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

NATHANIEL BORRELL DYER,

Plaintiff,

v.

ATLANTA INDEPENDENT SCHOOL SYSTEM,

Defendant.

Civil Action No. 1:18-CV-03284-TCB

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Atlanta Independent School System ("AISS") files this reply in support of its Motion for Summary Judgment (Doc. 34-1), showing the Court the following:

ARGUMENT AND CITATION TO AUTHORITY

This reply will address three assertions raised in Plaintiff's response brief (Doc. 35-1). First, it will respond to Plaintiff's insistence that AISS removed and suspended him from public meetings not because Plaintiff repeatedly uttered offensive racial slurs, but because it disapproved of the viewpoint expressed in his speech. Second, it will rebut Plaintiff's argument that AISS's policy governing conduct at public comment was facially unconstitutional. And third, it will address Plaintiff's unfounded allegation that AISS submitted falsified evidence in support of

its Motion for Summary Judgment. For all other issues raised in Plaintiff's response, AISS relies on the arguments in its principal summary-judgment brief.

I. AISS suspended Plaintiff from meetings because he issued racial slurs, not because of disagreement with his message.

Plaintiff accuses AISS of engaging in "viewpoint discrimination," pointing to his removal and suspension from Board meetings as his sole evidence. Plaintiff does not deny that he uttered racial slurs at multiple Board meetings. And he does not dispute that his use of those slurs precipitated his removals and suspensions. He presents no evidence to rebut David Jernigan's testimony regarding AISS's motivations for temporarily barring him from meetings. And Plaintiff has identified no other evidence suggesting AISS disagreed with the content of his speech or even understood what that content was. Yet, Plaintiff makes the inferential leap that, simply because AISS suspended him, AISS must have disagreed with the message he intended his speech to convey.

Plaintiff has presented no evidence suggesting that AISS engaged in viewpoint discrimination. Mr. Jernigan testified in his declaration that AISS suspended Plaintiff because he disrupted meetings and offended the Board, AISS staff members, and meeting attendees. (Jernigan Dec. at ¶¶ 22, 30.) Plaintiff cites no evidence to contest Mr. Jernigan's testimony. Plaintiff concedes that he has expressed disparaging comments about AISS more than once both before and after

his suspensions without repercussion. (Doc. 36 at ¶¶ 12, 48.) He also admits that other participants at public comment routinely criticize AISS. (*Id.* at ¶ 10.) AISS does not seek to chill criticism or differing viewpoints; it simply requires that speakers express their views without resorting to demeaning racial slurs. That policy does not favor one viewpoint over another.

II. <u>AISS's public-comment policy does not prohibit protected speech.</u>

For the first time, Plaintiff mounts a facial attack on the constitutionality of Atlanta Board of Education Policy BC-R(1), which governs conduct at the public-comment portion of the Board's public meetings. (Dyer Depo., Ex. 9.) Plaintiff asserts that the Board's policy is "content-based because it distinguishes between critical and favorable speech, restricting critical speech." (Doc. 35-1 at 12.) While it is not entirely clear whether Plaintiff means to attack AISS policy or if he is blindly parroting portions of cases he found online, he appears to contend that Policy BC-R(1) "expressly restricts critical speech aimed at the individual members of the Board." (*Id.*) Plaintiff analogizes Policy BC-R(1) to other school boards' "personal attacks" policies, which expressly proscribed criticism of board members, district personnel, or other persons. (*See id.*)

Plaintiff's mischaracterizes Policy BC-R(1) by claiming it singles out criticism of Board members or other AISS officials. The policy only prohibits

"[a]pplause, cheering, jeering, or speech that defames individuals or stymies or blocks meeting progress." (Dyer Depo., Ex. 9.) Nothing in the policy specifically prohibits critical remarks about Board members or AISS officials. And the Constitution permits the Board to curtail defamatory speech, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992), or speech that disrupts the orderly progress of public meetings, *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989). Thus, Policy BC-R(1)'s admonition against "speech that defames individuals or stymies or blocks meeting progress" does not, on its face, violate the First Amendment.

Plaintiff analogizes Policy BC-R(1) to the "personal attacks" policy challenged in *MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ.*, No. CV 12-1137 MCA/KBM, 2015 WL 13659218, at *4 (D.N.M. Apr. 6, 2015). In *MacQuigg*, the Albuquerque Public Schools Board of Education's policy provided,

> Personal attacks upon Board of Education members, district personnel, or other persons in attendance or absent[,] by individuals who address the Board of Education shall be prohibited and may be justification for removal from the meeting.

Id. at *4. The district court held that this policy violated the First Amendment because it favored non-critical remarks against board members and district employees over critical remarks against those same individuals. *Id.* at *7.

Although Plaintiff tries to draw similarities between the policy in *MacQuigg* and Policy BC-R(1), the two policies obviously differ. The Albuquerque Board's

policy prohibited critical remarks aimed at the board members and district personnel. Policy BC-R(1), on the other hand, does not disallow criticism of the Atlanta Board of Education members or AISS employees. Instead, Policy BC-R(1) permits participants in public comment to express praise, neutral, and criticism, alike, provided the speaker's comments are not defamatory and do not unreasonably disrupt the progress of meetings. Plaintiff admits that he and other attendees commonly express criticism of AISS, the Board, and AISS employees during public comment. (Doc. 36 at ¶ 10, 12, 48.) In alleging that Policy BC-R(1) prohibits speech critical of Board members or AISS officials, Plaintiff ignores the policy's plain language and its application in practice. Plaintiff's facial challenge lacks merit.

III. AISS did not submit "tampered evidence" in support of its Motion for Summary Judgment.

In the introduction section of his response, Plaintiff falsely accuses AISS of presenting doctored evidence. During his deposition, Plaintiff testified that he received a letter, dated February 6, 2018, that suspended him from attending Board meetings until February 6, 2019. (Dyer Depo. at 150:5-19, Ex. 12.) In his response to AISS's Motion for Summary Judgment, Plaintiff presents a different letter, dated February 8, 2018, that both suspended Plaintiff until February 2019 and prohibited him from contacting any AISS employees or Board members during his suspension.

(Doc. 35-1 at 4, Ex. 3.) Relying on the differences between the two letters, Plaintiff accuses AISS of "submitting tampered evidence" and committing "perjury." (*Id.*)

This Court should reject Plaintiff's false accusation. In his own deposition, Plaintiff testified that he was familiar with the version of the February 2018 suspension letter that AISS presented as an exhibit to its Statement of Material Facts:

> MR. MOULARD:· I'll mark this Exhibit 12.
> (Exhibit D-12 was marked for identification.)
> BY MR. MOULARD:
>
> Q: Do you recognize this document?
> A: Yes, I do.
> Q: So this is a letter dated February 6, 2018, signed by Board Member Jason Esteves; correct?
> A: Correct.
> Q: And this letter notified you that – for the third time that you had been suspended from board meetings; correct?
> A: Correct.

(Dyer Depo. at 150:5-13, Ex. 12.) Plaintiff never stated during his deposition that Defendant's Ex. 12 differed from the version of the letter he received or otherwise suggested that another version of the February 2018 letter existed. And Plaintiff has not submitted a declaration or pointed to any other testimony establishing that the version of the letter attached to his brief as Ex. 3 is the correct copy. Plaintiff has waited until now, two months since his deposition, to question whether the version of the letter dated February 6, 2018, is the correct one.

Plaintiff has presented no evidence showing that AISS "tampered" or falsified evidence to support its Motion for Summary Judgment, and AISS vehemently denies even the suggestion of such wrongdoing. AISS simply relied on Plaintiff's testimony that he recognized and received the suspension letter dated February 6, 2018. Plaintiff cannot, in one breath, authenticate the February 6 letter and, in another, claim that the February 6 letter is false.

CONCLUSION

AISS asks this Court to grant its Motion for Summary Judgment.

Respectfully submitted this 11th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was prepared using Times New Roman font, 14-point type, which is one of the font and print selections approved by the Court in L.R. 5.1(B).

This 11th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of November, 2019, I served a copy of **DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** via first-class mail and CM/ECF notification to the following:

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