OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-2064

TITLE T. H. BELL, SECRETARY OF EDUCATION, Petitioner v. NEW JERSEY

PLACE Washington, D. C.

DATE January 8, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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T. H. BELL, SECRETARY OF EDUCATION, : No. 83-2064

Petitioner :

v. :

NEW JERSEY :

- -x

Washington, D.C.

Tuesday, January 8, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:47 o'clock p.m.

APPEARANCES:

MICHAEL W. McCONNELL, ESQ., Washington, D.C.;
on behalf of Petitioner.

MARY ANN BURGESS, ESQ., Trenton, N.J.;
on behalf of Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. McConnell, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF MICHAEL W. McCONNELL, ESQ.

ON BEHALF OF THE PETITIONER

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

This case, like the last one, arises from an attempt by the Secretary of Education to recover federal Title I funds spent by a state in violation of its grant agreement. The grant agreement principally involved here is one entered into between the State of New Jersey and the federal Office of Education in 1971, whereby New Jersey received some $52 million in federal funds, in return for which it provided assurances that it would spend those funds in accordance with Title I and the implementing regulations.

QUESTION: Was that a formal commitment, Mr. McConnell?

MR. McCONNELL: It was, Justice Brennan, the formal commitment required by statute and by regulations and on file with the Department of Education.

All of the events at issue in this case took place in 1971 and 1972. It was in those years that Respondent had on file with the Office of Education its

grant application. It was in those years that Respondent approved a plan submitted by the Newark Board of Education that was not in compliance with those regulations, and it was in those years that Respondent spent over one million dollars providing Title I services in parts of Newark that were not eligible for Title I projects.

In the years since 1972, federal educational policy has undergone many changes, including specific changes by both the agency and the Congress in the standards for determining which areas are eligible for Title I projects.

Respondents error back in 1971 was a straightforward mathematical mistake. But as it happens, under standards subsequently enacted some, although not all, of the areas that were mistakenly included in the Title I projects would have become eligible had subsequent standards been in effect at the time.

The question before this Court today, therefore, is whether Respondent's compliance with its 1971 grant agreement should be judged in accordance with the standards that were in effect at the time or whether, as the Court of Appeals held, it should be judged according to standards enacted some six years

after the grants were awarded and the moneys were expended.

QUESTION: Mr. McConnell, do you think that there is any inconsistency in the position of the Solicitor General in this case from the position in the Kentucky case?

MR. McCONNELL: No, Your Honor. In both cases we are seeking to enforce the requirements that were in effect at the time. We believe in the Kentucky case that there was no ambiguity, but in any event the only question there was whether the interpretation of the requirements might have left room for doubt. There is no suggestion in the Kentucky case by the Court of Appeals that the standards were actually changed, that there was any kind of a retroactive application of standards.

I think it would be helpful at the outset to clarify several questions that are not before the Court in this case. First, the validity of the regulations violated by Respondent is not at issue. In the Court of Appeals below, Respondent contended that these regulations were inconsistent with the purpose of Title I and thus that they were invalid. Had the Court of Appeals accepted that theory, the result would have been to enter a judgment that Respondent owes the Federal

Government no money.

The Court of Appeals did not accept that argument and instead entered a judgment that was inconsistent with it, namely that Respondent owes the Federal Government at least $249,000. Respondent did not take a cross-petition for certiorari from that decision and accordingly is not free to argue in this Court that those regulations were invalid, since that would result in a judgment granting it greater relief than it was awarded by the court below.

QUESTION: Mr. McConnell, there were other arguments raised below in defense of the state's position, were there not?

MR. McCONNELL: Yes, Your Honor.

QUESTION: And I suppose even if you were correct that the Court of Appeals here committed error in applying a subsequent Congressional interpretation, the case would once again have to be remanded, would it, for those other issues?

MR. McCONNELL: Well, Your Honor, I agree that the case will have to be remanded, but only for those issues that Respondent has preserved. And for any argument that Respondent made which would result in relief which is greater than it won the first time, it was required to file a cross-petition; any argument now

would be foreclosed.

I was going to point out another prominent example of that, which is that Respondent also contended in the court below that it was in substantial compliance with the regulations at the time, relying upon the Sixth Circuit's Kentucky decision.

QUESTION: And is that open on remand?

MR. McCONNELL: No, Your Honor, because again, as Respondent itself concedes in its brief, the result of such a holding would be that it would be absolved from all liability. The Court of Appeals did not accept that. The judgment of the Court of Appeals was inconsistent with that, and in light of the fact that there was no cross-petition that issue is now foreclosed.

Accordingly, in the posture of the case today this Court may assume that Respondent in fact violated regulations that were valid and enforceable at the time.

QUESTION: Is it not true that in this case, unlike the Kentucky case, the violation was that they spent the money in the wrong districts? There's no doubt about they were spent for the correct purposes?

MR. McCONNELL: That's -- well, that's correct. They spent the money in the wrong attendance

area.

QUESTION: And the wrong attendance areas in which they did spend the money would qualify under today's standard for the money?

MR. McCONNELL: Some of those districts would, Your Honor. But let me point out that in a sense the problems are not that different, because the question is still which children receive the benefits of Title I. And Congress intended that the children in the areas with the highest concentrations of poverty would receive those services.

QUESTION: Until 1978?

MR. McCONNELL: That's still the standard. There is now an exception for very poor districts, where the levels of poverty are in excess of 25 percent, that it would not be confined just to those areas that are above average, but in fact those areas above 25 percent.

But the fact that Congress has made an exception to the general principle does not at all affect the fact that the general principle of the statute is to concentrate the expenditures of Title I funds in areas that are the neediest.

QUESTION: Let me just ask one further question. What will happen with this money if you're

successful in recouping it? Will it go back to New Jersey or will you keep it?

MR. McCONNELL: The statute provides that the Secretary may in his discretion grant back 75 percent of the recovery to New Jersey where it would be able to demonstrate that those funds could be used essentially for the purposes for which they should have been used the first time.

QUESTION: Take an attendance area that has more than 25 percent of low income families, but less than the average throughout the larger area. Would they get the money back?

MR. McCONNELL: Your Honor --

QUESTION: They'd be eligible to, would they not?

MR. McCONNELL: I do not know whether in the grantback authority whether the standards today would apply or whether the standards in effect at the time would apply. I think that's a very different question.

I suspect, Your Honor, but this is only my speculation, that the requirement would be that the money be spent in the neediest areas of Newark. Now, whether those would be the same areas geographically that were the neediest back in 1971 or whether, due to demographic shifts or regulatory changes, either one,

they might physically be different areas, I don't know.

QUESTION: They might possibly be the same areas?

MR. McCONNELL: It might very -- I suspect that any area that was --

QUESTION: Well, wouldn't that be spinning wheels a little?

MR. McCONNELL: No, Your Honor. This would be additional funds that were not spent in those areas the first time, that would be required to be spent this time.

QUESTION: What this is is the money went to the wrong poor people.

MR. McCONNELL: That's correct, Your Honor. And the remedy would be to require New Jersey to spend -- well, either to recoup, but given the grantback authority that New Jersey would have to spend additional money this time for the poor people for whom the services were required.

Let me note that no children are going to be worse off as a result of this proceeding. On the contrary, it's very possible, given the grantback authority, that the children for whom the statute is intended will receive additional moneys, namely 75 percent of the recovery.

QUESTION: Not these children. These children are out of school, aren't they? Didn't you say it was in the seventies?

MR. McCONNELL: Yes, I assume that they have graduated, but their successors in interest, shall we say.

QUESTION: Well, if they haven't graduated they won't deserve the money.

MR. McCONNELL: Presumably they are beyond our reach. But there are poor children in Newark today who may very well be the beneficiaries of this decision.

Your Honors, there are three reasons why it makes sense when judging an audit recovery of a grant program to apply the standards that were in effect at the time. I'll touch upon the first two briefly and then would like to spend most of my time on the third.

The first is that Congress has definitively resolved this issue. For over a century it has been the law that when a statute is repealed any liability incurred under such a statute shall not be released or extinguished, and the statute shall remain in force for the purpose of sustaining any proper action for enforcing such liability.

This provision, which is now codified at 1 U.S.C. 109, has been applied to all manners of

liability, including taxes, fines, criminal penalties. It's been applied to amendments as well as repeals, and it's applied to all liabilities incurred under the statute, which this Court has held includes liabilities incurred under a regulation which was authorized by the statute.

Thus, we submit that this savings clause applies directly to the decision in this case and that it is dispositive.

Second, the 1978 Act upon which Respondent relies was by its terms prospective only. It had an effective date which applied by its terms to its repeal as well as to its new provision, and that effective date was October 1st, 1978. It also provided that its standards would apply to grants in the years 1978 through '83.

Moreover, the legislative history of the specific change at issue here spoke in prospective terms. It referred to the manner in which school districts are to distribute Title I funds.

Finally, three times since 1978, in 1981 and twice in 1984, Congress has considered legislation that would have the effect of applying the 1978 standards to the pre-1978 audits. Each time Congress has rejected this, but most importantly, each time during the debates

over the provisions no member of Congress ever suggested that this result might have occurred under the force of the 1978 Act itself. Thus, it's quite clear that Congress both intended and understood the 1978 Act tc be prospective only.

Finally and perhaps most importantly, inherent in the nature of a grant agreement is the understanding that it must be enfcrced in accordance with the terms in effect at the time. And this is true whether you lock at it from the point of view of the grantee, whether you look at it from the point of view of Congress, or cf the agency which is entrusted with the responsibility of enfcrcing the grant agreement.

From the point of view of the grantee, it's very important that the obligations be fixed and foreseeable in advance, because this is the only way grantees can act with any kind of assurance that they will administer the program and not be hit with liability for something unforeseeable in the future. In some senses, one can say that this is a principle by analogy to the Pennhurst decision.

The Court of Appeals' holding in this case thus is far more likely to injure than to help most grantees. As Justice White intimated in his concurring opinion in this case the last time it was in this Court,

New Jersey would have a legitimate complaint if it were the Federal Government that was trying to enforce new provisions of law instead of the other way around.

And for evidence that that was in fact the shared understanding of the Federal Government and the grantee, we need look no further than the conduct by Respondent in this very litigation, because all of the changes on which they rely were promulgated by the agency in '76 and then enacted by Congress in 1978. It was not until the Respondent's brief in this Court in 1983 that it first occurred to Respondent to suggest that anything other than the standards in effect at the time might apply to this case.

Respondent in its brief now castigates Secretary Hufstedler for having upheld the audit determination in this case, while ignoring, as Respondent puts it, the 1976 regulations and the 1978 regulations. But it's far more difficult to understand, given the Respondent's position now, why Respondent during that period of litigation before Secretary Hufstedler never cited '76 regulations or the '78 Act, certainly never suggested that they should apply to judging their compliance with the 1971 grant agreement.

This perspective is also shared by Congress, because under Congress' spending power each Congress has

the right to determine how the federal tax dollars are going to be spent. This applies not just to how to divide federal funds among the various projects and activities that are in the federal budget or might be, but also to how those funds are to be spent.

The grant conditions are simply the strings attached by a Congress to the particular grants that it is appropriating money for. Subsequent Congresses, of course, have the power to alter the conditions on the grants. Subsequent Congresses can even relieve grantees of the consequences of having violated conditions that had been imposed in the past.

But it makes no sense to presume that when a Congress alters the conditions on the grants that it is appropriating money for that it intends in any sense to alter the conditions that a previous Congress had attached to the funds that it was appropriating money for. Policies change --

QUESTION: Could Congress do so affirmatively?

MR. McCONNELL: Your Honor, what Congress can do is relieve a grantee of the obligation, of all of the consequences today of having violated its obligation in the past. I don't understand metaphysically how it would be able to remake the history of whether the

grantee had violated the grant agreement that it was operating under at the time.

As a practical matter, though, yes, Congress could do that. And indeed, among those changes that I was referring to in 1981 and 1984 that Congress considered and rejected would have been provisions that would have done just that. But those provisions were not enacted.

Policies change --

QUESTION: Is this a fair statement of your position? I want to be sure. The money was spent in years past in a district which would now be an appropriate district to spend the money. But you're saying that Congress in effect said, we want you to recover it back, even though it would now be appropriate, because you should have given it to even needier people, a district that was even more in need of the money than the one you actually gave it to, which would now qualify?

MR. McCONNELL: Well, the point is that they should have spent it in those areas that qualified under the standards at the time.

QUESTION: But the result of this position is that --

MR. McCONNELL: And it happens that --

QUESTION: -- it can't be spent in either. That's what troubles me.

MR. McCONNELL: Oh, oh, that's not at all true, Justice Stevens. The money has already been spent.

QUESTION: Well, but it comes back. New Jersey has to finance it.

MR. McCONNELL: The money does not come back. They're not going to be able to de-educate the children that they educated.

QUESTION: No, no, no. But New Jersey has to finance it itself, is what you're saying.

MR. McCONNELL: Which will lead, in a sense, not to -- it's not that neither will be served, but that both will be served, because New Jersey serves some non-Title I eligible children to an extent that it is not required to do under federal law. It did that back in 1971 and '2.

Today if the money is recovered and then if there's the grantback, it will serve the children in the areas that are actually eligible.

QUESTION: But that's only a percentage of it.

MR. McCONNELL: I beg your pardon?

QUESTION: You said only 75 percent, didn't

you?

MR. McCONNELL: That's correct.

QUESTION: And so another 25 percent will be put on armaments?

MR. McCONNELL: It'll be covered into the Treasury, Your Honor. Apparently Congress intended that there be some incentive left in the program for the state to comply with the grant agreements, and that's why there's not a 100 percent grantback authority.

Congress has a continuing interest in ensuring the grantees comply with lawful restrictions, whatever they happen to be at the time and regardless of whether policies may change later that lead subsequent Congresses to make a different substantive decision.

This same perspective -- that is, the contemporaneous perspective -- is also important to the agency which is entrusted with enforcement of these grant agreements. It is no exaggeration to say that adoption of the Court of Appeals' holding would lead to chaos.

Auditors have trouble enough as it is, given all of the categorical and cross-cutting requirements that they are asked to enforce, without also being required to measure compliance under standards that were not applied by the grantee at the time. And those who

review audit determinations should be able to review those determinations on the basis of the same standards that the auditors applied.

QUESTION: At any given time, Mr. McConnell, in round figures how many programs are extant out of the Department? It must run into thousands, must it not?

MR. McCONNELL: Do you mean Title I programs or do you mean all of the programs?

QUESTION: Just Title -- all of the variety of Title I programs.

MR. McCONNELL: There are Title I programs in all 50 states, and the Federal Government -- it would be impossible for the Federal Government directly to enforce requirements in every school district that had a Title I program because, although I could be wrong, to my knowledge every state participates and every part of every state participates, and I believe that there are no districts that are not eligible for at least a small Title I project.

So the enforcement scheme of the statute provides for a relationship between the enforcing agency, the Department of Education, and the states, rather than directly between the Federal Government and the local districts. And it is for that reason that the grant agreement requires the state to provide an

assurance that the local school districts will also comply.

And the local applications go to the state, they do not go to the Federal Government. Newark's 1971 application is in the joint appendix. It's the last item in the application. That went to the state officials. It did not go to Washington. The state officials simply provide an assurance that they are going to enforce and ensure that all the standards are carried out.

This is really quite important for the point, because it would be meaningless to say to the states that they are required to enforce the requirements of Title I as they may subsequently be amended, because the states have no way of knowing what amendments may be made at some point in the future.

The only sense in which a state can be said to enforce the requirements of the law are the requirements of the law as it exists at the time. Now, as it happens the State of New Jersey did not make any inquiries about the errors in the Newark application. It was thus derelict in its responsibilities.

The fact that by happenstance some of those mistakes later would for other reasons become non-mistakes is quite irrelevant to the point that New

Jersey failed in a responsibility that is very important under the statutory enforcement scheme, to ensure that its local districts in fact were in compliance with the law.

To apply the Court of Appeals' standard would require that there be re-audits of all pending cases every time there's a change in educational policy, and it's not at all clear that those re-audits could be conducted because --

QUESTION: Mr. McConnell, you don't have another state like New Jersey that presents the same kind of problem that this case does, do you, where you have seven, for example, seven districts that are ineligible, they have over 30 percent poverty within the district, but the area-wide average was 33 percent, so they were ineligible?

MR. McCONNELL: Justice Stevens --

QUESTION: That sort of problem isn't typical?

MR. McCONNELL: -- the problem here was that the mathematical formula was misapplied.

QUESTION: Right. Well, it happened in seven districts, though.

MR. McCONNELL: It so happened that -- you stated the underlying economic context correctly, but

the problem was that they simply did their mathematics wrong. And I suspect that that is, although not common, at least I would suspect that that's as likely to occur in any other state as it is in New Jersey.

QUESTION: Well, it could only occur in states where your average low income percentage is over 25 percent.

MR. McCONNELL: It's only those states where the 1978 change would make any difference.

QUESTION: Right, correct. I just wonder if there are any other states.

MR. McCONNELL: I do not know. Certainly there are other cities with low income percentages above 25 percent, and if there were errors of any sort in their designation of --

QUESTION: They have to be both --

MR. McCONNELL: -- their attendance areas --

QUESTION: -- above 25 percent and below the average for a larger area, which is a fairly unique kind of situation.

MR. McCONNELL: Well, there simply seems -- all that's really required is that there have been an error in a city over 25 percent, and it's not at all unlikely in that case that the change, the drop in the threshold, might pick up a few of the mistakenly

included areas, regardless of what might have been the source of the error.

The results of the Court of Appeals' opinion, in addition to creating extreme difficulties for audits, requirements for re-audits, difficulties in reviewing audits, would also create incentives for delay in the proceedings, because a grantee that was found in violation of its agreement would have every reason to protract the administrative and judicial proceedings in the hope that Congress might subsequently change the standaress, would in addition have a fairness problem, because it would result in treating grantees differently.

New York and New Jersey might very well make the same mistake, but if New York's audit had been finally determined before 1978 it would be decided on the basis of one standards and New Jersey on another. Surely the consequence of this would be cries to Congress for redress, and it would be necessary to set up some sort of a proceeding to reopen past cases to make sure that all grantees are equally granted the benefit of subsequent changes in the law. Thus, from the point of view of fairness and finality, the Court of Appeals' decision would be a disaster.

Perhaps most importantly, the Court of

Appeals' decision would undermine respect for the very idea of the rules, because the only standards that the grantees have to comply with are those that are in effect at the time. To say that those standards fluctuate is to say that the grantees are not under a strict obligation to comply with the agreements that they have signed.

Unless there are further questions, I'll reserve my remaining time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Ms. Burgess.

ORAL ARGUMENT OF MARY ANN BURGESS, ESQ.,

ON BEHALF OF RESPONDENT

MS. BURGESS: Thank you, Mr. Chief Justice, and may it please the Court:

This is indeed an extraordinary case. From the Solicitor General's arguments one would believe that it was New Jersey who had violated the basic objectives of the Title I program and now seeks the benefit of a later, more lenient standard in order to avoid the consequences of that violation. Such is not the case before this Court.

It is not Newark or the State of New Jersey which did not conduct its Title I program in accordance with the basic objectives of that important

legislation. Rather, it was the Secretary whose inflexible, restrictive implementation of its targeting regulation -- it was that application which ran counter to the basic objectives of the program. It was not New Jersey or Newark who did not comport with its agreement to conduct a Title I program in accordance with the basic objectives of Congress, but rather the Secretary who did not --

QUESTION: Are you arguing now that New Jersey, Newark and New Jersey did not violate the regulations in effect at the time, or the statute?

MS. BURGESS: It has always been our contention in this case that New Jersey and the Newark program have been in compliance with the targeting regulations --

QUESTION: That were then in effect?

MS. BURGESS: -- if those targeting regulations had been applied in a manner consistent with the objectives of the Congress.

QUESTION: Well, is that in issue here before us?

MS. BURGESS: It was an issue which was raised below and I believe it still is an issue in this case.

QUESTION: You think it's still an issue. You're arguing this as a Respondent. It isn't a

question that the United States raised in its petition?

MS. BURGESS: The question was whether or not the Title I program was consistent with the Congressional objectives of that important legislation.

QUESTION: Well, the question the United States raised is whether the later legislation should be -- furnishes the rule by which a violation should be decided. That's the question, whether the law that was in effect in '70 and '72 should govern or the law that was in effect in later years. That's the question that's pending, that the United States raises.

Now, are you saying that even if the United States is right the judgment should be affirmed on the ground that you never did violate the earlier law?

MS. BURGESS: It's our position that the Title I program was operated in the Newark district in a manner that was consistent with the program as originally intended by Congress, and that it was the Secretary's regulations --

QUESTION: So your answer is yes, your answer is yes?

MS. BURGESS: -- that was inconsistent with that.

QUESTION: Your answer is yes, that you never did violate any law?

MS. BURGESS: That was our position in the Third Circuit, that our program was consistent. Those were the initial arguments that we made to the Third Circuit.

QUESTION: Well, is that what you're arguing now, too?

MS. BURGESS: In the Third Circuit on remand, we asked the Third Circuit, in supplementing our arguments that we had raised initially, to judge the eligibility of those attendance areas by the later statutory enactment, which included a 25 percent standard.

QUESTION: Now, isn't that the only issue that's before us now?

MS. BURGESS: I believe it is the issue before this Court. But I think implicated in that is the Third Circuit's finding, very specific finding, that the regulations which they determined should not be applied, the restrictive targeting regulations, that those regulations frustrated the basic objectives of Title I, that those regulations worked inequities in high poverty districts and they thwarted the intent of Title I.

And it was in the context of those specific findings that the Third Circuit determined to apply the corrective 25 percent eligibility standard. And I think

that's the analysis that the Third Circuit followed in reaching the determination to apply the later standard.

So even though there's not a cross-petition from the Third Circuit's not reaching our challenge to the regulation vel non -- they did not invalidate the regulation, I must concede that to this Court, but they found that that regulation was inconsistent and used that as an issue or a finding to support their determination to apply the later corrective standard.

QUESTION: If that's what the Court of Appeals really did, it sounds like they did invalidate the regulation. They said the regulation is inconsistent with the statute.

MS. BURGESS: They found that it was, Your Honor. They found it was inconsistent, but they did not invalidate it because had they invalidated it they would have relieved New Jersey of responsibility. What they did was they made a choice.

They were faced with a very difficult choice of evaluating the eligibility of attendance areas either by the regulation in place at the time of the program or by the later standard. It was that choice that was before the court. So they used the later standard to measure the eligibility of the districts. They didn't say that -- they did not address directly the validity

of the regulation, but they chose not to apply it.

QUESTION: Do you agree that the only issue before us is whether the law in effect in '70 and '71, or '71 and '72, whenever it was, whether that is the law that governs your obligations, rather than a later law? Is that the only issue we have?

MS. BURGESS: I think the issue before the Court, Justice White, is whether the original intent of that law which was in effect at the time of the grant arrangement was complied with by the Newark school district.

QUESTION: That isn't the question that the United States puts before us. But you're entitled to argue, I suppose, as a Respondent some other ground for affirming.

MS. BURGESS: What we argue is that the '78 standard, the 25 percent eligibility standard, corrected an inequity in the Department's application of the original very broad standard of eligility which was included in the Title I legislation.

QUESTION: That sounds like a retroactive argument you're making now.

MS. BURGESS: Well, that is the choice that the Third Circuit based its decision. It chose to apply the later corrective standard, finding that the earlier

administrative regulation --

QUESTION: Doesn't that bring us back to what Justice White just suggested, that the issue here is whether the 1970 status should be applied or the 1978?

MS. BURGESS: In 1971 the statutory standard very simply stated that Title I funds should be used to provide projects in attendance areas with high concentrations of children from low income families. Those standards, we suggest, were met. The regulation at that time had no absolute threshold for eligibility of an attendance area.

Eligibility or targeting is really a preliminary step in the Title I process. You target or identify a population of children who should be considered for participation in the Title I program, and then they're tested and determined whether they are educationally in need of specialized programs. That --

QUESTION: Counsel, could I ask, the Third Circuit applied the '78 standard, didn't it?

MS. BURGESS: That's right.

QUESTION: What standard was in effect when the Third Circuit made its decision, that one?

MS. BURGESS: The Third Circuit in my understanding or what I would suggest to this Court, the Third Circuit applied the '78 standard, holding the

Secretary to that specific corrective standard which rectified or reformed the administrative regulations.

QUESTION: I know, but my question is what standard was in effect when the Third Circuit decision was rendered.

MS. BURGESS: The Third Circuit's decision was rendered December 27, 1983. It is my understanding that a modified 25 percent standard was then in effect, in the sense --

QUESTION: Well, why then on your theory wasn't the Third Circuit applying the modified '78 standard?

MS. BURGESS: I believe the Third Circuit could have applied that, but it was not briefed at that time.

QUESTION: It seems to me --

MS. BURGESS: The virtue of the --

QUESTION: -- that your argument is not supported by the Third Circuit decision.

MS. BURGESS: The Third Circuit decision I think did not establish any broad rule of retroactive application to preexisting grants. I think the Third Circuit looked very closely at Newark's unique situation and the legislative history surrounding targeting, the targeting provision of Title I. And understanding that

Congress never intended by that targeting regulation to deprive children who were living in areas of high incidence of poverty, as high as 30 percent --

QUESTION: Ms. Burgess, we're just talking, I take it, about what the Third Circuit decided. Judge Adams' opinion is five pages long. I mean, it isn't 40 pages long or 500 pages long.

The Court of Appeals did decide that the 1978 amendments, rather than the earlier legislation, would govern this case, didn't it?

MS. BURGESS: That's right, Justice Rehnquist.

QUESTION: And do you also say that it declared a Secretary's regulation invalid?

MS. BURGESS: No, Your Honor, I do not. I say that they specifically found that that regulation worked inequities in high poverty districts and that it frustrated the intent of Title I, but it did not invalidate the regulation.

If it had invalidated it, there would have been no responsibility on New Jersey's behalf to repay any moneys.

QUESTION: Is that quite correct? May I interrupt you? Didn't -- I didn't understand the Court of Appeals itself to say the earlier regulations

thwarted the program.

QUESTION: I didn't either.

QUESTION: I thought it said that Congress in 1978 determined that the Secretary's earlier regulations had thwarted the basic program, which is quite a different thing. I think it said so in so many words.

MS. BURGESS: That's what it said, sir.

QUESTION: Did the court say the 1978 amendments were designed to correct regulations that frustrated the basic objectives of the Title I program? I guess that's the language.

MS. BURGESS: That was the language of the court.

QUESTION: But what it did was to simply apply the '78 amendments retroactively. Now, suppose we decide that was wrong as a matter of law, that it isn't supported by the legislative history or the language of the amendments. Then what is open, do you think, on remand?

MS. BURGESS: I think on remand the question which the court below did not reach, the validity vel non of the regulation, could be addressed, as well as the two other arguments that New Jersey advanced: one, that New Jersey had in fact complied with the regulation in effect at the time, and in support of that we

submitted calculations which show that a number of the districts were in compliance, a number of the attendance areas were in compliance.

And secondly, which I think is the stronger argument, that at that point in time New Jersey should have qualified for district-wide designation as a Title I area. I think the legislative --

QUESTION: Now, you disagree with the argument made by Mr. McConnell that the state would be somehow limited in what's open to it on remand?

MS. BURGESS: Yes, Justice O'Connor, because I think the Third Circuit simply did not reach our alternate argument --

QUESTION: Well, why isn't the --

MS. BURGESS: -- and did not rule adversely to us on that.

QUESTION: Why isn't the validity of the old regulations an issue that you could argue here as the Respondent?

MS. BURGESS: I think --

QUESTION: That's because that would change the judgment, I suppose, below that you got, or not?

MS. BURGESS: I think -- I do believe that the fact that the regulation was out of harmony with the statute is an issue before this Court, because it was an

element, a very important element, in the Third Circuit's decision.

QUESTION: So and that means validity. That means validity, I suppose?

MS. BURGESS: I think its inconsistency, certainly, was found.

QUESTION: Well, it's pretty hard to sustain that a regulation --

MS. BURGESS: That it's inconsistent.

QUESTION: -- that it's inconsistent with the statute, isn't it? So are you submitting that, that the regulation is inconsistent -- I mean, is invalid, as an alternate -- as a ground for affirmance?

MS. BURGESS: We did not argue that, Justice White.

QUESTION: All right. All right.

MS. BURGESS: We pointed out that it was raised below, and that I think it was very important in the Third Circuit's decision not to apply that regulation to judge the eligibility of these districts.

I think it's very important to understand what wasn't involved for the Court as well. As the Secretary has conceded, Newark for that year received the proper amount of Title I funds. There is no question that there was any inflation or any effort to obtain more

funds.

More importantly, those moneys were spent on eligible children. All the children who benefited by the program had been properly tested and were eligible. And there's no question that children in some of the higher areas of poverty received adequate programs. There was no diversion away from those children. All the children eligible in Newark for Title I programs received them.

They also received programs that were adequate, that were of sufficient scope and quality to be meaningful supplemental programs.

So those were not issues. I think the only issue is this very limited one of whether a district, an attendance area in Newark, which had 33.5 percent should have received these moneys, when that attendance area, had it been in almost any other district in the United States, would have been eligible under the targeting regulations. And I think that was the inequity that the court below saw, to deprive those children of needed programs --

QUESTION: Well, what the court was saying was that Congress had passed an inequitable statute, then.

MS. BURGESS: I don't think so, Mr. Chief Justice. I think the statute was equitable and had the

valid objective of targeting money to certain areas in high need. But the way it was construed was not in harmony with that objective.

From the very earliest days of Title I, the legislative history shows that Congress recognized that districts of high poverty, which are most often urban districts, large urban districts, had to be treated with flexibility, so that the intent of the Title I program could be realized.

And I think it was a history of criticism of the Secretary, of not having the flexibility. In the early reports they talk about districts with 30 to 40 percent levels of poverty, that the entire district could be a target population for Title I programs.

And in Newark this was particularly true because there was such a high mobility rate among the districts that to say an attendance area over here with 33 percent wouldn't qualify, one over here with 50 percent would, was almost meaningless because we had shifting populations. A child in one attendance area could be in another one another. So there was that kind of blurring of attendance lines, which made the Secretary's regulation much more inequitable in a district such as Newark.

New Jersey would submit that the decision of

the Third Circuit was correct and should be affirmed, because it basically furthered the fundamental purposes of the Title I program, while basically adjusting the equities between the parties to this matter.

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

REBUTTAL ARGUMENT OF

MICHAEL W. McCONNELL, ESQ.,

ON BEHALF OF PETITONER

MR. McCONNELL: Just three quick points, Mr. Chief Justice.

First of all, I would like to point out that the Court of Appeals did not just fail to reach the arguments presented by Respondents below, but entered a judgment which was inconsistent with those arguments. The Court of Appeals did hold that New Jersey is liable for at least $249,000. That is an implied holding rejecting Respondent's arguments that would have resulted in no liability at all.

Second, I would like to just correct a small inaccuracy when Respondent suggests that the children who were served in this case were eligible. They were not eligible for Title I services. There are two standards for eligibility in the statute. The first is that they live in an eligible area. The second is that

they be educationally deprived. They were educaticnally deprived, but they did not live in eligible areas and thus were not eligible for Title I services.

It also does not follow that there was nc diversion of funds from actually eligible areas. It may be, althcugh there was no finding to that effect, that the children in the eligible areas received adequate services under the statute. But there's also no doubt that they received something over one million dollars less in services than they were entitled to under the statute.

Finally, just one comment on the thrust of Respondent's position. It seems to be that a state is entitled to disregard regulations that are valid and enforceable on its own opinion that those regulations are inconsistent with the statute. But that isn't the way the legal system works.

QUESTION: Well, did the Court of Appeals sustain the regulations, or did it say?

MR. McCONNELL: By entering a judgment that Respondent owes at least $249,000, Your Honor, I would suggest that the Court of Appeals sustained the regulations, at least insofar as they were not inccnsistent with the 1978 Act.

QUESTION: Even though it said that there was

some inconsistency?

MR. McCONNELL: That's correct, Your Honor. Let me point out --

QUESTION: Well, would there be anything open on remand with respect to the validity of the earlier regulations?

MR. McCONNELL: I do not think so, Your Honor.

Let me just observe that whenever Congress changes the terms of a grant program, it usually does so because it thinks that the change will better effectuate the purposes of the statute. Clearly, the '78 Act in Congress' view would better effectuate its purposes. We don't dispute that.

But if that were the standard, then every change in a grant statute or virtually every change would be applied retroactively, and we don't believe that that is the law.

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

(Whereupon, at 2:33 p.m., argument in the above-entitled matter was submitted.)

* * *

CERTIFICATION

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

#83-2064 - T. H. BELL, SECRETARY OF EDUCATION, Petitioner v. NEW JERSEY

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)