESTION: I see. All right.

MR. GELLER: Thank you.

CHIEF JUSTICE BURGER: Ms. Hunting?

ORAL ARGUMENT OF MARGARET HUNTING, ESQ.

ON BEHALF OF THE RESPONDENT

MS. HUNTING: Mr. Chief Justice, and may it please the Court:

In the briefs in this case, there has been some strong language used to characterize Pennsylvania's program in an effort to justify the severe and unauthorized penalty which is now seeks to impose.

I want to make to day only three points with

respect to his challenge. My first point is that Pennsylvania conducted its Title I program in good faith and this is not a case, as Justice White pointed out, where we should have known that we were in violation of a set of complex regulations.

QUESTION: Well, isn't a state, when it receives a grant from the federal government under an explicit statute bound to know the law?

MS. HUNTING: Your Honor, we agree with that. The state was -- and this is my third point, which is that the state was under an explicit statute and that we were entitled to rely on that statute not only for our responsibilities, but also for the extent of our liabilities.

In connection with that also, I want to make one other point which is that when a Title I program is out of compliance, the statute gives the state an opportunity to correct that program before the imposition of any penalty and that penalty can be lifted upon the correction of the program. This is part of the statute and has been ignored. That opportunity has been denied in this case.

As to our first point, regarding our actual program, I would like to make -- point out one thing, that as Mr. Geller observed, this statute envisioned a partnership between the state educational agency and the federal agency in operating and administering this grant. Instead of a partnership which is cooperative with complimentary responsibilities and

liabilities, the federal agency's policy of pursuing an unauthorized repayment authority which it claims to exist is a devisive and conflicting method of enforcing this program which is causing the states and the federal government to fall apart in confusion in battling over little petty disputes and interpretations which could be resolved and should be resolved for the benefit of the program.

QUESTION: You wouldn't regard half a million dollars as petty, would you, despite --

MS. HUNTING: The amounts are not petty, Your Honor. They are definitely not petty. This case originally was a ten a half million dollar audit as was pointed out earlier.

QUESTION: It still is not petty though, is it?

MS. HUNTING: But, the disputes themselves can result in petty bickering which divides us on the question of interpretation and makes administration of the program extremely difficult.

For example -- And, I wish to dispute at this point the characterization that we haven't challenged our facts with respect to this case. We have not specifically talked about the facts before the Third Circuit, but we have challenged the procedures used to find those facts and, therefore, we do not believe that the facts have accurately been found.

In our particular case, we had a situation where the agency was demanding a -- the federal agency is demanding

reimbursement for a school district operated program where the Title I program was being operated at the same time as a busing for desegregation program was being operated.

In this particular circumstance, there was a lot of confusion, and this is just an example of our type of case, a lot of confusion about the eligibility of students who were being bused from an eligible area into an illegible area.

Both the federal and the state administrators were confused on this subject and when the state sought advice, which was recommended in a suggestion by this Court just a few moments ago that advice be sought from the federal officials, when the state sought this advice, the federal officials were unclear as to how to handle the situation. They admitted that they had confusion in their own office and that there was a philosophical gulf dividing them on how to handle this particular situation.

We tried to follow what direction we could get. We implemented a program and the panel itself declared that this program was exemplary, the panel that heard this case.

However, when the auditors came out to review the program, they found that the program was out of compliance with these regulations and, therefore, a decision was made regarding a difficult issue, which administrators and educators could not agree on, by a group of auditors who were not trained in the law or in education.

As Justice White pointed out, this is not the type

of program that we should have known was in violation.

QUESTION: Are these details before us?

MS. HUNTING: Your Honor, I wish to give you this characterization of our case in order to refute some of the challenges that have been made and some of the language that has been used, that we have converted funds, that we have squandered money, because this is certainly not the case. I don't think it ever has been disputed --

QUESTION: Do you have to worry us with that?

MS. HUNTING: I will go on with my next point.

QUESTION: Did you take the position you are now taking before the Court of Appeals for the Third Circuit?

MS. HUNTING: We took the same position, Your Honor. We didn't talk about the facts in the Third Circuit because we stressed the point at that time that the procedures were unfair and that the facts were not properly arrived at.

And, I do want to point out that with respect to Title I that this is an evolving program and this kind of an example can show how it is evolving and the statute is perfectly reasonable in not assigning liability and not requiring the states to underwrite this kind of evolution of a program.

QUESTION: Ms. Hunting, what in your view should the federal government do if the procedures had been fair -- I know you disagree -- and if you really had misspent money and clearly misspent the money? Would there be any remedy for the federal

government with the --

MS. HUNTING: Your Honor, I think the remedy is contained in the statute for the way the federal government should handle that kind of case.

QUESTION: And, what should it do?

MS. HUNTING: It should follow the statutory penalties of withholding or application disapproval. The withholding penalty can be a very effective remedy for the federal government.

QUESTION: Do you think it is a proper remedy to say you spend a million dollars and we will give you $950,000 or whatever, you know, just give you the amount less that they claim you have misspent? Is that a proper way to do it?

MS. HUNTING: No, Your Honor, and it is particularly improper because they want to couple that with -- that power to offset with an order that the state make up the difference and that the --

QUESTION: Well, I still am not clear then. How could they -- In your view, is there any way -- assuming a case where procedures were fair and the facts were against you, a different case. Is there any way the government could get its misspent money back from the State of Pennsylvania?

MS. HUNTING: No, Your Honor. We feel --

QUESTION: So the facts are really irrelevant then?

MS. HUNTING: Well, I don't believe they are

relevant because in this case it is a case of good faith.

QUESTION: If it is a matter of law, you win no matter what the facts are under your argument?

MS. HUNTING: Under our argument, we would win no matter what the facts are, Your Honor, because there was no assignment of liability in that statute. Even if the conduct was criminal, the state treasury was not responsible for this. But, that does not mean that the federal government or the state could go against the individuals responsible for the criminal conduct and achieve reimbursement that way or it doesn't mean that if the penalties provided in the statute were not sufficient to enforce the statute that the federal government couldn't go and seek stronger penalties to be written into the Act as they eventually were in 1978 or, as it suggests itself in its own brief, that they could switch to a penalty -- to a reimbursement system instead of having a forward paid system and, therefore, if the state continued to misspend funds they could just fail to reimburse them.

QUESTION: You have left me somewhat confused as to the obligations of the state. Let's take an extreme case. The state gets several hundred million dollars in grants for this program, but they decide that the governor of the state needs an official residence so they spend a million dollars to provide an official residence for the governor and then because they have, as some of the seaboard states, they have

got water available they buy a yacht for the governor. Now, are you suggesting for one minute seriously that the federal government cannot make the state account for that?

MS. HUNTING: Your Honor, the state -- We would dispute that the state's treasury was responsible for that misexpenditure. Absolutely the government could pursue with criminal penalties for civil fraud, for reversionary interest in these items that were purchased.

QUESTION: How about just withholding the next grant, from the next grant that they receive?

MS. HUNTING: Well, if the program continued to be misadministered, then they could withhold from the next grant. But, we submit that the treasury has never been made liable, the state's treasury has never been made liable, has never been required to underwrite criminal conduct or fraud or any other -- or just doubt as to how to administer the program or any other misexpenditure in this grant.

And, I will explain in my second point why that is a fair result.

QUESTION: Ms. Hunting, before you get to another point, how is it that you think that Section 415 couple with the Claims Collection Act provided no remedy for the federal government before 1978?

MS. HUNTING: Section 415 is the --

QUESTION: Of the General Education Provisions Act.

MS. HUNTING: That is the payment provision of the --

QUESTION: It expressly allows adjustments for overpayments and that coupled with the Claims Collection Act would appear to have provided some pre-1978 remedies.

MS. HUNTING: We have to agree with the Third Circuit and with Mr. Geller's position on that, that that relates to overpayments, meaning accidental payments to the states that were in excess of what the state was entitled to or perhaps a situation where a program did not need to expend all of its funds for some reason, a teacher didn't show up or something. This would be what we consider an overpayment. It doesn't relate to grant misexpenditures.

QUESTION: Do you think there is anything in the legislative history to put that kind of a gloss on it?

MS. HUNTING: The Third Circuit noticed that there was some confusion in the legislative history on this point as to exactly what legislative history attached to that. We do not believe that that section applies to the kind of offset that we are talking about here. It talks about --

QUESTION: Well, is there any reason why it shouldn't? I mean, what is the fundamental different between some kind of accidental overpayment versus the kind of thing that happened here?

MS. HUNTING: Your Honor, I think that provision, as the Third Circuit noted, is talking in terms of adjustments

of grants in a bookkeeping kind of situation like that. It would not apply in this sort of situation because in this situation the federal government is asking for a reimbursement and to the extent that it is asking for offset, the offset is being coupled with an invasion of the state's and its localities' educational programs by the federal government to direct them how to spend their money.

QUESTION: If there was an invasion as you call it that way, wasn't there an invasion by the state into the pockets of the federal taxpayers?

MS. HUNTING: Your Honor, initially I want to point out that this case is not a case of willful disregard of the regulations; that this case is a case where we attempted at all times to put on a good program and I do not believe that it is a -- I believe that Congress has the right to decide and its decision should be given authority that when it assigns liability for a program, and in this case it did not assign liability to the state, that that decision should be put in effect.

The state, I believe, as the grantee is entitled to rely on the terms of the grant.

And, in this particular case, the grant guaranteed to the states an opportunity to correct its program and to lift the enforcement mechanism when its program was brought into compliance.

The statutory provision of withholding can only be applied until the grant program is brought into compliance and this is not a discretionary provision of the statute that requires the agency to notify the states of the problem and then it requires the agency to lift that enforcement provision and refund the program when the program is in compliance. This is a benefit. This obviously is designed to benefit the program. It is a positive, therapeutic method of enforcing the program and it was the will of Congress that this is the method to be used. Instead, the agency has ignored this particular remedy, has not ever used it and has ignored its obligation under the remedy which is to give timely advice and then to exercise the penalty. This is coupled with a notice to the states that this program is out of compliance and gives it an opportunity to identify what is wrong with the program and then to correct it.

Instead, what the federal government has done has been to give the notice to the state at the same time it gives the retroactive penalty. This is the complete opposite of the point that Congress was trying to -- the scheme that Congress was trying to effect in creating a withholding remedy. And, all of this, this imposition of this penalty, was done not only without statutory authorization but not even with regulatory powers being assigned by its own regulating power in this case. The federal government had no regulations. Even a hearing board was not created by regulations but was merely the subject of a notice in

the Federal Register.

My third point is that the states are entitled to rely on the terms of the statute when they accept the grant. The statute has assigned not only the responsibilities, but the liabilities that pertain to the state in administering this program. It is not only our liability, but the federal government's responsibility which is defined in the enforcement provisions of this Act.

It is not unreasonable that Congress should have assumed that the enforcement scheme, structure, into the Act would be sufficient to manage this program. Congress has not been proved wrong in this regard. There has been no evidence of purchases of yachts or purchases of governors' mansions.

QUESTION: Ms. Hunting, may I ask you a question about your understanding of exactly what is before us? I notice in the petition for review filed by the State of New Jersey, they object to the order. They ask for a review of the Secretary's order ordering New Jersey to refund certain money, whereas your petition asks them for a review of an order ruling that Pennsylvania should refund a certain amount of money. Do you think you were ordered to pay the money or there was merely a determination of how much money was owed?

MS. HUNTING: It looks -- The document that we received is a letter that compels -- It states the amount that is owed. It says we are to repay it and for every day we don't repay it

interest is assessed.

QUESTION: It does assess interest, does it?

MS. HUNTING: Yes.

QUESTION: I see.

MS. HUNTING: So, in conclusion, I would like to make just three basic points; that when a state accepts a grant, it is entitled to rely upon the statute in effect at the time it accepts the grant to determine its liability and to determine the extent of its liabilities. For the federal agency to go outside the statute denies the state its rights under it.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Cole?

ORAL ARGUMENT OF MICHAEL R. COLE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. COLE: Mr. Chief Justice, and may it please the Court:

In response to a number of questions asked of Ms. Hunting and particularly Justice Stevens' last question, we had been under the assumption in the Third Circuit that we were appealing na order to pay money. I don't think the federal government, the Secretary ever disabused us of that motion. Indeed, as Ms. Hunting points out, both the State of New Jersey and the State of Pennsylvania received letters with the final administrative determination saying you shall please send us

your check and for each day that you delay we will tack on interest at, I think, an average annual rate of about 12%.

It wasn't until this Court through the Solicitor General's brief the Secretary suggested that that was just an initial step. So, I think it is important to start the analysis of the Third Circuit's decision with precisely what that court had before it. It had before it challenges to -- orders from the Secretary that we characterized as orders that state funds be used to pay deficiencies found in order determination. And, it was in that setting that the Third Circuit looked to Title I as it was in place in the years in question. And, for New Jersey, that is really federal fiscal years 1970, 1971, and 1972, to determine --

QUESTION: Mr. Cole, are the letters enclosing the orders and which the letters said we expect you to pay interest, are they in the record?

MR. COLE: I believe they are, Justice. I am quite sure they are.

QUESTION: Because the orders themselves don't say that.

MR. COLE: The orders themselves -- you are quite right -- say their determination is New Jersey should pay.

QUESTION: Should pay so much, yes.

MR. COLE: But, the letters that accompany them -- And I think we may have quoted from the letters in our brief.

The letters accompanying them said, please remit your check and also stated that interest would be assessed.

So, the question before the Third Circuit was did Title I permit the Secretary to require an expenditure of state funds as a result of an order of determination.

QUESTION: Do you think the state -- the federal government could refuse to honor any future grants until the debt was satisfied?

MR. COLE: I think you would strain the language of the statute as it existed in 1978, Chief Justice. The statute allowed the federal government to withhold future grant loans and also to suspend payments until you brought yourself into compliance. Now, I have always construed that to mean that you cured any past failing and that there was a recordkeeping --

QUESTION: Just correct it for the future and not worry about the past?

MR. COLE: That is correct. Our essential argument and that was adopted by the Third Circuit is that this statute, if it allocates any risk of mistake at all by its silence, must allocate that risk of loss by mistake to the federal government, not to the state treasury. And, the Third Circuit found that because there is no unequivocal statement of congressional intent that the state should be underwriting this program in terms of bearing the risk of loss. We are not dealing with a yacht case here and I understand that the facts are not before

you. But, I think the New Jersey case shows you, you know, what type of mistake we are dealing with.

QUESTION: Do you think it would make any difference whether you were dealing with a yacht case or misapplying funds from one program to some other perfectly legitimate program of the state? Do you think legally for the purposes you are here there is any difference?

MR. COLE: Not for the purposes of oral argument. It makes no difference, because our argument says that the state treasury is not exposed. We don't have to address the yacht hypothetical or the governor's mansion hypothetical to make a determination whether individuals may be exposed. But, the state treasury is not exposed under the statute prior to the 1978 amendments. And, we say that because Congress has not given a clear, unequivocal indication that the states were to assume this risk when entering into the program.

QUESTION: Would it be -- In your view, it would require an affirmative, explicit statute to create that and that common law or debtor/creditor standards would not apply, is that it?

MR. COLE: That is correct, Chief Justice, because we are dealing in a grant area and we are dealing with a principle, if not directly on point, at least sufficiently analogous to the principle this Court adopted in the Pennhurst decision, that the conditions -- We are dealing in an area that makes it like a

contract. You have got to set forth your conditions clearly, unequivocally, or the states are entitled to the benefit of any ambiguity there.

I would also point out under common law, the Third Circuit never reached the question of what common law rights, if any, the government had. It merely addressed itself to the question of whether the federal government could administratively make a determination of whether or not you had spent money properly. And, having made that determination, whether it could order you to repay it either directly -- And, I suspect they would make the same determination as to Mr. Geller's proposed variance of offset which says you don't have to pay it directly but you have to pay it indirectly because you have to underwrite the cost of the Title I program.

QUESTION: Mr. Cole?

MR. COLE: Yes, sir.

QUESTION: It strikes me that your analogy to the Pennhurst situation is by no means a complete one. As I recall in Pennhurst, Congress had granted a certain amount of money and then the argument was that because of some things in the legislation the states were expected to put in a great deal more money if they accepted the grant. But, here, all the money we are talking about comes from the federal government. It is just a question of whether the states are expected to spend it in accordance with the terms on which they received it, isn't it?

MR. COLE: You are quite right. That is what I said, you know, Pennhurst is analogous.

QUESTION: Not identical.

MR. COLE: It is not directly on point, because you are talking about imposition of an affirmative obligation. We are talking about the imposition of a risk. But, we submit there should be no distinction between a remedy or an affirmative undertaking in the Pennhurst analysis.

QUESTION: Well, if the focus is on what would the state expect in getting into this thing, don't you think it is far more likely that most people, if they accept a million dollars on certain conditions, that they do a particular thing with that million dollars, would expect to be held do it, then if they accept a million dollars and one of the conditions that they put in another $5 million of their own, but the condition is somewhat vague?

MR. COLE: The answer to your question is I don't think that is clear, Justice, because this allocation of risk to the states, either by way of liability of a private action as the Court addressed in Rosado or in liability in order determination. There is something that doesn't follow as night to day.

QUESTION: But, you say allocation of risk as if this were kind of a joint venture and each -- you participated in the employment of someone who made off with some funds. But, here,

if the government granting to New Jersey, New Jersey misspends the funds, it seems to me the risk would be 100% on New Jersey in a normal situation. It was New Jersey employees who did it.

MR. COLE: If I may, Justice Rehnquist, here is where I think you should understand what is involved in the New Jersey case and why we are talking about it in terms of risk. Title I, its basic policy was to address the needs of the educationally deprived student and because of the relationship with low income and educational privation it targeted -- Title I funds were to be targeted to areas where there was a high concentration of low-income students.

Now, Newark -- We were here in Newark and we were disallowed in Newark precisely because Newark is too poor. What you had in Newark is you had a unique circumstance of an improvished city with a high incidence throughout its history of low-income population and you had the problem of incomplete statistics.

I think everybody recognized that we didn't follow the normal federal approach to determining eligibility. But, even the Secretary recognizes that we shouldn't have followed that approach in the case of Newark because the statistics you needed were simply not available.

So, everybody recognized you had to have an alternative approach and the dispute here is whether the alternative approach for calculation that we used is acceptable. The Secretary found

it was not. The Secretary opted for a more conservative approach than that that had been done by the State of New Jersey on recalculation and by the district in the first instance.

Secondly, what is at dispute here is whether the entire Newark School District should have been declared a Title I district. The areas, the attendance areas that the Secretary is disallowing in this audit, in some of them only one out of every three students on the Secretary's own numbers is a AFDC recipient. I think that is true in five areas --

QUESTION: Do we have to decide that?

MR. COLE: No, you don't, Justice, but what I am pointing out --

QUESTION: I think there is something we do have to decide. Assuming that everything the government says on the facts is correct, that the money was not used properly and according to law, how can I get my tax money back?

MR. COLE: Justice Marshall, our position on that is that the federal government made the choice initially that there should be no recoupment in the sense --

QUESTION: Do you mean the federal government gave New Jersey the money to do with as they pleased?

MR. COLE: Without exposing the New Jersey treasury to risk, yes, that is our position.

QUESTION: That is your view of the pre-1978 matter?

MR. COLE: That is correct, Chief Justice.

QUESTION: So, in your view, must this Court now decide whether you are right about that 1978 amendment and the legal rights of the two parties prior to 1978?

MR. COLE: If the federal government is not pursuing a course of action that would affirmatively impose obligations on the state treasury, the answer is no. But, as I understand the position on offset, they would want the state treasury to make up the difference in the loss of grant funds.

QUESTION: I don't think the federal government is going after the state treasury. I think the federal government is going after its money which the state treasury took.

MR. COLE: With respect, Justice Marshall, that would be true if we had that money. That money has been spent. It has been spent on children. So, in fact, they are going after the state treasury.

I started to say before in common law the Third Circuit never decided what, if any, common law rights the federal government had against the state government. I would point out on that score that all the cases cited in the Solicitor General's brief involve individuals or involve situations where a particular program has a regulatory scheme in effect which imposes that liability. I know of no case where common law rights against state government have been found other than the West Virginia case where it was a non-explained dictum.

QUESTION: Well, we don't need to reach that question

if we were to find that the statutory authority before 1978 authorized some kind of recovery, do we?

MR. COLE: No, you do not, Justice O'Connor.

QUESTION: And, I guess the main thrust of the Court of Appeals' reason for not finding the pre-1978 authority was its view that if it had existed the 1978 legislation would not have been necessary.

MR. COLE: That is correct. They could not find -- I believe it is Section 185 -- would have served any purpose had the authority had existed as the federal government has alleged.

QUESTION: And, perhaps that argument isn't correct either if there is a difference between offset and outright recovery in some other fashion.

MR. COLE: That is true, but from our standpoint, we take the view that the Third Circuit probably concluded that there were no affirmative funding obligations on the state prior to 1978.

Under common law, I would make one last point and of course, we all know that in common law the principle of sovereign immunity extends to state governments as well as the federal government so it is somewhat anomalous to talk about the federal government being in the same position vis a vis the state as a private creditor at common law, wherein common law that private creditor would have had no rights whatsoever against the state government because of sovereign immunity.

Just very briefly in summary we say that the legislation that existed for Title I prior to 1978 did not impose any risk on state treasury. In addition, there were no regulations adopted by the Secretary which assumed that he had this authority or intended to impose it. The first regulations were adopted after 1978. The Secretary's regulations prior to that time with respect to Title I referenced only the withholding and the suspension of funding as remedies for violations of any assurance given.

So, it is a case where the Secretary did not by regulation assert the power. The statute, we say on its face, does not provide for the remedy the Secretary seeks to invoke and for that reason and as a matter of fairness this Court should not find that the state treasury is liable for any mis-expenditures prior to 1978. After 1978 the problem does not exist because Congress has affirmatively provided the authority the Secretary seeks to exercise.

QUESTION: May I ask you just one more question, Mr. Cole?

MR. COLE: Yes, Justice Stevens.

QUESTION: Would you agree that if, as a condition of future grants by the federal government, they said we are not going to give you any more money unless you first repay the amount that was determined to be misspent under this audit, would they have that power?

MR. COLE: Not prior to 1978. I don't believe so, Justice Stevens.

QUESTION: They couldn't even say we will eliminate you from future programs unless you repay?

MR. COLE: I don't think the withholding or suspension -- I think that would be an abuse of that provision. What they could do is the change of state from a grants funding program to a reimbursement program and, therefore, really strictly police its expenditures in the future.

QUESTION: But then could they subtract from the reimbursement under such a program the amount that they found due under this audit?

MR. COLE: Well, the position that we took in our brief is that they have some offset authority.

QUESTION: The answer is yes, they could do that?

MR. COLE: Under that position, yes.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Geller?

MR. GELLER: Just one or two things, Mr. Chief Justice.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. GELLER: This case involves in many ways a very confusing array of statutes and I just want to clarify one thing that Respondent Pennsylvania may have confused in our discussion of the withholding remedy under the pre-1978 statute which is

Section 241j of Title XX. That remedy only applies to current violations of the Act. The Secretary could not have used that remedy for past violations of the Act and it is an extremely drastic remedy, the one that New Jersey or Pennsylvania was suggesting to use, because prior to 1978 all of the funds to a SEA or a LEA and not just an amount that is equal to the amount of past misspent funds would have had to be withheld even if Section 241j were to cover past withholdings.

Now, secondly, Justice Stevens' question, there is no question that there was an order to repay the money. The only thing that was left open was the method of collection. The federal government has been proceeding the way the Federal Claims Collection Act expects it to proceed. In other words, to make an initial request for repayment, but if that is not met with a check for the full amount, then to consider a number of other options as to how to collect the money. And, we haven't reached that point yet in the collection process.

QUESTION: You say there is no question there was an order, but it is a very strangely worded order, Mr. Geller?

MR. GELLER: Well, I think even if your question were correct in assuming that this was a final order in some way, that would simply to to whether the Education Appeal Board --

QUESTION: It is final in the sense of determining the amount due.

MR. GELLER: Yes, but --

QUESTION: There is nothing in there directing payment by anyone to anyone at any particular point of time.

MR. GELLER: I think the follow-up letters make quite clear --

QUESTION: Are they in the record?

MR. GELLER: They are. In fact, one --

QUESTION: And, are they part of the order in your judgment?

MR. GELLER: One of them is appended to --

QUESTION: Are the follow-up letters part of the order in your judgment?

MR. GELLER: I think --

QUESTION: Do we have to look at those to know what the order means?

MR. GELLER: I think to inform one's self of what the Secretary means --

QUESTION: To remove any question about the meaning of the order?

MR. GELLER: Yes. Now, I know -- I can't really resist the temptation, much as I thought I should, to rebut what the Respondent New Jersey has just said about the technicality of the violations here. I would simply refer the Court to page 43a of the Appendix to the Petition for a description of the way that New Jersey computed the amount -- the number of its eligible schools in Newark, New Jersey, including certain things

in the enumerator of a fraction but not in the denominator and as a result having a great extra number of eligible schools in the New Jersey School District.

Now, finally, I would just like to refer the Court to a recent decision which just came to our attention a few days ago. It is a decision of the Sixth Circuit decided on April 5th. It is Commonweath of Kentucky versus Donovan. It is a case involving the CETA program but in many ways it involves the issues presented here. And, the Sixth Circuit, we think quite correctly, rejected a Pennhurst type argument that a state did not have to pay over essentially misspent funds because the particular remedies were not explicitly stated in the statute.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

We will resume arguments at 1:00.

(Whereupon, at 11:56 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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NEW JERSEY AND PENNSYLVANIA # 81-2125

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