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, 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

[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.

[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.

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 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

[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.

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 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]

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

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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 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.

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 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) 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

[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 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).

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 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, 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

[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.

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.

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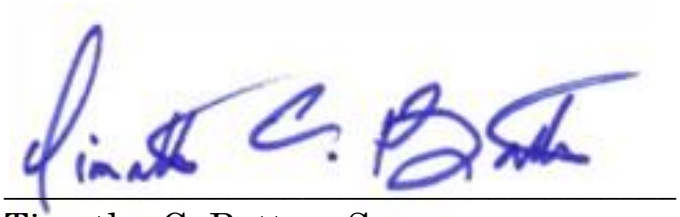
[7] Dyer need not have actually taken advantage of this remedy for it to trigger the adequate-state-remedy doctrine. *Horton v. Bd. of Cty. Comm'rs of Flagler Cty.*, 202 F.3d 1297, 1300 (11th Cir. 2000).

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



Timothy C. Batten, Sr.
United States District Judge