IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ANTHONY T. LEE, et al.,	)	
	)	
Plaintiffs,	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor	)	
and Amicus Curiae,	)	
	)	
NATIONAL EDUCATION ASSOCIATION,	)	
Plaintiff-Intervenor,	)	Civ. No. 70-251-S
	)	
vs.	)	CLAY COUNTY BOARD
	)	OF EDUCATION
MACON COUNTY BOARD	)	
OF EDUCATION, et al.,	)	
	)	
Defendants.	)	
	)	

RESPONSE OF UNITED STATES IN OPPOSITION TO THE MOTION TO INTERVENE BY PARENTS AND TAXPAYERS WHOSE STUDENTS ATTEND MELLOW VALLEY PUBLIC SCHOOL OPERATED BY THE CLAY COUNTY BOARD OF EDUCATION

The United States opposes the Motion to Intervene by Parents and Taxpayers Whose Students Attend Mellow Valley Public School Operated by the Clay County Board of Education ("Motion to Intervene"), filed on March 5, 2003. At issue is whether a group comprised of white Mellow Valley School students, white parents of Mellow Valley students, and white taxpayers residing in Mellow Valley (collectively, "proposed intervenors") should be permitted to intervene in the above-captioned school desegregation case to participate in any proceedings concerning the parties' Joint Motion for Approval of Consent Decree ("Joint Motion"), which was filed

February 26, 2003, and is currently pending before this Court. The proposed intervenors assert that they are entitled to intervene to oppose the planned closing of Mellow Valley, a 99% white school. As explained more fully below, this Court should deny intervention because the proposed intervenors fail to satisfy the legal requirements for either intervention of right or permissive intervention.[1]

PROCEDURAL AND FACTUAL BACKGROUND

This action is part of the state-wide school desegregation litigation styled as Lee v. Macon County Board of Education, initiated in 1963. On July 3, 1963, the United States was added as a Plaintiff-Intervenor and as amicus curiae "in order that the public interest in the administration of justice would be represented." Lee v. Macon County Bd. of Educ, 267 F. Supp. 458, 460 (M.D. Ala. 1967), aff'd sub nom., Wallace v. United States, 389 U.S. 215 (1967). On July 11, 1974, this Court entered an Order applicable to seven school systems, including Clay County, from among the defendants in Lee v. Macon County Board of Education. This Order dissolved the detailed regulatory injunction in place at the time, and replaced it with a permanent injunction addressing, inter alia, student assignment, faculty and staff assignment, transportation, school construction and consolidation, and transfers. The Court also placed this case on its inactive docket, subject to reactivation "on proper application by any party."

The Board sought to reactivate this case on June 26, 2000, by filing a petition seeking

[1] Although there is a general rule in favor of holding evidentiary hearings for intervention motions filed by parents in a school desegregation case, see Adams v. Baldwin County Bd. of Educ., 628 F.2d 895, 897 (5th Cir. 1980), the Eleventh Circuit has held that district courts may deny such a motion to intervene without a hearing when "it is more than clear that [the proposed intervenors] are not entitled to intervene." Bradley v. Pinellas County Sch. Bd., 961 F.2d 1554, 1556 (11th Cir. 1992) (citation and internal quotations omitted). The United States believes this Motion to Intervene should be denied without a hearing consistent with Bradley.

approval for continued transfers of students into Clay County from Talladega and Randolph Counties. The United States opposed the petition, and the United States and private plaintiffs (collectively, "plaintiff parties") sought additional information. On July 21, 2000, this Court granted the Board's petition for the 2000-01 school year, but denied the petition for future years.

On May 17, 2002, the Board informed the United States that it had recently voted to close Bibb Graves School, a 29% black K-12 school, for budgetary reasons before the 2002-03 school year.[2] During subsequent conversations concerning the impact of the Board's decision on desegregation, the Board informed the plaintiff parties that for budgetary reasons, the Board needed to close at least one school in the district, and that closing one, or both, of its K-12 schools (Bibb Graves and Mellow Valley) would provide the greatest financial benefit to the district. The plaintiff parties engaged in an extensive evaluation of the Board's closure and consolidation plan, including review of the Board's responses to the United States' information requests, interviews with district staff and select Board members, tours of the relevant school facilities, tours of bus routes, and detailed discussions with the Board's counsel.

On June 7, 2002, a group of Bibb Graves parents moved to intervene in this case to object to the proposed closure of Bibb Graves. The United States, the private plaintiffs, and the Board opposed the proposed intervention. This Court denied their motion to intervene on July 17, 2002.

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[2] During the 2002-03 school year, the Board is operating six schools with a total enrollment of 2339 students, 22% of whom are black and 76% of whom are white:

- Mellow Valley School (K-12 399 students 0% black, 99% white)
- Bibb Graves School (K-12 341 students 29% black, 71% white)
- Ashland Elementary School (K-6 394 students 17% black, 79% white)
- Clay County High School (7-12 320 students 21% black, 77% white)
- Lineville Elementary School (K-6 480 students 32% black, 65% white)
- Lineville High School (7-12 405 students 32% black, 67% white)

On July 23, 2002, the Board voted unanimously to close both Bibb Graves and Mellow Valley at the end of the 2002-03 school year. After a careful review of the Board's decision and extensive negotiations, the United States, private plaintiffs, the Board and Defendant Alabama State Board of Education drafted a consent decree that provided for the closure of the two schools.[3] At the request of the Board, the parties agreed not to finalize the consent decree until county residents voted on a November 2, 2002 referendum to increase taxes, which was apparently proposed to help keep Bibb Graves and Mellow Valley open. Although the referendum ultimately failed, the Board by that time had learned that the projected budget deficits, which prompted the Board's original decision to close Bibb Graves, were no longer accurate and the school district was in fact expecting to end the 2002-03 school year with a surplus. See Letter from Sweeney to Rho of 10/14/02 (attached as Exhibit 2).

Notwithstanding this revised forecast, the Board, on January 17, 2003, affirmed its July 23, 2002 decision, again voted to close the schools, and authorized its counsel to sign the proposed consent decree on the Board's behalf before filing it with this Court. The Board, the United States and the private plaintiffs all signed the consent decree. While the parties waited for the consent of the Alabama State Board of Education, a member of the Board who had voted for the consent decree resigned and the Board appointed a replacement. On February 26, 2003,

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[3] The Board projects that after implementing the consent decree, the student enrollment at the district's schools will be:

- 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 Letter from Miller to Rho of 1/17/03 (attached as Exhibit 1).

with the consent of all the parties, the Joint Motion for Approval of Consent Decree ("Joint Motion") was filed.

On the next day, despite having given its consent, granted authority to counsel to sign on its behalf, and jointly filed the consent decree, the Board voted 3-2 to rescind its consent. The Board thereafter filed a Motion to Reject Proposed Consent Decree ("Motion to Reject") on March 10, 2003. Both the Joint Motion and the Motion to Reject are pending before this Court.

On March 5, 2003, proposed intervenors filed this Motion to Intervene, as well as a Complaint for Declaratory and Injunctive Relief ("Complaint") and a Motion to Dismiss and Objection to Consent.[4] The proposed intervenors' Motion to Intervene states that they "claim an interest relating to the closing of Mellow Valley School" (Mot. to Intervene ¶ 8) and are seeking to intervene as plaintiffs "for the purpose of objection to any alleged Consent Order and for the purpose of moving to dismiss the motion to approve any Consent Order as granted" (id. ¶ 10).

The proposed intervenors allege, inter alia, that the Board's February 27 vote to rescind

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[4] Rule 24(c) of the Federal Rules of Civil Procedure requires persons seeking intervention to file a complaint-in-intervention along with a motion to intervene. Here, the proposed intervenors filed the Complaint and specifically incorporated it into the Motion to Intervene (Mot. to Intervene ¶ 17). However, the Complaint, both in its caption and body, includes groups of people who did not file the Motion to Intervene, which was submitted solely on behalf of white Mellow Valley students, parents, and taxpayers. Specifically, the Complaint purports to assert claims on behalf of black Bibb Graves parents and students as well as white Bibb Graves parents and students. Without moving for and being granted intervention, these additional groups cannot file pleadings in the Lee v. Macon County case such as the Complaint.

The United States therefore considers the Complaint to be a proposed complaint-in-intervention on behalf of only the white Mellow Valley students, parents, and taxpayers who filed the Motion to Intervene. The black Bibb Graves group has filed separate pleadings that the United States has responded to separately. The white Bibb Graves group has not sought to intervene in Lee v. Macon County. The United States therefore does not address their objections.

its consent was an effective withdrawal of consent from the Joint Motion (id.); the private plaintiffs have failed to protect the proposed intervenors' interests by allowing the district to operate without attendance zones or zoned bus routes (id. ¶ 11); the proposed consent decree was the product of a false impression that the district faced a budget deficit and was motivated by false and fraudulent motives including racism and the desire to increase Clay County High School's athletic classification from 1A to 2A (id. ¶¶ 11, 13, 14); and the Consent Decree ignores the proposed intervenors' "rights in attending an integrated school at a close proximity to their homes and to participate in athletics and other extracurricular activities in a small, neighborhood school" (id. ¶ 13). The Complaint submitted with and incorporated into the Motion to Intervene alleges in addition that closing Mellow Valley would violate Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., and the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq. (Compl. Declaratory Inj. Relief ¶¶ 44-48, 58-59.)[5]

In sum, the proposed intervenors seek to intervene to oppose the closing of Mellow Valley on various grounds, none of which includes the effect the closure will have on

[5] The Complaint also includes allegations related to the closure of Bibb Graves, including some allegations related to the effects of that closure on black students. However, as noted above, see supra note 4, the proposed intervenors of this Motion to Intervene include only white students, parents, and taxpayers of the 99% white Mellow Valley. Indeed, the Motion to Intervene identifies the proposed intervenors' interest solely in terms of opposing the closure of Mellow Valley, without mentioning Bibb Graves. (Mot. to Intervene ¶ 8 ("Petitioners file this Motion to Intervene as a matter of right . . . because your Petitioners' claim an interest relating to the closing of Mellow Valley School which is the subject of this action . . . .").) In support of their Motion to Intervene, the Mellow Valley proposed intervenors therefore cannot rely upon objections raised by a group of people -- the Bibb Graves students and parents -- who are not part of the proposed intervenors.

To the extent the Complaint raises the objections of black Bibb Graves students and parents, those objections have also been raised in the separate intervention motion filed by a group of black Bibb Graves students and parents. The United States has filed a separate memorandum in opposition to the Bibb Graves motion to intervene.

desegregation in the school district. The proposed intervenors seek intervention of right under Federal Rule of Civil Procedure 24(a), or in the alternative, permissive intervention under Rule 24(b). The United States therefore addresses both.

ARGUMENT

I. The proposed intervenors are not entitled to intervention of right.

Rule 24(a)(2) of the Federal Rules of Civil Procedure requires would-be intervenors to demonstrate that they meet each of the following requirements: (1) the application to intervene is timely; (2) the applicant has an interest in the subject matter of the underlying action; (3) the applicant is so situated that disposition of the action, as a practical matter, may impede or impair his or her ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties to the action. United States v. City of Miami, 278 F.3d 1174, 1178 (11th Cir. 2002). The applicant bears the burden of establishing each of these four elements. Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989).

Here, the proposed intervenors' application fails because their stated interest in maintaining their 99% white neighborhood school is not a legally cognizable interest in this desegregation lawsuit. In the event this Court concludes that the proposed intervenors have asserted a cognizable interest in furthering desegregation, the Motion to Intervene should still be denied because the existing parties adequately represent such an interest.

A. *Proposed intervenors have failed to articulate a legitimate interest in this case.*

The subject matter of this litigation is the desegregation of the Clay County School District and the Board's compliance with this Court's desegregation orders. The proposed intervenors have failed to demonstrate an interest in desegregation or in the Board's compliance

with this Court's orders. Indeed, in their Motion to Intervene, the proposed intervenors do not even mention the term "desegregation," much less attempt to relate their opposition to closing Mellow Valley to the pursuit of a desegregated Clay County School District.[6]

In United States v. Perry County Board of Education, 567 F.2d 277 (5th Cir. 1978),[7] the Fifth Circuit Court of Appeals embraced a "narrow reading" of the term "interest" and held that parties seeking intervention must articulate a "direct, substantial, legally protectable interest in the proceedings." Id. at 279. In the context of a school desegregation case, "parents seeking to intervene must demonstrate an interest in a desegregated school system." Id. A motion for intervention must therefore "bring to the attention of the district court the precise issues which the [proposed intervenors] sought to represent and the ways in which the goal of a unitary system had allegedly been frustrated." Hines v. Rapides Parish Sch. Bd., 479 F.2d 762, 765 (5th Cir. 1973).

Here, the proposed intervenors have asserted an interest "relating to the closing of Mellow Valley School." (Mot. to Intervene ¶ 8.) But closing the 99% white Mellow Valley and relocating those students to schools that closely mirror the district's overall racial composition clearly furthers desegregation in the district. See 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

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[6] To the extent this Court attributes to the proposed intervenors any desegregation-related interests in opposing the Bibb Graves closing, those interests are adequately represented by the existing parties. See infra Part I.B.

[7] In Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

concerned with the elimination of one-race schools."). Given their opposition to this desegregation remedy, the proposed intervenors have failed to articulate a valid "interest in a desegregated school system" that might warrant intervention. Perry County, 567 F.2d at 279.

The thrust of the proposed intervenors' interest in opposing the Joint Motion is their asserted "rights in attending an integrated school at a close proximity to their homes and to participate in athletics and other extracurricular activities in a small, neighborhood school." (Mot. to Intervene ¶ 13.) These interests do not warrant intervention: "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); see also, e.g., Perry County, 567 F.2d at 279 ("In the context of public school desegregation, there are innumerable instances in which children, parents, and teachers may be deprived of various 'rights' (e.g., the 'right' to attend a neighborhood school) without having had the opportunity to participate directly in the judicial proceedings which divest them of those 'rights.'").

Like the group of parents who were denied intervention in Perry County, the proposed intervenors "oppose the [decision] on various policy grounds, which, though important, are unrelated to desegregation and the establishment of a unitary school system." 567 F.2d at 279-80. For example, proposed intervenors assert in their Complaint that white Mellow Valley athletes may face greater competition at the consolidated schools (Compl. ¶¶ 44-48); white Mellow Valley special education students will have to move to new schools that may not meet their needs as well as Mellow Valley (id. ¶ 59); and white Mellow Valley students in general will

be moved closer to a potential safety hazard in the event of a chemical disaster at the nearby U.S. Army Depot (id. ¶ 55). Although these asserted interests are undoubtedly important to the proposed intervenors, they are, like the interest in maintaining a neighborhood school, merely policy objections that are unrelated to desegregation and therefore unavailing to their argument for intervention. Perry County, 567 F.2d at 279-80. Simply put, the proposed intervenors "are not entitled to intervention of right simply because they would have voted differently had they been members of [the Board]." Id. at 280 (citing Jones v. Caddo Parish Sch. Bd., 487 F.2d 1275, 1277 (5th Cir. 1973)).[8]

B. ***The existing parties adequately represent any cognizable interest the proposed intervenors may have.***

To the extent this Court concludes that the proposed intervenors have an interest in furthering desegregation, the United States, private plaintiffs, and the Board share the identical interest and adequately represent it. Because the proposed intervenors cannot meet their burden of proving that their (cognizable) interests are not adequately represented, the Motion to Intervene should be denied. E.g., City of Miami, 278 F.3d at 1178.

Under Title IV of the Civil Rights Act of 1964, the United States is charged with representing the interests of public school children by challenging state-imposed segregation in education. See 42 U.S.C. § 2000c-6. As a result of this charge, insofar as the proposed intervenors seek to ensure desegregation of the school system, the United States necessarily

[8] The proposed intervenors also claim they have "a direct, substantial, legal [sic] protectable interest in intervening because their interests are not protected by either of the present parties." (Mot. to Intervene ¶ 9.) This argument provides no support for the Motion to Intervene because it merely conflates two separate intervention requirements. The proposed intervenors must prove both that they have a cognizable interest in this litigation and that their interest is not adequately represented by the parties.

shares the same ultimate objective. Similarly, the private plaintiffs in this case are a class comprised of black students and parents of black students in the Clay County school system who seek desegregation of the school system.

There is a presumption "that a proposed intervenor's interest is adequately represented when an existing party pursues the same ultimate objective as the party seeking intervention." United States v. Georgia, 19 F.3d at 1394; see also City of Miami, 278 F.3d at 1178-79. This presumption is "especially appropriate" where the United States is a party "because . . . the Government is charged by law with representing the interests of the absentee." United States v. S. Bend Cmty. Sch. Corp., 692 F.2d 623, 628 (7th Cir. 1982). Thus, "when the government is a party, the moving party must make a very compelling showing of inadequacy of representation." United States v. Coffee County Bd. of Educ., 134 F.R.D. 304, 310 (S.D. Ga. 1990).

Here, the proposed intervenors's Motion to Intervene and Complaint is silent as to why the current plaintiff parties cannot adequately protect the proposed intervenors' interest in achieving a desegregated school system. Moreover, the fact that the United States and private plaintiffs may have arrived at a different conclusion than the proposed intervenors with respect to the proposed closures does not render our representation of their interest in desegregation inadequate. See Perry County, 567 F.2d at 280 (holding that interests of applicants were properly represented by school board even though applicants would have voted differently than board on issue of school construction). Finally, as discussed above, proposed intervenors cannot base intervention on the inadequate representation of interests that are unrelated (and run counter) to the goal of desegregating the school district. See id., 567 F.2d at 279.

II. The proposed intervenors should not be permitted to intervene permissively.

An applicant for intervention may be permitted to intervene when a timely motion is made, and "an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). In considering whether to permit intervention, courts are to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id. Whether to allow permissive intervention is entirely within the discretion of the court; thus, courts may deny permissive intervention even when the timeliness and commonality requirements are met. E.g., Sunbelt Veterinary Supply, Inc. v. Int'l Bus. Sys. United States, Inc., 200 F.R.D. 463, 466 (M.D. Ala. 2001). Moreover, it is well-settled that in school desegregation cases, a court may deny intervention where the "parties in the original action [are] aware of [the issues proposed intervenors seek to present] and are completely competent to represent the interests of the new group." Hines, 479 F.2d at 765. As with intervention of right, "[t]he parental interest that justifies permissive intervention is an interest in a desegregated school system." Pate v. Dade County Sch. Bd., 588 F.2d 501, 503 (5th Cir. 1979).

Here, the proposed intervenors have neither asserted an interest in a desegregated system nor shown that the existing parties are not aware of the issues they want to present. Like the movants in Dade County and Perry County, the proposed intervenors "are not seeking to challenge deficiencies in the implementation of desegregation orders" but are instead "oppos[ing] such implementation." Id. (quoting Perry County, 567 F.2d at 279) (internal quotation marks omitted). Under such circumstances, permissive intervention should be denied.

Furthermore, given that any interest the proposed intervenors may have in furthering desegregation is fully represented by the United States, private plaintiffs, and the Board, their

entry in the case would serve only to burden and delay unnecessarily the implementation of the proposed consent decree. As this Court is well aware, the longer the parties wait before beginning the closure process, the less feasible it becomes to close the schools before the start of the 2003-04 school year, as the parties agreed. Cf. Coffee County, 134 F.R.D. at 310-11 (finding that where United States and school system were engaged in active and time-sensitive negotiations, permitting intervention would prejudice ongoing negotiations).

Finally, permitting this group of proposed intervenors to intervene would undermine the effective management of this case. The proposed intervenors have failed to explain why they, as opposed to any other group of interested students and parents, should be permitted to intervene when their desegregation-related interests are identical to those of the existing parties in the case. Under the proposed intervenors' theory, any student or parent of a student raising school-related concerns, however remotely related to desegregation, could intervene. This is precisely the type of unmanageable situation courts have the authority to prevent through the discretion afforded in Rule 24(b).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the proposed intervenors' Motion to Intervene.

Respectfully submitted,

ALICE H. MARTIN
United States Attorney
for the Northern District of Alabama

SHARON D. SIMMONS
Chief, Civil Division
Office of the United States Attorney
Suite 200, Robert S. Vance Federal Building
1800 Fifth Avenue North
Birmingham, Alabama 35203-2189
(205) 244-2001

RALPH F. BOYD, JR.
Assistant Attorney General

FRANZ R. MARSHALL
DANIEL S. GORDON
Attorneys
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, N.W.
Educational Opportunities Section
Patrick Henry Building, Suite 4300
Washington, D.C. 20530
(202) 514-4092
(202) 514-8337 (FAX)

Dated: April 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to Motion to Intervene has been sent, by facsimile and first-class mail, postage paid, on this tenth day of April 2003, to the following counsel of record:

Stanley F. Gray, Esq.
Gray, Langford, Sapp, McGowan, Nathanson, Gray
P.O. Box 830239
Tuskeegee, AL 36083

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

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

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

Huel M. Love, Sr., Esq.
Love, Love, & Love, P.C.
P.O. Box 517
Talladega, AL 35161

George L. Beck, Jr., Esq.
P.O. Box 5019
Montgomery, AL 36103

_____
DANIEL S. GORDON