No. 03-13272-II

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BOBBY CURRY, *et al.*, and JAKE BARRETT, *et al.*,
Proposed Intervenors-Appellants

v.

CLAY COUNTY SCHOOL SYSTEM,
Defendants-Appellees

UNITED STATES OF AMERICA,
Plaintiff/Intervenor-Appellee

ANTHONY T. LEE, *et al.*,
Plaintiffs-Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLEE

R. ALEXANDER ACOSTA
Assistant Attorney General

DENNIS J. DIMSEY
LISA WILSON EDWARDS
Attorneys
United States Department of Justice
Civil Rights Division
Appellate Section
950 Pennsylvania Ave., N.W. – PHB 5026
Washington, D.C. 20530
(202) 514-5695

CERTIFICATE OF INTERESTED PERSONS

Counsel for the United States of America hereby certifies, in accordance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, that the following persons may have an interest in the outcome of this case:

Bibbs Graves proposed intervenors

Arthur Adair and Minnie Adair as parents of Demetrius Adair

Charlotte Marbury as parent of Bobby Curry, Shacorri Marbury, and Mario Stripling

Shevon Dawson as parent of April Dawson

Edward DuPree and Legaither DuPree as parents of Ashley DuPree and Britney DuPree

Sonia Gaddis as parent of Devin Gaddis

Tracie Gardner as parent of Lakenya Gardner and Keaunna Gardner

CheRhonda Hernandez as parent of Checorya Gibbons and Jade Gibbons

Edward Earl Johnson as parent of Qumorris Johnson

LaMarcus Jones and Rita Jones as parents of Lamar Jones, Brandon McCain, and Shawanda McCain

Antoinette Marbury as parent of Ledra Leonard, Annquanetta Marbury, Satdrina Marbury, and Antonio Marbury

Benitta Marbury as parent of Alexis Marbury, Anastazia Marbury, and JuDarius Marbury

Mulvine McCain as parent of April McCain

Alison Meadows as parent of Rikkila Meadows

Emma Noble as parent of Krystal Noble

Patricia Norris as parent of Shandrea Norris

Lillian Phillips as parent of Symba Phillips and Julissa Wilson

Pat Ware and Robert Ware as parents of Deidra Ware

Vanessa Williams as parent of Kayla Williams

Frederick Wilson as parent of LaNell Wilson

Mellow Valley proposed intervenors

Donna Barrett and Randy Barrett as parents of Jake Barrett and Kaitlin Barrett

Bryan Belcher as parent of Trenton Belcher

Jacky Brown as parent of Jacky Brown, Jr.

Janine Brown and Johnny Mack Brown as parents of Tyler Brown and Bradley Brown

Lisa Brown as parent of Emily Brown

Lori Carroll and Sonny Carroll as parents of Jason Edmondon

Tim Carroll as parent of Ethan Carroll and Nathan Carroll

Darlene Casey and Randall Casey as parents of Chasity Casey and Colton Casey

Kelly Cheaney and Michael Cheaney as parents of Caitlin Cheaney and Chase Cheaney

Buddy Childers as parent of Mary Childers and Daniel Childers

Dewey Clifton as parent of Hannah Clifton

Lona Cotney as parent of Dylan Cotney, Stephanie Cotney, and Matthew Cotney

Cindy Crawford and Joey Crawford as parents of Colleen Crawford, Dakota Crawford, and Kayla Crawford

Alan Denney and Freda Denney as parents of Brittney Denney and Misty Dennny

Vivian Eargle as parent of Mickey Eargle

Jody East and Rita East as parents of Colton East and Jordan East

Dawn Elder and Mike Elder as parents of Brett Elder, Chad Elder, and Deric Elder

Janet Farr and Mark Farr as parents of Anna Siggers

Keith Gilbert and Wynema Gilbert as parents of Blain Gilbert and Payton Gilbert

Johnnie Glenn and Wayne Glenn as parents of Tiffany Glenn

Tammy Gortney and Vic Gortney as parents of Ethan Gortney and Shawnee Gortney

Lindell Graham and Virginia Graham as parents of Jennifer Williams and Jamie Williams

Lynn Griffin and Melanie Griffin as parents of Jodi Griffin

Amy Hamlin and Johnny Hamlin as parents of Billy Ray Hamlin

Delane Hodnett as parent of Terry Cantrell, Eric Hodnett, and Tanya Cantrell

Diane Jacobs and Wayne Jacobs as parents of Hannah Jacobs

Jerry Jett and Tina Jett as parents of Carrie Jett

Becky Jones and Winfred Jones as parents of Abbey Jones

Wanda Jones as parent of Shalena Karr, Justin Karr, and Martin Karr

Charles B. Kinde as parent of Terri Ann Bailey

Brenda Kytan and Mark Kytan as parents of Lindsay Kytan, Nathan Kytan, and

Jessica Kytan

Alison Lee as parent of Scott Lee and Timothy Lee

Cheryl Lee and Mike Lee as parents of Brandi Lee, Brandon Adam Lee, and Michael Lee

Dianne Looser as parent of Colton Looser

Terry J. Meek as parent of Joseph Meek

Ann Melton as parent of Hannah Melton

Jo Ann Mitchell as parent of Jake Mitchell, Jared Mitchell, and Jeff Mitchell

James Moon as parent of Dylan Moon and Melanie Moon

Michelle Morris as parent of Caitlin Morris

Bob Nolen and Sharilyn Nolen as parents of Autumn Nolen and Holly Nolen

Kenneth Packer as parent of Matthew Packer

Billy Parris, Jr. as parent of Holly Britton and Megan Britton

Daniel Ricketson and Toni Ricketson as parents of Heather McCormick

Vickie Schoggins as parent of Adam Schoggins

James Smith and Janice Smith as parents of Megan Smith

Jill S. Smothers and Kent Smothers as parents of Kurtis Smothers, Rachel Smothers, and Rebecca Smothers

Christie Thompson and Ricky Thompson as parents of Amber Thompson and Katelyn Thompson

Lisa Thompson and Tim Thompson as parents of Danielle Courson, Dean Courson and Daniel Thompson

Anita Waldrep and Tim Waldrep as parents of Amber Waldrep

Lisa Waldrep and Wendell Waldrep as parents of Chasity Waldrep

Angie Watts and Jimmy Watts as parents of Steven Watts

Yvonne Watts as parent of Holly Watts

John Wellborn as parent of Aaron Wellborn, Rachel Wellborn, and Rebekah Wellborn

Bonnie Wellborn and Stephen Wellborn as parents of Amber Wellborn, Krislyn Wellborn, and Caleb Wellborn

Dawn Whaley as parent of Rebekah Whaley

Timmie Whaley as parent of Alyssa Whaley

Brenda Wheeles and David Wheeles as parents of Bridget Wheeles

Latricia White and Michael White as parents of Heather White and Anthony White

Paul Wilkerson and Wanda Wilkerson as parents of Kimberly Wilkerson and Jason Wilkerson

Other interested persons and entities

R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice

George L. Beck, Jr., Esq., Attorney representing proposed intervenors

Norman J. Chachkin, Attorney with the NAACP Legal Defense and Educational Fund, Inc. representing private plaintiffs

Clay County Board of Education

Dennis J. Dimsey, Deputy Chief, Appellate Section, Civil Rights Division, U.S. Department of Justice

Clarence Dortch, Esq., Attorney representing proposed intervenors

Lisa Wilson Edwards, Attorney, Appellate Section, Civil Rights Division, U.S. Department of Justice

Richard Farrow, Member, Clay County Board of Education

Dennis Gautney, Member, Clay County Board of Education

Jeremiah Glassman, Chief, Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice

Daniel Gordon, Attorney, Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice

Javier Guzman, Deputy Chief, Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice

Stanley F. Gray, Esq., Attorney with Gray, Langford, Sapp, McGowan, Nathanson & Gray representing private plaintiffs

Donald Harris, member, Clay County Board of Education

Anita Kelly, Esq., Attorney, Alabama State Board of Education

Anthony T. Lee, Lead Private Plaintiff

Huel Love, Esq., Attorney with Love, Love & Love, P.C. representing proposed intervenors

Macon County Board of Education

Denise McDonald, Member, Clay County Board of Education

Gene Miller, Superintendent, Clay County School System

National Education Association

Arthur Oliver, Member, Clay County Board of Education

C. Lynnwood Smith, Jr., United States District Court Judge, Northern District of

Alabama

Donald B. Sweeney, Jr., Esq., Attorney with Bradley, Arant, Rose & White representing Clay Board of Education

_____
Lisa Wilson Edwards

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose appellants' request for oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES:

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. 1331 and 1343(a)(3) because the case involved civil rights issues arising under the Constitution and the laws of the United States.

On June 12, 2003, proposed intervenors Bobby Curry, *et al.*, and Jake

Barrett, *et al.*, noticed an appeal of the district court's May 13, 2003, order denying intervention. The district court's May 13, 2003, order denying intervention is not a final appealable order, and this Court should dismiss the appeal for want of jurisdiction. See pp. 13-17, *infra*.

STATEMENT OF THE ISSUES

1. Whether this appeal should be dismissed for lack of appellate jurisdiction.

2. Whether the district court properly denied appellants' motion to intervene as of right under Fed. R. Civ. P. 24(a), or abused its discretion in denying permissive intervention under Fed. R. Civ. P. 24(b).

3. Whether the district court acted within its discretion by approving the School Board's school closure plan without an evidentiary hearing, where the plan was consented to by the parties and found to not perpetuate the former dual system.

STATEMENT OF THE CASE

1. *Background*

This longstanding school desegregation case was initiated in 1963 by black children and their parents residing in Tuskegee, Alabama. Shortly after this suit was filed, the United States was added as a party. In August 1963, the court ordered that Macon County public schools be desegregated. *Lee* v. *Macon County*

Bd. of Educ., 221 F. Supp. 297 (M.D. Ala. 1963). The following year, the complaint was amended to challenge dual school systems throughout the state and to seek statewide desegregation. Following extensive litigation, the court concluded that a dual school system based on race was maintained and operated throughout the state. *Lee* v. *Macon County Bd. of Educ.*, 231 F. Supp. 743 (M.D. Ala. 1964). Since then this Court and its predecessor, the former Fifth Circuit, have heard numerous appeals regarding desegregation in the State of Alabama.[1]

On July 11, 1974, the district court entered an order applicable to seven defendant school systems in Alabama, including Clay County, Alabama. U.S. Add. 1.[2] The July 1974 order prohibited the Clay County School Board from taking any action "which tends to segregate or otherwise discriminate against

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[1] See, *e.g.*, *Lee* v. *Macon County Bd. of Educ.*, 970 F.2d 767 (11th Cir. 1992); *Lee* v. *Macon County Bd. of Educ.*, 650 F.2d 608 (5th Cir. 1981); *Lee* v. *Macon County Bd. of Educ.*, 584 F.2d 78 (5th Cir. 1978); *Lee* v. *Macon County Bd. of Educ.*, 498 F.2d 1090 (5th Cir. 1974); *Lee* v. *Macon County Bd. of Educ.*, 483 F.2d 242 (5th Cir. 1973); *Lee* v. *Macon County Bd. of Educ.*, 482 F.2d 1253 (5th Cir. 1973); *Lee* v. *Macon County Bd. of Educ.*, 468 F.2d 956 (5th Cir. 1972).

[2] "U.S. Add. __" refers to items in the United States' Supplemental Record Excerpts filed with this brief as appellee. "R.E. __" refers to items in the Record Excerpts filed with proposed intervenors-appellants' brief. "Consent Order at __" refers to pages of the Consent Order which appears as item 2 of the Record Excerpts. "Br. __" refers to pages in proposed intervenors-appellants' opening brief. "R. (date), (document at _)" refers to the filing date and documents listed in the district court's docket sheet, and the page numbers within those documents.

students or faculty by or within school[s] on the basis of race, color, or national origin," and requires "[a]ll school construction, school consolidation, and site selection * * * be done in a manner which will prevent the reoccurence of the dual school structure." *Ibid*. The district court placed the Clay County case on its "inactive docket," but subject to reactivation "on proper application by any party or on the Court's motion." *Ibid.* The Clay County school system remains subject to the July 11, 1974, Order.

During the 2001-2002 school year, the Clay County School Board operated six schools serving 2,346 students, of whom about 23% were black, 77% white, and 1% Hispanic or American Indian. The schools and populations were as follows:

> Ashland Elementary School (K-6, 397 students, 18% black; 78% white);
> Clay County High School (7-12, 310 students, 24% black; 74% white);
> Lineville Elementary School (K-6, 465 students, 31% black; 67% white);
> Lineville High School (7-12, 383 students, 35% black; 64% white);
> Bibb Graves School (K-12, 381 students, 28% black; 72% white);
> Mellow Valley School (K-12, 410 students, 0% black, 99.5% white).

R.E. 2 at 3. During that school year, the Clay County schools operated under a "freedom of choice" plan that permitted students who provide their own transportation to attend any school of their choice. *Ibid*. The Clay County schools have desegregated student populations, with the exception of Mellow Valley. *Ibid.*

Under the freedom of choice plan, 48 white students from outside the Mellow Valley area provided their own transportation to Mellow Valley during the 2001-2002 school year. *Ibid.* The total number of students who provided their own transportation to the district's other schools was 35, of whom 26 were white and 9 were black. *Ibid.*

During 2002, the Clay County School Board informed the United States that it had voted to close Bibb Graves School at the end of the 2001-2002 school year for budgetary reasons. *Ibid.* On June 7, 2002, a group of parents whose children attend Bibb Graves School moved to intervene to oppose the proposed school closure. The district court denied the motion to intervene on July 17, 2002. U.S. Add. 2. No appeal was taken of that intervention order.

On July 23, 2002, the School Board voted unanimously to reopen Bibb Graves School for the 2002-2003 school year, but to close *both* the Bibb Graves *and* Mellow Valley Schools (both K-12) at the end of the 2002-2003 school year. R.E. 2 at 4. The Clay County School Board determined that "it [was] necessary to close at least one school for budgetary reasons, and that closing one, or both, of its K-12 schools will provide the greatest financial benefit." *Id.* at 3.

The Clay County School Board projected that after closing Bibb Graves and

Mellow Valley Schools, the student enrollment at the remaining schools would be as follows:

> Ashland Elementary School (K-6, 569 students, 17% black, 81% white);
> Clay County High School (7-12, 567 students, 19% black, 79% white);
> Lineville Elementary School (K-6, 504 students, 26% black, 71% white);
> Lineville High School (7-12, 516 students, 26% black, 71% white).

See U.S. Add. 3; R. Apr. 11, 2003, Response Of The United States To Bibb Graves Motion To Intervene at Exh. 1; R. Apr. 11, 2003, Response Of The United States To Mellow Valley Motion To Intervene at Exh. 1.

Citizens from Mellow Valley and Bibb Graves requested the School Board "to defer submission until after November 5, 2002, at which time the citizens of Clay County would vote on a proposal to increase the ad valorem taxes for the benefit of the school system." R.E. 14 at 2. The tax proposal was subsequently defeated. *Ibid.* After the defeat, however, the financial projections for the school system changed, so that instead of a projected deficit in excess of $600,000 for the 2002-2003 school year, the Board anticipated an operating surplus. *Id.* at 2-3. The Mellow Valley and Bibb Graves parents thus requested the Board to reconsider its school closure decisions in view of the projected operating surplus. The Board considered changing its decision, "but on January 17, 2003, by a 3-2 vote, the Board authorized its attorney to submit the consent decree for this court's

approval." *Id.* at 3.

On February 26, 2003, the School Board and other parties to the case jointly moved the district court to approve a consent order facilitating the school closings. R.E. 2. The next day, on February 27, 2003, a newly composed Board, by a vote of 3-2, voted to rescind the prior Board's decision to close the Bibb Graves and Mellow Valley schools, and on March 10, 2003, filed a motion to reject the proposed consent order. R.E. 14 at 2-3.

On March 5, 2003, two groups moved to intervene as of right and permissively to oppose the school closings. Black Bibb Graves students and their parents and taxpayers moved to intervene to oppose the closing of Bibb Graves School, and white Mellow Valley students and their parents and taxpayers moved to intervene to oppose the closing of Mellow Valley School. See R.E. 4, 7. The district court held a status conference on March 13, 2003, and asked the parties to further brief the issues concerning intervention and the school closings. See R. March 14, 2003, Order.

2. *District Court's Order On Intervention And Approval Of Consent Order*

On May 13, 2003, the district court denied intervention to the Bibb Graves and Mellow Valley proposed intervenors. R.E. 14. The district court stated that it

had "previously denied the motion to intervene filed by the Bibb Graves Plaintiffs on July 17, 2002." R.E. 14 at 2-3. The district court held

> [t]he Bibb Graves Plaintiffs have recast their motion to intervene and request that a substitute class and class counsel be appointed or that the original class be decertified. The motion is denied. Upon consideration of the motions to intervene filed by both the Mellow Valley Plaintiffs and the Bibb Graves Plaintiffs and the responses of the United States, the Lee Plaintiffs, and the Clay County Board of Education, the motions to intervene are DENIED.

R.E. 14 at 2.

By that same order, the district court denied the School Board's motion to reject the consent decree. The district court held that it is "not free to reject the consent decree solely because the reconstituted Board no longer wishes to honor it." *Id.* at 3. "Eleventh Circuit case law makes clear that the new Board cannot succeed in its attempt to withdraw its predecessor's properly granted consent." *Ibid*, citing *Stovall* v. *City of Cocoa, Fla.*, 117 F.3d 1238, 1242 (11th Cir. 1997); *Allen* v. *Alabama State Bd. of Educ.*, 816 F.2d 575 (11th Cir. 1987).

The district court approved the consent order, and held that

> [c]losing Mellow Valley and Bibb Graves will not perpetuate or re-establish the dual system. There being no evidence presented to the court to indicate that the proposed consent decree is unconstitutional, unlawful, unreasonable, or contrary to public policy, the court grants the Joint Motion to Approve Consent Order filed on February 26, 2003.

R.E. 14 at 4.

3. *District Court's Order Denying Reconsideration*

On May 21, 2003, the Bibb Graves and Mellow Valley proposed intervenors moved for a new trial and to stay enforcement of the Consent Order pending resolution of the motion. R. May 21, 2003, Motion for New Trial and Motion to Stay Execution and Enforcement. On May 23, 2003, the School Board petitioned for reconsideration and to stay enforcement of the decree. R. May 23, 2003, Petition for Reconsideration and Motion To Stay By Clay County Board of Education. The district court ordered the parties to respond to the motions. See R. May 22, 2003, Order; R. May 27, 2003, Order. The district court denied the motions on May 30, 2003. R.E. 15.

The district court rejected the School Board's argument that implementing the Consent Order was infeasible. The district court observed that the School Board had "indicated that it was willing and able to begin the process of closing a school as late as mid-May * * * [having] first voted to close Bibb Graves before the 2002-2003 school year." R.E. 15 at 2. The district court stated that

> the Board has provided to the parties all information required by the consent decree. This information includes the Board's plans for assigning students to the consolidated schools, transporting students along newly designed bus routes, reassigning faculty and staff, addressing additional school construction needs, and providing notice of the closings to students and parents. * * * The Board has had sufficient time to prepare for, and begin

closing, the two schools.

R.E. 15 at 3-4.

The district court denied proposed intervenors' motions for reconsideration of the denial of intervention and for a new trial. The district court stated that proposed intervenors in a school desegregation case must demonstrate that they seek to "further the goal of removing all vestiges of prior discrimination, and thereby achieving 'unitary status,' rather than seeking to advance other interests, such as their desire to keep a particular school open or to retain a particular school attendance pattern." *Id.* at 4. The district court held that proposed intervenors failed to identify how they meet this standard, and that the "factual allegations of the proposed intervenors are so devoid of merit that they justify summary denial of intervention." *Ibid*.

The district court also rejected proposed intervenors' request for a hearing under Fed. R. Civ. P. 23(e). The district court observed that in view of the denial of intervention, proposed intervenors have no standing to move for reconsideration of the court's enforcement order, and that the Board has not requested any additional hearing with respect to the Consent Order. *Id.* at 5. The district court held that Rule 23(e) does not require a fairness hearing at each interim step in the

course of ongoing litigation, and that instead such hearings are afforded "prior to the termination of class actions" to give "sufficient protection of the interests of absent class members." *Ibid.*

STANDARDS OF REVIEW

The district court's denial of intervention as of right should be reviewed *de novo.* *Georgia* v. *United States Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002). Subsidiary factual findings are subject to review for clear error. *Meek* v. *Metropolitan Dade County*, 985 F.2d 1471, 1477 (11th Cir. 1993). Orders denying permissive intervention are subject to review for abuse of discretion. *Ibid.* The district court's approval of the school closure plan without an evidentiary hearing should be reviewed for abuse of discretion. *Lee* v. *Macon County Bd. of Educ.* 483 F.2d 244, 245 (5th Cir. 1973).

SUMMARY OF ARGUMENT

1. The district court's denial of intervention was proper, and under this Court's "anomalous rule" the appeal must be dismissed for want of appellate jurisdiction. As we explain in the United States' Response To Jurisdictional Question (filed July 24, 2003), and Argument II (p. 18, *infra*), the district court correctly denied intervention in this case. Under this Court's decisions, the proper denial of a motion to intervene is not an appealable order.

Proposed intervenors nevertheless argue that under *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002), they can appeal the district court's grant of the Consent Order as non-named class members. *Devlin*, however, does not apply to the circumstances of this case because the Consent Order does not dispose of the lawsuit. The school district remains under federal court supervision.

2. The district court correctly held that proposed intervenors fail to satisfy the criteria to intervene as of right or permissively under Fed. R. Civ. P. 24. Proposed intervenors do not assert a legally cognizable interest that would entitle them to intervene as of right in this school desegregation case. Intervention as of right in school desegregation cases is very limited, and requires that intervenors demonstrate an interest in a unitary school system. Proposed intervenors wholly fail to make such a showing. Instead, the interests asserted by proposed intervenors relate to maintaining their neighborhood schools, which this Court has made clear is not legally cognizable in school desegregation cases. Proposed intervenors also assert interests in protecting the rights of special education students under the Individuals With Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (IDEA), and female athletes under the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (Title IX). These interests, however, are unrelated to desegregation, and may not

be pursued in this case. To the extent that proposed intervenors have interests related to desegregation, those interests are fully represented by the existing parties to the suit. The district court did not abuse its discretion by denying permissive intervention as well.

3. Finally, the district court's approval of the Consent Order was well within its discretion. The district court had ample evidence demonstrating that the school closings would further desegregation within the remaining schools. The district court fully considered these facts and reasonably exercised its discretion by approving the Consent Order without further evidentiary hearing.

ARGUMENT

I

THE APPEAL SHOULD BE DISMISSED FOR LACK OF APPELLATE JURISDICTION

On July 11, 2003, this Court requested the parties to respond to the following jurisdictional question:

> Whether the district court's May 13, 2003, order denying the plaintiffs-intervenors' motions to intervene is an appealable final order? See 28 U.S.C. 1291; *Bhd. of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 524, 67 S.Ct. 1387, 1389-90, 91 L. Ed. 1646 (1947); *Meek* v. *Metro Dade County*, 985 F.2d 1471, 1476 (11th Cir. 1993).

The parties responded to this Court's jurisdictional question. On November 5, 2003, this Court entered an order that the jurisdictional issue would be carried with the case, and stated that "the parties may, but are not required to, further address the jurisdictional issue in their briefs."

Under this Circuit's "anomalous rule," this Court has jurisdiction to determine whether the denial of intervention is proper. *Davis* v. *Butts*, 290 F.3d 1297, 1299 (11th Cir. 2002); *Chiles* v. *Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). In *Stallworth* v. *Monsanto Company*, 558 F.2d 257, 263 (5th Cir. 1977), this Court's predecessor explained that

> we have provisional jurisdiction to determine whether the district court erroneously concluded that the appellants were not entitled to intervene as of right under section (a) of Rule 24, or clearly abused its discretion in denying their application for permissive intervention under section (b) of Rule 24. If we find that the district court's disposition of the petitions [to intervene] was correct, or within the ambit of its discretion, then our jurisdiction evaporates because the proper denial of leave to intervene is not a final decision, and we must dismiss these appeals for want of jurisdiction. But if we find that the district court was mistaken or clearly abused its discretion, then we retain jurisdiction and must reverse. In either event, we are authorized to decide whether the petition for leave to intervene was properly denied.

See also *Chiles*, 865 F.2d at 1212; *Davis*, 290 F.2d at 1299; *Meek* v. *Metropolitan Dade County*, 985 F.2d 1471, 1476-1477 (11th Cir. 1993). "This rule only applies, however, if what the district court denied was intervention as a matter of right

under section (a) of Rule 24 of the Federal Rules of Civil Procedure, and not permissive intervention under section (b) of that very same rule." *Davis*, 290 F.2d at 1299. "Standing alone, an order denying permissive intervention is neither a final decision nor an appealable interlocutory order because such an order does not substantially affect the movant's rights." *Ibid.*; *Meek*, 985 F.2d at 1476.

For reasons set out in the United States' Response To Jurisdictional Question (filed July 24, 2003) and our argument herein, this appeal should be dismissed for lack of jurisdiction. As we explained in our Response, proposed intervenors do not assert a legally cognizable interest that entitles them to intervene as of right, nor have they shown that they are inadequately represented by existing parties. Response at 8-10. There was also no abuse of discretion by the district court in denying permissive intervention. *Id.* at 11. Moreover, denial of intervention with respect to the Bibb Graves proposed intervenors is law of the case and precludes them from attempting to intervene a second time for the same reasons. *Id*. at 10-11. See also pp. 26-27, *infra*.

Proposed intervenors nevertheless argue (Br. 15 and Intervenors' Response to Jurisdictional Question at 17-18 (filed July 24, 2003)), that they are entitled to appeal the district court's May 13, 2003, order granting the Joint Motion to

Approve Consent Order as "non-named class members" under *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002). *Devlin*, however, is inapplicable to this case.

Devlin involved a retiree who sought to intervene in a class action to challenge a settlement relating to his retirement plan. The district court denied the retiree's informal request to intervene, and the court of appeals affirmed that order and held that the retiree lacked standing to challenge the fairness of the settlement on appeal. 536 U.S. at 4-6. The Supreme Court reversed, and held that "nonnamed class members like petitioner who have objected in a timely manner to approval of a settlement at the fairness hearing have the power to bring an appeal without first intervening." *Id.* at 14. In *Devlin*, however, the Supreme Court explained that petitioner's right to appeal turned on the "[d]istrict [c]ourt's approval of the settlement – which binds petitioner as a member of the class [and] amounted to a final decision of [petitioner's] right or claim sufficient to trigger his right to appeal." *Id.* at 9 (internal quotations and citation omitted).

The Consent Order in this case, however, is not a final judgment on the merits of the desegregation case because it does not fully dispose of proposed intervenors' rights. Rather, it is an intermediate remedial order which ensures that the Clay County School Board's school closing decisions comply with the district

court's July 11, 1974, desegregation order. See, *e.g.*, *P.A.C.E.* v. *School Dist. of Kansas City*, 312 F.3d 341, 342 (8th Cir. 2002) (where unnamed class members rely on *Devlin* in seeking to appeal an order denying motion to decertify class, the court of appeals holds that *Devlin* is "not on point because it involved a final order approving settlement of the case"). The Clay County school district has not been found unitary, and any "school construction, school consolidation, or site selection" is subject to judicial oversight and approval. See U.S. Add. 1. Thus, unlike in *Devlin*, the school district remains subject to federal court jurisdiction following the district court's May 13, 2003, order approving the Consent Order.

Even if proposed intervenors are correct that *Devlin* applies to this appeal, it would benefit only the Bibb Graves proposed intervenors, as they are black parents, students, and taxpayers attending and residing near Bibb Graves School. These are the only individuals among the proposed intervenors who would fall within the scope of unnamed class members in the school desegregation case. *Lee* v. *Macon County Bd. of Educ.*, 221 F. Supp. 297 (M.D. Ala. 1963). Mellow Valley proposed intervenors are not unnamed members of the plaintiff class and would therefore have no right under *Devlin* to appeal the district court's May 13, 2003, order denying intervention and approving the Consent Order.

II

PROPOSED INTERVENORS DO NOT SATISFY THE CRITERIA FOR INTERVENTION

A party who seeks to intervene as of right under Fed. R. Civ. P. 24(a) must establish that:

> (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Chiles v. *Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). A party must meet all four prerequisites to intervene as of right. *Ibid.* Permissive intervention under Fed. R. Civ. P. 24(b) is wholly discretionary with the court and may be appropriate where a party's claim or defense and the main action have a question of law or fact in common and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties. *Walker* v. *Jim Dandy Co.*, 747 F.2d 1360, 1365 (11th Cir. 1984); see also *Purcell* v. *BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996) ("[E]ven though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention."), cert. denied, 519 U.S. 867 (1996).

A. *The District Court Correctly Denied Intervention As Of Right*

The district court correctly denied proposed intervenors' motions because the movants fail to satisfy the second and fourth factors to intervene as of right under Rule 24(a).

1. *Proposed intervenors do not assert legally cognizable interests*

In determining a sufficiency of interest to intervene as of right, this Court requires that proposed intervenors show "a direct, substantial, legally protectable interest in the proceedings." *Purcell*, 85 F.3d at 1512. This Court adheres to a "narrow reading" of interests in school desegregation cases by requiring that movants demonstrate an interest "in a desegregated school system." *Hines* v. *Rapides Parish Sch. Bd.*, 479 F.2d 762, 765 (5th Cir. 1973); *United States* v. *Perry County Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978). "An interest in maintaining local community schools, without any showing that consolidation would hamper the avowed goal of eliminating the vestiges of past discrimination, fails to constitute a legally cognizable interest in a school desegregation case." *United States* v. *Georgia*, 19 F.3d 1388, 1394 (11th Cir. 1994); *Perry County*, 567 F.2d at 279-280. Proposed intervenors in this case assert interests in opposing the closure of their neighborhood schools. Such interests are not legally cognizable in school desegregation cases and thus proposed intervenors do not satisfy Rule 24(a).

The Bibb Graves proposed intervenors argue (Br. 18-19) that closing Bibb

Graves School will impose an undue transportation burden on black students, reduce scholarship opportunities for black students, cause black students to utilize portable classroom facilities at their new school, and frustrate the "freedom of choice plan" instituted during the pendency of this litigation.

The district court, however, determined that closing Bibb Graves School will not have an undue burden on black students. Bibb Graves School is 28% black and 72% white. During briefing on the school closings, the United States explained to the district court as follows:

> [w]ith respect to student assignment, the Board's proposal will move Bibb Graves students from one desegregated school to other desegregated schools. If anything, the resulting consolidated schools in Ashland and Lineville will have student bodies that are slightly *more* representative of the overall district racial composition than is currently enrolled at Bibb Graves. * * * With respect to transportation, extracurricular activities, and the other factors * * * the United States and private plaintiffs concluded that although there are certainly burdens associated with any school closing, the Board's plan to close Bibb Graves will distribute those burdens equitably across racial groups. * * * Indeed, the overwhelming majority of students effected by the closings are white, and there is no reason to expect that black students will bear the consequences of closing Bibb Graves any more than their white classmates.

See R. Apr. 11, 2003, United States' Response To Bibb Graves Motion To Intervene at 10-11. The United States also explained to the district court that the school closings would facilitate further racial integration among the students in the

remaining schools. See p. 6, *supra.* Based on briefings by the United States and private plaintiffs, the district court determined that the school closing plan proposed by the Clay County School Board, and agreed to by the parties in the Joint Motion for Consent Order, "should be approved as it is not unconstitutional, unlawful, unreasonable, or contrary to public policy," and would "not perpetuate or re-establish the dual system." R.E. 14 at 4.

The Bibb Graves proposed intervenors' interest in challenging the School Board's decision to close their neighborhood school does not rise to the level of warranting intervention as of right. This Court has recognized that "[o]ne of the ultimate considerations in a desegregation case is that the basic administration of a school district, such as the number and location of schools, should be left to local authorities and the political process." *Georgia*, 19 F.3d at 1392, citing *Freeman* v. *Pitts*, 503 U.S. 467, 489-490 (1992). Thus this Court has dismissed appeals of the denial of intervention by parents seeking to intervene in school desegregation cases to oppose implementation of desegregation orders for reasons that do not relate to achieving a unitary school system.

In *Georgia*, for example, this Court dismissed an appeal of a denial of intervention where proposed intervenors asserted interests involving the "alleged

advantages of operating smaller local schools as opposed to a larger single school, and not the projected racial makeup of a consolidated school." 19 F.3d at 1394. This Court determined that proposed intervenors' "overriding purpose [was] in maintaining local community schools," and not in achieving a unitary school system. *Ibid*. Similarly, in *Perry County*, this Court dismissed an appeal by parents who sought to intervene in a school desegregation case to oppose the construction of a high school at the school board's chosen site. The parents expressed concerns about "[the] safety and welfare of school children, a large attendance zone that would require considerable travel on the part of some students, and the significant outlay of public funds that would be required." 567 F.2d at 280 n.3. This Court determined, however, that the "parents [were] not seeking to challenge deficiencies in the implementation of desegregation orders" but were "oppos[ing] the [school location] on various policy grounds, which, though important, are unrelated to desegregation and the establishment of a unitary school system." *Id.* at 279-280. See also *United States* v. *Mississippi*, 958 F.2d 112, 115-116 (11th Cir. 1992) (association of parents denied intervention as of right where they assert interests in opposing school board's school reorganization plan for reasons other than achieving a desegregated school system). Indeed,

school locations are "matters of policy * * * to be determined by the Board of Education, not by the federal courts." *Perry County*, 567 F.2d at 280. "Location of a school comes within the purview of the federal courts only to the extent that it has an impact on desegregation." *Ibid.*; see also *Tasby* v. *Estes*, 517 F.2d 92, 105 (5th Cir.), cert. denied, 423 U.S. 939 (1975).

Like the Bibb Graves proposed intervenors, Mellow Valley proposed intervenors argue (Br. 18-19) that they have a legally cognizable interest in opposing the closure of Mellow Valley School. See also R.E. 3, 4. Their interest in preserving their local school and preventing the consolidation of Mellow Valley School students into integrated schools is not a valid "interest in a desegregated school system" warranting intervention. *Perry County*, 567 F.2d at 279; see also *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971) ("The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools."); *Pate* v. *Dade County Sch. Bd.*, 588 F.2d 501, 503 (11th Cir.) ("The parental interest that justifies * * * intervention is an interest in a desegregated school system."), cert. denied, 444 U.S. 835 (1979). Indeed, maintaining the status quo at Mellow Valley School, which has a student

body that is 99.5% white, in the wake of school closings in Clay County would be contrary to the goal of achieving a unitary school system. See, *e.g.*, *St. Helena Parish Sch. Bd.* v. *Hall*, 287 F.2d 376, 379 (5th Cir. 1961) (denial of motion to intervene by white child who asserted an interest in opposing relief to minority plaintiffs in school desegregation case).

Proposed intervenors also argue (Br. 21-31) that the school closings will adversely affect special education students at Bibb Graves and Mellow Valley Schools in violation of the Individuals With Disabilities Education Act, 20 U.S.C. 1400, *et seq.* (IDEA) and state law, and female athletes in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, *et seq*. (Title IX). These interests, which are unrelated to achieving a racially desegregated school system, are not legally cognizable interests that satisfy Rule 24(a) in this school desegregation case. Proposed intervenors' interests in protecting the rights of special education students under the IDEA, and female athletes under Title IX, must be advanced in another forum or proceeding. See, *e.g.*, *Horton* v. *Lawrence County Bd. of Educ.*, 425 F.2d 735 (5th Cir. 1970) (petition of professional association of teachers, which asserted interests in protecting rights of teachers in school desegregation case, did not assert legally cognizable interests that mandated

intervention as of right); *Bennett* v. *Madison County Bd. of Educ.*, 437 F.2d 554 (5th Cir. 1970) (same).

2. *Any cognizable interests asserted by proposed intervenors are adequately represented by existing parties*

Proposed intervenors argue (Br. 19-21) that they are not adequately represented by the existing parties. This argument has no merit. "Representation is adequate if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor, and if the representative does not fail in fulfillment of his duty." *Meek*, 985 F.2d at 1478, quoting *Federal Sav. & Loan Ins. Corp.*, v. *Falls Chase Special Taxing Dist.*, 983 F.2d 21, 215 (11th Cir. 1993). To the extent that proposed intervenors assert any legally cognizable interests in desegregating the Clay County school system, those interests are fully represented by the United States and private plaintiffs.

This Court presumes that a proposed intervenor's interest is adequately represented "when applicants for intervention seek to achieve the same objectives as an existing party in the case." *United States* v. *City of Miami*, 278 F.3d 1174, 1178 (11th Cir. 2002); see also *Georgia*, 19 F.3d at 1394. The presumption is "especially appropriate" in this case where the United States is a party to the

litigation, and under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, is charged with representing the interests of public school children by challenging state-imposed segregation in education. See *United States* v. *South Bend Cmty. Sch. Corp.*, 692 F.2d 623, 628 (7th Cir. 1982) (intervention of national organization that sought to represent black students in school desegregation case denied where organization and United States share same objectives); *Miami*, 278 F.3d at 1178 (intervention denied to police association in employment discrimination case where association shared same goals as, and was adequately represented by, the United States). Indeed, there is no indication of collusion between the United States and the School Board. The United States fully evaluated the School Board's school closing plan and explained to the district court that closing Bibb Graves and Mellow Valley Schools was consistent with the July 1974 remedial order, and would further facilitate the School Board's desegregation efforts. See R. Apr. 11, 2003, Response Of The United States to Bibb Graves Motion To Intervene; R. Apr. 11, 2003, Response Of The United States To Mellow Valley Motion To Intervene.

3. *Denial of intervention to Bibb Graves proposed intervenors is law of the case*

The Bibb Graves proposed intervenors are also not entitled to intervene as of right because the district court's July 17, 2002, order denying intervention to a

similar group of Bibb Graves parents and students is law of the case. "[A] court should not reopen issues decided in earlier stages of the same litigation." *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997), citing *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). In both motions filed in June 2002 and March 2003, the Bibb Graves parents sought to intervene as of right to oppose the closing of Bibb Graves School. The district court denied the June 2002 motion, and no appeal was taken from that order. U.S. Add. 2. The district court correctly applied the law of the case in denying intervention to the Bibb Graves proposed intervenors in May 2003. R. 14 at 1-2. See also *Hopwood* v. *Texas*, 78 F.3d 932, 961 (5th Cir.) (law of the case bars proposed intervenors challenging a second time district court's denial of intervention), cert. denied, 518 U.S. 1033 (1996).

4. *The district court acted within its discretion in denying intervention as of right without conducting an evidentiary hearing*

Since proposed intervenors failed to assert legally cognizable interests (p. 19, *supra*), there is no merit to proposed intervenors' argument (Br. 17) that the district court was required to hold a hearing on their intervention motion. A "petition for intervention in a school desegregation case should bring to the district court's attention the precise issues that the putative intervenors seek to represent, and the

manner in which the challenged plan fails to realize the goal of a unitary system." *United States* v. *CRUCIAL*, 722 F.2d 1182, 1190 (5th Cir. 1983). "In general, to the extent that putative intervenors raise issues properly cognizable in a school case[,] * * * an evidentiary hearing should be held by the district court to aid its assessment of the proposed intervention." *Ibid*. "An exception to the hearing requirement applies where the petitioners allege matters unrelated to desegregation and therefore inappropriate in a school case." *Ibid.*

In *Perry County*, for example, this Court affirmed the district court's order denying intervention without a hearing because proposed intervenors failed to assert legally cognizable interests. 567 F.2d at 279-280 (denial of intervention without hearing proper where intervenors sought to challenge construction site of new school). Since, in this case, proposed intervenors plainly fail to assert legally cognizable interests to intervene as of right in this school desegregation case, the district court acted well within its discretion when it denied the motion to intervene without a hearing. In any event, the district court had ample evidence demonstrating that the school closing decisions by the School Board were consistent with the desegregation goals of the July 1974 remedial order, and would not perpetuate the dual school system.

B. *The District Court Did Not Abuse Its Discretion By Denying Permissive Intervention*

Proposed intervenors argue (Br. 38) that under *Calhoun* v. *Cook*, 487 F.2d 680 (5th Cir. 1973), the case should be remanded to the district court for an evidentiary hearing on their intervention motion, and that "school children should be allowed to intervene permissively under Rule 24(b) since such intervention" would not "prejudice" the rights of the original parties. Proposed intervenors' reliance on *Calhoun* is misplaced.

Calhoun involved the entry of a settlement agreement in a school desegregation case without an evidentiary hearing. The court of appeals remanded the case for a hearing because there was a dispute as to the existence of a settlement agreement. *Id.* at 682 ("At least some of the attorneys representing the original plaintiffs assert no such compromise was made."). In this case, though, there is no dispute as to the existence of the Joint Motion For Approval Of Consent Order, which was signed by all of the parties and filed with the district court on February 26, 2003. R.E. 2.

The court of appeals in *Calhoun* also ordered that on remand the district court conduct a hearing on the motions to intervene of three groups of students in the school system, and directed that the motions raise "precise issues which the

new group sought to represent and the ways in which the goal of a unitary system had allegedly been frustrated." 487 F.2d at 682. Proposed intervenors in this case, however, raised precise issues in their complaint on intervention, none of which related to "ways in which the goal of a unitary system had allegedly been frustrated." *Ibid*. Moreover, proposed intervenors' intervention in this case would prejudice the parties by interfering with a school closing plan agreed to by the parties and found by the district court to be constitutionally permissible. Thus the district court was well within its discretion in denying permissive intervention as well.

III

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN APPROVING THE CONSENT ORDER WITHOUT A HEARING

Proposed intervenors argue (Br. 38) that the district court was required under Fed. R. Civ. P. 23(e) to conduct an evidentiary hearing prior to granting the Joint Motion to Approve Consent Order. Since proposed intervenors fail to satisfy the criteria to intervene in this case, they are foreclosed from challenging the district court's approval of the Consent Order. See *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 262 (5th Cir. 1977); see also *Meek* v. *Metropolitan Dade County*, 985 F.2d

1471, 1476-1477 (11th Cir. 1993) (on appeal by intervenors, court of appeals has no jurisdiction to review appealable injunction in absence of conclusion that district court improperly denied motions to intervene).

Should this Court nevertheless reach the propriety of the district court's approval of the Consent Order, it should affirm. Proposed intervenors fully briefed the district court on the bases for their opposition to the Consent Order. Moreover, the parties to the litigation demonstrated that the school closings would further desegregation within the school district. See, *e.g.*, *Lee* v. *Macon County Bd. of Educ.*, 483 F.2d 244, 245 (5th Cir. 1973) (district court reasonably exercised discretion by approving desegregation plan without further evidentiary hearing after considering all facts concerning alternatives for desegregating schools, and objections raised by private plaintiffs who claimed they were entitled to a further hearing).

There is no merit to proposed intervenors' argument that the district court was required to conduct a hearing under Fed. R. Civ. P. 23(e) prior to granting the Consent Order. Fed. R. Civ. P. 23(e) provides that a "class action shall not be dismissed or compromised without the approval of the court." The primary concern addressed by Rule 23(e) is the protection of class members whose rights

may not have been given adequate consideration during the settlement negotiations that led to the dismissal of the case. See, *e.g.*, *Communication Workers of Am.* v. *New Jersey Dep't of Pers.*, 282 F.3d 213 (3d Cir. 2002); *Christina A.* v. *Bloomberg*, 315 F.3d 990, 991 (8th Cir. 2003). In this case, the Consent Order does not relinquish the district court's jurisdiction or end the litigation. Pursuant to the July 11, 1974, order (U.S. Add. 1), the district court retains the power to revise its desegregation orders and reopen the Board's school closing decisions if necessary. Furthermore, as the district court observed, proposed intervenors "fail[ed] to cite, and research fail[ed] to reveal, a single case where Rule 23(e) has been construed to mandate notice and fairness hearings" preceding the adoption of incremental remedial measures in school desegregation cases. R.E. 15 at 5. Thus, the district court did not abuse its discretion in approving the Consent Order.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for want of jurisdiction. Alternatively, the district court's May 13, 2003, order denying the motion to intervene and approving the Consent Order should be affirmed.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

_____
DENNIS J. DIMSEY
LISA WILSON EDWARDS
Attorneys
United States Department of Justice
Civil Rights Division
Appellate Section
950 Pennsylvania Ave., N.W. – PHB 5026
Washington, D.C. 20530
(202) 514-5695

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). The brief was prepared using WordPerfect 9.0 and contains 7,336 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Lisa Wilson Edwards
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2003, a copy of the Brief for the United States As Appellee was served by first class mail, postage prepaid, on each of the following persons:

Stanley F. Gray, Esq.
Gray, Langford, Sapp, McGowan, Nathanson, Gray
108 Eastside Street
Tuskegee, Alabama 36083

Donald B. Sweeney, Jr., Esq.
Bradley, Arant, Rose & White
One Federal Place
1819 Fifth Avenue North
Birmingham, Alabama 35203

Anita Kelly, Esq.
Alabama State Board of Education
Room 5130, Gordon Persons Building
50 North Ripley Street
Montgomery, Alabama 36103

Clarence Dortch, III, Esq.
130 East Street North
Talladega, Alabama 35160

Huel M. Love, Sr., Esq.
Love, Love & Love, P.C.
117 East North Street
Talladega, Alabama 35161

George L. Beck, Jr., Esq.
22 Scott Street
Montgomery, Alabama 36104

Norman J. Chachkin
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013

_____
Lisa Wilson Edwards
Attorney