No. _____

In the
Supreme Court of the United States

Nathaniel Borrell Dyer,
Petitioner

v.

Atlanta Independent School District,
Respondents

On Petition For A Writ Of Certiorari to the United States Court of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Nathaniel Borrell Dyer
Petitioner Pro Se
202 Joseph E. Lowery Blvd. NW
Atlanta, Georgia 30314
(404) 964-6427

QUESTIONS PRESENTED FOR REVIEW

On February 8, 2018, Atlanta Independent School System (AISS) attached a scanned version of Mr. Dyer's satirical flyer to a suspension letter which banned him from public comment for one year. AISS stated, "Specifically, you passed out flyers to audience members that contained the phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it. These insulting references are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community."

This court has stated "giving offense is a viewpoint." *Matal v. Tam,* 582 US _ (2017). We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U. S. 576, 592 (1969). ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55–56 (1988). The questions presented are:

1. Whether Atlanta Independent School System violated Mr. Dyer's First Amendment right to free speech by categorically banning him from using protected speech in a limited public forum because of a satirical flyer depicting public figures and elected officials which AISS found to be offensive?

2. Whether AISS violated Mr. Dyer's Fourteenth Amendment due process rights by categorically banning him from engaging in public comment at school board meetings while instructing him not to set foot on any AISS property or have any communication with AISS officials and staff, without providing him a way to contest the suspension?

LIST OF PARTIES TO PROCEEDING

Petitioner Nathaniel Borrell Dyer was plaintiff pro se in the district court and appellant in the court of appeals. Respondent Atlanta Independent School System was defendant in the district court and appellee in the court of appeals.

- *Nathaniel Borrell Dyer v. Atlanta Independent School System*, No. 20-10115, United States Court of Appeals, 11th Circuit. Judgment entered March 22, 2021.

- *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB, United States District Court, Northern District of Georgia, Judgment entered December 5, 2019.

- *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB, United States District Court, Northern District of Georgia, Judgment entered March 14, 2019.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Petitioner Nathaniel Borrell Dyer, has no parent corporation. He has no publicly owned stock, and no publicly held company owns 10 percent or more of his stock.

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The Appeals Court Order of the United States Court of Appeals, 11th Circuit, *Nathaniel Borrell Dyer v. Atlanta Independent School System*, No. 20-10115 *(*March 22, 2021), is attached to the Appendix as Appendix "A".

The Summary Judgment Order of the United States District Court, Northern District of Georgia, *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB (December 5, 2019), is attached to the Appendix as Appendix "B".

The Motion to Dismiss Order of the United States District Court, Northern District of Georgia, *Nathaniel Borrell Dyer v. Atlanta Independent School System*, 1:18-cv-03284-TCB (March 14, 2019), is attached to the Appendix as Appendix "C".

STATEMENT OF THE BASIS FOR THE JURISDICTION

The judgement of the Court of Appeals was entered on March 22, 2021. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment (Amendment I) to the United States Constitution prevents the government from making laws which regulate an establishment of religion, or that would prohibit the free exercise of religion, or abridge the freedom of speech, the freedom of the press, the freedom of assembly, or the right to petition the government for redress of grievances.

The Fourteenth Amendment states that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Since 2006, Pro Se Nathaniel Borrell Dyer has consistently attended and participated in public comment at Atlanta Independent School System (AISS) Board meetings. Mr. Dyer has a longstanding reputation for advocating for children, who are predominantly Black, in economically challenged neighborhoods of Atlanta, Georgia. Over the past 14 years, Mr. Dyer has garnered support from the community, as well as AISS employees.
He has been successful in advocating on behalf of AISS educators, bus drivers and custodial workers. As a result of his tireless activism, Mr. Dyer had the honor of being endorsed by the Atlanta Association of Educators (AAE) and their parent organization the National Association of Educators (NEA) in his bid for AISS School Board in 2017. Mr. Dyer's mother, who is a retired educator of 33 years, was also a longtime member of her local teacher's union and the NEA.

Mr. Dyer, who is a graphic artist, has been creating and distributing satirical flyers critical of AISS policies since 2009. Before the board meetings, he ensures that each board member receives a copy of the flyer. Mr. Dyer's first flyer depicted AISS Interim Superintendent Erroll Davis, an African American man, donning a Ku Klux Klan robe. This flyer made national news as it protested Davis' policy to close 13 schools in low-income communities on the south side of Atlanta which were predominately Black.

AISS, who is no stranger to wrongdoing, was involved in what is rivaled to be the worst school cheating scandal in U.S. history. According to an 800 page Investigative Report, "A culture of fear and a conspiracy of silence infected this school system, and kept many teachers from speaking freely about misconduct." The report stated, "From the onset of this investigation, we were confronted by a pattern of interference by top APS leadership in our attempt to gather evidence." Mr. Dyer is completely aware of the tactics AISS uses on those they wish to silence. For example, Mr. Dyer has been falsely accused of fighting

a student; he was instructed not to raise his hand to ask questions in meetings; was forcefully removed from meetings just for being in attendance, and was labeled a pedophile by AISS. To prove Mr. Dyer's case even further, the character assassination tactics of AISS can be seen by this statement, "as AISS had a substantial government interest in "preserving meeting decorum" and the suspensions were necessary because Mr. Dyer continued to disrupt meetings when he was on school property, regardless of whether he was able to speak or enter the meeting room."

On February 8, 2018, Mr. Dyer was attending a community meeting at Perkinson Elementary School in Atlanta, Georgia. During the meeting, AISS Chief Ronald Applin arrived and told Mr. Dyer that he was not allowed on the campus. When Mr. Dyer asked for an explanation, Applin callously dropped a stack of papers in his lap which included the letters that served as trespass warnings. One letter referenced the February 5, 2018 AISS board meeting where Mr. Dyer distributed a satirical flyer. The letter read in part, "You once again introduced racist and hate-filled epithets at an ABOE meeting. Specifically, you passed out flyers to audience members that contained the phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it. (Exhibit C – February 5, 2018 Flyer). These insulting references are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community. These references fail to advance any meaningful discourse upon which the Board or Superintendent could possibly act. We cannot and will not allow such abhorrent and hate-filled behavior in a meeting of an organization whose sole purpose is to educate children."

This letter of trespass represented the third suspension delivered to Mr. Dyer with no opportunity to contest the ban.

PROCEDURE

I. District Court's Motion to Dismiss Proceedings

AISS holds monthly community meetings with a time set aside for public comment. Speakers are asked to sign up between 5-5:50 p.m. Once signed up, speakers are given two minutes; or four minutes if another speaker has yielded their time. When the meeting starts, speakers are called in the order they signed up. Board policy states there should be no applauding, cheering, jeering or speech that defames individuals or stymies or blocks meeting progress. Board policy also states that no board member should interrupt the speaker because it may impugn the speaker's motives.

On February 5, 2018, Mr. Dyer was granted two minutes to speak. As he was speaking, his microphone was cut off before his time ended. According to Mr. Dyer's video evidence, AISS General Counsel Glenn Brock, partner at Nelson, Mullins, Riley and Scarborough, told the Board Chair that the flyer Mr. Dyer was holding contained racially charged information and he should not be allowed to continue to speak. AISS Board Chair Jason Esteves agreed and informed Mr. Dyer that his time for public comment was over. Mr. Dyer responded by asking the Board Chair if he knew what satire was and told him that the flyer was satire. The Board Chair stated, "It is not".

Mr. Dyer brought this suit under 42 U.S.C. § 1983 against AISS for violations of his right to free speech under the First Amendment (count 1) and right to procedural due process under the Fourteenth Amendment (count 2). He also alleges claims that the Court construes as arising under state law for slander per se (count 3), discrimination and retaliation (count 4), and harassment (count 5).

February 8, 2018 was Mr. Dyer's third time receiving a letter of suspension. The suspension letter accused Mr. Dyer of using "racist and hate-filled epithets," [1-1] ¶ 47, based on photoshopped fliers containing the tagline "unnigged coming soon" and a photo of AISS Superintendent Meria J. Carstarphen wearing a jersey superimposed with the word "FALCOONS." Mr. Dyer

claims he used no racially insensitive language in his verbal comments and that the suspension was based only on the literature distributed at the meeting. The suspension was for one year. The suspensions restricted Mr. Dyer from participating in public comment, stepping foot upon any AISS property, or communicating with any AISS personnel. This suspension was to start on February 6, 2018 and end in one year. There were no options given to contest the ban.

The first suspension occurred on January 15, 2016. The suspension letter alleged that Mr. Dyer used racial slurs and derogatory terms that violated the rules of decorum for school board meetings. The suspension lasted six months, until July 2016. There were no options given to contest the ban.

On February 1, 2016, Mr. Dyer attended the next meeting in order to contest the ban. He was not allowed to speak during the public-comment segment and was, in his words, "harassed" by resource officers for attending.

The second suspension occurred on October 11, 2016. Mr. Dyer was told this suspension was based, at least in part, on his use of the word "Sambos" to refer to AISS students during a public comment session. Mr. Dyer does not deny using this term but states that he was not referring to AISS students. Instead, he contends he was not given an opportunity to finish or expound upon his statement before being asked to step down. Mr. Dyer was led out of the meeting by AISS officers while he tried to explain his use of the term. This suspension lasted fourteen months, until December 31, 2017. There were no options given to contest the ban.

AISS moved to dismiss all of Mr. Dyer's counts for failure to state a claim. AISS argued, and Mr. Dyer contested, that his speech at the school board meetings was not protected by the First Amendment. First, AISS alleged that Mr. Dyer's reference to "Sambos" was not protected as it was "insulting, racially-insensitive language" used in reference to AISS students. [2-1] at 4-5. Second, AISS alleged that Mr. Dyer's distribution of flyers containing the

phrase "unnigged" and "FALCOONS" was not protected because it involved "offensive and racially-charged" language aimed at "mocking" a school board official. *Id.* at 17. AISS also appeared to argue that Mr. Dyer's use of the word "buffoon" or other derogatory terms to criticize the school board fell outside the First Amendment's protections. The district court soundly rejected such an argument. It is beyond peradventure that a citizen has a First Amendment right to criticize government officials. *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001) ("The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government and government officials."). Contrastingly, when the district court viewed the complaint in the light most favorable to Mr. Dyer, they stated that AISS's suspensions were issued in direct response to Mr. Dyer's alleged protected speech at the school board meetings.

The district court wanted to make it abundantly clear that the terms Mr. Dyer used are abhorrent. But abhorrence does not ipso facto bring them outside the First Amendment's protection.

The district court also recognized that the restrictions were also a form of prior restraint on Mr. Dyer's speech. Such restraints occur when the Government has "den[ied] access to a forum before the expression occurs." *Bourgeois v. Peters, 387 F.3d 1303, 1319 (11th Cir. 2004) (quoting United States v. Frandsen*, 212 F.3d 1231, 1236-37 (11th Cir. 2000)). And a "prior restraint of expression comes before [the] court with 'a heavy presumption against its constitutional validity.'" *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165 (5th Cir. 1978) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

Following *Cyr v. Addison Rutland Supervisory Union,* the district court did not hold that Mr. Dyer "possessed a liberty interest-independent of the First Amendment-in accessing school property." *Id.* It did, however, allow his claim to proceed on the basis that he had a liberty interest in engaging in public comment at school board meetings.

The district court also found that Mr. Dyer had alleged

sufficient facts, which AISS had not rebutted, to make it at least plausible that a pre-deprivation remedy was practical before he was suspended. AISS's suspensions were not issued immediately or as an emergency measure to stop a live disruption. E.g., [1-1] at 45 (suspending Mr. Dyer on October 11, 2016 for conduct at an October 10, 2016 meeting). AISS was able to predict that a hearing was required before suspending Mr. Dyer because it took the time to create a letter that applied prospectively to him. Moreover, as AISS has presumably been clothed with the state's authority to suspend persons from attending public meetings, it is its "duty ... to provide pre-deprivation process." *Burch*, 840 F.2d at 802 n.10.

The district court's conclusion was that Mr. Dyer's allegations made it plausible that he was entitled to a hearing before AISS deprived him of his liberty interest. Under these circumstances, a post-deprivation remedy, such as the Georgia Open Meetings Act (GOMA), would not satisfy due process. Mr. Dyer's procedural due process claim was therefore allowed to proceed.

II. District Court's Summary Judgment Proceedings

AISS moved for summary judgment on Mr. Dyer's constitutional claims. Although conceding Mr. Dyer's offensive speech was "protected" under the First Amendment, AISS argued there was no genuine dispute that, as a matter of law, its suspending Mr. Dyer from attending community meetings was lawful because that offensive speech was disruptive and violated its policies on proper decorum. In other words, AISS insisted that it removed Mr. Dyer from its community meetings "not because it disagreed with Mr. Dyer's message, but because it regarded his use of racially-insensitive language to be ... disruptive to the meeting." (emphasis added). As for Mr. Dyer's due process claim, AISS argued that the claim failed because it was duplicative of the First Amendment claim.

In support of its motion, AISS submitted a declaration from its deputy superintendent. The deputy superintendent stated that, at the October 16, 2016 community meeting,

Mr. Dyer refused to leave the speakers' podium when instructed to do so. Following Mr. Dyer's refusal, police officers escorted Mr. Dyer from the meeting, and Mr. Dyer continued to shout and curse outside of the meeting room. AISS also submitted the three suspension letters: one from January 15, 2016, one from October 11, 2016, and one from February 6, 2018[1]. In the January 15, 2016 letter, AISS told Mr. Dyer that he was suspended because his use of racial slurs was "outside the bounds [of] decorum," "offensive," and "failed to advance any meaningful discourse." In the October 11, 2016 letter, AISS stated that Mr. Dyer's use of the word "sambos" was "completely outside the bounds of civility," "offensive," and "failed to advance any meaningful discourse." AISS informed Mr. Dyer that he was suspended from participating in meetings or entering AISS property until December 31, 2017. AISS also told Mr. Dyer that, if he entered school property, he would be arrested for trespassing and warned him of additional consequences if his conduct continued, including permanent suspension of his privilege to speak during meetings. In the February 6, 2018 letter, AISS again suspended Mr. Dyer from meetings and prohibited him from entering school property because of his "inappropriate and disruptive behavior." The suspension and trespass warning were for the remainder of the term of the letter's author, and the letter again told Mr. Dyer that, if he entered school property, he would be arrested. It stated that his flyers were "offensive" and "failed to advance any meaningful discourse."

On December 5, 2019, the district court granted AISS's motion for summary judgment on both remaining constitutional claims. For the First Amendment claim, the district court found that AISS's restrictions on Mr. Dyer were content-neutral, as AISS "cut off Mr. Dyer's speech because he expressed himself in a hostile manner

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[1] The February 6, 2018 letter appeared during Mr. Dyer's deposition. Mr. Dyer's February 8, 2018 letter was personally delivered to him by AISS Chief Ronald Applin. Mr. Dyer is on record filing the document in Fulton County Superior Court on July 9, 2018 where it was authenticated.

that disrupted meeting progress." The district court also found the restrictions were narrowly-tailored to advance a substantial government interest, as AISS had a substantial government interest in "preserving meeting decorum" and the suspensions were necessary because Mr. Dyer continued to disrupt meetings when he was on school property, regardless of whether he was able to speak or enter the meeting room. As to the Fourteenth Amendment claim, the district court found that, although Mr. Dyer had a protected liberty interest in attending the AISS community meetings, AISS had no requirement to provide him a pre-deprivation remedy because he had an adequate post-deprivation remedy in the Georgia Open Meetings Act ("GOMA"). See Ga. Code Ann. § 50-14-1. Therefore, the district court found that there was no procedural due process violation.

Defendants' motion [34] for summary judgment was granted. To the extent that Mr. Dyer intended to file a cross-motion [37] for summary judgment, that motion was denied. Mr. Dyer timely filed his notice of appeal.

III. 11th Circuit Court Proceedings

Because Mr. Dyer's claim is based on private speech on government property, we apply the three-step analysis established by the Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). First, because not all speech is protected, we must determine if Mr. Dyer engaged in speech protected by the First Amendment. *Id.* at 797. Second, if that speech was protected, "we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, we must determine whether AISS suspending Mr. Dyer from its public meetings satisfied "the requisite standard" that is applied to the forum identified in step two. *Id.* The first and second steps are uncontested. AISS concedes Mr. Dyer's speech was protected by the First Amendment, and the 11th Circuit agreed. See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) ("Speech may not be

banned on the ground that it expresses ideas that offend."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). The 11th Circuit also agreed with the parties' other concession—that an AISS community meeting is a "limited public forum." *See Cambridge Christian Sch. Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1237 (11th Cir. 2019) ("[W]e have identified the public-comment portions of school board meetings, among other things, as limited public forums.").

Here, the AISS board policies outlining how someone may speak at a community meeting, prohibiting disruption, and requiring decorum are content-neutral policies. The 11th Circuit agreed with the district court's determination that AISS did not regulate Mr. Dyer's speech based on its content, i.e., because it was offensive. Rather, AISS regulated Mr. Dyer's offensive speech because it was disruptive. The letters sent by AISS explained that his suspensions were the result of his conduct "fail[ing] to advance any meaningful discourse." The fact that AISS also told Mr. Dyer that his comments were "abusive, abhorrent, [and] hate-filled" was merely support for the suspensions for disruptive and unruly behavior; the offensiveness of the comments themselves was not the basis for his suspension. We have made this distinction before, and we believe it is a meaningful one. *See, e.g., Jones*, 888 F.2d at 1332 ("The district court found that Jones had complied with the time, place and manner restrictions imposed on the meeting and was silenced because of the content of his speech. We disagree. In our opinion, the mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion.").

Moreover, AISS's actions seem justified as, by Mr. Dyer's own admission, his aggressive and offensive choice of words were calculated to "send a message" and engage in "psychological warfare." Removing Mr. Dyer

for his disruptive behavior and lack of proper decorum at an AISS community meeting was content-neutral and, thus, permissible. The district court therefore did not err in granting AISS summary judgment as to the First Amendment claim.

Mr. Dyer asserted that the district court erred by not finding that AISS had "altered and falsified evidence in violation of Georgia Code § 16-10-20.1 and ABA Model Rule of Professional Conduct Rule 3.3.(a)(3)." Specifically, Mr. Dyer contended that there is a dispute between the February 6 letter and a different letter dated February 8, 2018. It appears that Mr. Dyer presumed that the February 6, 2018 letter shown to him at his deposition was actually the February 8, 2018 letter and AISS deliberately misled him. He then argued to the district court, and here on appeal, that AISS "falsified" this evidence.

The 11th Circuit concluded that Mr. Dyer failed to adequately explain—and cite to legal authority demonstrating—how AISS falsified evidence and how that alleged falsification constituted violations of section 16-10-20.1 and rule 3.3(A)and abandoned the argument.

Moreover, Mr. Dyer had an adequate post-deprivation remedy in state law under GOMA, which authorizes an individual to file a civil suit when he or she is affected by a violation of the statute, including the requirement that government meetings be open to the public. See Ga. Code Ann. § 50-14-1. Through GOMA, Mr. Dyer could seek an injunction or other equitable relief to challenge his trespass notice. *See id.*; see also *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (holding that an adequate state remedy providing for a post-deprivation process is sufficient to cure a procedural deprivation). Because a pre-deprivation remedy was impracticable in this situation and because GOMA provides an adequate post-deprivation remedy, Mr. Dyer's Fourteenth Amendment claim fails. The 11th Circuit affirmed the district court's order granting summary judgment in favor of AISS.

The following pages contain the documents personally delivered by AISS Chief Ronald Applin to Mr. Dyer.

February 8, 2018 Trespass Warning Documents

ATLANTA PUBLIC SCHOOLS

Jason Esteves
Chair, Atlanta Board of Education
Center for Learning & Leadership
130 Trinity Avenue, S.W.
Atlanta, Georgia 30303
Phone 404-802-2801
Fax 404-802-1801
www.atlantapublicschools.us

February 8, 2018

Via Personal Delivery

Nathaniel B. Dyer
202 Joseph E. Lowery Blvd NW
Atlanta, GA 30314

Re: Suspension from Public Comment at Atlanta Board of Education Meetings

Dear Mr. Dyer:

This letter is to inform you that your privilege to speak at any meeting sponsored by the Atlanta Board of Education ("ABOE") is hereby suspended for one year beginning on February 6, 2018. In addition, this letter will serve as a trespass warning. You are instructed not to set foot on Atlanta Public Schools ("APS") property during this one-year suspension. If you do, you will be arrested for trespassing. You are further instructed not to have any communication whatsoever with any employee or representative of the ABOE or APS for the duration of this suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication. These actions are a direct result of yet another instance of inappropriate and disruptive behavior by you at the February 5, 2018 ABOE meeting. This is your *third* violation of ABOE directives to you, and future occurrences will not be tolerated.

As you know, on January 15, 2016, you were suspended from speaking at any ABOE meeting because of your use of several racial slurs during the public comment portion of the January 2016 ABOE meeting. You then attended a town hall meeting and disrupted the meeting being led by Dr. Carstarphen's senior staff. As a result of that behavior, Former APS Chief of Police Sands issued a trespass warning against you, prohibiting you from coming onto school property. You were notified that any future similar demonstration may result in additional suspensions. (Exhibit A – January 15, 2016 Letter). Your suspension at that time ended in July 2016. However, despite that warning, on October 10, 2016, you used a racial slur when you referred to APS students as "sambos" during the public comment portion of the ABOE meeting. That behavior led to another suspension and trespass warning through December 31, 2017. (Exhibit B – October 11, 2016 Letter). You were also warned that similar conduct in the future could lead to additional consequences, including permanent suspension of your privilege to speak at APS board meetings.

Nevertheless, on February 5, 2018, you once again introduced racist and hate-filled epithets at an ABOE meeting. Specifically, you passed out flyers to audience members that contained the

phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it. (Exhibit C – February 5, 2018 Flyer). These insulting references are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community. These references fail to advance any meaningful discourse upon which the Board or Superintendent could possibly act. We cannot and we will not allow such abhorrent and hate-filled behavior in a meeting of an organization whose sole purpose is to educate children.

I once again further advise you that any further demonstration of such conduct may result in additional consequences, including permanent suspension of your privilege to speak at APS board meetings.

Sincerely,

/s/ Jason Esteves

Jason Esteves

cc: Meria J. Carstarphen, Superintendent
Ronald Applin, APS Chief of Police
D. Glenn Brock, General Counsel

ATLANTA PUBLIC SCHOOLS
Making A Difference

Courtney D. English
Chair, Atlanta Board of Education
Center for Learning & Leadership
130 Trinity Avenue, S.W.
Atlanta, Georgia 30303
Phone 404-802-2801
Fax 404-802-1801
www.atlantapublicschools.us

January 15, 2016

Via Email (nate@natbotheedge.com) and U.S. Mail

Nathaniel B. Dyer
202 Joseph E. Lowery Blvd NW
Atlanta, GA 30314

Re: Suspension from Public Comment at Atlanta Board of Education Meetings

Dear Mr. Dyer:

This letter is to inform you that your privilege to speak at any meeting sponsored by the Atlanta Board of Education (ABOE) is hereby suspended until July 2016.

This action is taken as a result of your public comments during community meeting portion of the January meeting of the ABOE. Using race-based slurs (including the "N" word, "coons," and "buffoons") was outside the bounds decorum that such a setting demands. They were not only disrespectful but were offensive to our board, our superintendent and our staff. Further, those abusive comments failed to advance any meaningful discourse upon which the board or superintendent could possibly act. As Chairman of the Board, I cannot and will not allow such abhorrent and hate-filled epithets, that can create a hostile work environment, during a meeting of an organization where the sole purpose is to advance the education of children. Members of our staff must attend our meetings as well as children along with their families are often present and none of them deserve to be subjected to such behavior.

I would further advise you that any further demonstration of such conduct may result in additional consequences including permanent suspension of your privilege to speak at APS board meetings.

Sincerely,

/s/ Courtney D. English

Courtney D. English

cc: Meria J. Carstarphen, Superintendent
D. Glenn Brock, General Counsel

Exhibit A

Courtney D. English
Chair, Atlanta Board of Education
Center for Learning & Leadership
130 Trinity Avenue, S.W.
Atlanta, Georgia 30303
Phone 404-802-2801
Fax 404-802-1801
www.atlantapublicschools.us

October 11, 2016

Via Personal Delivery

Nathaniel B. Dyer
202 Joseph E. Lowery Blvd NW
Atlanta, GA 30314

Re: Suspension from Public Comment at Atlanta Board of Education Meetings

Dear Mr. Dyer:

This letter is to inform you that, once again, your privilege to speak at any meeting sponsored by the Atlanta Board of Education ("ABOE") is hereby suspended until December 31, 2017. In addition, this will serve as a trespass warning. You are instructed not to set foot on Atlanta Public Schools ("APS") property for the remainder of this year and next year. If you do, you will be arrested for trespassing. These actions are a direct result of your inappropriate and disruptive behavior at yesterday's October 10, 2016 ABOE meeting.

As you know, on January 15, 2016, you were suspended from speaking at any ABOE meeting because of your use of several racial slurs during the public comment portion of the January ABOE meeting (see attached 1/15/2016 letter from C. English to you). You then attended a town hall meeting and disrupted the meeting being led by Dr. Carstarphen's senior staff. As a result of that behavior, Former APS Chief of Police Sands issued a trespass warning against you, prohibiting you from coming onto school property. (Copy attached). You were notified that any future similar demonstration may result in additional suspensions. Your suspension at that time ended in July 2016.

Nevertheless, on October 10, 2016, you brazenly ignored our previous warnings and again, you used a racial slur when you referred to APS students as "sambos" during the public comment portion of the ABOE meeting. You also referenced on the official sign-in sheet to speak at the ABOE meeting having previously spoken to "[a]ll of these fools." (Copy attached). Your insulting comments, particularly your reference to APS students as "sambos," are completely outside the bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community. Your comments failed to advance any meaningful discourse upon which the Board or Superintendent could possibly act.

In addition to subjecting everyone in the meeting to your offensive language, you refused to leave the podium after I repeatedly directed you to do so. Police ultimately escorted you from

Exhibit B

the meeting room, but you continued to disrupt the meeting by shouting within and outside of the room. We cannot and we will not allow such abhorrent and hate-filled behavior in a meeting of an organization whose sole purpose is to educate children.

I would further advise you that any further demonstration of such conduct may result in additional consequences, including permanent suspension of your privilege to speak at APS board meetings.

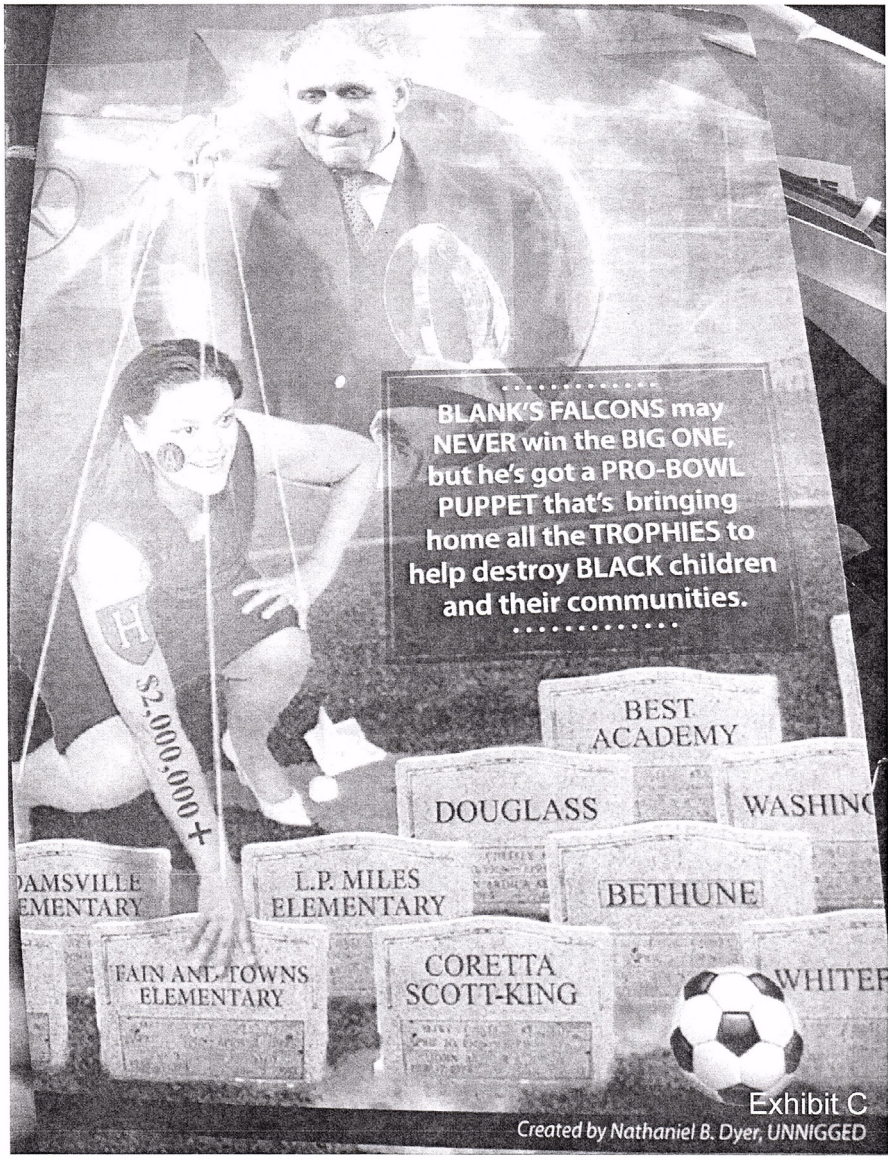
Sincerely,

/s/ Courtney D. English

Courtney D. English

Enclosures

cc: Meria J. Carstarphen, Superintendent
Ronald Applin, APS Chief of Police
D. Glenn Brock, General Counsel


BLANK'S FALCONS may NEVER win the BIG ONE, but he's got a PRO-BOWL PUPPET that's bringing home all the TROPHIES to help destroy BLACK children and their communities.
$2,000,000+
BEST ACADEMY
DOUGLASS
WASHING
L.P. MILES ELEMENTARY
BETHUNE
CORETTA SCOTT-KING
Exhibit C
Created by Nathaniel B. Dyer, UNNIGGED


ROOKIE CATASTROPHE
ALL-STAR
2015
2018
FALCOONS
11
SUPERINTENDENT
Meria Catastrophe's
TOP 10
CATASTROPHIC
PLAYS
1 SELLING SCHOOLS - She tackles the issues of deeds from the city to sell them to developers for gentrification of Black neighborhoods.
2 CLOSING SCHOOLS - She closed schools such as Bethune ES and Kennedy MS located in the midst of a minimum of five billion dollars in development which includes Arthur Blank's Mercedes Benz Stadium Project.
3 MERGING SCHOOLS - She has merged Black students together into overcrowded situations while proposing options to alleviate overcrowding for White students.
4 PRIVATIZING SCHOOLS - She gives private operators, Purpose Built Communities and Kindesi, carte blanc and long contracts with little to no accountability.
5 CHARTER SCHOOLS - She places Kindesi and KIPP schools in the heart of neighborhoods where she claims there is low student population. Her latest KIPP move will kill Douglas High School.
6 OPPORTUNITY SCHOOL DISTRICT (OSD) - She hired the architect of Gov. Nathan Deals' OSD proclaiming to save schools from takeover but she closed them instead.
7 AGE DISCRIMINATION - More than 100 teachers over 40 are suing this rookie for age discrimination. The culture of fear and intimidation still exists within Atlanta Public Schools and it may have intensified.
8 POLICE FORCE - She created a police force claiming they are to aid with mentoring students. To date, bullying and discipline issues are still prevalent within APS at an all-time high.
9 BODY CAMERAS FOR OFFICERS - Offering little money for exposure and resources to help children, this rookie wants to expose them in a hi-tech manner to be legally profiled for life.
10 INEQUITIES - She caters heavily to White communities through whatever measures it takes to help them maintain stability and an uninterrupted learning experience. Anything to the contrary, this would cause White Flight. And Lawdy, She's Sho nuffin Don't Wants Dat!
It's time to retire this rookie. A new contract cannot be an option for what this third year rookie has done to Atlanta's children who possess so much promise and potential.
UNNIGGED COMING SOON! For more information, please contact Nathaniel B. Dyer at 404.964.6427 or email district7@nathanielbdyer

REASON FOR GRANTING THE PETITION

THE ARGUMENT

"In limited public forums, to avoid infringing on First Amendment rights, the government regulation of speech only need be viewpoint-neutral and 'reasonable in light of the purpose served by the forum.'" *Galena v. Leone*, 638 F.3d 186, 198 (3d Cir. 2011). To determine whether a restriction on speech in a limited public forum passes constitutional muster, the court must analyze whether the restriction on speech is a valid time, place, or manner restriction. *Id*. at 199. A restriction on speech is a valid time, place, or manner restriction if it (1) is justified without reference to the content of the regulated speech, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open alternative channels for communication of the information. *Id*.

The 11th Circuit claimed to have applied the three-step analysis established by the Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). The 11th Circuit agreed that Mr. Dyer's speech was protected speech. They also determined that it was given in a limited public forum. The step unanswered was that the government restriction must have been content-neutral for time, place, and manner of access all of which must have been narrowly tailored to serve a significant government interest.

I. Mr. Dyer Briefed the District Court on Narrow-Tailoring

The 11th Circuit stated in part, "We offer no comment on the issues of narrow-tailoring or satire because Mr. Dyer has failed to brief the issue adequately or failed to raise it below to the district court."

To say that Mr. Dyer did not brief narrow-tailoring and satire in the district court is not only misleading but utterly false. The record shows that Mr. Dyer did in fact brief narrow-tailoring as follows:

Mr. Dyer also argues that his suspensions constitute an overbroad, "categorical ban," rather than being narrowly tailored. [35–1] at 13.

Mr. Dyer goes even futher by addressing narrow-tailoring by this excerpt:

> A categorical ban on speech is not tailored at all, as it entirely forecloses a means of communication. *Cf Hill v. Colo.*, 530 U.S. 703, 726 (2000) ("when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal"). In order to be narrowly tailored, a time, place, or manner restriction must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at W. Here, ostensibly because of a satirical flyer and words the Defendant viewed as offensive, Plaintiff was banned not only from the AISS school grounds, but from all premises owned by the AISS. He was not banned only during regular school hours, but at all hours, for a total of two years and eight months.
>
> In addition to proscribing certain conduct by the *Visors*, the injunctions also prohibited "mak[ing], post[ing] or distribut[ing] comments, letters, faxes, flyers or emails regarding [Hansen or Streeter] to the public" at large. This broad restriction expressly forbidding future speech is a classic example of a prior restraint. *See Alexander v. United States*, 509 U.S. 544, 550 (1993). Prior restraints, which we have characterized as "the most serious and least tolerable infringement on First Amendment rights," carry a heavy presumption of invalidity. *Nash v. Nash*, 232 Ariz. 473, 481–82, ¶ 32, 307 P.3d 40, 48–49 (App. 2013). A restriction like this based on the content of speech is permissible only if narrowly tailored to achieve a compelling state interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Because of the dangers of prior restraints, even content-neutral

injunctions should not burden more speech than necessary to serve a significant government interest. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Here, the injunctions at issue were not narrowly tailored and were overbroad because they prohibited all public speech regarding Hansen or Streeter.

The record clearly refutes the 11th Circuit's assertion that Mr. Dyer failed to brief the subject of narrow-tailoring.

II. Mr. Dyer Briefed the District Court on Satire

The following excerpt from Mr. Dyer's motion can prove that he did in fact brief the issue:

> The February 8, 2018 trespass warning was issued to the Plaintiff for a flyer that he created. The flyer, commonly known as satire, depicted Superintendent Carstarphen as a puppet on a string for billionaire Arthur Blank's business developments around Vine City and English Ave. which are located in downtown Atlanta, Georgia. The tombstones represented the schools Superintendent Carstarphen has closed and/or merged on the neighborhood children during her tenure. The back of the flyer has a photoshopped image of the superintendent wearing a football jersey with the word "FALCOONS" on it and a list with the caption "Superintendent Meria Carstarphen's Top Ten Catastrophic Plays." Being a community activist and a seasoned graphic designer for 30 years, the Plaintiff uses his artistic capability to protest bad policies governed by the Superintendent and elected officials that are unfavorable to the children of AISS. For close to 10 years, the Plaintiff has designed up to 20 satirical flyers which have been instrumental in impacting Board policy. As common practice at AISS Board's Community Meetings, Plaintiff printed hundreds of colorful copies at his own expense and distributed them to the Board, Superintendent and to those in the audience who would accept them.
>
> Both AISS Board Chair Jason Esteves and AISS General Counsel D. Glenn Brock, Nelson Mullins Riley

> and Scarborough LLP, ordered the Plaintiff removed by law enforcement even after he explained that the flyer was satire which is protected by the First Amendment. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L.Ed.2d. 41 (1988): Hustler Magazine published a parody of a liquor advertisement in which Rev. Jerry Falwell described his "first time" as a drunken encounter with his mother in an outhouse. The Court held that political cartoons and satire such as this parody "have played a prominent role in public and political debate. And although the outrageous caricature in this case "is at best a distant cousin of political cartoons," the Court could see no standard to distinguish among types of parodies that would not harm public discourse, which would be poorer without such satire."

Mr. Dyer's motion contained the definition for satire[2]. Further evidence shows Mr. Dyer on record for submitting interrogatories which posed questions to the AISS Board Chair related to his comments on satire. The following excerpt is from Mr. Dyer's interrogatories:

> Statement No. 29: Mr. Dyer explained to Board Chair Esteves that the flyer was satire. (Exhibit 7)
>
> Response: Admitted.
>
> Statement No. 30: Board Chairman Jason Esteves told Mr. Dyer that it was not satire. (Exhibit 7)
>
> Response: Admitted. Doc. 40, Pg. 14; Appendix O (Video of Feb. 5th board meeting on USB drive).

Finally, Mr. Dyer also cited the U.S. Supreme Court's decision which unanimously agreed in *Hustler v. Falwell*, 485 U.S. 46 (1988), that a parody, which no reasonable person expected to be true, was protected free speech. The justices also stated that upholding the 11th Circuit's decisions would put all political satire at risk.

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[2] Satire is a genre of literature that uses wit for the purpose of social criticism. Satire ridicules problems in society, government, businesses, and individuals in order to bring attention to certain follies, vices, and abuses, as well as to lead to improvements. Irony and sarcasm are often an important aspect of satire.

III. This Court's Precedents State that "Giving Offense" is a Viewpoint

A limited public forum, according to the Supreme Court, is a forum set aside by government for expressive activity. Like a traditional public forum, content-based speech restrictions in a designated public forum are subject to strict scrutiny. Content-based restrictions limit speech based on its subject matter. Viewpoint discrimination is the singling out of a particular opinion or perspective on that subject matter for treatment unlike that given to other viewpoints. In the words of Justice Anthony M. Kennedy in *Rosenberger v. Rector and Visitors of the Univ. Of Virginia* (1995). Viewpoint discrimination is thus an egregious form of content discrimination.

From the majority opinion of this court, written by Justice Samuel A. Alito Jr. and joined by Chief Justice John G. Roberts Jr., Justice Clarence Thomas and Justice Stephen G. Breyer; but a concurring opinion by Justice Anthony M. Kennedy, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, agreed:

> [The Government argues] that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so … The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

The 11th Circuit's opinion states, "We agree with the district court's determination that AISS did not regulate

Mr. Dyer's speech based on its content, i.e., because it was offensive. Rather, AISS regulated Mr. Dyer's offensive speech because it was disruptive. The letters sent by AISS explained that his suspensions were the result of his conduct "fail[ing] to advance any meaningful discourse." The fact that AISS also told Mr. Dyer that his comments were "abusive, abhorrent, [and] hate-filled" was merely support for the suspensions for disruptive and unruly behavior; the offensiveness of the comments themselves was not the basis for his suspension.

The 11th Circuit's order reads in part, "The suspension and trespass warning were for the remainder of the term of the letter's author, and the letter again told Mr. Dyer that, if he entered school property, he would be arrested. It stated that his flyers were offensive and "failed to advance any meaningful discourse." Because Mr. Dyer's speech was defined by its content (i.e. "unnigged" and "FALCOONS"), and then regulated and censored, this court has described this as viewpoint discrimination.

The district court's records reflect that AISS argued Mr. Dyer's speech at the school board meetings was not protected by the First Amendment. First, AISS alleged that Mr. Dyer's reference to "Sambos" was not protected as it was "insulting, racially-insensitive language" used in reference to AISS students. [2-1] at 4-5. Second, AISS alleges that Mr. Dyer's distribution of flyers containing the phrase "unnigged" and "FALCOONS" was not protected because it involved "offensive and racially-charged" language aimed at "mocking" a school board official. *Id*. at 17. AISS also appears to argue that Mr. Dyer's use of the word "buffoon" or other derogatory terms to criticize the school board fell outside the First Amendment's protections.

The 11th Circuit's conclusion cannot be squared with this court's precedents. The reoccurring theme in the 11th Circuit's order is the word "offensive". This court has been clear in its assertion that "giving offense" is a viewpoint. We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street*

v. New York, 394 U. S. 576, 592 (1969). *See also Texas v. Johnson*, 491 U. S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Hustler Magazine, Inc. v. Falwell*, 485 U. S. 46, 55–56 (1988); *Coates v. Cincinnati*, 402 U. S. 611, 615 (1971); *Bachellar v. Maryland*, 397 U. S. 564, 567 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 509–514 (1969); *Cox v. Louisiana*, 379 U. S. 536, 551 (1965); *Edwards v. South Carolina*, 372 U. S. 229, 237–238 (1963); *Terminiello v. Chicago*, 337 U. S. 1, 4–5 (1949); *Cantwell v. Connecticut*, 310 U. S. 296, 311 (1940); *Schneider v. State* (Town of Irvington), 308 U. S. 147, 161 (1939); *De Jonge v. Oregon*, 299 U. S. 353, 365 (1937).

"[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*, at 745-746, 98 S.Ct., at 3038. *See also Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 1366, 22 L.Ed.2d 572 (1969) ("It is firmly settled that … the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

The Supreme Court has long identified the suppression of speech by public officials to be unlawful: It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys (citations omitted) … When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. (Citations omitted.) *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-830 (1995) (forbidding viewpoint discrimination regardless of nature of forum).

The 11th Circuit stated, "We have made this distinction before, and we believe it is a meaningful one. *See, e.g.,*

Jones, 888 F.2d at 1332 ("The district court found that Jones had complied with the time, place and manner restrictions imposed on the meeting and was silenced because of the content of his speech. We disagree. In our opinion, the mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion.")."

In contrast to Jones, Mr. Dyer was silenced specifically because he distributed a satirical flyer that contained the phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it that the AISS board found to be offensive. Here, ostensibly because of a satirical flyer and words the AISS board viewed as offensive, Mr. Dyer was banned not only from the AISS school grounds, but from all premises owned by the AISS. Mr. Dyer was not banned only during regular school hours, but at all hours, for a total of two years and eight months.

The current state of First Amendment jurisprudence, as articulated in *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam), prohibits restrictions on mere advocacy and requires the government to prove that the expression it would sanction is intended to incite imminent lawless action and is likely to produce such action. (The Government may not retaliate against individuals or associations for their exercise of First Amendment rights.); *see also Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) (retaliatory prosecution goes to the core of the First Amendment). ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action"). And, as we stated in *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978):

The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

"The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to

> pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, *The Quill* 56, 57 (Nov. 1962).

The 11th Circuit doubled down on their rhetoric by stating, "AISS's actions seem justified as, by Mr. Dyer's own admission, his aggressive and offensive choice of words were calculated to "send a message" and engage in "psychological warfare." Removing Mr. Dyer for his disruptive behavior and lack of proper decorum at an AISS community meeting was content-neutral and, thus, permissible. The district court therefore did not err in granting AISS summary judgment as to the First Amendment claim." As the words "Sambo" and "unnigged" were taken out of context, the 11th Circuit's interpretation of Mr. Dyer's use of the phrase "psychological warfare" is not in alignment with this courts precedents. Below is a brief excerpt from Mr. Dyer's deposition in response to the question asked by AISS attorneys at Nelson, Mullins, Riley and Scarborough.

·4 · · Q · · What is psychological warfare, in your
·5 · · view?
·6 · · A · · Psychological warfare is getting into
·7 · · someone's head; to get them to think consciously
·8 · · about the decisions that they're making.

In comparison to *Hustler Magazine v. Falwell*, Larry Flynt's deposition reveals that he freely admitted running the ad to "settle a score" with Falwell for his criticism of his private life and said he included the small disclaimer at the bottom only at the insistence of his in-house lawyer (David Kahn), who Flynt identified only as "that asshole sitting over there." His goal was "to assassinate" Falwell's integrity. Grutman, who was Falwell's attorney, opened his argument with the words before this court, "Deliberate, malicious character assassination is not protected by the First Amendment to the Constitution." Apparently, this court was not moved or impressed. On February 24, 1988, Chief Justice Rehnquist announced the decision of a unanimous Supreme Court reversing the jury's award of

damages to Jerry Falwell. Rehnquist wrote:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern ... [I]n the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. "'Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred ...' Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.

The 11th Circuit suggests that Mr. Dyer had ample channels through which he could communicate with community members and other elected officials. However, the February 8, 2018 letter of trespass states, "You are not to set foot on Atlanta Public Schools ("AISS") property during this one-year suspension. If you do, you will be arrested for trespassing. You are further instructed not to have any communication whatsoever with any employee or representative of the ABOE or AISS for the duration of this suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication."

III. Mr. Dyer was Deprived of His Due Process Rights

The 11th Circuit states, "Mr. Dyer clearly presented such a threat when he shouted racial slurs in front of children present at the board meetings, accused school board officials of committing crimes akin to murder, and tried to "send a message" that school officials were "just as destructive" as members of the Ku Klux Klan." Here, the 11th Circuit is meshing the hearsay of AISS and Mr. Dyer's deposition to paint him as a stark raving lunatic. If the 11th Circuit would have chosen to view Dyer's video evidence and adhered to the precedents of this

court, they would have found the truth and reversed the district court's order. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court established that speech advocating illegal conduct is protected under the First Amendment unless the speech is likely to incite "imminent lawless action."

Dyer has been participating in public comment at AISS since 2006. AISS had 14 years to establish a due process policy to address disruptive speakers who received a trespass warning because of offensive speech.

Before the district court contradicted itself, it believed "some kind of a hearing" is required "before the State deprives a person a liberty or property interest." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). At the Motion to Dismiss, the record clearly shows that AISS asked the Court to apply *Parratt's* principles here and hold that the Georgia Open Meetings Act ("GOMA"), O.C.G.A. § 50-14-1 *et seq*., provides an adequate state remedy to Mr. Dyer's alleged deprivation. GOMA authorizes anyone to file a civil suit when he or she is affected by a violation of GOMA, such as the requirement that government meetings be open to the public. The district court explained that a cause of action under GOMA is only a post-deprivation remedy in the form of a civil suit. The district court claimed that it was insufficient here. *Parratt* and the adequate-state-remedy doctrine have no application "when the state is in the position to provide pre-deprivation process." *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 801 (11th Cir. 1988); *see also Rittenhouse v. DeKalb Cty.*, 764 F.2d 1451, 1454 (11th Cir. 1985) ("Since pre-deprivation process was not feasible [in *Parratt*], the Court held that the appropriate analysis for a procedural due process claim would focus on postdeprivation remedies."); *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983)

The 11th Circuit has put it this way: "[A] pre-deprivation hearing is practicable when officials have both the ability to predict that a hearing is required and the duty because of their state-clothed authority to provide a hearing." *Burch*, 840 F.2d at 802. In this instance, the 11th Circuit acted in direct

conflict with *Burch* by affirming that a pre-deprivation remedy was impracticable in this situation and claimed GOMA provides an adequate post-deprivation remedy.

In contrast, the district court acknowledged that Mr. Dyer had alleged sufficient facts, which AISS had not rebutted, to make it at least plausible that a pre-deprivation remedy was practical before he was suspended. AISS's suspensions were not issued immediately or as an emergency measure to stop a live disruption. E.g., [1-1] at 45 (suspending Mr. Dyer on October 11, 2016 for conduct at an October 10, 2016 meeting). AISS was able to predict that a hearing was required before suspending Mr. Dyer because it took the time to create a letter that applied prospectively to him. Moreover, as AISS has presumably been clothed with the state's authority to suspend persons from attending public meetings, it is its "duty ... to provide pre-deprivation process." *Burch*, 840 F.2d at 802 n.10.

The district court concluded by saying that Mr. Dyer's allegations make it plausible that he was entitled to a hearing before AISS deprived him of his liberty interest. Under these circumstances, a post-deprivation remedy, such as GOMA, would not satisfy due process. The district court decided Mr. Dyer's procedural due process claim would therefore be allowed to proceed. The district court was correct in its decision.

In response to Mr. Dyer's February 8, 2018 trespass warning inquiry, Assistant Attorney General Jennifer Colangelo stated, "This is not a matter that our office will be able to assist with. The primary duties of this office are to represent State agencies, departments, authorities and the Governor. Our office does not have the authority to oversee the operations of local agencies, or to investigate allegations of First Amendment violations."

In sum, the district court contradicted itself by saying that the GOMA provided an adequate post-deprivation remedy. The 11th Circuit contradicted their own precedents in *Burch* by affirming the district court's decision. The 11th Circuit erred in affirming the district court's decision.

IV. The Questions Presented Give This Court Opportunity to Bring Clear Precedents to "Giving Offense" is a Viewpoint.

From the outset of this case, Mr. Dyer possessed overwhelming evidence in the form of documents and recorded video of each occurrence. At the time, AISS did not record their meetings, therefore, Mr. Dyer had the only recorded evidence of the incidents in question. He did so to protect himself from the malicious tactics of AISS. However, the district court and the 11th Circuit never referenced Mr. Dyer's evidence in their orders. Both courts only responded to hearsay and innuendo from AISS whose goal was to maliciously attack Mr. Dyer's character.

Mr. Dyer has been advocating on behalf of children within AISS and surrounding school systems for over a decade. Mr. Dyer would never call or refer to children as "Sambos" or act in a manner outside of his constitutional freedoms. The district court construed Mr. Dyer's alleged speech as political speech regarding local school governance; this category of speech finds First Amendment protection at "its zenith." *Meyer v. Grant*. Mr. Dyer concedes that the school boards have an interest in running orderly meetings. However, elected officials who randomly and indiscriminately ban a speaker because they are offended by protected speech, contradict the basic premise of the First Amendment and this court's precedents. And the standard that was used in this case (i.e. "The insulting references are completely out of bounds of civility and, as before, were offensive to the Board, our Superintendent, and our staff and community."), is no standard at all. All it does is allow the punishment of unpopular speech, flyers of satire and criticisms that elected officials choose not to hear at their discretion.

The 11th Circuit's Order is in direct conflict with *MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ.* and *Cyr v. Addison Rutland Supervisory Union.* These two cases involved speakers exercising protected speech at school board meetings and were banned because of it. In the case of Mr. Cyr, the district court stated, "The First Amendment

does not permit the ARSU to confine Mr. Cyr's speech to telephone or "assistive technologies" by issuing a blanket notice against trespass when less burdensome alternatives exist. *See Madsen*, 512 U.S. at 765. Accordingly, Mr. Cyr's motion for summary judgment is granted as to his First Amendment freedom of expression claim." In regards to Mr. Cyr's due process, the district court stated, "Upon weighing the *Mathews* factors, the court found the notices against trespass violated Mr.Cyr's due process rights by depriving him of his First Amendment right to express his views at school board meetings without adequate process." The district court in Mr. MacQuigg's case stated, "It is further ordered and declared that, on its face, the "personal attacks" policy of Defendant Albuquerque Public Schools Board of Education violates the First Amendment as applied to the States through the Fourteenth Amendment." "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural …" *Turner Broadcasting System, Inc. v. Federal Commc'n Comm'n*, 512 U.S. 622, 664 (1994).

The 11th Circuit's Order also contradicts the precedents of this court. The U.S. Supreme Court which unanimously agreed in *Hustler v. Falwell*, 485 U.S. 46 (1988), that a parody, which no reasonable person expected to be true, was protected free speech. The justices also stated that upholding the 11th Circuit's decisions would put all political satire at risk.

In *Matal v. Tam*, 582 U.S. __ (2017), the band called the "Slants" said it wanted to reclaim what is often seen as a slur against Asian Americans. Similarly, Mr. Dyer created the word "unnigged", an online publication, to reclaim the slur into a positive one. In *Tam*, the U.S. Supreme Court unanimously ruled 8-0 that a federal law prohibiting trademark names that disparage others was unconstitutional because "speech may not be banned on the grounds that it expresses ideas that offend." Today,

this court is challenged with protecting these precedents by securing protected speech and satire from viewpoint discrimination from government abuse within limited public forums because "giving offense" is a viewpoint.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

Nathaniel Borrell Dyer
Petitioner Pro Se
202 Joseph E. Lowery Blvd. NW
Atlanta, Georgia 30314

July 4, 2021

APPENDIX
APPENDIX A

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-10115
Non-Argument Calendar

D.C. Docket No. 1:18-cv-03284-TCB
NATHANIEL BORRELL DYER,
Plaintiff - Appellant,
versus
ATLANTA INDEPENDENT SCHOOL SYSTEM,
Defendant - Appellee.

Appeal from the United States District Court for the
Northern District of Georgia
(March 22, 2021)

Before MARTIN, BRANCH, and LAGOA, Circuit Judges.
PER CURIAM:

Nathaniel Dyer, *pro se*, appeals the district court's order granting summary judgment in favor of Atlanta Independent School System ("AISS"). Dyer filed this action against AISS asserting claims under the First and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, as well as three state-law tort claims. After dismissing the tort claims, the district court granted summary judgment in favor of AISS on Dyer's § 1983 claims. Finding no violations of his constitutional rights, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Since 2006, Dyer, a graphic designer by trade, worked directly with schools in the Atlanta area and also operated independent youth organizations, which provided services to children in the Atlanta area. His working relationship with the Atlanta school system, however, soured sometime

in 2007 when he allegedly witnessed administrators at one middle school engaging in "unethical and unprofessional manner which violated federal laws." Dyer took his concerns directly to AISS.

AISS holds various types of monthly meetings, including "community meetings." The community meetings are open to the public where, at reserved times, members of the community can offer "input . . . regarding policy issues, the educational program, or any other aspect of AISS business except confidential personnel issues." If a member of the community wishes to speak during the public-comment portion, he or she must register in person prior to the meeting, and the chairperson must recognize the person before he or she may speak. To maintain proper decorum and avoid disruptive meetings, AISS established several policies with which members of the public in attendance are expected to comply. For example, AISS board policy BC-R(1) prohibits those in attendance from applauding, cheering, jeering, or engaging in speech that "defames individuals or stymies or blocks meeting progress." Such conduct may even be "cause for removal from the meeting or for the board to suspend or adjourn the meeting."

Sometime in 2009, Dyer's relationship with AISS devolved from vocal criticism to ugly opposition. For instance, outside of one of the community meetings, he distributed a flyer depicting the former superintendent of AISS in a Ku Klux Klan robe. In his own words, this flyer was meant to be a way of engaging in "psychological warfare." Doubling-down on that effort, he created other flyers depicting AISS board members as flying monkeys and clowns. The timeline is not particularly clear, but these actions began years—up to a decade—of heated, over-the-top rhetoric from Dyer directed towards the AISS board members.

The situation reached a tipping point when Dyer directed racially-charged, derogatory epithets like the "N-word," "coons," and "buffoons" toward the board at the January 2016 community meeting. This episode marked the beginning of Dyer receiving multiple suspensions from

speaking at, and later attending, the AISS community meetings. In a January 15, 2016, letter, AISS suspended Dyer from speaking at meetings for six months. Nonetheless, he attended the February 2016 community meeting, where he was not permitted to speak and was escorted to his seat by police. After this first suspension ended in July 2016, AISS again suspended Dyer in October 2016, this time for over a year, for "inappropriate and disruptive behavior" at the October 2016 meeting. AISS warned him that similar conduct in the future would result in a permanent suspension of his speaking privileges at community meetings. Dyer's third suspension came in February 2018 after AISS claimed he again used racial slurs at a prior meeting. Under the terms of this last suspension, Dyer could not enter AISS property or communicate with any AISS employee for a year. He contends that he was not told how to, or even if he could, contest any of the suspensions.

Dyer filed a five-count complaint in state court in Fulton County, Georgia, alleging violations of the First Amendment and due process under the Fourteenth Amendment under 42 U.S.C. § 1983, as well as three state-law claims of slander, discrimination and retaliation, and harassment. He sought declaratory relief, an injunction prohibiting AISS from enforcing its no-trespass warning, $10,000,000 in damages, and a public apology. AISS removed the action to federal court and then moved to dismiss the complaint for failure to state a claim, raising several arguments not relevant to this appeal. The district court agreed in part, determining that Dyer's claims predating June 4, 2016, were barred by the two-year statute of limitations and that his state law claims were barred by sovereign immunity. AISS then moved for summary judgment on Dyer's constitutional claims. In its view, the community meetings AISS holds are "limited public forums" because participation was limited to registered speakers and topics relating to the school system. Although conceding Dyer's offensive speech was "protected" under the First Amendment, AISS argued

there was no genuine dispute that, as a matter of law, its suspending Dyer from attending community meetings was lawful because that offensive speech was disruptive and violated its policies on proper decorum. In other words, AISS insisted that it removed Dyer from its community meetings "not because it disagreed with Dyer's message, but because it regarded his use of racially-insensitive language to be . . . *disruptive* to the meeting." (emphasis added). As for Dyer's due process claim, AISS argued that the claim failed because it was duplicative of the First Amendment claim.

In support of its motion, AISS submitted a declaration from its deputy superintendent. Among many other things, the deputy superintendent stated that, at the October 16 community meeting, Dyer refused to leave the speakers' podium when instructed to do so. Following Dyer's refusal, police officers escorted Dyer from the meeting, and Dyer continued to shout and curse outside of the meeting room. AISS also submitted the three suspension letters: one from January 15, 2016, one from October 11, 2016, and one from February 6, 2018. In the January 15 letter, AISS told Dyer that he was suspended because his use of racial slurs was "outside the bounds [of] decorum," "offensive," and "failed to advance any meaningful discourse." In the October 11 letter, AISS stated that Dyer's use of the word "sambos" was "completely outside the bounds of civility," "offensive," and "failed to advance any meaningful discourse." AISS informed Dyer that he was suspended from participating in meetings or entering AISS property until December 31, 2017. AISS also told Dyer that, if he entered school property, he would be arrested for trespassing and warned him of additional consequences if his conduct continued, including permanent suspension of his privilege to speak during meetings. In the February 6 letter, AISS again suspended Dyer from meetings and prohibited him from entering school property because of his "inappropriate and disruptive behavior." The suspension and trespass warning were for the remainder of the term of the letter's author, and the letter again told Dyer that, if he entered

school property, he would be arrested. It stated that his flyers were offensive and "failed to advance any meaningful discourse."

On December 5, 2019, the district court granted AISS's motion for summary judgment on both remaining constitutional claims. For the First Amendment claim, the district court found that AISS's restrictions on Dyer were content-neutral, as AISS "cut off Dyer's speech because he expressed himself in a hostile manner that disrupted meeting progress." The district court also found the restrictions were narrowly-tailored to advance a substantial government interest, as AISS had a substantial government interest in "preserving meeting decorum" and the suspensions were necessary because Dyer continued to disrupt meetings when he was on school property, regardless of whether he was able to speak or enter the meeting room. As to the Fourteenth Amendment claim, the district court found that, although Dyer had a protected liberty interest in attending the AISS community meetings, AISS had no requirement to provide him a *pre*-deprivation remedy because he had an adequate *post*-deprivation remedy in the Georgia Open Meetings Act ("GOMA"). *See* Ga. Code Ann. § 50-14-1. Therefore, the district court found that there was no procedural due process violation. Dyer timely filed his notice of appeal.

II. STANDARD OF REVIEW

We review *de novo* a district court's order granting summary judgment. *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1185 (11th Cir. 2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011). We view all evidence and all reasonable inferences drawn therefrom in "a light most favorable to the non-moving party." *Guideone Elite Ins. Co. v. Old Cutler Presbyterian*

Church, Inc., 420 F.3d 1317, 1325–26 (11th Cir. 2005) (quoting *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998)).

III. ANALYSIS

On appeal, Dyer argues that the district court erred in granting summary judgment in favor of AISS on his First Amendment and Fourteenth Amendment claims brought under 42 U.S.C. § 1983.[1] We find Dyer's arguments without merit.

A. The First Amendment Claim

Dyer argues that the district court erred as a matter of law when it found that AISS had not violated his right to free speech under the First Amendment. Specifically, he contends that AISS placed restrictions on his speech that

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[1] Dyer further asserts that the district court erred by not finding that AISS had "altered and falsified evidence in violation of Georgia Code § 16-10-20.1 and ABA Model Rule of Professional Conduct Rule 3.3.(a)(3)." Specifically, Dyer contends that there is a dispute between the February 6 letter and a different letter dated February 8. It appears that Dyer presumed that the February 6 letter shown to him at his deposition was actually the February 8 letter and AISS deliberately misled him. He then argued to the district court, and only passingly here on appeal, that AISS "falsified" this evidence.
While we construe pro se briefs liberally, *Harris v. United Auto. Ins. Grp., Inc.*, 579 F.3d 1227, 1231 n.2 (11th Cir. 2009), *pro se* parties are still required to follow the rules of court, *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). "A party fails to adequately 'brief' a claim when he does not 'plainly and prominently' raise it." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–82 (11th Cir. 2014) (quoting *Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 530 (11th Cir. 2013)). This occurs when the party only casually raises an issue, makes passing reference to the claim, or fails to elaborate the argument in the brief's argument section. *Id.; see also* Fed. R. App. P. 28(a)(8)(A) (explaining that a brief must contain an "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). Beyond a conclusory assertion, Dyer fails to adequately explain—and cite to legal authority demonstrating—how AISS falsified evidence and how that alleged falsification constituted violations of section 16-10-20.1 and rule 3.3(A)(3). We therefore deem this argument abandoned.

were neither content-neutral nor narrowly tailored. He also argues that the speech and conduct that AISS complained of were "satire" and protected under the First Amendment. As an initial matter, we will address only Dyer's first claim—whether AISS's restrictions were content-neutral. We offer no comment on the issues of narrow-tailoring or satire because Dyer has failed to brief the issue adequately or failed to raise it below to the district court. See *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–82 (11th Cir. 2014) (noting that "[a] party fails to adequately 'brief' a claim when he does not 'plainly and prominently' raise it."); *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (explaining that an issue raised for the first time in an appeal will not be considered by this court).

Although the First Amendment protects individuals' freedom of speech, there are certain limitations to that right. See *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989). Indeed, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). For instance, it is "well settled that the government need not permit all forms of speech on property that it owns and controls." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

Because Dyer's claim is based on private speech on government property, we apply the three-step analysis established by the Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). First, because not all speech is protected, we must determine if Dyer engaged in speech protected by the First Amendment. *Id*. at 797. Second, if that speech was protected, "we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id*. Finally, we must determine whether AISS suspending Dyer from its public meetings satisfied "the requisite standard" that is applied to the forum identified in step two. Id. The first and second steps are uncontested.

AISS concedes Dyer's speech was protected by the First Amendment, and we agree. *See Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). We also agree with the parties' other concession—that an AISS community meeting is a "limited public forum." *See Cambridge Christian Sch. Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1237 (11th Cir. 2019) ("[W]e have identified the public-comment portions of school board meetings, among other things, as limited public forums.").

We next turn to the proper standard against which AISS's restrictions must be assessed. "The government may restrict access to limited public fora by content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993)). "[A] content-neutral ordinance is one that 'places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed.'" *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 (11th Cir. 2005) (second alteration in original) (quoting *Hill v. Colorado*, 530 U.S. 703, 723 (2000)).

Here, the AISS board policies outlining how someone may speak at a community meeting, prohibiting disruption, and requiring decorum are content-neutral policies. We agree with the district court's determination that AISS did not regulate Dyer's speech based on its content, i.e., because it was offensive. Rather, AISS regulated Dyer's offensive speech because it was disruptive. The letters sent by AISS explained that his suspensions were the result of his conduct "fail[ing] to advance any meaningful discourse." The fact that AISS also told Dyer that his comments were "abusive, abhorrent, [and] hate-filled" was merely support

for the suspensions for disruptive and unruly behavior; the offensiveness of the comments themselves was not the basis for his suspension. We have made this distinction before, and we believe it is a meaningful one. *See, e.g., Jones*, 888 F.2d at 1332 ("The district court found that Jones had complied with the time, place and manner restrictions imposed on the meeting and was silenced because of the content of his speech. We disagree. In our opinion, the mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion.").

Moreover, AISS's actions seem justified as, by Dyer's own admission, his aggressive and offensive choice of words were calculated to "send a message" and engage in "psychological warfare." Removing Dyer for his disruptive behavior and lack of proper decorum at an AISS community meeting was content-neutral and, thus, permissible. The district court therefore did not err in granting AISS summary judgment as to the First Amendment claim.

B. The Fourteenth Amendment Claim

Regarding his Fourteenth Amendment claim, Dyer argues the district court erred as a matter of law when it found he had an adequate post-deprivation remedy in the form of the GOMA. We disagree.

The Fourteenth Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The most basic tenets of procedural due process are notice and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). To state a claim for such a violation, a plaintiff must show three elements: "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006) (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)). It is undisputed that AISS's actions constitute state action.

As for the protected liberty or property interest, the

district court noted that Dyer does not expressly argue or identify any such interest. But, again, liberally construing this *pro se* appeal, we interpret his claim as alleging a deprivation of a liberty interest in attending public school board meetings. We, however, have never recognized such a liberty interest. Although the district court held that such an interest is protected, relying on, *Cyr v. Addison Rutland Supervisory Union*, 955 F. Supp. 2d 290, 295–96 (D. Vt. 2013), we need not reach this issue today because Dyer's due process claim fails on the third element—there was an adequate post-deprivation remedy available.

Dyer argues that "some kind of a hearing" is required "before the State deprives a person of liberty or property." *See Zinermon v. Burch*, 494 U.S. 113, 127 (1990). But this is not necessarily true all of the time. The Supreme Court has recognized that a pre-deprivation process may be "impracticable" in some cases, as a public body cannot always know when a deprivation will occur. *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). If a pre-deprivation hearing is impracticable, we must determine whether the plaintiff had an "adequate post-deprivation remedy" for the alleged violation. *Id*. at 534; *see also Goss v. Lopez*, 419 U.S. 565, 582 (1975) (holding that post-deprivation remedies may be constitutionally adequate in situations where prior notice and hearing cannot be provided, including situations where there is a continuing danger to persons or property or an ongoing threat of disruption).

AISS argues that a pre-deprivation hearing would not have been possible here because it could not have anticipated how or when Dyer would disrupt its community meetings. We agree. Here, similar to the situation in Goss, pre-deprivation remedies were not practicable as AISS could not have predicted when and how Dyer would act at the community meetings and because Dyer posed an ongoing threat of disruption. Moreover, Dyer had an adequate post-deprivation remedy in state law under GOMA, which authorizes an individual to file a civil suit when he or she is affected by a violation of the statute, including the requirement that government meetings be

open to the public. See Ga. Code Ann. § 50-14-1. Through GOMA, Dyer could seek an injunction or other equitable relief to challenge his trespass notice. *See id.; see also McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (holding that an adequate state remedy providing for a post-deprivation process is sufficient to cure a procedural deprivation). Because a pre-deprivation remedy was impracticable in this situation and because GOMA provides an adequate post-deprivation remedy, Dyer's Fourteenth Amendment claim fails.

IV. CONCLUSION

For the reasons discussed, we affirm the district court's order granting summary judgment in favor of AISS.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NATHANIEL BORRELL DYER,
Plaintiff,
v.
ATLANTA INDEPENDENT SCHOOL SYSTEM
(Atlanta Public Schools),
Defendant.

CIVIL ACTION FILE
NO. 1:18-cv-3284-TCB

O R D E R

This case comes before the Court on the motion [34] for summary judgment of Defendant Atlanta Independent School System a/k/a Atlanta Public Schools ("APS").

I. Background

Plaintiff Nathaniel Dyer is a graphic designer by trade but spends much of his time as a community advocate for issues related to children and education in the Atlanta area. Over the past decade or more, Dyer has repeatedly found himself at odds with Atlanta schools and their leadership.

A significant incident in this rocky relationship occurred in 2006, while Dyer was volunteering at John F. Kennedy Middle School. He alleges that APS caused him to be prosecuted for false arrest after he broke up a violent fight between two students. The charges were eventually dismissed, but Dyer was no longer allowed to volunteer at the school.

After this disruptive episode, Dyer remained engaged with APS. He considered it his mission to police APS and

its officials for "federal violations and problems plaguing the district . . . ." [1-1] at ¶ 12.

In 2009, Dyer distributed a flyer that depicted former interim superintendent of APS Erroll Davis in a Ku Klux Klan robe. Dyer argues that Davis's role in reassigning students to different schools is akin to the activities of the KKK and contends that he is engaging in "psychological warfare" to draw the public's attention to the APS system. [82] at 21–24. Dyer would subsequently make other flyers containing inflammatory rhetoric. One depicts members of the APS board of education as flying monkeys; another calls the APS board members buffoons and clowns.

Dyer's activism continued to get him in trouble with APS and its officials. In addition to his messaging via printed flyers, Dyer would deliver his criticisms of APS during public comment sessions at APS board meetings. Though Dyer attended many school board meetings, three are particularly relevant.

In January 2016, Dyer attended an APS school board meeting in which he admits to using the words "nigger," "coons," and "buffoons," all in reference to the board members. The board subsequently suspended Dyer from attending board meetings until July 2016, noting that the comments failed to advance any meaningful discourse at the meetings and that the language was inappropriate—in the board's view—to use in front of the children who were present. In the letter informing Dyer of his suspension, he was warned that if he spoke at another meeting using similar language, he might be permanently suspended.[1]

After the conclusion of his first suspension, Dyer attended another board meeting on October 10, 2016. During the public comment portion of that meeting,

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[1] At the motion-to-dismiss stage of this litigation, the Court concluded that the two-year statute of limitations barred Dyer's claims predating June 4, 2016. Accordingly, the Court's review of Dyer's First Amendment claim is limited to violations occurring after June 4. Because a portion of Dyer's suspension following the January 15 letter falls within the applicable limitations period, however, the Court will also consider that portion of Dyer's first suspension.

he used the word "Sambos"[2] in reference to children at APS. Arguing that he was not given an opportunity to finish or expound upon his statement before being asked to step down, Dyer refused to leave the podium. Police were ultimately notified, and they escorted Dyer from the meeting amidst his shouting.

The next day, Dyer received a letter informing him that he had been suspended from speaking at APS board meetings for fourteen months, through December 31, 2017. He was warned that similar conduct in the future would result in a permanent suspension of speaking privileges. The letter also served as a trespass warning, instructing Dyer not to set foot on APS property until January 1, 2018, or risk being arrested for trespassing.

On February 5, 2018, Dyer attended another board meeting. This time, Dyer was, in his word, "harassed" by resource officers for attending. [1-1] at ¶ 23. Dyer did not speak during that board meeting, but he passed out photoshopped fliers containing the tagline "unnigged coming soon" and a photo of APS Superintendent Meria J. Carstarphen wearing a football jersey superimposed with the word "FALCOONS." The next day, Dyer received a suspension letter that accused him of using "racist and hate-filled epithets," [1-1] ¶ 47, that "fail[ed] to advance any meaningful discourse." [34-6] at 45. He was suspended for the remainder of board chair Jason Esteves's term and warned again that he would be arrested for trespassing if he stepped onto APS property during that same period. Dyer was also warned a second time that any further such conduct might result in a permanent suspension of his speaking privileges at board meetings. On June 7, Dyer filed this suit under 42 U.S.C. § 1983 against APS for violations of his right to free speech under the First

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[2] At times, Dyer does not deny using the term "Sambos." [34-6] at 22–24. At other times, he insists that he instead used the term "Samboed." [36] at 33. To the extent Dyer is arguing that his conversion of the term into the past tense cleanses it of its racial undertones, the Court is unconvinced.

Amendment (count 1) and right to procedural due process under the Fourteenth Amendment (count 2). He also alleged state-law claims, but the Court dismissed the state-law claims in its order [22] granting in part and denying in part APS's motion [2] to dismiss for failure to state a claim. Now, APS has moved [34] for summary judgment. Dyer has filed objections [35].[3]

II. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). There is a "genuine" dispute as to a material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). The first is to produce "affirmative evidence demonstrating

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[3] As part of his response to APS's motion for summary judgment, Dyer provided the Court with his "Statement of Undisputed Material Facts . . . in support of its [sic] opposition and cross-motion for summary judgment." [37], [38] at 1. Because Dyer makes no other mention of a cross-motion for summary judgment and offers no argument or evidence in support of such a motion, the Court will treat Dyer's Statement of Undisputed Material Facts solely as support for his opposition to APS's motion, rather than as a separate cross-motion.

that the nonmoving party will be unable to prove its case at trial." *Id*. at 1438 (citing *Celotex Corp.*, 477 U.S. at 331). The second is to show that "there is an absence of evidence to support the nonmoving party's case." *Id*. (quoting *Celotex Corp.*, 477 U.S. at 324). If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. Id. At this point, the nonmoving party must "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (quoting *Celotex Corp.*, 477 U.S. at 324).

III. Discussion

Dyer's remaining claims concern two alleged constitutional violations brought pursuant to § 1983. Section 1983 creates no substantive rights. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Rather, it provides a vehicle through which an individual may seek redress when his federally protected rights have been violated by an individual acting under color of state law. *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994).

To state a claim for relief under § 1983, a plaintiff must satisfy two elements. First he must allege that an act or omission deprived him of a right, privilege, or immunity secured by federal law. *Hale v. Tallapoosa Cty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). Second, he must allege that the act or omission was committed by a state actor or a person acting under color of state law. *Id*.

Here, the issue of state action is uncontested, so the Court need only consider whether Dyer was deprived of his federal constitutional rights.

Dyer first contends that APS's suspensions infringed upon his First Amendment right to free speech. Second, he contends that his rights were suspended without due process of law as required by the Fourteenth Amendment.

A. First Amendment Claim

Dyer alleges that APS violated his First Amendment right to free speech by excluding him from public property and instructing him not to communicate with APS officials during the suspensions.

First Amendment claims proceed in three steps. First, the Court determines whether Dyer's "speech [was] protected by the First Amendment …" *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). If so, the Court next "must identify the nature of the forum" in which Dyer spoke. *Id.* Then the Court asks "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.* For a limited public forum, the standard is reasonableness. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

APS does not contest in its motion for summary judgment that Dyer's speech is protected, and the parties do not dispute that the school board meetings were limited public fora. Accordingly, the operative question is whether APS's regulation of Dyer's speech was reasonable.

To be reasonable, restrictions on speech in limited public fora must be "content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993). The restrictions must also "leave open ample alternative channels for communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The Court will address each of these requirements in turn.[4]

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[4] Dyer also urges that the restrictions on his speech are a prior restraint. A prior restraint is a type of content-based restriction on free speech that occurs when the government has "den[ied] access to a forum before the expression occurs." *Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004) (quoting *United States v. Frandsen*, 212 F.3d 1231, 1236–37 (11th Cir. 2000)). Prior restraints are disfavored because "the enjoyment of protected expression [becomes] contingent upon the approval of government officials." *White v. Baker*, 696 F. Supp. 2d 1289, 1306 (N.D. Ga. 2010) (citing *Near v. Minnesota*, 283 U.S. 697, 711–12 (1931)). Courts in this circuit have found that banning a member of the public from attending or speaking at meetings for a period of less than a year because of past

1. Content Neutrality

"The restriction of speech is content-neutral if it is justified without reference to the content of the regulated speech." *Harris v. City of Valdosta, Ga.*, 616 F. Supp. 2d 1310, 1322 (M.D. Ga. 2009) (internal quotation marks and citation omitted). "In determining whether a restriction is content-neutral, the Court's controlling consideration is the purpose in limiting the Plaintiffs' speech in a public forum." *Id*. (internal quotation marks and citation omitted). "As long as a restriction serves purposes unrelated to the content of the expression, it is content-neutral even if it has an incidental effect upon some speakers or messages but not others." *Id*. (internal quotation marks and citation omitted).

Here, APS stopped Dyer from speaking at meetings because his use of racial epithets "offended the Board, staff, and audience members." [34-2] at 6.

While school officials cannot restrict public comments simply because the content is offensive or controversial, *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969) (finding that school officials' decision to prohibit students from wearing black armbands in protest of the Vietnam War was a First Amendment violation), if such speech causes a material disruption, a substantial disorder, or invades of the rights of others, that speech is "not immunized by the constitutional guarantee of freedom of speech." *Id*. at 513. Here, APS officials were not regulating Dyer's speech

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commentary is a prior restraint. *See Brown v. City of Jacksonville, Fla.*, No. 3:06-cv-122-J-20MHH, 2006 WL 385085, at *4 (M.D. Fla. Feb. 17, 2006) (citing *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 507 (6th Cir. 2001)).

However, a prior restraint is not per se unconstitutional. *Frandsen*, 212 F.3d at 1237. Instead, a prior restraint must "meet the requirements for reasonable time, place, and manner restrictions of protected speech in public fora." *Coal*. for the *Abolition of Marijuana v. City of Atlanta (CAMP)*, 219 F.3d 1301, 1318 (11th Cir. 2000). Accordingly, the Court's conclusion regarding the reasonableness of the restrictions on Dyer's speech is also determinative of Dyer's claim regarding APS's use of a prior restraint.

because they were offended by and attempting to silence his criticism of APS. Other attendees had previously expressed criticism of APS without incident. Dyer himself before and since the incidents in question—has been allowed to freely criticize APS policy decisions and board members when he has done so without the use of racial slurs.

Here, however, Dyer admits that he attempted to "send a message" by engaging in "psychological warfare" that involved the use of racial slurs. [33-1] at 74, 82. Accordingly, APS cut off Dyer's speech because he expressed himself in a hostile manner that disrupted meeting progress. *See Arnold v. Ulatowski*, No. 5:10-cv-1043 (MAD/ATB), 2012 WL 1142897, at *5 (N.D.N.Y. Apr. 4, 2012) (finding that a disruption occurred where the plaintiff admitted he was speaking loudly and angrily), *cf. Hammond v. S. Carolina State Coll.*, 272 F. Supp. 947 (D.C.S.C. 1967) (constraint of protest on state college campus was unconstitutional because the protest was orderly and non-disruptive).

Thus, APS's restriction on Dyer's free speech was content-neutral. *See Tinker*, 393 U.S. at 509; *Barnes v. Zaccari*, No. 1:08-cv-77-CAP, 2008 WL 11339923, at *6 (N.D. Ga. Nov. 19, 2008) (finding that a restriction on free speech in a school was appropriate where "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"); *Kirkland v. Luken*, 536 F. Supp. 2d 857, 875–76 (S.D. Ohio 2008) (holding that there was no First Amendment violation where the speaker's microphone was turned off and the speaker was removed from a public hearing for using inappropriate language and shouting).

2. Narrowly Tailored to Advance a Substantial Interest

Even if content-neutral, the restrictions on Dyer's speech must also be narrowly tailored to advance a substantial government interest.

Courts have generally found that there is a strong government interest in preserving decorum at board

meetings. *See Kirkland*, 536 F. Supp. 2d at 876 (finding that "[t]he interest in conducting orderly meetings of the City Council was a compelling state interest"); *Scroggins v. Topeka*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) ("[T]he Council's interest in conducting orderly, efficient, and dignified meetings and in preventing the disruption of those meetings is a significant governmental interest."). In schools, this interest is designed to prohibit "the sort of uninhibited, unstructured speech that characterizes a public park." *Lowery v. Jefferson Cnty. Bd. of Educ.*, 586, F.3d 427, 432 (6th Cir. 2009).

APS codified its interest in orderly meetings through board policy BC-R(1), which provides that "[a]pplause, cheering, jeering, or speech that defames individuals or stymies or blocks meeting progress will not be tolerated and may be cause for removal from the meeting . . . ." [34-3] at 3. Such rules of decorum "serve[] the important government interest of preventing disruptions to its meetings." *Scroggins*, 2 F. Supp. 2d at 1373.

Although Dyer appears to concede that his removal served APS's legitimate interest in conducting an orderly and efficient meeting, he attacks the facial constitutionality of BC-R(1). He contends that it establishes an unconstitutional prohibition on critical speech because Defendants describe it in their briefing as prohibiting a speaker from "mak[ing] defamatory statements about an [APS] official" [34–3] at 27.

When ripped out of context, this fragment of APS's statement could be read to suggest that the policy prohibits speakers from engaging in critical commentary about board members.[5] However, APS's statement regarding BC-R(1)

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[5] Dyer appears to argue that prohibiting defamation is equivalent to prohibiting a personal attack on an individual. Defamation is not protected by the First Amendment, *see United States v. Stevens*, 559 U.S. 460, 468–69 (2010), so a board policy prohibiting defamation does not give rise to a constitutional claim. However, district courts have found that school board policies prohibiting personal attacks on board members violate the First Amendment because the policies distinguish

reads in full as follows:

> Nathaniel Dyer has spoken at numerous community meetings, often making disparaging remarks about [APS]'s policy decisions and the performance of various [APS] officials and Board members. [APS] did not stop Mr. Dyer from making those comments. However, participants at public comments may not use certain types of speech. *For instance*, a speaker could not use profanity, make defamatory statements about an [APS] official . . . ."

Id. (emphasis added). In other words, the policy prohibits defamatory statements—such as Dyer's—that concern APS officials because the policy prohibits *all* defamatory statements. The Supreme Court has found that regulating defamatory speech is permitted under the Constitution. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004).

Accordingly, the Court finds that APS board policy BC-R(1) is constitutional and that APS had a substantial government interest in preserving meeting decorum.

Dyer also argues that his suspensions constitute an overbroad, "categorical ban," rather than being narrowly tailored. [35–1] at 13.

For a restriction on speech to be narrowly tailored to achieve a substantial government interest, the restriction "need not be the least restrictive or least intrusive means of" serving the interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Instead, the government is prohibited from "regulat[ing] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id*. at 799. Here, the record reflects that when Dyer was asked to refrain from using racial slurs

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unfavorable comments from neutral or favorable ones. *See MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ.*, No. 12-1137 MCA/KBM, 2015 WL 13659218, at *4 (D.N.M. Apr. 6, 2015); *see also Moore v. Asbury Park Bd. of Educ.*, No. Civ.A.05–2971 MLC, 2005 WL 2033687, at *11–13 (D.N.J. 2005).

during meetings, he responded by shouting at the board and continuing to cause a disruption. In the October 2016 meeting, police were ultimately required to remove Dyer from the meeting after he refused to leave the podium; even after he was removed from the meeting room, he does not dispute that he continued to cause a disruption by shouting outside of the room. When he was prevented from speaking during a subsequent meeting, he passed out flyers containing racial slurs. Because Dyer continued to disrupt meetings when he was on school property, regardless of whether he was permitted to speak or enter the meeting room, his suspensions were necessary to preserve meeting decorum. Accordingly, APS's suspensions of Dyer were narrowly tailored to serve APS's legitimate interest in maintaining order during the meetings.

3. Alternative Channels for Communication

The last requirement for a constitutionally valid restriction is that there remain ample alternative channels of communication. *See Jones v. Heyman*, 888 F.2d 1328, 1334 (11th Cir. 1989). Dyer operated a public-access television show throughout his suspensions from APS board meetings. He acknowledges that the concerns he previously expressed during the public comment portion of the board meetings comprised the "main brunt" of his show and that as a result of the show, he was still able to publicly criticize APS policies and officials. [33-1] at 188. As a result, another channel of communication was available to Dyer during the suspensions.[6]

Accordingly, APS's removal of Dyer and suspension from board meetings did not violate Dyer's right of free speech,

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[6] There may be a dispute regarding APS's February 2019 letter(s) to Dyer. One letter, dated February 6, does not ban all forms of communication with APS officials. The other, dated February 8, does include such a ban. Though Dyer contends in his response to APS's motion for summary judgment that APS "submitt[ed] tampered evidence" and committ[ed] "perjury" by offering the February 6 letter into evidence, [35-2] at 25, he authenticated and acknowledged receipt of the February 6 letter during his deposition.

and the Court will grant Defendants' motion for summary judgment as to Dyer's First Amendment claim.

B. Procedural Due Process Claim

Dyer also makes a procedural due process claim alleging that APS violated his right to due process when it prohibited him from participating in board meetings and issued notices against trespass in its October and February letters.

The Fourteenth Amendment protects individuals from deprivations of life, liberty, or property without due process. U.S. CONST. Amend. XIV, § 1. A procedural due process claim requires a showing of (1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). There is no dispute that APS's involvement constitutes state action. However, the parties debate whether there was a deprivation of a constitutionally protected interest. Dyer also argues that he received inadequate process. The Court will address each of these arguments in turn.

1. Liberty or Property Interest

Dyer does not explicitly argue that APS has deprived him of any interest. However, he appears to contend that APS deprived him of a liberty interest—his First Amendment right to access school property in order to express himself at board meetings. Courts generally have found that members of the public lack a constitutionally protected interest in accessing school property. *See Hannemann v. S. Door Cnty. Sch. Dist.*, 673 F.3d 746, 755–56 (7th Cir. 2012); *Martin v. Clark*, No. 3:10-cv-1500, 2010 WL 4256030, at *2 (N.D. Ohio Oct. 21, 2010) (finding no authority in any jurisdiction "that establishes [that] he has a liberty interest in attending school functions or being on school property"); *Pearlman v. Cooperstown Cent. Sch. Dist.*, No. 3:01-cv-504, 2003 WL 23723827, at *3 (N.D.N.Y. Apr. 6, 2003); *Lovern v. Edwards*, 190 F.3d 648, 655–56 (4th Cir. 1999); *see also Carey v. Brown*, 447 U.S. 455,

470–71 (1980) (finding that state officials can limit access to school grounds "to protect the public from boisterous and threatening conduct that disturbs the tranquility of . . . schools") (quoting *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring)). Accordingly, Dyer has no protected liberty interest in unfettered access to school property.

However, even if Dyer cannot assert a liberty interest in accessing school property generally, the notice against trespass prohibited his participation in a school board meeting on school property. As the Court noted at the motion-to-dismiss stage of this litigation, a district court in an analogous case found that such a trespass notice deprived an individual of a constitutionally protected liberty interest in engaging in public comment at school board meetings. *See Cyr v. Addison Rutland Supervisory Union*, 955 F. Supp. 2d 290, 295–96 (D. Vt. 2013). APS contends that the Court need not reach this issue because Dyer's due process claim is duplicative of his First Amendment claim. APS argues that, because there is no First Amendment violation, the related due process claim is without merit.

Though not in as many words, APS argues in favor of an expansive interpretation of the Graham rule. That rule "requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1988) (internal quotations omitted). While the Supreme Court applies the Graham rule to substantive due process claims only, lower courts are split as to whether the rule should be extended to a procedural due process claim, which "seeks to redress the process by which a liberty or property interest is denied, not the actual denial of that right." *Cyr*, 955 F. Supp. 2d at 295–96; *cf. Ritchie v. Coldwater Cmty. Sch.*, No. 1:11-cv-530, 2012 WL 2862037 (W.D. Mich. July 11, 2012); *Decker v. Borough of Hughestown*, No. 3:09-cv-1463, 2009

WL 4406142, at *4–5 (M.D. Pa. Nov. 25, 2009). Thus, the question becomes: Is Dyer's claim that the trespass notices violated his First Amendment right a substantive or a procedural due process claim?

Substantive due process "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotations omitted). By contrast, a procedural due process claim challenges the fairness of the procedures through which the government denies a constitutionally protected interest in life, liberty, or property. *Id*. at 125. In other words, the deprivation by itself is not unconstitutional, but due process of law is required in order to deprive an individual of such an interest. *Id*. Here, Dyer's allegation clearly asserts a procedural due process claim, and the Court declines to apply the Graham rule to that procedural due process claim. Accordingly, the Court will determine whether APS afforded Dyer constitutionally adequate process in regard to the October and February trespass notices.

2. Constitutionally Adequate Process

A procedural due process claim requires consideration of whether a claimant had an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). As noted above, Dyer appears to argue that he did not receive a meaningful opportunity to contest the two trespass notices/warnings. APS does not argue in its summary judgment briefing that Dyer was afforded an adequate opportunity to be heard, instead relying entirely on its contention that Dyer's First Amendment and due process claims are redundant.

While the Court declines to find that the claims are redundant under the Graham rule, the Court nevertheless disagrees with Dyer's contention that he did not receive an adequate opportunity to contest his notices against trespass.

"Due process is a flexible concept that varies with the particular situation." *Cryder v. Oxendine*, 24 F.3d 175,

177 (11th Cir. 1994); *see also Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) ("The nature of the hearing should vary depending upon the circumstances of the particular case."). As a general rule, if "the state is in a position to provide for predeprivation process," *Hudson v. Palmer*, 468 U.S. 517, 534 (1984), it must do so. However, under "rare and extraordinary" circumstances, *Goss v. Lopez*, 419 U.S. 565, 582 (1975), "postdeprivation remedies made available by the State can satisfy the Due Process Clause," *Parratt v. Taylor*, 451 U.S. 527, 538 (1985), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327, 330 (1986).

One such "rare and extraordinary" circumstance occurs when an individual presents an "ongoing threat of disrupting the educational process." *Castle v. Marquardt*, 632 F. Supp. 2d 1317, 1332 (N.D. Ga. 2009) (citing Goss, 419 U.S. at 582). At the motion-to-dismiss stage of this litigation, the record did not reflect that such an extraordinary circumstance existed.

However, Dyer clearly presented such a threat when he shouted racial slurs in front of children present at the board meetings, accused school board officials of committing crimes akin to murder, and tried to "send a message" that school officials were "just as destructive" as members of the Ku Klux Klan. [33-1] at 79–80; *see Hill v. Bd. of Trs. of Mich. State Univ.*, 182 F. Supp. 2d 621, 630 (W.D. Mich. 2001) (approving a student's suspension with only a post-deprivation remedy where the student was arrested for inciting a riot). Consequently, a post-deprivation remedy is all that is required.

Dyer had such a post-deprivation remedy available to him through the Georgia Open Meetings Act ("GOMA"), O.C.G.A. § 50-14-1 et seq. Section 50-14-1 authorizes an individual to file a civil suit when he or she is affected by a violation of GOMA, such as the requirement that government meetings be open to the public. Through GOMA, Dyer could seek an injunction or other equitable relief to challenge his trespass notice. *See Scott v. Atlanta Indep. Sch. Sys.*, No. 1:14-cv-01949-ELR, 2015 WL

12844305, at *4–5 (N.D. Ga. Sept. 14, 2015).

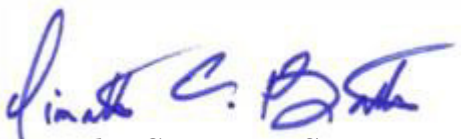
Thus, an adequate state remedy existed to provide Dyer with an opportunity[7] to contest the notices against trespass. Such a procedural remedy cures APS's failure to provide Dyer with a post-deprivation hearing, for a procedural due process claim brought pursuant to § 1983 can stand only when "the state refuses to provide a process sufficient to remedy the procedural deprivation," *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994).

Accordingly, the Court will grant APS's motion for summary judgment as to Dyer's procedural due process claim.

IV. Conclusion

For the foregoing reasons, Defendants' motion [34] for summary judgment is granted. To the extent that Dyer intended to file a cross-motion [37] for summary judgment, that motion is denied.

IT IS SO ORDERED this 5th day of December, 2019.



Timothy C. Batten, Sr.
United States District Judge

[7] Dyer need not have actually taken advantage of this remedy for it to trigger the adequate-state-remedy doctrine. *Horton v. Bd. of Cty. Comm'rs of Flagler Cty.*, 202 F.3d 1297, 1300 (11th Cir. 2000).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NATHANIEL BORRELL DYER,
Plaintiff,
v.
ATLANTA INDEPENDENT SCHOOL SYSTEM
(Atlanta Public Schools),
Defendant.

CIVIL ACTION FILE
NO. 1:18-cv-3284-TCB

O R D E R

This case comes before the Court on the motion [2] of Defendant Atlanta Independent School System a/k/a Atlanta Public Schools ("APS") to dismiss Plaintiff Nathaniel Dyer's complaint for failure to state a claim.

I. Background[1]

Dyer is a graphic designer by trade but spends much of his time as a community advocate for issues related to children and education in the Atlanta area. Over the past decade or more, Dyer has found himself at odds with Atlanta schools and their leadership.

A significant incident in this rocky relationship occurred in 2006, while Dyer was volunteering at John F. Kennedy Middle School. He alleges that APS charged him with disorderly conduct after he broke up a violent fight between two students. The charges were eventually dismissed, but Dyer was no longer allowed to volunteer at that school.

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[1] At the motion-to-dismiss stage, the Court accepts as true all of Dyer's well pleaded allegations.

After this disruptive episode, Dyer remained engaged with APS.

He considered it his mission to police APS and its officials for "federal violations and problems plaguing the district … "[1-1] ,i 12. He would often deliver his criticisms during public comment sessions at APS school board meetings.

Dyer's activism continued to get him in trouble with APS and its officials. He attended several school board meetings and, based on his conduct at these meetings, was suspended multiple times. The suspensions restricted him from participating in public comment, stepping foot upon any APS property, or communicating with any APS personnel.

The first suspension occurred on January 15, 2016. The suspension letter alleged that Dyer used racial slurs and derogatory terms that violated the rules of decorum for school board meetings. The suspension lasted six months, until July 2016.

Nevertheless, Dyer attended the next meeting, which was on February 1. He was not allowed to speak during the public-comment segment and was, in his words, "harassed" by resource officers for attending. *Id*. ¶ 23.

APS suspended Dyer again on October 11, 2016. He was told this suspension was based, at least in part, on his use of the word "Sambos" to refer to APS students during a public comment session. He does not deny using this term. Instead, he contends he was not given an opportunity to finish or expound upon his statement before being asked to step down. Dyer was led out of the meeting by APS officers while he tried to explain his use of the term.[2] This suspension lasted fourteen months, until December 31, 2017.

On February 8, 2018, APS suspended Dyer a third time. The suspension letter accused Dyer of using

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[2] Dyer avers that several witnesses say they did not hear him refer to children as "Sambos" but appears to admit that he did, in fact, use the word.

"racist and hate-filled epithets," [1-1] ¶ 47, based on photoshopped fliers containing the tagline "unnigged coming soon" and a photo of APS Superintendent Meria J. Carstarphen wearing a jersey superimposed with the word "FALCOONS." Dyer claims he used no racially insensitive language in his verbal comments and that the suspension was based only on the literature distributed at the meeting. The suspension was for one year.

Dyer alleges myriad other ill treatments following from or in addition to the suspensions, all allegedly in retaliation for his self-appointed ombudsman role. For example, he alleges that an APS employee referred to him as "the pedophile," [1-1] at 9, when a parent inquired about him. He was also running for election to the board of education in 2018, but due to the APS suspensions was prohibited from participating in a candidate forum because it was held on APS property.

Dyer brings this suit under 42 U.S.C. § 1983 against APS for violations of his right to free speech under the First Amendment (count 1) and right to procedural due process under the Fourteenth Amendment (count 2). He also alleges claims that the Court construes as arising under state law for slander per se (count 3), discrimination and retaliation (count 4), and harassment (count 5).
APS has moved to dismiss all of Dyer's counts for failure to state a claim.

II. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Chandler*

v. Sec'y of Fla. Dep't of Transp., 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); see also *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324-25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level … " *Twombly*, 550 U.S. at 555-56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." Id. at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiffs legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Thus, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

The Court liberally construes the facts in favor of Dyer, a pro se plaintiff, in its review of the motion to dismiss. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

III. Discussion

APS's motion comes in three parts. First, it argues that a number of Dyer's federal claims are barred by the statute of limitations. Second, it argues that it did not violate

Dyer's constitutional rights under the First or Fourteenth Amendments. Third, it argues that Dyer's state-law claims are barred by sovereign immunity. These are taken in turn.

A. Statute of Limitations

APS contends that Dyer's claims are governed by a two-year statute of limitations. Dyer initially argued that Georgia's "discovery rule" applies and that under this rule all of his claims are timely.

However, in his "amended response" [18] in opposition to the motion to dismiss, he "does not dispute that the two-year statute of limitations bars claims predating June 4, 2016." [18] at 5. Accordingly, the Court holds that all claims arising from Dyer's suspensions prior to June 4, 2016 are time-barred.[3]

B. Constitutional Claims Pursuant to Section 1983

Now the Court turns to Dyer's alleged constitutional violations brought pursuant to§ 1983. Section 1983 creates no substantive rights. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Rather, it provides a vehicle through which an individual may seek redress when his federally protected rights have been violated by an individual acting under color of state law. *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994).

To state a claim for relief under§ 1983, a plaintiff must satisfy two elements. First, he must allege that an act or omission deprived him of a right, privilege, or immunity secured by federal law. *Hale v. Tallapoosa Cty.*, 50 F.3d

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[3] Even if Dyer did not concede the issue, the Court would conclude that, under federal law, Dyer's contention that Georgia's discovery rule applies is without merit. See Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003) (holding that federal law governs the commencement of§ 1983 statute of limitations). Dyer's § 1983 claim began to run at the time when his alleged constitutional violations occurred because a reasonably prudent person with regards for their rights would have known that his rights were violated at that time. *See id.*; *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

1579, 1582 (11th Cir. 1995). Second, he must allege that the act or omission was committed by a state actor or a person acting under color of state law. *Id*. The issue of state action is uncontested, so the Court need only consider whether Dyer was deprived of his federal constitutional rights. Dyer first contends that APS's suspensions infringed his First Amendment right to free speech. Second, he contends he was suspended from school board meetings without due process of law as required by the Fourteenth Amendment.

1. First Amendment

In light of the Court's decision on the statute-of-limitations issue, the Court's review of Dyer's First Amendment claim is limited to violations occurring after June 4, 2016. Thus, the universe of alleged violations includes APS's October 11, 2016 suspension lasting through December 31, 2017, as well as APS's February 8, 2018 suspension lasting through February 8, 2019. Based on these two incidents,[4] the Court considers whether APS violated Dyer's First Amendment rights.

First Amendment claims proceed in three steps. First, the Court determines whether Dyer's "speech [was] protected by the First Amendment … " *Cornelius v. NAACP Legal Def & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). If so, the Court next "must identify the nature of the forum" in which Dyer spoke. *Id*. Then the Court asks "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id*.

APS argues that Dyer's speech was not protected by the First Amendment, and that even if it was protected, the restrictions were reasonable. The parties do not dispute that the school board meetings were limited public fora.

a. Protected Speech

APS argues, and Dyer contests, that his speech at the school board meetings was not protected by the First

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[4] It is also possible that a portion of the January 15, 2016 suspension may fall within the applicable limitations period.

Amendment. First, APS alleges that Dyer's reference to "Sambos" was not protected as it was "insulting, racially-insensitive language" used in reference to APS students. [2-1] at 4-5. Second, APS alleges that Dyer's distribution of flyers containing the phrase "unnigged" and "FALCOONS"[5] was not protected because it involved "offensive and racially-charged" language aimed at "mocking" a school board official. *Id.* at 17.[6]

The First Amendment "is a guarantee to individuals of their personal right 'to make their thoughts public and put them before the community.'" *Belyeu v. Coosa Cty. Ed. of Educ.*, 998 F.2d 925, 930 (11th Cir. 1993) (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967)). "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). "[T]he freedom to speak one's mind is not only an aspect of individual liberty-and thus a good unto itself-but also is essential to the common quest for truth and the vitality of society as a whole." *Id.* at 50-51 (alteration in original) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984)).

Consistent with these principles, the Court must also consider that the First Amendment protects speech that society may not like or finds unpopular. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)) ("If there is a bedrock principle underlying the First Amendment, it is that the

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[5] Dyer is African-American.

[6] APS also appears to argue that Dyer's use of the word "buffoon" or other derogatory terms to criticize the school board falls outside the First Amendment's protections. The Court soundly rejects such an argument. It is beyond peradventure that a citizen has a First Amendment right to criticize government officials. *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001) ("The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government and government officials.").

government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Indeed, and contrary to APS's contention regarding offensive speech, "the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001). The protection of such offensive speech is arguably one of the most important functions of the First Amendment.

There is no question that Dyer's use of "Sambos" and "unnigged" was patently offensive. But no matter how despicable the rhetoric may be, it cannot be said that such speech is categorically unprotected by the First Amendment. Unprotected categories of speech are confined to a "well-defined and narrowly limited" list. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *see also United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (listing the categories of traditionally unprotected speech).

"The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." Stevens, 559 U.S. at 4 70. Given the centrality of First Amendment freedoms to the constitutional guarantees inhered to every citizen of this country, Courts should be wary of expanding the list of unprotected speech or too readily finding that speech has wandered from the warm hedgerows of First Amendment protection into the wild dells of unprotected speech. *See id*. at 471 (declining to exclude animal cruelty from First Amendment protection or analyze the First Amendment protectability "on the basis of a simple cost-benefit analysis"). The Court is reluctant to do so here. A decision that Dyer's speech is per se unprotected by the First Amendment would be a weighty and heavy-handed determination at this stage of the case. This is particularly true when, as here, the Court construes Dyer's

alleged speech as political speech regarding local school governance; this category of speech finds First Amendment protection at "its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quoting *Grant v. Meyer*, 828 F.2d 1446, 1457 (10th Cir. 1987)).

APS has pointed the Court to no case in which speech similar to Dyer's was found categorically outside First Amendment protection. For example, APS's attempts to analogize its regulation of Dyer's speech to the regulations of prostitution or other illegal sex acts upheld in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), is unpersuasive. The regulations in *Arcara* had only an incidental effect on protected expression because the unlawful regulations were primarily aimed at unlawful conduct. Dyer was engaged in lawful conduct at the school board meetings from which he was eventually banned. Thus, *Arcara* is in apposite.
The Court also finds APS's reliance on *Wright v. City of St. Petersburg*, 833 F.3d 1291 (11th Cir. 2016), misplaced. In that case the plaintiff engaged in street ministry and outreach to the poor and homeless. He noticed a man being interrogated by the police and attempted to engage the officers, asking what the man had done wrong and telling the police to stop harassing him. A police officer instructed the plaintiff to not interfere, but he did not comply. The officers then arrested him for obstruction and issued him a trespass warning. The warning, barring him from going on to that same park for a year. The plaintiff filed suit alleging the ordinance pursuant to which he was issued a trespass warning violated the First Amendment. The Eleventh Circuit held that it did not.

APS cites this case for its argument that Dyer's speech was unprotected. But the Eleventh Circuit's decision was more nuanced than this. It clearly held that the plaintiff engaged in protected speech while ministering and advocating for the less fortunate. *See id*. at 1293 ("There is no question that the First Amendment protects Wright's ministerial outreach and political speech."). However, in upholding the plaintiffs arrest and the trespass warning, the court concluded that the warning was not issued in

response to his protected speech; rather, it was issued because he failed to obey the lawful command of a police officer, which was not expressive conduct. Thus, it was his failure to obey the officer, not his street ministry, that prompted the officer to issue the trespass warning. Contrastingly, when viewing the complaint in the light most favorable to Dyer, APS's suspensions were issued in direct response to Dyer's alleged protected speech at the school board meetings. This distinguishes our case from Wright.

In the absence of cases supporting APS's contention that Dyer's speech was unprotected, the Court believes it more prudent to follow other cases where extraordinarily offensive speech, such as Dyer's, was found to be protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15, 18 (1971) (reversing conviction that was based solely on "the asserted offensiveness of the words [the defendant] used to convey his message to the public" on a jacket that read "Fuck the Draft"); *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (holding that professor's racially charged commentaries were protected by the First Amendment because "the government may not silence speech because the ideas it promotes are thought to be offensive"); *see also Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (professor's use of the word "nigger" protected by the First Amendment because it was germane to subject-matter of college lecture); *Bonnell v. Lorenzo*, 241 F.3d 800, 820-21 (6th Cir. 2001)(discussing constitutional rights to use words that, depending on the context, may be considered vulgar or offensive).

The Court wants to make abundantly clear that the terms Dyer used are abhorrent. But abhorrence does not ipso facto bring them outside the First Amendment's protection.

Moreover, at this stage the record is too undeveloped for the Court to even determine the full extent of what Dyer said at these meetings because the complaint supports only the conclusion that he used the word "Sambos" and "unnigged" in his comments at school board meetings. He

appears to deny the use of other slurs as alleged by APS or the characterization and context of such usage as alleged by APS. E.g., [1-1] ¶ 48 (Dyer did not use any language that could be considered a racial epithet during his public comment[.]"); id. ¶ 39 ("Courtney English ... *claimed* that Mr. Dyer called children "Sambos" during the public comment portion of the meeting." (emphasis added)).

Similarly, to the extent APS contends that Dyer's speech was unprotected because it constituted "'fighting' words, that is, words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Wilson v. Attaway,* 757 F.2d 1227, 1246 (11th Cir. 1985) (quoting *Chaplinsky,* 757 F.2d at 1242), the Court finds it inappropriate to make a determination on this issue at the motion-to-dismiss stage. The Eleventh Circuit has made clear that determining "whether the tendency of words is to provoke violence" is an issue "of fact." *Id*. While the Court is acutely aware of the radioactive nature of Dyer's words, the facts and inferences drawn in the light most favorable to Dyer do not permit the Court to conclude, at this stage, that his words constituted unprotected fighting words.

Thus, the Court is driven to the conclusion, based on the cases argued and the stage of factual development in this case, that Dyer's speech was protected by the First Amendment. However, it reserves a final determination on this issue after further factual development. *Cf. King v. Ed. of Cty. Comm'rs*, No. 8:16-cv-2651-T-33TBM, 2018 WL 515350, at *2 (M.D. Fla. Jan. 23, 2018) ("[T]he legal question of whether speech is protected by the First Amendment is highly fact-specific.").

This of course has no bearing on whether APS may properly restrict Dyer's speech, the issue to which the Court now turns.

b. First Amendment Scrutiny-Limited Public Fora

There is no dispute that APS's suspensions restricted Dyer's protected speech. These restrictions must now pass through the relevant level of scrutiny, which asks whether

the regulations on Dyer's speech were reasonable based on the forum in which he was speaking.

"[I]n evaluating a citizen's right to express his opinion on public property, the Court has established certain boundaries within which it balances a citizen's First Amendment rights and the government's interest in limiting the use of its property." *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989).

> Courts use "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. In forum analysis, we identify the type of government forum involved and then apply the test specific to that type of forum in evaluating whether a restriction violates the First Amendment.

Barrett v. Walker Cty. Sch. Dist., 872 F.3d 1209, 1223-24 (11th Cir. 2017) (citation omitted) (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015)).

The parties agree that school board meetings are limited public fora, so there is no dispute as to the relevant standard of scrutiny. Restrictions on speech in limited public fora must be "content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Crowder v. Hous. Auth. of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993). The restrictions must also "leave open ample alternative channels for communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

APS's purported justifications suffer from the same procedural malady as the protected-speech issue analyzed above. Its resolution requires a level of analysis that is inappropriate at the motion-to-dismiss stage. APS implicitly relies on facts not derived from or contrary to those found in Dyer's complaint; or it calls for inferences adverse to Dyer. For example, APS references a commotion in the audience caused by Dyer's speech at the school board meetings. It argues that Dyer's speech disrupted the meetings when he refused to leave, [2-1] at 10, and that

these disruptions prevented APS from efficiently moving through meeting topics, *id*. at 15. Dyer, however, contests the disruptiveness of his speech at the school board meetings, and at this stage an inference of disruption, even if present in the complaint, may not be drawn in APS's favor. And whether there was a disruption due to Dyer's speech is directly relevant to APS's contention that its suspension was justified under First Amendment scrutiny. Such disputes on material issues, among others, preclude judgment for APS at the motion-to-dismiss stage.

The Court is also mindful that APS bears the burden of showing that it survives the limited public fora scrutiny. *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("[T]he State bears the burden of justifying its restrictions" on protected speech.); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (holding that "the burden is on the government to show the existence of" its interest in regulating protected speech); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012) ("The City has the burden of proof in this inquiry."). And "since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Fox*, 492 U.S. at 480 (citation omitted).[7]

Though APS does not present its justifications for restricting Dyer's speech as an affirmative defense in the traditional sense, it functions much the same. It is generally inappropriate to decide affirmative defenses on a motion to dismiss unless they "clearly appear□ on the face

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[7] The restrictions are also a form of prior restraint on Dyer's speech. Such restraints occur when the Government has "den[ied] access to a forum before the expression occurs." *Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004)(quoting United States v. Frandsen, 212 F.3d 1231, 1236-37 (11th Cir. 2000)). And a "prior restraint of expression comes before [the] court with 'a heavy presumption against its constitutional validity.'" *Universal Amusement Co. v. Vance*, 587 F.2d 159, 165 (5th Cir. 1978) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). This weighs in favor of requiring APS to further develop the record before deciding the constitutional validity of the suspensions.

of the complaint." *Quiller v. Barclays Am.I Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984). The same principle operates here. Because APS's justifications are not clear from Dyer's complaint, the Court cannot rule in its favor on the issue of First Amendment scrutiny when it bears the burden on that issue. *See Asociacion de Educacion Privada de P.R., Inc. v. Echevarria-Vargas*, 385 F.3d 81, 86 (1st Cir. 2004) (reversing a granted motion to dismiss "in the absence of any evidence about the nature and weight of the burdens imposed and the nature and strength of the government's justifications" in a First Amendment challenge).

As APS has not had a chance to develop the record regarding its restrictions on Dyer's speech, the Court defers its scrutiny of APS's restrictions on Dyer's speech to the summary judgment stage. It may well be appropriate for APS, in a limited public forum, to prohibit baselevel rhetoric such as that Dyer was accused of using. But the final resolution of this issue must wait for summary judgment after the facts have become clearer.

2. Procedural Due Process

Dyer also contends that the suspensions were issued without due process of law as required by the Fourteenth Amendment. APS argues that Dyer fails to state a claim.

A procedural due process claim requires a showing of (1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process. Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003). Only the first and third prongs are contested.

a. Deprivation of a Constitutionally Protected Interest

First, the Court determines whether Dyer has shown either a liberty or a property interest protected by the Due Process Clause. APS contends that Dyer lacked a property interest in attending school board meetings. Even

if this was correct, APS does not argue that Dyer has no constitutionally protected *liberty* interest, and the Court holds that he does.

First Amendment rights are among the liberty interests protected by the Due Process Clause of the Fourteenth Amendment. *Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359, 1367-68 (11th Cir. 2011)(finding a liberty interest arising from a First Amendment right to access inmates). Construing both Dyer's complaint and his rights under the First Amendment broadly, *see id*. at 1367, Dyer has alleged at least a plausible liberty interest derived from the First Amendment to participate in school board meetings.

However, this does not mean that Dyer has a First Amendment right to access school property as a general matter. The opinion in *Cyr v. Addison Rutland Supervisory Union,* 955 F. Supp. 2d 290, 295-96 (D. Vt. 2013), is instructive. There, the district court rejected a plaintiffs contention, similar to Dyer's, that a school board's issuance of a notice against trespass on school property violated his procedural due process rights. Like Dyer, the plaintiff asserted a liberty interest[8] to access school property.

The district court rejected in part this argument. It held that even though the plaintiff lacked a general liberty interest in accessing school property, the notice against trespass nevertheless "deprived him of First Amendment rights without sufficient process" to the extent it prohibited his participation in a school board meeting on school property. *Id*. at 296.

Following *Cyr,* this Court does not hold that Dyer "possesses a liberty interest-independent of the First Amendment-in accessing school property." *Id.* It does, however, allow his claim to proceed on the basis that he had a liberty interest in engaging in public comment at school board meetings.

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[8] Dyer has not done this in so many terms, but construing the complaint liberally the Court concludes that this is indeed Dyer's contention.

b. Constitutionally Inadequate Process

Dyer must also demonstrate that the alleged deprivation of his liberty interest was done without due process. APS contends that Dyer had an adequate, post-deprivation remedy under state law to challenge the suspensions. Though not entirely clear, the Court construes Dyer's response to be that he was entitled to some process before, rather than after, the alleged deprivation. The Court once again agrees.

The parties' disagreement raises an issue that was not thoroughly briefed by either party, namely whether Dyer was entitled to pre- or post-deprivation process before APS suspended him from public comment. APS's argument depends on a presumption that no pre-deprivation hearing was required because it offers the Court only a post-deprivation remedy to correct the alleged due process violation. Because APS does not further develop this issue, the Court cannot resolve the motion in its favor at this time.

Generally, "some kind of a hearing" is required "*before* the State deprives a person a liberty or property interest." *Zinermon v. Burch,* 494 U.S. 113, 127 (1990). But this is not always the case. In *Parratt v. Taylor,* 451 U.S. 527, 538 (1985), *overruled on other grounds by Daniels v. Williams*, 4 74 U.S. 327, 330 (1986), the Supreme Court recognized that in certain circumstances "post-deprivation remedies made available by the State can satisfy the Due Process Clause." *See also Zinermon*, 494 U.S. at 128 ("In some circumstances, however, the Court has held that a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process."). These situations are often ones in which "a State must act quickly, or where it would be impractical to provide pre-deprivation process … "*Gilbert v. Hamar*, 520 U.S. 924, 930 (1997).

APS asks the Court to apply *Parratt's* principles here and hold that the Georgia Open Meetings Act ("GOMA"), O.C.G.A. § 50-14-1 *et seq*., provides an adequate state remedy to Dyer's alleged deprivation. GOMA authorizes

anyone to file a civil suit when he or she is affected by a violation of GOMA, such as the requirement that government meetings be open to the public.

However, a cause of action under GOMA is only a post-deprivation remedy in the form of a civil suit. This is insufficient here.

Parratt and the adequate-state-remedy doctrine have no application "when the state is in the position to provide predeprivation process." *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 801 (11th Cir. 1988); see also Rittenhouse v. DeKalb Cty., 764 F.2d 1451, 1454 (11th Cir. 1985) ("Since predeprivation process was not feasible [in *Parratt*], the Court held that the appropriate analysis for a procedural due process claim would focus on post-deprivation remedies."); *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983) ("[E]ven if a state tort action is adequate to redress the damage to [plaintiffs] property, we would have to find that a pre-deprivation hearing was impractical in order to invoke the adequate state remedy doctrine of *Parratt*."); *Branch v. Franklin*, No. 1:06-cv-1853-TWT, 2006 WL 3335133, at *2 n.1 (N.D. Ga. Nov. 15, 2006) (noting the limitation of *Parratt's* deprivation hearing was required and concluding it does not apply when a deprivation "was not a random or unauthorized act"). That is, if "pred-eprivation procedures were practicable ... post-deprivation remedies cannot provide due process." *Burch*, 840 F.2d at 801.

Thus, the Court must consider the threshold question of whether a pre-deprivation remedy was practical here. The "controlling inquiry" for determining whether a pre-deprivation hearing is required is "whether the state is in a position to provide for pre-deprivation process." *Hudson v. Palmer,* 468 U.S. 517, 534 (1984). The Eleventh Circuit has put it this way: "[A] pre-deprivation hearing is practicable when officials have both the ability to predict that a hearing is required *and* the duty because of their state-clothed authority to provide a hearing." *Burch*, 840 F.2d at 802.

Dyer has alleged sufficient facts, which APS has not rebutted, to make it at least plausible that a pre-

deprivation remedy was practical before he was suspended. APS's suspensions were not issued immediately or as an emergency measure to stop a live disruption. E.g., [1-1] at 45 (suspending Dyer on October 11 for conduct at an October 10 meeting). APS was able to predict that a hearing was required before suspending Dyer because it took the time to create a letter that applied prospectively to him. Moreover, as APS has presumably been clothed with the state's authority to suspend persons from attending public meetings, it is its "duty ... to provide pre-deprivation process." *Burch*, 840 F.2d at 802 n.10.

To sum up, Dyer's allegations make it plausible that he was entitled to a hearing before APS deprived him of his liberty interest. Under these circumstances, a post-deprivation remedy, such as GOMA, will not satisfy due process. Dyer's procedural due process claim will therefore be allowed to proceed.[9]

C. State-Law Claims and Sovereign Immunity

Dyer also alleges counts that appear to arise under state law for slander per se (count 3), discrimination and retaliation (count 4), and harassment (count 5). APS contends that these claims, if legally cognizable at all, are barred by sovereign immunity.

A school district is a political subdivision of the State of Georgia and can avail itself of sovereign immunity, which can be waived "only by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of the waiver." *Wellborn v. DeKalb Cty. Sch. Dist.*, 489 S.E.2d 345, 347 (Ga. Ct. App. 1997). Dyer bears the burden of demonstrating the existence of a waiver. *Bomia u. Ben Hill Cty. Sch. Dist.*, 740 S.E.2d 185, 188 (Ga. Ct. App. 2013).

Dyer has pointed to no waiver of sovereign immunity that would cover APS. While he correctly contends that

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[9] Because the Court's decision here is based on underdeveloped briefing of the issues, APS is free to renew its arguments at summary judgment on these issues.

sovereign immunity does not apply to his claims under§ 1983, it is applicable to his state-law claims, and he has failed to rebut this argument. Thus, APS is entitled to judgment on Dyer's state-law claims. *Accord Davis u. DeKalb Cty. Sch. Dist.*, 996 F. Supp. 1478, 1484 (N.D. Ga. 1998) ("The Georgia Tort Claims Act provides for a limited waiver of the state's sovereign immunity for the torts of its officers and employees, but it expressly excludes school districts from the waiver. Therefore, the Georgia Tort Claims Act ... does not divest the School District of its sovereign immunity." (citation omitted)).

IV. Conclusion

For the foregoing reasons, APS's motion [2] to dismiss for failure to state a claim is granted in part and denied in part. Dyer's§ 1983 claims under the First Amendment (count 1) and the Fourteenth Amendment Due Process Clause (count 2) may proceed. His state-law claims (counts 3 through 5) are dismissed as barred by sovereign immunity.[10]

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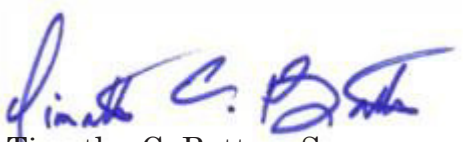
[10] The Court also grants Dyer's motion (11] for leave to file excess pages. The Court denies his motions [14, 20] to allow late filings. Dyer has not shown good cause for his late filings or successive and repetitive briefing of issues, nor will this be allowed in future filings. Dyer is directed to this Court's Local Rule 7.1 regarding the filing of motions. Dyer should not file successive motions or responses to motions without first obtaining leave of the Court and showing good cause.

Dyer is also required from this point forward to comply Local Rule 5.l(C) regarding formatting, spacing, and font for filings with this Court. Dyer is specifically warned that the Court will disregard any future filings that are not 14-point, double-spaced, and in an approved font. Failure to comply with this Order or the local rules may result in sanctions including and up to dismissal of this case.

The Court denies APS's motion [13] and objections [19] as moot due to the foregoing rulings.

Accordingly, APS is ordered to file a responsive pleading to counts 1 and 2 by April 4.

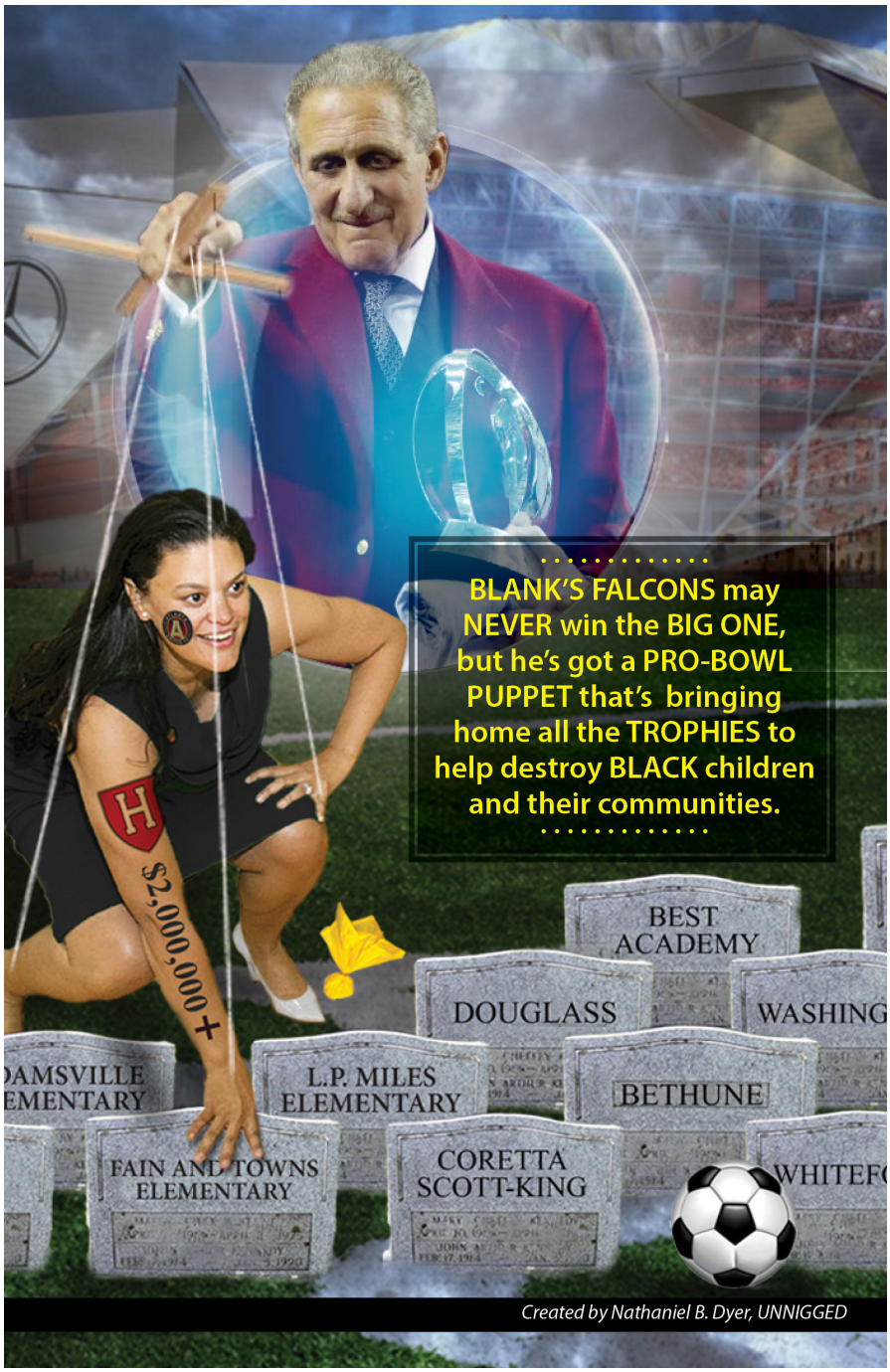
IT IS SO ORDERED this 14th day of March, 2019.

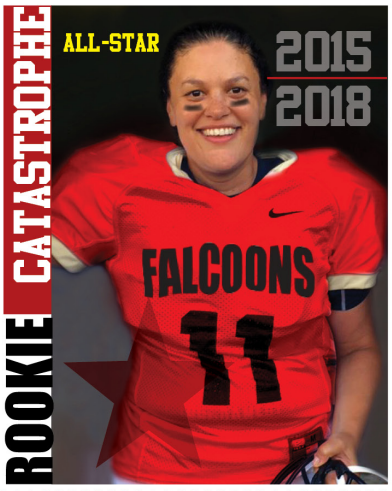


Timothy C. Batten, Sr.
United States District Judge

APPENDIX D

Mr. Dyer's Satirical Flyer





SUPERINTENDENT *Meria Catastrophe's* TOP 10 CATASTROPHIC PLAYS

1. **SELLING SCHOOLS** - She tackles the issues of deeds from the city to sell them to developers for gentrification of Black neighborhoods.
2. **CLOSING SCHOOLS** - She closed schools such as Bethune ES and Kennedy MS located in the midst of a minimum of five billion dollars in development which includes Arthur Blank's Mercedes Benz Stadium Project.
3. **MERGING SCHOOLS** - She has merged Black students together into overcrowded situations while proposing options to alleviate overcrowding for White students.
4. **PRIVATIZING SCHOOLS** - She gives private operators, Purpose Built Communities and Kindesi, carte blanc and long contracts with little to no accountability.
5. **CHARTER SCHOOLS** - She places Kindesi and KIPP schools in the heart of neighborhoods where she claims there is low student population. Her latest KIPP move will kill Douglas High School.
6. **OPPORTUNITY SCHOOL DISTRICT (OSD)** - She hired the architect of Gov. Nathan Deals' OSD proclaiming to save schools from takeover but she closed them instead.
7. **AGE DISCRIMINATION** - More than 100 teachers over 40 are suing this rookie for age discrimination. The culture of fear and intimidation still exists within Atlanta Public Schools and it may have intensified.
8. **POLICE FORCE** - She created a police force claiming they are to aid with mentoring students. To date, bullying and discipline issues are still prevalent within APS at an all-time high.
9. **BODY CAMERAS FOR OFFICERS** - Offering little money for exposure and resources to help children, this rookie wants to expose them in a hi-tech manner to be legally profiled for life.
10. **INEQUITIES** - She caters heavily to White communities through whatever measures it takes to help them maintain stability and an uninterrupted learning experience. Anything to the contrary, this would cause White Flight. And Lawdy, She's Sho nuffin Don't Wants Dat!

It's time to retire this rookie. A new contract cannot be an option for what this third year rookie has done to Atlanta's children who possess so much promise and potential.

UNNIGGED COMING SOON! For more information, please contact Nathaniel B. Dyer at 404.964.6427 or email district7@nathanielbdyer.com.