THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

GEORGIA DEPARTMENT OF EDUCATION

Respondent.

Docket No. 12-35-R
Recovery of Funds
Proceeding

DECISION OF THE SECRETARY

The Georgia Department of Education (GDE) has appealed a January 25, 2016, Decision of Chief Administrative Law Judge (CALJ) Rod Dixon. In the Decision, the CALJ considered the issue of whether, through an equitable offset, GDE could avoid a liability of $2,072,888 assessed for GDE's violating the terms of the 21st Century Community Learning Centers (21st CCLC) program.[1]

The CALJ made two rulings in the Decision that are relevant in this case. First, the CALJ ruled that the doctrine of equitable offset was extinguished by act of Congress when Congress amended the General Education Procedures Act (GEPA) in 1988, thereby rendering an equitable offset unavailable to GDE in this case.[2] Second, following a brief analysis, the CALJ held that GDE would not qualify for an equitable offset even if that remedy was available.[3] GDE appealed.

While on appeal before me, a third issue arose. GDE filed a motion to supplement the record asserting that its entire liability was extinguished by the statute of limitations based on the 3rd Circuit's dismissal order in *Pennsylvania Dep't of Educ. v. Secretary U.S. Dep't of Educ. (Pennsylvania)*.[4] The Department's Office of Elementary and Secondary Education (OESE) opposed that motion.

In the following analysis, I address all three issues. First, I reject GDE's argument that the statute of limitations prevents assessing the liability at issue in the appealed decision. Second, I reverse the CALJ's holding that the doctrine of equitable offset was extinguished by Congress and is not available here. Finally, I provide a complete analysis of GDE's case, concluding that an equitable offset is not appropriate here.

---

[1] Decision, p. 1.
[2] *Id.*, p. 6.
[3] *Id.*, p. 4.
[4] *Pa. Dep't of Educ. v. U.S. Dep't of Educ.*, Dkt. No. 15-1420 (3rd Cir. 2016).

I. Background

The 21st CCLC grant program "supports the creation of community learning centers that provide academic enrichment opportunities during non-school hours for children, particularly students who attend high-poverty and low-performing schools."[5] Under the program, state educational agencies (SEAs) receive formula grants from the U.S. Department of Education. SEAs then run statewide competitions to make subgrants to eligible entities. In fiscal year 2007, GDE held a competition to award $10,650,962 to subgrantees under the terms of the program.[6] The Georgia Department of Audits and Accounts conducted an audit of these grants for the period from July 1, 2006 through June 30, 2007.[7]

The auditors "uncovered evidence of a complex fraud scheme involving several GDE employees" as well as members of an independent peer review panel and community-based organizations.[8] Among other things, the auditors found that the Grant Program Consultant in charge of the award process overrode GDE's internal controls to exclude 23 grant proposals from consideration.[9] The auditors also found that the required grant *competition* was converted to a grant *allocation* when GDE ignored the peer review panel's scores for potential subgrantees and instead awarded grants to all 30 remaining eligible grant proposals.[10] This departure was "materially non-compliant with applicable Federal laws and regulations."[11]

Based on these findings, the auditors questioned the amount of money GDE paid the panel reviewers and recommended that the Department consider whether these charges should be refunded to the federal government.[12] GDE concurred with the findings and reorganized in April 2007 to move the 21st CCLC program to a new division.[13] The new division has implemented a revised operations manual for the program and revised applications for future subgrantees.[14]

OESE sustained the auditors' findings in a Program Determination Letter (PDL). For its part, OESE concluded that "the real harm to the Federal interest is . . . that GDE failed to follow its own procedures, which resulted in 17 entities receiving funding for which they did not qualify . . . . $5,668,335 – is the harm to the Federal interest."[15] Therefore, according to OESE, GDE was liable for $5,668,335 "because GDE failed to maintain accountability for the use of funds."[16] GDE appealed the PDL. The parties have since stipulated that a portion of GDE's

---

[5] http://www2.ed.gov/programs/21stcclc/index.html.
[6] PDL, p. 1.
[7] *Id.*, cover letter. The Georgia Department of Audits and Accounts provided a final audit report to OESE on April 15, 2008. GDE Brief dated Mar. 21, 2014, Ex. A-1, p. 1.
[8] PDL, p. 1.
[9] *Id.*
[10] *Id.*
[11] *Id.*, p. 2.
[12] *Id.*
[13] *Id.*, p. 3.
[14] *Id.*
[15] *Id.*, p. 5. OESE determined that 16 entities receiving funds did not qualify because the independent peer review panel did not give them high enough scores, and GDE awarded funds to a 17th entity beyond its qualification. *See id.*, Ex. A.
[16] *Id.*, p. 6 (citing 20 U.S.C. § 1234(b)(a)(2)).

liability is barred from recovery by the statute of limitations, setting GDE's remaining liability at $2,072,888.22.[17]

On appeal before the CALJ, GDE did not dispute that violations occurred.[18] Instead, it contested the severity of the violations and primarily argued that its remaining liability should be extinguished by an equitable offset.[19] OESE argued that GDE did not qualify for an equitable offset. Ultimately, the CALJ held that an equitable offset was not an available remedy, but that even if it was, GDE would not qualify for one.

GDE appealed the CALJ's Decision.

II. Application of the Statute of Limitations

Before I consider the merits of GDE's appeal, I must address GDE's motion asserting that its entire liability is barred from recovery by the applicable statute of limitations. GDE raised this statute of limitations argument in a motion filed in the appeal before the Secretary, dated March 18, 2016. The statute of limitations that applies to this case is at 20 U.S.C. § 1234a(k). Under that rule, no liability attaches to funds erroneously "expended . . . more than 5 years before the recipient received written notice of a preliminary departmental decision."[20]

The relevant ruling by the Department on this statute of limitations is in *Appeal of the State of Louisiana*, decided August 12, 1988.[21] A panel of deciding officers of the Education Appeal Board held as follows:

> The date of "expenditure" is the date of the obligation of the funds. The case herein involves a subgrant by a State; in such a case the date of expenditure or obligation is the date of expenditure or obligation of funds by the LEA or other subgrantee of the State. The "expenditure," for the statute of limitations purposes, does not occur when the State receives the money from ED; nor does it occur when the State authorizes the LEA or other subgrantee to expend the funds.[22]

The panel in *Louisiana* cited *Appeal of the State of Michigan*,[23] a decision from 1987 which stated that "ED and the EAB have consistently held that 'expended' as used in the Statute means 'obligated.'"

In this case, the parties previously agreed that the statute of limitations ran back five years from May 8, 2012 (the date of the PDL) to May 8, 2007. Subsequently, the Court of Appeals for the Third Circuit issued a ruling in *Pennsylvania*, which ruled against the Pennsylvania Department of Education on its challenge to the recoverability of funds. Georgia

---

[17] Joint Stipulation dated Feb. 3, 2014, p. 2.
[18] Decision, p. 1.
[19] Georgia Department of Education Petition for Review of Initial Decision (GDE Appeal), pp. 2, 15.
[20] 20 U.S.C. § 1234a(k).
[21] *Appeal of the State of Louisiana*, Dkt. No. 22(258)87, EAB Decision (Aug. 12, 1988).
[22] *Id.*, p. 2.
[23] *Appeal of the State of Michigan*, Dkt. No. 8(272)88, EAB Decision (Nov. 17, 1989).

filed its motion based on the language used by the court in *Pennsylvania*, arguing that the court materially reinterpreted this statute of limitations.

GDE notes that the court stated the statute of limitations in *Pennsylvania* ran from "the date of the impermissible expenditure, not simply the date of obligation."[24] According to GDE, its failure to follow its procedures when awarding subgrants was the relevant violation, so the clock should have started on the statute of limitations when GDE awarded the subgrants.[25] GDE also argues that this was the earliest point at which the Department could have known of the improper use of federal funds.[26]

OESE opposes GDE's motion, arguing that "the date the federal funds are obligated" is the relevant expenditure date under the statute of limitations.[27] Funds are not obligated when a state awards a subgrant, but when the subgrantee enters a binding commitment to use the funds.[28]

I disagree with GDE. Indeed, *Pennsylvania* supports OESE's position. In *Pennsylvania*, the court rejected the Pennsylvania Department of Education's argument that charges in March 2006 to local accounts started the clock on the statute of limitations. Instead, the court upheld the Department's interpretation that the clock began to run in September 2006, when the Pennsylvania Department of Education "link[ed] those expenses to its federal account."[29]

The court did not cite to any past cases, departmental or otherwise, nor did it suggest it was reinterpreting the statute of limitations. Further, the court did not seem to consider the terms "obligation" and "expenditure" in the same way as the Department used them in *Louisiana*. The upshot is that the *Pennsylvania* court held that the statute of limitations began to run when the subgrantee "changed the funding code to link the expenses to its federal account."[30]

It is clear that the Third Circuit did not consider the date of "expenditure" to be either the date the Department credited grant funds to the Pennsylvania Department of Education or the date the Pennsylvania Department of Education subgranted funds to the Philadelphia School District. It is also clear the Third Circuit did not believe the statute of limitations began to run on the earlier date when the subgrantee entered into contracts using a local account code. The statute of limitations began to run only when a federal account was actually charged for unauthorized expenses. Therefore, the court in *Pennsylvania* did not materially reinterpret the statute of limitations or change the calculation of the statute of limitations in GDE's case.

Applying the well-established statute of limitations, the original stipulations agreed upon by the parties govern this proceeding. Subgrantee obligations made on or after May 8, 2007, remain recoverable under the statute of limitations. Accordingly, GDE's motion is denied.

I now turn to the issue of whether an equitable offset is an available remedy.

---

[24] *Pennsylvania*, p. 7.
[25] GDE Motion to Supplement, p. 4.
[26] *Id.*, p. 4.
[27] OESE Opposition to Motion, p. 3.
[28] *Id.*, p. 3.
[29] *Pennsylvania*, p. 6.
[30] *Id.*

III. Availability of an Equitable Offset

The CALJ's Decision primarily focused on whether an equitable offset was available as a remedy in this type of case. The CALJ held that "application of the doctrine would contravene the congressional mandate expressed in GEPA."[31] The CALJ held that Congress intended to extinguish the doctrine of equitable offset in the 1988 amendments to GEPA.[32] Specifically, the reasoning goes, Congress created a statutory provision setting recovery for unallowable expenditures "in an amount that is proportionate to the extent of the harm its violation caused."[33] According to the CALJ, the equitable offset doctrine cannot coexist with the statute because "Congress amended the statute and chose not to incorporate the doctrine."[34] Although both administrative and federal judges have upheld the use of the doctrine over the many years following the 1988 GEPA amendments, the CALJ found that line of cases poorly reasoned because "these decisions rested on the assumption that the Department was interpreting a statute rather than attempting to apply a judge made doctrine."[35]

GDE argues that the doctrine of equitable offset remains available as a remedy. OESE does not disagree. Rather, OESE argues that I should set aside that portion of the CALJ's decision because it was not raised by either party and is immaterial to the resolution of GDE's case. OESE argues further that GDE does not qualify for an equitable offset. To undertake an analysis of whether an equitable offset applies in GDE's case, I must directly address the CALJ's holding that the equitable offset doctrine ceased to exist after 1988.

Both the Department and federal courts have consistently upheld the legal propriety of using an equitable offset since 1988.[36] The CALJ's Decision assumes that those cases overlooked a vital preliminary issue. In my view, those decisions show a consistent interpretation that the 1988 GEPA amendments do not conflict with, or extinguish, the equitable offset doctrine. Indeed, most recently, in March 2016 the United States Court of Appeals for the Third Circuit deferred to the Secretary's decision on whether to apply an equitable offset without finding the doctrine unavailable due to the 1988 amendment.[37]

The 1988 GEPA amendments did not expressly extinguish the equitable offset doctrine; instead providing for recovery proportionate to the harm done.[38] The intent of the amendments was, among other things, to make the audit and appeal process more equitable.[39] The offset doctrine is an important discretionary tool that enables the Department to consider the specific

---

[31] Decision, p. 3.
[32] *Id.*, p. 5.
[33] 20 U.S.C. § 1234b(a)(1).
[34] Decision, p. 7.
[35] *Id.*
[36] *E.g.*, *New York v. Riley*, 53 F.3d 520, 522–23 (2nd Cir. 1995) (upholding the Secretary's application of the equitable offset doctrine).
[37] *Pennsylvania.*
[38] *See* GDE Appeal, p. 5.
[39] *Id.*, p. 5 (quoting *Colorado*, Dkt. Nos. 89-41-R, 90-35-R, p. 5, citing House Rept. No. 95, 100th Cong. 1st Sess., May 15, 1987).

context of a given situation when determining what is appropriate to recover. Silently extinguishing the equitable offset doctrine, therefore, would not serve the amendment's purpose.

I find that the doctrine of equitable offset remains an available remedy. I now turn to my analysis of whether allowing an equitable offset for GDE is appropriate in this case.

IV. Application of the Equitable Offset Doctrine for GDE

An appellant is not entitled to an equitable offset as a matter of right.[40] The determination of whether to apply an equitable offset is fact-intensive and should proceed case-by-case.[41] An appellant bears the burden of demonstrating that an offset "achieves the aims of the governing statute and regulations and the particular expenditure constitutes an allowable cost under the Federal grant program."[42] Circumstances that may affect the equitable offset determination include the scope of the violation, whether the violation was intentional or an honest mistake, and the efforts by the appellant to mitigate the violation's harm.[43]

GDE argues it should receive an equitable offset. It argues that its internal controls promptly detected the violation; that GDE acted in good faith upon discovering the violation; and that it "responded appropriately with swift reporting and disciplinary actions and comprehensive corrective action."[44] GDE also recognized the harm to the federal interest caused by the violation.[45] GDE argues it self-reported the violation, and that granting an equitable offset in this case would encourage self-reporting in similar future cases.[46] Further, GDE asserts the violation was a one-time event, limited to one grant program, perpetrated by a small number of employees who had "little to no influence among other employees or grant programs."[47] GDE argues the scope of its violation is similar to that in *Arizona Department of Education*, where three individuals engaged in fraud affecting a single program over the course of three years.[48]

OESE disagrees. OESE contends that GDE's violation was a significant one, including intentional fraud rather than an honest mistake or clerical error.[49] The violation "compromised the fairness and integrity of the entire application review and competitive process."[50] The amount of funds at issue, approximately $5.7 million, was significant.[51] At least one person involved in the fraudulent scheme was a GDE manager and the fraud extended beyond the

---

[40] *Application of the Pennsylvania Dep't of Educ.*, Dkt. No. 11-33-R, U.S. Dep't of Educ. (Decision of the Secretary), p. 6 (citing *Consolidated Appeals of the Florida Department of Education*, Dkt. Nos. 29(293)88, 33(297)88, EAB Decision (June 29, 1990)).
[41] *Id.*, p. 7.
[42] *Id.*, p. 6 (quoting *North Carolina Dep't of Pub. Instruction,* Interlocutory Decision, Dkt. No. 91-86-R, U.S. Dep't of Educ. (Oct. 13, 1993)).
[43] *Id.*, p. 7 (citing *Arizona Dep't of Educ.*, Dkt. No. 06-07-R, U.S. Dep't of Educ. (Aug. 12, 2010)).
[44] GDE Appeal, pp. 14, 16–17.
[45] *Id.*, p. 14.
[46] *Id.*, p. 18.
[47] *Id.*, p. 15.
[48] *Arizona Dep't of Educ.*, Dkt. No. 06-07-R, U.S. Dep't of Educ. (Aug. 12, 2010), pp. 1–2.
[49] OESE Brief, pp. 12–13.
[50] *Id.*, p. 13.
[51] *Id.*, p. 14.

employees involved to the peer review panel and others.[52] Further, OESE argues that GDE's self-reporting the violation is already rewarded by other statutory provisions, such as the grantback provision of GEPA, and does not provide a reason to grant an equitable offset.[53]

In this case, I find that the nature and scope of GDE's violation is too serious to warrant an equitable offset. GDE attempts to diminish the severity of the violation by asserting that only three employees working on the program participated in the scheme. But GDE need not have adopted a fraudulent scheme at a high level, or incorporated dozens of employees into it for the violation to be severe. The violation here was an act of intentional fraud by GDE employees and others, not an honest mistake. The intentional nature of the violation weighs against applying an equitable offset.

GDE also attempts to diminish the severity of the violation by asserting that the improperly expended funds went to programs that served the objectives of the 21st CCLC program. I appreciate the point, but an important objective of the 21st CCLC grant program is to make grant money available to properly chosen subgrantees. The reality is that the violating individuals fraudulently undermined the subgrant competition, thereby frustrating key objectives of the 21st CCLC. The result of the violation was misusing approximately $5.7 million of 21st CCLC grant money, regardless of where that money ultimately went. As a point of reference, that improper expenditure vastly exceeds the falsified travel reimbursement claims at issue in the *Arizona* case that GDE referenced, which totaled $212,436.03 over three fiscal years.[54] The wide scope of GDE's violation weighs against applying an equitable offset.

I find no other circumstance in this case that outweighs the scope and severity of the violation. While GDE made efforts to mitigate the harm, the amount of mitigation available to GDE was limited. By the time GDE took these actions, the entire amount of grant money had been improperly expended. Further, I am not convinced that the harm was significantly lessened because "the awarded subgrantees operated 21st CCLC programs that served intended beneficiaries and met program goals and objectives."[55] It would be inequitable to future potential subgrantees of Department grants to hold otherwise.

Based on this analysis, I deny GDE's request for an equitable offset of its liability for the violation at issue. GDE is liable for $2,072,888.22.[56]

---

[52] *Id.*

[53] "Under section 459 of GEPA, a grantee that [is] required to repay funds to the Department due to the misexpenditure of funds, or for otherwise failing to discharge its responsibility to account properly for funds, may apply to the Department for a grantback of up to 75 percent of program funds that were repaid." OESE Brief, p. 17, citing 20 U.S.C. § 1234h.

[54] *Arizona Dep't of Educ.*, Dkt. No. 06-07-R, U.S. Dep't of Educ. (Aug. 12, 2010), pp. 1–2. I also note that the Department did not oppose the application of an equitable offset in *Arizona*, whereas OESE opposes an offset in this case.

[55] GDE Appeal, p. 19.

[56] I note GDE argued on appeal that the CALJ erred in his application of the statute's proportionality provision, claiming its liability should be, at most, $29,415.60. GDE Appeal, pp. 19–20. GDE previously stipulated the amount at issue in this case is $2,072,888.22. Joint Stipulation dated Feb. 3, 2014, p. 2. GDE also made no significant argument in its brief before the CALJ that the Department should reduce the finding of liability to $29,415.60. *See* GDE Brief dated Mar. 21, 2014. Regardless, in light of my analysis above, I reject GDE's proportionality argument, finding $2,072,888.22 the correct measure of GDE's liability.

ORDER

Accordingly, GDE's motion on the statute of limitations is DENIED. The Decision of the CALJ is REVERSED IN PART with regard to the availability of the doctrine of equitable offset and AFFIRMED IN PART with regard to the application of an equitable offset in this case. GDE is liable for $2,072,888.22.

So ordered this 4th day of November 2016.

John B. King, Jr.

Washington, D.C.

Service List

Greer Armandroff
Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-4616

Michael L. Brustein, Esq.
Michael F. Bender, Esq.
Brustein & Manasevit, PLLC
3105 South Street, N.W.
Washington, D.C. 20007

Sam Olens, Esq.
Georgia Attorney General
Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, GA 30334

Cathy L. Grimes-Miller, Esq.
Counsel for the Assistant Secretary
for Elementary and Secondary Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202