No. 01-14811-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DELLA SULLINS,

Appellant

v.

ANTHONY T. LEE, et al.,

Plaintiffs-Appellees,

and

NATIONAL EDUCATION ASSOCIATION, INC.,

Plaintiff-Intervenor-Appellee,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

v.

MACON COUNTY BOARD OF EDUCATION, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS APPELLEE

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CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for the United States certifies that the following persons and parties have an interest in the outcome of this case:

Alabama State Department of Education

Anniston City Board of Education

Bishop, Colvin, Johnson & Kent

Ralph F. Boyd, Jr., Assistant Attorney General

Dennis J. Dimsey

Gray, Langford, Sapp, McGowan, Gray & Nathanson

Anita Kelly

Burgin H. Kent

Anthony T. Lee

Macon County Board of Education

Pauline Miller

National Educational Assoc., Inc.

Ernestine Sapp

James M. Sims

Hon. C. Lynwood Smith, Jr., United States District Judge

Karen L. Stevens

C. David Stubbs

Della Sullins

United States Department of Justice

United States

_____
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Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument would be useful because the Court lacks jurisdiction and the issues appellant raises can be resolved on the parties' briefs.

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STATEMENT OF JURISDICTION

The jurisdiction of the district court in this school desegregation case is based upon 28 U.S.C. 1331, 1343 and 1345. On July 12, 2001, the district court approved the Anniston City Board of Education's petition to modify the court's order of July 9, 1999, and for relief from the Consent Order entered February 17, 1998 (R-1, Tab E). Sullins filed a notice of appeal from that order on August 16, 2001 (Notice of Appeal). Because Sullins is not a party to the case and did not move to intervene, this Court has no jurisdiction over this appeal. See pages 19-23, *infra*.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the parent representative of a named plaintiff in a class action suit who was never a party in her individual capacity has standing to appeal a district court order modifying a consent decree, when the order was entered many years after her child reached the age of majority.

2. Whether a non-party who failed to intervene in the district court can appeal a district court order.

3. Whether an individual who made no objection to the proposed modification waives arguments she failed to raise in the district court proceedings.

4. Whether the district court abused its discretion in approving the modification of a consent order in a desegregation case, where the petitioning school district demonstrated a significant change in facts warranting modification of the decree, no party objected to the modification, and the evidence demonstrated

that the modification was motivated and supported by legitimate educational and financial objectives and would not affect desegregation.

STATEMENT OF THE CASE

A. *Course of Proceedings*

This appeal arises from a district court order entered as part of that court's continuing jurisdiction over the Anniston City, Alabama, School District. On March 26, 2001, the Anniston City Board of Education (hereinafter "Board") filed a petition seeking modification of the district court's consent order of July 9, 1999, and approval to close Norwood Elementary School and to reassign elementary school students to the five remaining elementary schools (R-1, Tab A).

The district court directed all parties to respond to the petition by April 30, 2001, and further directed the parties to respond to a letter and petition objecting to the school closing filed by June Stanley, President of the Norwood Elementary Parent-Teacher Organization (Order, Mar. 27, 2001). On June 14, 2001, the court scheduled an evidentiary hearing for July 9, 2001. The court also ordered any interested person to file any written objections to the closure by July 6, 2001 (Order, June 14, 2001). The United States filed a response stating it had no objection to the proposed closure (R-1, Tab C, at 2), noting it was based on sound educational and financial reasons (*id.* at 1), that the proposed changes had no apparent effect on desegregation (*id.* at 2), and that the *Lee* plaintiffs were in agreement with this position (*id.* at 2).

The court held the hearing on July 9, 2001. Counsel for the *Lee* plaintiffs

testified that they did not object to the closure and that the facts showed it "will have no impact on desegregation" (Tr. 78). The court allowed testimony by six persons who were not parties to the suit (Tr. 3), all of whom objected to closing Norwood (Tr. 85-115). Sullins did not file any written objections to the closure, and did not testify at the July 9 hearing (see Br. Appellant Sullins at 3-4 (no mention of any responses in statement of case)).

On July 12, 2001, the district court entered an order authorizing the Board to close the Norwood Elementary School and reassign elementary students as indicated in the map submitted with its motion (R-1, Tab E). The district court considered the petition, the responses filed by the parties, and the views expressed, both orally at the hearing and in writing, by members of the community who were not parties (*id*. at 2). The district court found that the Board "established a significant change in facts, such that modification is warranted, and that the proposed modification is suitably tailored to the changed circumstances" – the standard set out in *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), for modification of a consent order in an institutional reform class action (R-1, Tab E, at 2). The district court found that the Board's membership changed twice following entry of the previous order; that the current Board was elected rather than appointed; and that the newly elected board voted to reject the prior plan and, after further review, voted to close Norwood (*ibid*.).

Sullins filed a notice of appeal on August 16, 2001 (Notice of Appeal). On August 21, Sullins filed a motion to stay the court's July 12, 2001, order pending

her appeal (Sullins Mot. to Stay, Aug. 21, 2001). Sullins filed a supplemental motion on August 28 (Sullins Supp. Mot., Aug. 28, 2001). The Board filed a response opposing the motion for a stay on August 30 (Board Resp. Opp. to Mot., Aug. 30, 2001). On August 31, the Board filed a supplemental response (Board Supp. Resp. Opp. Mot, Aug. 31, 2001), and the plaintiffs and the United States each filed a response opposing the motion (Plaintiffs' Resp. Opp. Mot., Aug. 31, 2001; USA Resp. Opp. Mot., Aug. 31, 2001). In an order dated September 7, 2001, the court denied Sullins' motion (Order Denying Mot. to Stay, Sep. 7, 2001).

B. *Statement of Facts*

1. *Background of Lee v. Macon (Anniston City)*

This appeal arises from a longstanding school desegregation suit brought in 1963 by a class of black students residing in or attending school in Macon County, Alabama, against the Macon County School District (Board Mot. to Dismiss Appeal, Oct. 3, 2001, at 3). The United States joined the suit in 1963 (*id*. at 4). The district court added the State Board of Education, the Superintendent of the State Department of Education, and the Governor as defendants in 1964 (*ibid*.). In 1967, a three-judge panel of the district court found for the *Lee* plaintiffs and ordered "a uniform statewide plan for school desegregation, made applicable to each local county and city system not already under court order to desegregate," and "require[d] the defendants to implement that plan." *Lee* v. *Macon County*, 267 F. Supp. 458, 478 (M.D. Ala. 1967). The City of Anniston School District was added as a defendant in 1969. *Lee* v. *Macon County*, 429 F.2d 1218, 1219 (5th Cir.

1970). The three-judge court entered an order approving a plan of desegregation for the City of Anniston School District on March 16, 1970, and transferred the case to the United States District Court for the Northern District of Alabama shortly thereafter. *Ibid.* Since the 1970 desegregation order, the Anniston District has been subject to other desegregation orders and consent decrees setting out objectives for eliminating the vestiges of its former dual school system. The City of Anniston was added as a defendant in 1997 (Tr. 73-74).

Sullins served as a parent and next friend for three of her then minor children who were named plaintiffs in the original 1963 suit (Br. of Appellant Sullins at 1). Sullins is not a resident of Anniston, and no longer has any minor children living in or attending school in Alabama (Supp. Br. for Appellant Sullins at 6). Fred D. Gray, Sr., who filed the original suit, members of the law firm at which he is a principal (Gray, Langford, Sapp, McGowan, Gray & Nathanson), or Solomon Seay, a former partner at the firm, have represented and continue to represent the class in these proceedings (Board Mot. to Dismiss Appeal, Oct. 3, 2000, at 7).

In the 2000-2001 school year, the Anniston District enrolled 2826 students at six elementary schools, one middle school, and one high school (R-1, Tab A, Attach., Anniston City Schools Five-Year 40th Day Enrollment (hereinafter "Five Year 40th Day Enrollment")). The district was 91% black, 7% white, and 2% other race (*ibid.*). Five of the six elementary schools were over 90% black (*ibid.*). The sixth, Golden Springs Elementary, was 61% black (*ibid.*).

2. *Johnston Elementary and the Anniston Middle School/K-8 Proposal*

The events that led to the July 12, 2001, order giving rise to this appeal began in 1996 (Tr. 73). Facing declining enrollment and budget shortfalls, the Anniston District began considering cost saving measures, including closing some schools (Board Resp. to Objection, Apr. 30, 2001, Par. 2, 4). In March 1996, the Anniston District petitioned the court to close Johnston Elementary School and redraw elementary attendance zones (Board Pet., Mar. 15, 1996). This led to extensive negotiations and discussions among the parties, largely centering on the need to integrate Golden Springs Elementary (Tr. 73-74), then the only predominantly white school in the district with a black enrollment of just 15% (Board's Suggestion of Compliance, Apr. 12, 1996, Appendix 4).

Discussions continued throughout the 1996-1997 school year. At that time, Anniston enrolled 3570 students, of which 87% were black, 12% were white, and 1% were other race (Five Year 40th Day Enrollment). Johnston Elementary was 91% black, and Golden Springs black enrollment increased to 20% (*ibid.*).

On February 17, 1998, the court entered a consent order among all of the parties (Order, Feb. 17, 1998). The order called for the closure of Johnston Elementary School, the redrawing of the elementary attendance zones, and specific capital improvements at the remaining elementary schools (*id.* at Par. 1-3). Black enrollment at Golden Springs increased to 49% in 1998-1999 (Five Year 40th Day Enrollment).

The Anniston District continued to face declining enrollment and budget pressures (Board Resp. to Objection, Apr. 30, 2001, Par. 2, 4). In May 1999, the Anniston District petitioned the court for permission to close Anniston Middle School, construct new classrooms at the six elementary schools, and transfer students in grades 6-8 from the middle school to the elementary schools from which they came (Order, Jul. 9, 1999). On July 9, 1999, the district court entered an order approving the petition (*ibid.*).

3. *Reassessment of Anniston Middle/K-8 Proposal By the New Board*

By the end of 1999, the Board realized that it lacked the funds to fully implement the July 9 order because of unforseen expenses, increased construction costs, and decreased funding from the City of Anniston (R-1, Tab A, Par. 3). In addition to these funding problems, the Anniston City School Board was undergoing the first of a series of rapid and significant changes. Resignations and the expiration of a term left the Board with just three members in early 2000 (*ibid.*, Par. 6; Tr. 24-25).

In June 2000, the reduced Board rejected the plan to close Anniston Middle School, choosing instead to close two elementary schools, Norwood and Tenth Street, move the 7th and 8th grade students to Anniston High School, and convert the Middle School to a High School (R-1, Tab A, Par. 7; Tr. 24-25). At that time, Norwood's student body was 94% black. Tenth Street's student body was 87% black (Five Year 40th Day Enrollment).

A new interim Superintendent appointed by the State Superintendent of the

Department of Education assumed his post on June 30 (R-1, Tab A, Par. 8). In September 2000, Anniston's first elected School Board began its new term (*id*. at Par 9). Three of the five board members were black; two were white (Board Resp. to Objection, Apr. 30, 2001, Par. 7).

After a review of the July 9, 1999, order and the school district's enrollment, capital requirements, instructional program and budget, the newly elected Board voted to revoke the June 6 recommendation to close Norwood and Tenth Street elementary schools and to further review its options (*ibid*.; R-1, Tab A, Par. 7). In February 2001, the Board voted 3-2 to close Norwood Elementary School and redraw the elementary attendance zones (R-1, Tab A, Par. 12).

4. *The Decision to Close Norwood Elementary*

The Board offered several educational and financial reasons for its decision. First, further study revealed that closing Anniston Middle School was unworkable. Because 7th and 8th grade teachers must be certified in the subjects they teach, dispersing those students to six different locations instead of keeping them centrally located would have required hiring several additional certified teachers (Tr. 41-42). Extracurricular activities for the junior high students would also have to be set up in six places (Tr. 41-42; R-1, Tab A, Par. 20). The Board also determined that the Anniston Middle School building, which was built in 1986 and has traditional, four-wall classrooms, had a better learning environment and physical plant than the High School, which was built in 1970 with an "open" configuration that separates class areas with below-ceiling-height partitions (Tr. 48-50).

Second, state funding and program criteria made closing an elementary school, and in particular Norwood elementary, a reasonable policy choice. The State pays the full salary of the principal and librarian at any school that has 265 or more students (Tr. 45; R-1, Tab A, Par. 20). Because of declining enrollment, two of the six elementary schools – Golden Springs and Randolph Park – fell below this cut-off and were not eligible for this subsidy (Tr. 45; Five Year 40th Day Enrollment). Two other schools –Tenth Street and Constantine – were very close to the limit with 280 and 287 students, respectively (Five Year 40th Day Enrollment). The State of Alabama also has ordered districts to eliminate all portable classrooms (Tr. 32-33; R-1, Tab A, Par. 17). Five of the nine portable classrooms in the Anniston City District are at Norwood, and would have to be replaced with new classrooms if the school remained open (Tr. 32-33; R-1, Tab A, Par. 17). Each new classroom costs approximately $70,000 or more (R-1, Tab A, Par. 14). Norwood was also the oldest elementary school and the school in the worst physical condition (Tr. 31-32; Board Resp. to Objection, Apr. 30, 2001, Par. 5).

5. *Proceedings in the District Court*

Knowing that the district court would have to approve the new plan, June Stanley, the president of the Parent-Teacher Organization at Norwood Elementary, wrote to the court on March 8, 2001, voicing her objections to the closure (Order, Mar. 8, 2001, Attachment). In particular, she stated that the closure would cause intense hardship to the parents and that busing the students across town would

place them in danger (*ibid.*). She also noted that the City had recently annexed the predominantly white area of Blue Mountain, and stated her belief that the Board was closing Norwood so that those white students would not have to attend Norwood, a predominantly black school in a predominantly black community (*ibid.*). She attached a petition signed by 163 parents and community members *(ibid.*). While Ms. Stanley was not a party to the case, the court distributed her letter to counsel for all parties and ordered them to respond to her objection (Order, Mar. 8, 2001).

On March 26, 2001, the Board petitioned the court for modification of the July 9, 1999, order and approval to close Norwood Elementary (R-1, Tab A). The Board responded to Ms. Stanley's objections on April 30, noting that Blue Mountain had approximately 11 elementary students (8 white, 2 black, and 1 Hispanic) (Board Resp. to Objection, Apr. 30, 2001, Par. 10), and that under the revised attendance zones those students would be assigned to one of the schools in the northern part of the City, all of which were over 90% black (*ibid.*; Tr. 55-56).

While class members were not individually notified of the petition (Supp. Br. of Appellant Sullins at 7-8), the district court continued to solicit input from the Norwood community and any other interested parties. In an order on June 14, 2001, the district court called for written objections to the Board's petition for modification and provided that oral arguments could be heard at a hearing on July 9, 2001 (Order, June 14, 2001). The district court allowed several community members, including the City Councilman representing the Norwood community, to

submit written comments and to testify at the July 9 hearing (Tr. 85-115), and recalled the Board's witness, Interim Superintendent Stephen Nowlin, to respond to their contentions (Tr. 115-123).

None of the parties to the case objected to the petition (R-1, Tab E). Counsel for the plaintiffs stated that while closing Norwood would indeed impose a hardship on the Norwood parents, students, and surrounding community (Tr. 76-77), it was in the "best interest of the students" (Tr. 77), and "will have no impact on desegregation" (Tr. 78). The community would not be "stigmatized" by an abandoned building because the Boys and Girls Clubs had indicated they would lease the facility to house their youth programs in that area of the City (Tr. 78). The students would be transferred to the two closest remaining schools – Randolph Park and Tenth Street (Tr. 33-35, 55) – both of which were also over 90% black (Tr. 122; Five Year 40th Day Enrollment). Those schools were approximately 3.5 miles driving distance from Norwood (Tr. 33-35; Board Resp. to Objection, Apr. 30, 2001, Par. 8), which counsel found "very, very reasonable" (Tr. 80).

6. *Community Objections to the Norwood Closure*

The six members of the community who testified all opposed the closure of Norwood (Tr. 88, 93, 98-99, 101-03, 107, 112-113). Many of their objections centered on the impact that the closure would have on the students at Norwood and the surrounding community, who would now have to travel outside of their neighborhood to attend school or school events (Tr. 92-94, 98, 104). The witnesses also complained about the District's financial management (Tr. 95-97, 103, 105),

and the instructional program (Tr. 96, 103, 113-115). These concerns, for the most part, were not racial or related to desegregation.

While the City of Anniston filed a response stating it had no objection to the closure (R-1, Tab B), two members of the Anniston City Council, Benjamin Little and Herbert Palmore, testified to their individual objections (Tr. 85, 91). Little complained that class counsel did not consult with the Council (Tr. 86), and asked for time to retain an attorney. Palmore, who represents the Norwood community, stated that Norwood's relatively poor condition was due in part to the fact that "more money was put into [the renovations] at Tenth Street because of [its] location" but did not directly implicate race in that decision (Tr. 95).

Nimrod Reynolds, a former school board member, noted that "of all the elementary schools that the school board has closed, every one of them [has] been black" (Tr. 99), but later noted that "the whole system" was black, that the decision to close Norwood had no effect on "the racial problem, the ratio" and that "its not a racial problem[,] it's a geographic problem. You're moving everything that's black toward the east and toward the other area of the city. And we as a community really object to that" (Tr. 99). Roosevelt Parker, the interim president of the Anniston and Calhoun County branch of the NAACP, voiced similar concerns (Tr. 104).

Two witnesses, Little and George Bates, a parent of current Anniston students, alleged that black principals and a black former superintendent had faced opposition from staff, Board and City officials because of their race (Tr. 89, 114).

Little complained about the treatment of two black principals at Anniston High (Tr. 89). He stated that the first black principal "had to go" when he approached eligibility for tenure, and that Superintendent Nowlin didn't want to recommend the second black principal back now that he was close to tenure (*ibid.*). In testifying that deficiencies in the instructional program prompted the declining enrollment (Tr. 113-115), Bates noted that "some women and some teachers * * * did not want to teach school. * * * They were offended when this black superintendent said to these white women and others, now you are going to work, and they railroaded him out" (Tr. 114). The witnesses did not draw any connection between these allegations and the decision to close Norwood Elementary.

Class counsel noted that many community members were suspicious of the motives of the City officials and of the interim Superintendent, who, as an academic, participated in a community forum on merging the Anniston City District into the predominantly white Calhoun County School District some months before he became Superintendent (Tr. 58-63). That proposal was opposed by most of the black community in Anniston (Tr. 63, 71). This distrust was echoed by Henry Sterling, Executive Director of the Alabama chapter of the Southern Christian Leadership Conference, who testified that "the powers that be have chose[n] that it would be better not to have a school system if the system ha[s] to be black. Closing Norwood is just one more piece in the puzzle to dismantle the whole system" (Tr. 107). Sterling also noted that in the discussion of consolidation it became clear that the County did not want to take over Anniston High because it

was predominantly black (Tr. 111).

Finally, two witnesses alleged that the Board was closing Norwood so that future residents of the as yet undeveloped and sparsely populated "Fort McClellan" area in the northern part of the City, who would probably be white, would not have to attend a predominantly black school. Palmore testified that "I know there's going to be growth. The eastern bypass [is] going to come through" and "we need that school to remain to accommodate that growth" (Tr. 94-95). Sterling testified that while the growth prospects for the area were unclear in 1997, "now [the highway bypass is] ready to be built" (Tr. 107). He estimated that the area would hold "400 to 500 family dwellings. The only other school, if you close down Norwood, in that area will be * * * Saks" (Tr. 108), a predominantly white school in the Calhoun County District (Tr. 69-70). The Superintendent, on reexamination by the district court, testified that the growth had not yet occurred (Tr. 121-122); that in the last census there had been two or three students in the area (Tr. 120-121); that it would take several years for the development to phase in (Tr. 121-122); and that students in that area would most likely be zoned for Tenth Street Elementary if and when the court approved the addition of the Fort area to the district's attendance zone (Tr. 122).

Sullins did not take advantage of the opportunity to submit a written objection or to testify at the hearing. She has not cited any objection or involvement in any of the proceedings regarding the school closings under consideration in Anniston since 1995.

On July 12, 2001, the court entered an order authorizing the Board to close the Norwood Elementary School (R-1, Tab E). Sullins filed a notice of appeal on August 16, 2001 (Notice of Appeal).

SUMMARY OF THE ARGUMENT

Sullins claims that she has standing as a named plaintiff in this action, and that the court abused its discretion when it approved the Board's petition to close Norwood Elementary, a petition to which no party objected below. There are three grounds for dismissing this appeal without reaching the merits.

First, Sullins no longer has standing to bring this appeal as the parent and next friend of her children, who reached majority many years ago and can now represent their own interests. Once a child attains majority under state law, a parent loses standing to sue in a representative capacity to enforce her child's rights for injunctive relief. *Vandiver* v. *Hardin County Bd. of Educ.*, 925 F.2d 927, 930 (6th Cir. 1991); *Cobb* v. *Rector & Visitors of Univ. of Va.*, 84 F. Supp. 2d 740, 746 (W.D. Va.) aff'd, 229 F.3d 1142 (4th Cir. 2000); *Burrow* v. *Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1199 (N.D. Iowa 1996).

Second, Sullins is not and never was a party in her individual capacity, and she failed to intervene in the district court. "[T]he better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino* v. *Ortiz,* 484 U.S. 301, 304 (1988). Because it is the fact that she is not a party, rather than mootness, that defeats her claim, Sullins' reliance on *Sosna* v. *Iowa*, 419 U.S. 393 (1975), is to no avail.

Finally, even if this Court finds that Sullins is a party, she failed to raise her objections to the modification below. A party who fails to raise an issue or objection in the district court waives the right to appeal that issue. See *Johnson* v. *Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1267 (11th Cir. 2001); *Pulte Home Corp.* v. *Osmose Wood Preserving, Inc.*, 60 F.3d 734, 739 (11th Cir. 1995). Because she was not entitled to individual notice of the petition or the hearing, the lack of individualized notice cannot excuse her inaction in the proceedings below.

If this Court reaches the merits, it should affirm the district court's order approving the Board's petition. The district court's decision was well within the bounds of its discretion. The Board demonstrated a significant change in facts warranting revision of the consent order. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). The evidence demonstrated that the Board decided to close an elementary school because of declining enrollment, financial pressure, and the enrollment requirements for state administrative salary subsidies. Of the six elementary schools, Norwood was the oldest and had the worst physical plant. The court found, and all parties agreed, that the closure and rezoning would not affect desegregation.

Sullins' contention that the closure was motivated to prevent the assignment of future white students in the presently undeveloped Fort McClellan area to a predominantly black school is based on a chain of unlikely assumptions. The court gave those opposing the modification, even those who were not parties to the case, a full opportunity to present written and oral objections. The court heard testimony

regarding the expected growth in the Fort McClellan area, and recalled the Superintendent to respond to the objections of the non-party witnesses on this and other points. Sullins' argument that the district court abused its discretion by not requiring the Board or City to provide a more detailed study and presentation of the projected growth is without merit. The court had no such obligation, and did not abuse its discretion by making its decision based on the record, rather than speculation. Accordingly, this Court should affirm.

STANDARD OF REVIEW

This Court reviews *de novo* whether a plaintiff has standing to bring suit, *Pittman* v. *Cole*, 267 F.3d 1269, 1282 (11th Cir. 2001); *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1427 (11th Cir. 1998), and whether it has subject matter jurisdiction in a case, *University of S. Ala.* v. *American Tobacco Co.*, 168 F.3d 405, 409-410 (11th Cir. 1999) ("[A] federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.").

A district court decision to approve or modify a consent decree is reviewed for abuse of discretion. *Stovall* v. *City of Cocoa, Fla.*, 117 F.3d 1238, 1240 (11th Cir. 1997); *Jacksonville Branch, NAACP* v. *Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir. 1992).

ARGUMENT

I

SULLINS NO LONGER HAS STANDING AS THE PARENT AND NEXT FRIEND OF A MINOR NAMED PLAINTIFF

Sullins contends she retains standing as a named plaintiff in this action because she had standing as the representative of her then minor children, who were named plaintiffs, at the outset of this case in 1963. Because Sullins' children are no longer minors who need a next friend to represent their interests, Sullins does not have standing to bring this appeal and her appeal should be dismissed.

"Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 255 (1994); *Wilson* v. *State Bar of Ga.*, 132 F.3d 1422, 1427 (11th Cir. 1998). While her children may still have standing in this case, Sullins does not.

Sullins is the parent of three of the original named plaintiffs in *Lee* v. *Macon County* (Board Mot. to Dismiss Appeal, Oct. 3, 2001, at 6 & Attach.). The named plaintiffs represented a class of "Negro children, living and residing in various areas of Macon County, Alabama." *Lee* v. *Macon County Bd. of Educ.*, 221 F. Supp. 297, 298 (M.D. Ala. 1963). The class did not include parents. *Ibid.* It is her children who are parties and class representatives in this action, not Sullins.

Once a child attains majority under state law, a parent loses standing to sue in a representative capacity to enforce her child's rights for injunctive relief.

Vandiver v. *Hardin County Bd. of Educ.*, 925 F.2d 927, 930 (6th Cir. 1991) (parents lacked standing to assert claims on behalf of son under 42 U.S.C. 1983 and 1985 once son reached majority); *Cobb* v. *Rector & Visitors of Univ. of Va.*, 84 F. Supp. 2d 740, 746 (W.D. Va.) aff'd, 229 F.3d 1142 (4th Cir. 2000) (14th Amendment); *Burrow* v. *Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1199 (N.D. Iowa 1996) (Title IX of the Education Amendments of 1972). Similarly, rights that parents enjoy attendant to the upbringing and education of their child do not apply after the child becomes an adult. *Vandiver*, 925 F.2d at 930. The age of majority in Alabama is 19 years. Ala. Code § 26-1-1. The minor children Sullins represented in 1963 thus necessarily reached the age of majority many years ago. Accordingly, Sullins' standing as a parent and next friend for those named plaintiffs has expired.

The Fifth Circuit's holding in *Tasby* v. *Estes*, 643 F.2d 1103 (1981),[1] is not to the contrary. In *Tasby*, parents of black children in the Dallas Independent School District filed a motion in 1979 for additional relief to enforce the school district's obligations under an order they secured three years earlier. On appeal, the district challenged the standing of the parents, arguing that they had failed to show that they or their children were directly affected by the district's failure to comply with the earlier order. 643 F.2d at 1105. The court rejected the challenge, noting

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[1] *Tasby* was decided before September 30, 1981, and thus is binding precedent in this Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

that the parents' interest in ensuring compliance with the order was "no different today than when they commenced the suit." *Ibid*. The court then held that in a pending desegregation case, "the plaintiffs should not be expected to make a renewed showing of personal interest each time they bring a motion seeking additional relief." *Ibid*.

Tasby thus addressed whether the parents and children were required to demonstrate that the particular actions at issue affected them personally at the time they filed the modification for relief. *Ibid*. That court did not reach the issue presented by this appeal – whether the parent representative of a child who is no longer a minor can appeal from a court order in the case.

Further, Sullins is not in the same position as the parents in *Tasby*. The *Tasby* plaintiffs filed their motion for additional relief just three years after entry of the original decree and actively participated in the district court proceedings. Sullins did not bring this motion, or even appear in the district court. In addition, unlike the parents in *Tasby*, who were in court just eight years after initiating suit in 1971 and three years after the original 1976 order furnishing relief, Sullins initiates this appeal 38 years after filing of the original suit in *Lee* v. *Macon County* and 34 years after entry of the original order for relief. It thus cannot be said that her interest in this litigation is the same as when she initiated suit as the parent and next friend of her then minor children attending school in Alabama.

Sullins points to *Sosna* v. *Iowa*, 419 U.S. 393 (1975), to support her claim, but her reliance is misplaced. *Sosna* held that a class action challenge to a one-year

residency requirement for obtaining a divorce in state court was not moot even though the named plaintiff had satisfied that requirement by the time the Supreme Court heard her appeal. The Court reasoned that no single challenger would remain subject to the restrictions for a period necessary to see the action through the courts of appeals to its final conclusion. *Id*. at 400. It thus held that where "the issue sought to be litigated escapes full appellate review at the behest of any single challenger" a case "does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs." *Id.* at 401.

Sosna thus does not help Sullins. Unlike the named plaintiff in *Sosna*, Sullins is not and has never been a party to the case. She was the parent and next friend of three named plaintiffs who were and remain parties to the case. It is the fact that she is not a party, rather than mootness, that defeats her claim of standing. The named plaintiffs are no longer minor children. They, not their parents and next friends, together with other members of the class of black children residing in or attending school in Alabama, are the proper parties to proceed in this action.

II

SULLINS IS NOT A PARTY AND HER FAILURE TO INTERVENE IN THE DISTRICT COURT BARS THIS APPEAL

"[O]nly parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (affirming dismissal of appeal of an employment consent decree by a group of employee police officers who voiced objections to decree at district court hearing

but chose not to move to intervene); *Karcher* v. *May*, 484 U.S. 72, 77 (1987) (rejecting appeal of former state officials who instituted action while still serving in their official capacities as presiding officers of the New Jersey legislature). As indicated above, when she filed her notice of appeal Sullins was no longer representing her minor children as parent and next friend of a named plaintiff. "[T]he better practice is for such a nonparty to seek intervention for purposes of appeal." *Marino,* 484 U.S. at 304.

As the Supreme Court stated in *Karcher*, "[a]cts performed by the same person in two different [legal] capacities 'are generally treated as the transactions of two different legal personages.'" 484 U.S. at 78. Sullins thus cannot appeal in her individual capacity unless she participated in that capacity below. But she did not – she participated only as the parent and next friend of her then minor children.

III

IF SULLINS IS A PARTY, SHE WAIVED HER RIGHT TO APPEAL BY FAILING TO OBJECT TO THE CLOSURE IN THE DISTRICT COURT

A party who fails to raise an issue or objection in the district court waives the right to appeal that issue. See *Johnson* v. *Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1267 (11th Cir. 2001) (rejecting plaintiffs' standing argument because it was not raised below); *Pulte Home Corp.* v. *Osmose Wood Preserving, Inc.*, 60 F.3d 734, 739 (11th Cir. 1995) (party who acquiesced in district court's choice of law waived right to challenge on appeal); see also *Haitian Refugee Ctr.* v. *Civiletti*, 614 F.2d 92 (5th Cir. 1980) (holding that a party cannot appeal from an

injunction to which it agreed).[2]

If Sullins is a party, she is a named plaintiff who was represented by class counsel at the district court proceedings. Despite the opportunity afforded by the district court for even non-parties to offer written or oral objections, Sullins "did not object, offer evidence or appear at an evidentiary hearing to oppose the closing of Norwood Elementary School" (Board Mot. to Dismiss Appeal, Oct. 3, 2001, at 2). She has offered no evidence that she attempted to notify class counsel of her objections before filing this appeal.

Sullins' complains that she was not informed about the proceedings regarding the Board's petition (Supp. Br. of Appellant Sullins at 7-8), but this does not excuse her lapse. The Board's deliberations about possible school closings, and the Norwood closure specifically, received considerable attention in the community. The Board sent a notice to the parents of all elementary grade students showing the new zone lines if the court approved its petition (Tr. 9), and "had meetings with the community" over the year and a half that led up to the final decision (Tr. 66, 76). Six community members and the Norwood Parent-Teacher Organization, all nonparties, accepted the district court's invitation to register their objections in writing or at the hearing. Sullins failed to take advantage of these opportunities. She cannot make her objection for the first time on appeal.

This Court's precedent holding that "dissenters to a class action may retain

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[2] *Haitian Refugee* was decided before September 30, 1981, and thus is binding precedent in this Circuit. *Bonner*, 661 F.2d at 1207.

new counsel to appeal the district court's approval of a consent decree," *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1180 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979), does not aid Sullins. The *Pettway* class members, both named and unnamed, filed objections to the decree and moved to substitute counsel in the district court before proceeding to appeal. See *Pettway*, 576 F.2d at 1187. The same is true in other, similar cases. See, e.g., *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983) (39 unnamed class members objected below to the suggested allocation of the settlement); *Kincaide* v. *General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir. 1981) (five of six named plaintiffs and one unnamed plaintiff filed written objection below to proposed settlement; three objected at hearing); *Cotton* v. *Hinton*, 559 F.2d 1326, 1329 (5th Cir. 1977) (objectors retained counsel and entered objections to the settlement in district court).[3]

IV

IF THIS COURT REACHES THE MERITS, IT SHOULD HOLD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT APPROVED THE NORWOOD CLOSURE

Sullins claims that the Board closed Norwood in order to keep future residents of the as yet undeveloped Fort McClellan area, whom she believes will probably be white, from attending a black school in a black community (Br. of

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[3] *Pettway, Kincaide,* and *Cotton* were decided before September 30, 1981, and thus are binding precedent in this Circuit. *Bonner*, 661 F.2d at 1207.

Appellant Sullins at 7-8). She also contends that the court had an obligation to obtain more evidence about the projected growth before ruling on the Board's petition (*id*. at 8-9). The court heard similar allegations from community members at the July 9 hearing, and recalled the Board's witness to respond to the objections. The court had evidence that the Board's decision was supported by sound educational and financial reasons unrelated to the racial composition of projected development in the Fort area. The court was well within the bounds of its discretion in approving the closure.

"[A] party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). "A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law. Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous." *Id*. at 384.

A school system that has not achieved unitary status "has an affirmative duty to eliminate the effects of its prior unconstitutional conduct. To fulfill this duty, school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual

school system." *Harris* v. *Crenshaw County Bd. of Educ.*, 968 F.2d 1090, 1094-1095 (11th Cir. 1992) (citing *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968)). A school board violates this duty if it "fails to consider or include the objective of desegregation in decisions regarding the construction or abandonment of school facilities." *Harris*, 968 F.2d at 1095. "[W]hen a school board proposes to close a school facility with a predominately minority student body, it must adduce evidence sufficient to support the conclusion that [its] actions were not in fact motivated by racial reasons." *Ibid.*

The court found that the Board established a significant change in facts warranting modification, and that the proposed modification is suitably tailored to the changed circumstances (R-1, Tab E, at 2). Sullins argues that the court abused its discretion by "fail[ing] to give adequate consideration to the reestablishment of segregation if the Anniston City School Board was allowed to close Norwood Elementary School in the face of anticipated growth of the white population in the area of redevelopment at Fort McClellan" (Br. Appellant Sullins at 5). Sullins further contends that the Board closed "the school in a predominately black area so that white parents can move into the impending development * * * without fear of having their children attend school in a predominately black school that is situated in a black neighborhood" (*ibid.*). Segregation would be reestablished because the Board would have justification to build a new school and the Board would have discretion about how many of the former Norwood students to assign to the new school, thereby creating "a white majority elementary school" (*id.* at 6).

Sullins also claims that the Board failed to provide any direct evidence that the closing of Norwood School "was not racially motivated" (*ibid.)*, and did not "specifically identify the factors considered regarding the racial impact of closing Norwood school" *(id.* at 9). Sullins further faults the district court for not conducting "a more stringent examination of the growth potential in the former Fort area," such as quantifying the growth or analyzing plans of the City of Anniston for development *(id.* at 8).

Sullins' contentions boil down to an argument that the Board failed to satisfy *Harris* by establishing a non-racial motive for the Norwood closure and that the district court abused its discretion when it did not require further study of the projected growth in the Fort McClellan area. Neither contention has merit.

The Board demonstrated, and the parties agreed, that the decision to close Norwood was made for sound educational and financial reasons that had nothing to do with race. The Superintendent testified that closing Anniston Middle School, as specified in the July 1999 order, was unworkable, and that an alternative was needed to achieve the necessary cost savings. The court also heard unchallenged evidence that state funding and program criteria made closing an elementary school, and in particular Norwood elementary, a reasonable policy choice. By closing one elementary school, all the remaining schools would have more than 265 students and qualify for full state funding for principal and librarian salaries (Tr. 45; Five Year 40th Day Enrollment). In addition, Norwood, with five of the nine portable classrooms in the district, required the most expense to comply with

the State's mandate to eliminate all portable classrooms (Tr. 32-33; R-1, Tab A, Par. 17). Norwood was also the oldest elementary school and the school in the worst physical condition (Tr. 31-32; Board Resp. to Objection, Apr. 27, 2001, Par. 5).

In addition, the court examined the racial composition of the five remaining elementary schools, and concluded that the Norwood closure would not significantly change the racial makeup of any school's enrollment (Tr. 37-38). All six elementary schools were predominantly black, and all five of the remaining schools are predominantly black (Tr. 55; Five Year 40th Day Enrollment). Four of the five will continue to be more than 90% black (Tr. 55), and the remaining school, Golden Springs, will have a 4% increase in the number of black students (Tr. 38). The court found that black student population at Cobb would increase 5%, at Constantine 1%, and at Golden Springs 4%. Randolph's black population would decline by 3% and Tenth Street's by 1% (Tr. 38).

The court had no obligation to further investigate the projected growth in the Fort area. Sullins' most specific statement is that "the area at and around Fort McClellan is poised to grow dramatically over the next five years due to * * * redevelopment" (Br. of Appellant Sullins at 5, 7). But growth does not necessarily lead to segregation. To reach that conclusion, Sullins first assumes that the new residents, when they arrive, will be predominantly white. She then assumes that the Board will build a new school to accommodate the growth, rather than assigning the students to existing elementary schools, and that the new attendance

zones will make the new school a predominantly white school (*ibid.)*.

There is no evidence in the record that the Board has considered, let alone decided, to build a new school to serve students who have not yet moved into the district. In fact, the Superintendent, when asked precisely that question by the court and class counsel, testified that the students would most likely be assigned to Tenth Street, which is predominantly black, and that the most practical option would probably be to build on classrooms at existing schools (Tr. 82-84, 121-123). If Sullins is correct about the racial makeup of the growth, that could actually promote desegregation.

In addition, any proposal to add the Fort McClellan area to the Anniston attendance zone, to build a new school, to add on classrooms at existing schools, or to redraw attendance zones would be subject to the orders of the district court to desegregate the District and dismantle the prior dual system (Tr. 122). If the Board embarked upon the course charted by Sullins' speculation, its actions would be subject to challenge at that time by plaintiffs, intervenors, or the United States.

Once the court learned that members of the class objected to the closure, it did have a responsibility to "extend to the objectors leave to be heard." *Cotton*, 559 F.2d at 1331. But the scope of the proceedings is left to the court, which "may limit its proceeding to whatever is necessary to aid it in reaching an informed, just, and reasoned decision." *Ibid*. The district court went above and beyond what was required, inviting even nonparties to submit written or oral objections. As Sullins notes, some of those witnesses voiced concerns about the Fort area development.

The court recalled the Superintendent to respond to those objections (Tr. 115-125) and considered the objections in making its findings (R-1, Tab E,). It was not an abuse of discretion for the court to render its decision on the record before it.

CONCLUSION

The Court should dismiss this appeal for lack of jurisdiction. If the Court reaches the merits, it should affirm the order of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 7966 words of proportionally spaced test. The type face is Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2001, two copies of the foregoing Brief For The United States As Appellee and Certificate Of Interested Persons And Corporate Disclosure Statement were served by first-class mail, postage prepaid, to the following counsel of record:

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