**UNITED STATES DEPARTMENT OF EDUCATION**
OFFICE OF ADMINISTRATIVE LAW JUDGES
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Application of the

**GEORGIA DEPARTMENT OF EDUCATION**,

Applicant.

**Docket No. 12-35-R**

Recovery of Funds Proceeding

ACN: 040789126

## DECISION

This matter comes before me after a transfer of the case from Administrative Law Judge Allen C. Lewis, who retired from a long and productive Federal service on the bench. The case results from an audit of the Georgia Department of Education (Georgia)'s administration of the 21st Century Community Learning Centers (CCLC) grant program. In its May 8, 2012 program determination letter (PDL), the U.S. Department of Education's (Department) Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) found that Georgia misspent Federal elementary and secondary education funds by failing to follow established procedures for awarding grants to local recipients. In light of its findings, the Assistant Secretary concluded that the Department should pursue recovery of the purported unallowable and or misspent Federal funds pursuant to its authority under the General Education Provisions Act (GEPA), 20 U.S.C. § 1234 *et seq*., which governs grant programs administered by the Secretary of Education (Secretary).[1] Although the Assistant Secretary alleges that fraud occurred, it is undisputed by the parties that some of the CCLC grant recipients received an amount in excess of what was proper.

Georgia never disputed that some of its staff did not follow procedures in the manner required by the CCLC grant program. More directly, it is uncontested that a cohort of Georgia's staff deprived some potential beneficiaries of a Federal grant by awarding grants amounts in a manner that violated procedures for determining which organizations and in what amount a recipient should receive funds. A remaining unresolved issue in this case centered on whether the tribunal should apply the doctrine of equitable offset to reduce the amount of the recovery

[1] The PDL sought the return of $5,668,335. The parties agreed and I concur that $3,595,447 of the aforementioned liability assessed in the PDL is barred from recovery by the applicable statute of limitations. See 20 U.S.C. § 1234a(k).

allowed. In this regard, Judge Lewis stayed this case pending the Secretary's resolution of *In the Matter of Pennsylvania (Pennsylvania)*,[2] which was expected to address the same issue unresolved by Judge Lewis in this case – namely, whether the tribunal should apply the doctrine of equitable offset to reduce the amount of recovery allowed as a result of guidance provided by the Secretary.

Upon issuance of the Secretary's decision in Pennsylvania,[3] I lifted the stay in this case and allowed the parties to submit briefs on the relevance of the holding of the *Pennsylvania* decision to this case and conducted conference calls to determine future procedures. During this process, Georgia requested that it be provided an evidentiary hearing in Atlanta, Georgia. On June 3, 2015, Georgia's request for an evidentiary hearing was denied. Georgia subsequently sought review of the tribunal's denial by promptly filing a request with the Secretary for a stay and an interlocutory review of the tribunal's ruling. The Secretary accepted Georgia's request. After his review of the parties' submissions and the tribunal's response to Georgia's request, on July 10, 2015, the Secretary rejected Georgia's request. The Secretary then returned this matter to the tribunal to continue the hearing process. On August 5, 2015, the tribunal conducted oral argument to allow the parties to address the legal questions presented by the remaining disputed issues.

I.

As mentioned earlier in this decision, there is no dispute between the parties that Georgia failed to comply with the CCLC grant program requirements and otherwise misspent Federal funds in the amount determined by the Assistant Secretary. Additionally, the parties agreed on the appropriate application of the statute of limitations, which ostensibly resolves some of the matters that were in dispute by erecting a bar to what the Department may recover beyond a period of five years prior to the issuance of its May 8, 2012 PDL. In light of its findings, the Department concluded that it should pursue recovery of the purported unallowable and or misspent Federal funds pursuant to its authority under GEPA.

Notwithstanding the amorphous nature of how the doctrine of equitable offset has been formulated and variously applied, Georgia asserts that the preferred formulation of the doctrine includes two obligatory considerations — namely, that the record shows that Georgia spent non-Federal funds that aided beneficiaries in the same manner Congress intended in enacting the legislation governing the CCLC grant program. In the case at bar, Georgia argues that its evidence meets this standard. Thus, according to Georgia, the remaining amount of liability should be either substantially reduced or entirely eliminated as a result of the application of the doctrine of equitable offset to the particular facts of this case. Opposing Georgia's position, the

[2] *See the Application of the Pennsylvania Department of Education*, Docket No. 11-33-R, U.S. Dep't of Education (February 28, 2014) (Initial Decision).
[3] The Secretary's decision was issued on December 29, 2014.

Assistant Secretary argues that Georgia does not meet the requirements for applying the doctrine to this case. The Assistant Secretary argues that the doctrine also encompasses an element of clean hands as any equitable relief would require, which is absent in this case due to the broad nature in which Georgia misspent CCLC grant program funds.

What remains for the tribunal to decide is ostensibly a narrow question raised by Georgia regarding reducing the amount of the Department's recovery through the application of the doctrine of equitable offset. In light of the parties respective positions regarding the only remaining disputed legal question raised, the tribunal questioned the parties regarding a related threshold legal matter during oral argument. Noting that the tribunal's jurisdiction and remedial authority is necessarily circumscribed by the laws enacted by Congress, the tribunal tasked the parties to address whether the tribunal has the statutory authority to apply the doctrine of equitable offset at all under GEPA. Although the Assistant Secretary expressed less certainty about the ongoing vitality of this equitable doctrine, each of the parties focused its primary argument on whether the doctrine applied to the particular facts of this case.

After a close examination of this matter, for the reasons that follow, the tribunal concludes that application of the doctrine would contravene the congressional mandate expressed in GEPA. GEPA specifies how the tribunal and, therefore, the Department may measure recovery of Federal funds misspent as determined pursuant to notice and an opportunity for a hearing. Moreover, the Department has promulgated a detailed regulatory scheme implementing the statutory mandate governing the measure of recovery pursuant to GEPA, which the tribunal is clearly bound to follow. The tribunal notes that GEPA does not contain a single reference to equitable offset. More directly, the tribunal determines that as a matter of law, the application of the judge-made doctrine of equitable offset contravenes the clearly expressed mandate of Congress that the measure of recovery and repayment follow the standards set forth in GEPA.

In as much as a handful of cases have been out of step with the statute, that factor is no basis to continue to ignore Congress. In fact, GEPA, itself, withholds from the tribunal the power or authority to render a provision of the statute nugatory or otherwise render any of its straightforward provisions invalid. As noted more fully infra, although the doctrine is aimed at somewhat similar purposes, there can be no mistake that the specific provisions under section 1234 of GEPA set out factors that are not only distinct from previous uses of the doctrine, but encompass considerations not included in the doctrine in any of its amorphous formulations. For example, section 1234g and h of GEPA assigns to the Secretary the power to repay a portion of recovered Federal funds, if particular conditions are met. But, this equitable power may be exercised only after the recovery has been accomplished, not during the proceedings intended to effect the recovery in the first instance. Certainly, the tribunal need not divine Congress' intent in establishing section 1234g since the words are clear and remove any doubt that the continued application of the doctrine to these cases is contrary to the statute the tribunal is bound to follow in measuring recovery for misspent Federal grant program funds.

Moreover, even if the doctrine was within the power of this tribunal, I am persuaded by the arguments of the Assistant Secretary that the doctrine would be entirely unavailable to Georgia. In my assessment, Georgia not only lacked internal controls to prevent its staff from engaging in the significant misexpenditure of Federal funds, but it also still fails to acknowledge the harm to the Federal grant program arising as a result of its misexpenditure. As is often noted by courts, the party seeking equitable relief should come with clean hands. Here, Georgia does not.

II.

The foundation of equitable offset first explicitly appeared in three Federal decisions[4] purporting to encompass concepts of fairness identified by the Department, but not placed within a framework or classified as a cohesive doctrine. Following the framework of the courts, the Education Appeals Board (EAB), began using the doctrine in cases apparently regardless of whether doing so reflected consistency with changes to GEPA adopted by Congress in 1988. In each case, the Department's recovery was reduced by the amount spent or the imputed amount that would have been spent furthering the Federal interest pursuant to particular grant. Moreover, these cases arose and were resolved prior to the effective date of Congress' revision of the measure of recovery provision currently contained in GEPA.

Undoubtedly, the ALJs who followed the lead of the EAB did so to similarly inject fairness into the calculation of liability. Indeed, these cases demonstrate that the judge was convinced that the evidence justified the injection of fairness into the calculation of recovery of misspent Federal funds. These judges appear, however, to have carried out the analysis simply by following the lead of the EAB without precisely addressing whether doing so undermined the explicit mandate of Congress that the Department's ALJs should measure recovery in these cases pursuant to statute, which the ALJs did not adopt or otherwise incorporate in to their continued application of the judicial doctrine of equitable offset. With regard to how the doctrine of

[4] For example, in *Bennett v. Kentucky Department of Education*, the Court acknowledged a reduction in the Department's recovery based on "some additional benefits to the students . . . because the classes had smaller pupil-teacher ratios." 470 U.S. 656, 673 (1985). In *Tangipahoa v. Department of Education*, a school audit by the Department found violations of Title VII grants in several institutions and called for a refund of the entire grant. 821 F.2d 1022, 1027 (5th Cir. 1987). The Fifth Circuit held that a school may only be required to repay funds spent in a manner "clearly inconsistent" with the Act. Subsequently, one institution, St. Charles, was given credit for sums expended on eligible students. *Id.* at 1030. Here, the court injected fairness into the measure of recovery as a result of evidence that non-Federal funds were expended by the school district in a consistent manner that benefitted the targeted students of the Federal grant. Finally, in *California Department of Education v. Bennett*, the Ninth Circuit remanded a decision that disallowed expenditures for educational conferences impermissibly held at hotels instead of schools with instructions to reduce the recovery by an amount commensurate with the imputed costs of holding the conference at a school site. 849 F.2d 1227, 1232 (9th Cir. 1988).

equitable offset was previously applied, the tribunal recognizes that there are a handful of cases that have applied this doctrine. However, some of these cases rely on decisions issued prior to Congress' revision of GEPA in 1988 to include specific provisions regarding how this tribunal must measure recovery of misspent Federal funds.

As noted more fully below, in enacting GEPA's measure of recovery provision, Congress made it apparent in the legislative history that the adopted measure of recovery was imbued with fairness and equity. The 1988 amendment to 20 U.S.C. § 1234(b) embodies some of the fairness considerations similar to those thought to be represented in the doctrine of equitable offset, but in a distinct set of factors measuring the precise considerations dictated by Congress to include the concept of proportionality pursuant to Section 453(a)(1) of GEPA, as amended (20 U.S.C. § 1234b(a)(1)):

> [a] recipient determined to have made an unallowable expenditure or to have otherwise failed to discharge its responsibility to account properly for funds, shall be required to return funds in an amount that is proportionate to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which the recipient received the award.

An identifiable Federal interest in the above provision:

> includes but is not limited to, serving only eligible beneficiaries; providing only authorized services or benefits; complying with expenditure requirements and conditions (such as set-asides, excess cost, maintenance of effort, comparability, supplement-not-supplant; and matching requirements); preserving the integrity of planning, application, recordkeeping, and reporting requirements; and maintaining accountability for the use of funds.

Section 453(a) of GEPA (20 U.S.C. § 1234(a)(2)).

The regulations governing hearings for recovery of funds include substantially similar language, stating:

> "[a] recipient that made an unallowable expenditure or otherwise failed to account properly for funds shall return an amount that is proportional to the extent of the harm its violation caused to an identifiable Federal interest associated with the program under which it received the grant or cooperative agreement." 34 C.F.R. § 81.32.

As indicated by the plain language of GEPA and regulations regarding recovery of funds, a determination of the amount of recovery is contingent upon the harm to the entire program under which funds were dispersed. 20 U.S.C. § 1234b(a)(1); 34 C.F.R. § 81.32. Harm to the Federal interest requires consideration of the harm to the program's intended beneficiaries as well as the harm to the Federal program itself.[5]

[5] *See* 20 U.S.C. § 1234(a)(2); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. at 673; *California Dep't of Educ. v. Bennett*, 849 F.2d at 1232; *In re Pennsylvania Dep't of Educ.*, Dkt. No. 11-33-

Congress clearly desired to restrict the potential that a party could reduce its liability when violating program requirements such as maintenance of effort or the prohibition against supplanting state funds with Federal funds.[6] Similarly, a program that received the same benefit from charged funds and overmatch costs, the imputed harm to the Federal interest resulting from the recipient's error must also be considered.[7]

In accordance with Congress' stated purpose, the judicially created doctrine of equitable offset should have long succumbed to the priority of statute. It is worth noting that the cases cited by Georgia assume the doctrine of equitable offset remains applicable without first deciding whether the tribunal has the authority to apply the doctrine. Indeed, these cases seem to have applied the doctrine without consideration of whether continued application of the doctrine must yield to the expressed intent of Congress when identified by statute. In that regard, GEPA specifies that the measure of recovery is to be determined by calculating the extent of misspent Federal funds proportionate to the harm to the Federal interests impaired by the party's proven violation of Federal program requirements. As such, it is clear that Congress' reference to proportionality had established a measure of recovery that already injects a factor of fairness in these proceedings. What is more, the Department already has implemented a detailed regulatory scheme identifying the constituent elements of proportionality. Although the regulatory definition is not exhaustive, the regulations at 34 CFR Part 81 provide clear guidance to the parties and the tribunal on the calculation of liability in light of the statutory violation as well as any pertinent considerations of fairness and equity.

Unlike the clarity of the statute and regulations, the cases applying the doctrine often did so in a manner that could be viewed as unmoored from a consistent and ascertainable manner. The doctrine of equitable offset, as applied, has evolved from case to case into an amorphous standard, as illustrated by the appeal to the Secretary in *Pennsylvania*. Indeed, in this case, the parties requested a stay of the proceedings before Administrative Law Judge Lewis as a response to the parties' view that the judge had applied the doctrine in an unprecedented manner by apparently narrowing the reach of the doctrine to a particular scope of circumstances. What is more, the parties asserted during oral argument that although the Secretary rejected Judge Lewis'

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R, U.S. Dep't of Educ. (February 28, 2014) at 11; *In re New York State Dep't of Educ.*, Dkt. No. 90-70-R, U.S. Dep't of Educ. (April 21, 1994) at 60.

[6] The tribunal further explained that GEPA's proportionality provision was consistent with reduction of overmatch costs where an employee's salary was deemed an overmatch cost. The tribunal noted that proportionality was "X minus Y," where X is the disallowed dollars from a grant and Y is the dollars from other state funds "for the effort of an employee who did in fact work on the [grant]" and benefited the identifiable Federal interest in the grant.

[7] *See In re Pennsylvania Dep't of Educ.*, Dkt. No. 11-33-R, U.S. Dep't of Educ. (February 28, 2014) at 11 (explaining that fairness considerations require an evaluation of the "facts and circumstances surrounding the original violation"); *North Carolina Dep't of Public Instruction*, Dkt. No. 91-86-R, U.S. Dep't of Educ. (Interlocutory Decision) (October 13, 1993).

reformulation of the doctrine, the Secretary offered support for a revised and new formulation of the doctrine, which currently is under review by the Third Circuit.

III.

Pursuant to GEPA, Federal money is provided to the states on condition that certain grant program criteria are satisfied. *See, e.g., Bennett v. New Jersey*, 470 U.S. 632, 634 (1985). When states use Federal money for programs that do not satisfy the grant's criteria, the Federal government may recover the misused funds. Notwithstanding the aforementioned, in the case at bar, Georgia asserts that the judicially created doctrine to offset or eliminate any remaining recovery now sought by the Assistant Secretary be applied. In Georgia's view, the application of the doctrine would eliminate its remaining liability because it used non-Federal funds to achieve the purposes of the Federal grant program, which could have been applied to its grant directly.

To the extent that Georgia relies on case law as expressing support for the view that the Secretary may apply the doctrine when non-Federal funds have also been expended by the state or local educational agency, these decisions rested on the assumption that the Department was interpreting a statute rather than attempting to apply a judge made doctrine – for which *Chevron* deference is impertinent. Since these decisions had applied deference to a judicially created doctrine developed independently of the Secretary's expertise in interpreting a particular statute or a statutory provision, the reach and utility of the court's analysis for application to the matter at hand is unavailing. *Chevron* deference, as noted supra, does not apply to what is in essence judicially created doctrine but, instead, is applicable only to the Secretary's interpretation of an ambiguous statutory provision for which the Secretary is authorized to interpret.

As noted earlier, however, the relevant portions of GEPA statute are not ambiguous. Even if the statute was considered to be ambiguous, there is no connection between the statute and the doctrine of equitable offset. Congress amended the statute and chose not to incorporate the doctrine. Consequently, the doctrine is not a tool of statutory interpretation. Instead, the meaning of the statute and the Secretary's duly promulgated regulations best serve the purpose of applying *Chevron* deference. Consequently, Georgia's arguments regarding this line of case law does not provide instructive guidance for the matter at issue in this case. More broadly, other cases cited by Georgia are similarly unavailing for the purpose for which Georgia proposes. Accordingly, it simply cannot be the case that an open-ended judicially created standard can be relied upon by Georgia in this case or any other to replace a statutory standard without running afoul of commonsense legal principles limiting judges from legislating from the bench or otherwise exceeding the limited scope of authority granted by statute.

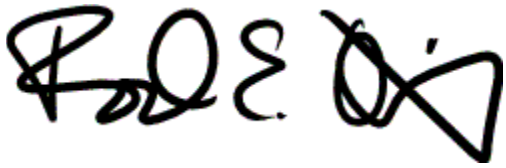
IV.

Accordingly, in light of the Assistant Secretary's findings of Georgia's compliance failures and the undisputed facts, I am persuaded that these factors constitute substantial evidence and persuasive support of the facts and the legal findings as alleged by the Assistant Secretary in the PDL. As such, recovery of the unallowable and misspent Federal funds pursuant to the authority under GEPA is warranted.

Furthermore, the tribunal finds that the relevant measure of recovery in this case is governed by statute, which in its current formulation provides no basis for application of the doctrine of equitable offset. Therefore, the tribunal declines Georgia's invitation to continue the erroneous use of this judge-made doctrine. Applying the statutory standard of proportionality, the Assistant Secretary has shown and the tribunal concludes that the proper measure of recovery is $2,072,888.

**ORDER**

Accordingly, the Georgia Department of Education shall repay to the United States Department of Education the sum of $2,072,888.



Rod Dixon
Chief Administrative Law Judge

Dated: January 25, 2016

## SERVICE

A copy of the attached document was sent by certified U.S. mail and a courtesy copy was sent by OHA's e-filing system to the following:

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