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.

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] ¶ 12. He would often deliver his criticisms during public comment sessions at APS school board meetings.

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

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 "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

[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.

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 plaintiff's 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.

---

[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).

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.* 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.*

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

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 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]

[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.").

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. Bd. 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 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 470. 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 inapposite.

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 plaintiff's 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. Bd. 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 of the complaint." *Quiller v. Barclays Am./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

[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.

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 base-level 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 plaintiff's 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

[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.

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.

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*, 474 U.S. 327, 330 (1986), the Supreme Court recognized that in certain circumstances "postdeprivation 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 postdeprivation 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 predeprivation process . . . ." *Gilbert v. Homar*, 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 postdeprivation 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 [plaintiff's] property, we would have to find that a predeprivation 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 adequate-state-remedy doctrine to cases where no pre-

deprivation hearing was required and concluding it does not apply when a deprivation "was not a random or unauthorized act"). That is, if "predeprivation procedures were practicable . . . postdeprivation 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 predeprivation process." *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). The Eleventh Circuit has put it this way: "[A] predeprivation 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 predeprivation 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

[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.

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 v. 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 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 v. 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]

---

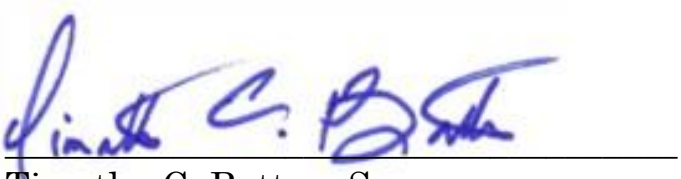
[10] The Court also grants Dyer's motion [11] for leave to file excess pages. The Court denies his motions [14, 20] to allow late filings. Dyer has not shown good cause for his late filings or successive and repetitive briefing of issues, nor will this be allowed in future filings. Dyer is directed to 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 5.1(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