

**IN THE SUPREME COURT  
STATE OF GEORGIA**

**CHRISTOPHER WADE WARD,** )  
                                  **Appellant**                  ) )  
                                  ) )  
**v.**                                  ) )  
                                  ) )  
**LAURA JEAN MCFALL,** ) )  
                                  **Appellee**                  ) )  
\_\_\_\_\_ )

**Case No. S03A1365**

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**APPELLEE’S  
PETITION FOR REHEARING AND  
MOTION FOR RECONSIDERATION**

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March 11, 2004

DARYL G. LECROY  
Counsel for Appellee  
Georgia Bar No. 443050  
Daryl G. LeCroy and Associates  
4609 Wieuca Road, NE  
Atlanta, Georgia 30342  
Telephone 404-256-0918  
Facsimile 404-256-1978

**IN THE SUPREME COURT  
STATE OF GEORGIA**

<b>CHRISTOPHER WADE WARD,</b>	)	
<b>Appellant</b>	)	
	)	<b>Case No. S03A1365</b>
<b>v.</b>	)	
	)	
<b>LAURA JEAN MCFALL,</b>	)	
<b>Appellee</b>	)	
_____	)	

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**APPELLEE’S  
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COMES NOW Appellee Laura Jean McFall and petitions this Court to rehear this case, and moves this Court to reconsider its decision in this case, showing this Court as follows:

- 1. The Court erred in applying traditional preemption analysis, and should instead have considered whether Georgia has complied with the Title IV-D federal funding mandate for its child support guidelines.**

Because Georgia voluntarily participates in the federally funded Title IV-D child support enforcement program, the Court erroneously applied traditional preemption analysis in considering whether Georgia’s child support guidelines “do major damage” to a federal interest, and should instead have considered whether Georgia has complied with federal Title IV-D statutory and regulatory requirements for its child support guidelines.

By asking whether Congress had preempted the field of child support, and finding that it had not, the Court erred in reversing the trial court’s ruling that O.C.G.A. § 19-6-15 did not comply with the requirements of the federal Family Support Act of 1988, codified at 42 U.S.C. § 667(b), and the implementing regulations of the U.S. Department of Health and Human Services [hereinafter *HHS*], codified at 45 C.F.R. § 302.56. Though Congress has limited authority to

preempt the family law field reserved to the States under the Tenth Amendment, *see, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001); *Rose v. Rose*, 481 U.S. 619, 625 (1987), it has broad authority to exercise its spending power to enlist State participation in federally funded family law programs. *See, e.g., Youakim v. Miller*, 425 U.S. 231 (1975); *Hagans v. Lavine*, 415 U.S. 528 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968). The federal program involved in this case, Title IV-D of the Social Security Act, falls in the latter category.

The Court thus applied the wrong test. This case involves cooperative federalism, in which Congress makes grants to States which accept those funds and agree to exercise their reserved powers as specified by Congress and HHS, while leaving non-participating States free to exercise their reserved powers as they see fit. *See, e.g., Massachusetts v. Mellon*, 262 U.S. 447, 479-480 (1923). Simply put, the question for the Court to review in this case is whether Georgia's child support guidelines, as embodied in O.C.G.A. § 19-6-15, comply with the requirements of the federal Family Support Act of 1988, and HHS's implementing regulations. If not, as the trial court held, those guidelines are null and void under the Supremacy Clause.

The Eighth Circuit Court of Appeals recently explained why traditional preemption principles do not apply to a question of cooperative federalism under Title IV-D:

The directors [of the Missouri Division of Child Support Enforcement] first argue that the district court erred in holding that the provisions of [the Missouri statute] and the division's policy and practice are preempted under the supremacy clause. The directors argue that preemption is not appropriate . . . because there is: (1) no congressional intent to preempt state law; (2) no actual conflict between the state law and federal regulations; and (3) the policies and practices of the division and [the Missouri statute] do not cause any major damage to any clear and substantial federal interest.

[Appellee-Plaintiffs] Jackson and Skelton respond that although the state statute

is preempted by federal law under [traditional preemption] analysis, such an analysis is not even necessary, when, as here, the state statute and policy do not conform with federal program regulations.

In *Townsend v. Swank*, 404 U.S. 282 (1971), the Supreme Court held that Illinois' definition of a "dependent child" was inconsistent with the federal definition required by the AFDC program. The Court, without engaging in a preemption analysis, simply concluded that the Illinois statute and regulations conflicted with the federal statute and therefore were invalid under the supremacy clause.

Similarly, in *King v. Smith*, 392 U.S. 309 (1968), the Court invalidated a state regulation which defined "parent" in a manner inconsistent with the definition set forth in the Social Security Act. Again, the Court did not employ a preemption analysis, but instead simply reasoned:

There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.

In *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987), we considered whether a regulation of [HHS] requiring that applications for public assistance for AFDC benefits include siblings living in the same household conflicted with the state's authority over child support obligations. Although this court stated that the issue did "not present the 'classic' preemption question of whether a congressional enactment precludes state regulation of the same subject," we went on to utilize a preemption analysis to determine whether a conflict between federal and state law existed, stating:

"The question here relates to the conditions that Congress has placed on state programs supported by federal funds." The State voluntarily accepts the conditions imposed by Congress and, once it chooses to do so, the supremacy clause obliges it to comply with federal AFDC requirements.

Similarly, the District of Columbia Circuit stated in *Planned Parenthood Federation v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983):

It is elementary that under the Supremacy Clause of the Constitution states are not permitted to establish eligibility standards for federal assistance programs that conflict with the existing federal statutory or regulatory scheme.

The court rejected the argument made in that case that a regulation issued by

[HHS], requiring Title X grantees to comply with prevailing state law as to parental notification or consent, merely clarified the fact that the state law was not preempted by federal law. The court explained:

This case presents no direct conflict between two bodies of law, one state and one federal. We have only a *voluntary* federal funding program with specific eligibility requirements. The law on this issue is clear: even if Congress permits the States to impose additional rules as to eligibility for federal funding, those rules must be consistent with the federal standards or else be held invalid under the Supremacy Clause.

The directors and amici argue that . . . the [foregoing] decisions are factually distinguishable because those decisions dealt with state limitations on the eligibility of individuals to receive benefits, and Missouri's policy of attempting to collect the entire amount of AFDC benefits paid out does not restrict the availability of individuals to receive child support enforcement services. We reject this distinction. These decisions do not rest on the fact that the state regulation in issue concerns eligibility requirements. Rather, it is the conflict between the state and federal regulation which supports the courts' invalidation of the state regulation.

. . . Here, Missouri participates in a federal program and receives federal funds. As a condition of receiving such funds, Missouri must comply with program requirements and cannot refuse to comply with federal regulations governing the program by simply stating that the monies it seeks to recover are governed by state law. . . .

We are convinced that . . . [the Missouri statute] and the Director's policy are inconsistent with federal regulations governing the AFDC program. Accordingly, [the Missouri statute] violates the supremacy clause and is invalid.

*Jackson v. Rapps*, 947 F.2d 332, 335-7 (8<sup>th</sup> Cir. 1991) (some citations and footnotes omitted).

The three decisions relied on by the Court in its contrary analysis in this case are inapposite because none of them involved federal mandates exercised through Congress' spending power. *Egelhoff*, 532 U.S. 141, involved preemption by the federal Employee Retirement Income Security Act (ERISA) of a Washington state statute governing the effect of divorce on life insurance policies and pension plan proceeds. *Egelhoff* did not involve participation by Washington in a federally funded mandate, so the U.S. Supreme Court applied

traditional preemption analysis in holding that the federal government had preempted the Washington statute.

*Gade v. National Solid Waste Management Association*, 505 U.S. 88 (1992), involved preemption by federal Occupational Safety and Health Act (OSHA) regulations of Illinois state hazardous waste regulations. Again, *Gade* did not involve participation by Illinois in a federally funded mandate, so the U.S. Supreme Court applied traditional preemption analysis in holding that the federal government had preempted the Illinois regulations.

*Rose*, 481 U.S. 619, involved potential preemption of a Tennessee child support award requiring a veteran to pay a portion of his disability benefits for the support of his children. *Rose* also did not involve participation by Tennessee in a federally funded mandate. In *Rose*, applying traditional preemption analysis, the U.S. Supreme Court held that the Veterans Administration's establishment of disability benefits had not preempted the State's prerogative to establish a child support award of part of a recipient's veteran benefits to support his children.

Unlike *Egelhoff*, *Gade* and *Rose*, this case does not involve a conflict between competing federal and State objectives. Here, the only objective is a federal objective, established by Congress in Title IV-D and HHS in regulations adopted through authority delegated by Congress. By participating in Title IV-D and accepting federal funds for child support enforcement, Georgia bound itself to comply with those federal mandates, including the requirement that the state adopt child support guidelines consistent with parameters set out in the federal statute and regulations. As noted by the Court in its opinion, the federal "mandate" provided the very impetus for this State's adoption of child support guidelines. The preamble to the original enactment of Georgia's guideline statute reflects that its purpose was "to implement

certain provisions of the federal Family Support Act of 1988.” *See* 1989 Ga. Laws 861, 862 (preamble) (codified as amended at O.C.G.A. §19-6-15 (2004)).

Thus, the Court’s application of traditional preemption analysis in deciding this case constitutes reversible error. On rehearing and reconsideration, the Court should apply cooperative federalism principles and judge the validity of O.C.G.A. § 19-6-15 in view of the clear mandate established by federal statute and regulations. Such an analysis will demonstrate that the trial court’s ruling was correct and should be affirmed.

**2. Because the trial court found that Georgia had completely failed to abide by 45 C.F.R. § 302.56(h), this Court’s deference to HHS’s approval of Georgia’s State plan constitutes reversible error.**

By deferring solely to HHS’s approval of Georgia’s Title IV-D State plan, this Court erred in finding that O.C.G.A. § 19-6-15 could not be adjudged contrary to the federal Family Support Act of 1988 and federal implementing regulations, and thus null and void under the Supremacy Clause. In an uninterrupted line of cases rooted in decisions of the U.S. Supreme Court, federal and State appellate courts have consistently held for 36 years that administrative approval of a State’s implementation of a Title IV program does not insulate the State’s law from subsequent judicial review for non-compliance with federal requirements when the question is raised by any person against whom such State law is or may be applied. *See, e.g., Youakim v. Miller*, 425 U.S. at 235-36; *Hagans v. Lavine*, 415 U.S. 528; *Carleson v. Remillard*, 406 U.S. 598; *Townsend v. Swank*, 404 U.S. 282; *California Department of Human Resources Development v. Java*, 402 U.S. 121; *Rosado v. Wyman*, 397 U.S. 397; *King v. Smith*, 392 U.S. 309; *Lynch v. Philbrook*, 550 F.2d 793, 795 (2d Cir. 1977); *Raskan v. Moran*, 684 F.2d 472, 475 (7<sup>th</sup> Cir. 1982); *Jackson v. Rapps*, 947 F.2d 332, 335-37 (8th Cir. 1991); *Gorrie v. Bowen*, 809 F.2d 508, 520 (8<sup>th</sup> Cir. 1987); *Page v. Preisser*, 585 F.2d 336, 339-41 (8<sup>th</sup> Cir. 1978); *McCoog v.*

*Hegstrom*, 690 F.2d 1280, 1284 (9<sup>th</sup> Cir. 1982); *Schultz v. Kott*, 329 A.2d 340 (N.J. Super. 1974); *In re Rose v. Moody*, 629 N.E.2d 378, 380 (N.Y. 1993), *cert. denied* 511 U.S. 1084 (1994); *Matter of Bosh v. Fahey*, 423 N.E.2d 49, 51 (N.Y. 1981); *Matter of Beaudoin v. Toia*, 380 N.E. 2d 246, 248 (N.Y. 1978); *Matter of Dunbar v. Toia*, 380 N.E. 2d 321, 322 (N.Y. 1978); *In re Marriage of Gilbert*, 945 P.2d at 243-44 (Wash. App. 1997). This Court erroneously broke rank with these decisions by deferring to HHS's approval of Georgia's Title IV-D State plan.

In *Rosado*, the U.S. Supreme Court explained the appropriateness of independent judicial review of State compliance with Title IV requirements:

A further reason given to support the contention that the District Court should have declined to exercise jurisdiction is that the Department of Health, Education, and Welfare was the appropriate forum, at least in the first instance, for resolution on the merits of the questions before us, and that at the time this action came to Court HEW was "engaged in a study of the relationship between Section 602 (a)(23) [of Title IV of the Social Security Act] and [the provision of the state law being challenged as non-compliant with Title IV]."

In order to evaluate this argument, it is necessary to understand the mechanism by which HEW reviews state plans under the AFDC program. States desiring to obtain federal funds available for AFDC programs are required to submit a plan to the Secretary of HEW for his approval. Once initially approved, federal funds are provided to the State until a change in its plan is formally disapproved. The Secretary must afford the State notice of an alleged noncompliance with federal requirements and an opportunity for a hearing. If, after notice and hearing, the Secretary finds that the State does not comply with the federal requirements, he is directed to make a total or partial cutoff of federal funds to the State. 42 U.S.C. § 1316 describes the administrative procedures that the Secretary must afford a State before cutting off funds, and also provides for review in the courts of appeals of the Secretary's action at the behest of the State. Whether HEW could provide a mechanism by which welfare recipients could theoretically get relief is immaterial. It has not done so, which means there is no basis for the refusal of federal courts to adjudicate the merits of these claims.

Petitioners answer, we think correctly, that neither the principle of "exhaustion of administrative remedies" nor the doctrine of "primary jurisdiction" has any application to the situation before us. Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs.

That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion, or in cases where there is real doubt as to how the Department's standards apply to the particular state regulation or program.

The District Court, in this instance, made considerable effort to learn the views of HEW. The possibility of HEW's participation, either as a party or an *amicus*, was explored in the District Court and the Department at that stage determined to remain aloof. We cannot in these circumstances fault the District Court for proceeding to try the case.

397 U.S. at 405-7 (some citations and footnotes omitted).

In this case, the trial court did not need to go on a fishing expedition to ascertain HHS's interpretation of the statutory requirement for establishing "appropriate" child support awards. Rather, the trial court benefited from the agency's most clear expression of its interpretation of the federal statute, and exercise of its delegated authority to supplement the statutory requirements, namely its own regulations adopted pursuant to 42 U.S.C. § 652(a)(1) and codified at 45 C.F.R. § 302.56. As noted by this Court, the trial court found that Georgia had "completely failed to abide by 45 CFR § 302.56(h)."

In enquiring whether HHS had evaluated Georgia's compliance with 45 C.F.R. § 302.56(h), requiring the State's guidelines to be based on study of economic and case data, the trial court also considered an HHS response to a request under the Freedom of Information Act for records showing that Georgia's guidelines had an economic basis. The trial court found that:

HHS confirmed . . . that it did not have on file any studies, or records of any studies, to validate Georgia's guidelines as economically appropriate . . . .

*See* Temporary Order, *McFall v. Ward*, No. 02-CV-2287N (Rockdale Co. Sup. Ct., Feb. 10, 2003) [hereinafter *Temporary Order*]. The trial court thus established sufficient grounds for

concluding that HHS had not fulfilled its duty to verify Georgia's compliance with 45 C.F.R. § 302.56, and thus had failed to enforce its own regulations.

This Court's deference to HHS's approval of Georgia's State plan is unwarranted and inappropriate when, as found by the trial court in this case, HHS's regulations are clear, and Georgia's failure to comply with them is equally clear. Well-settled principles of federal administrative law dictate that a federal agency must follow its own regulations in exercising its administrative discretion, and abuses its discretion by failing to do so. *See, e.g., Schroeder v. West*, 212 F.3d 1265, 1270 (Fed. Cir. 2000) (a federal agency must follow its regulations in assisting a veteran seeking disability benefits); *Torrington Co. v. United States*, 82 F.3d 1039, 1049 (Fed. Cir. 1996) (Department of Commerce must follow its regulations in determining whether to assess antidumping duties); *Shepherd v. Merit Systems Protection Board*, 652 F.2d 1040, 1043 (D.C. Cir. 1981) (Merit Systems Protection Board and Office of Personnel Management must follow the latter agency's regulations in considering a federal employee's claim to have her position converted to a career position); *Furnari v. Warden*, 218 F.3d 250 (3d Cir. 2000); *Moret v. Karn*, 746 F.2d 989, 992 (3d Cir. 1984) (INS must follow its regulations in determining whether to exclude an alien from the U.S.).

As held by the Court of Appeals for the D.C. Circuit in *Shepherd*:

An agency's interpretation of its enabling statute and its own regulations is usually entitled to deference, but there are limits on when and how far a court should defer to the agency. In any event, of course, we must overturn agency action and interpretation inconsistent with the regulations and statutes themselves.

652 F.2d at 1043.

In this case, the trial court's undisturbed findings regarding the adoption of Georgia's guidelines, and their subsequent review by the State's various child support commissions, reveals

that this State has “*never* shown any economic basis for its guidelines.” Temporary Order at 8 (emphasis in original). Accordingly, Georgia’s guidelines are inherently suspect in achieving the federal objective of assuring “that there is reasonable consideration given both to the needs of the child and the ability of the absent parent to pay.” S. Rep. No. 98-387, 1984 U.S.C.C.A.N. at 2436; *see also* O.C.G.A. § 19-6-1(c); *Arrington v. Arrington*, 261 Ga. 547 (1991), *quoted with approval in Department of Human Resources v. Sweat*, 276 Ga. 627, 631 & n.18 (2003); *Walker v. Walker*, 260 Ga. 442 (1990).

Seen in this light, the Court’s speculation that HHS may have exercised its discretion “to disregard [Georgia’s] technical noncompliance with [Title IV-D]” is utterly without foundation in the record of this case or in HHS’s own regulations. The requirement of 45 C.F.R. § 302.56 that Georgia base its child support guidelines on the reality of the cost of raising children, and of how its child support cases are adjudicated, reflects the very essence of congressional intent. Thus, the trial court’s undisturbed findings that Georgia has completely failed to comply with that requirement must be affirmed on rehearing and reconsideration.

WHEREFORE, Appellee prays that this Court grant her a rehearing and reconsider its decision in this case.

Respectfully submitted this 11<sup>th</sup> day of March 2004.

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DARYL G. LeCROY  
Counsel for Appellee  
Georgia Bar No. 443050

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a true and correct copy of the within and foregoing Appellee's Petition for Rehearing and Motion for Reconsideration upon all parties, the trial court and the Attorney General of the State of Georgia by depositing the same in the U.S. mail, properly addressed and with sufficient postage affixed thereto to assure delivery to the following:

Brett A. Schroyer  
Attorney for Appellant  
Schlueter Buck & Childers  
940 Center Street  
Conyers, Georgia 30012

Hon. Sidney L. Nation, Sr.  
Chief Judge  
Rockdale Superior Court  
Rockdale Judicial Circuit  
922 Court Street  
Conyers, Georgia 30012

Hon. Thurbert E. Baker  
Attorney General  
State of Georgia  
40 Capitol Square S.W.  
Atlanta, Georgia 30334

This 11<sup>th</sup> day of March 2004.

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Daryl G. LeCroy  
Counsel for Appellee  
Georgia Bar No. 443050

Daryl G. LeCroy and Associates  
4609 Wieuca Road, NE  
Atlanta, Georgia 30342  
Telephone 404-256-0918  
Facsimile 404-256-1978