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 FILE NO. 1:18-CV-03284-CAP

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Pursuant to Federal Rules 12(b)(6) and Local Rule 7.1, Defendant Atlanta Independent School System ("AISS") files this memorandum of law in support of its Motion to Dismiss,[1] showing this Court the following:

[1] Under Federal Rule of Civil Procedure 8(a)(2), a pleading must set forth a "short and plain statement of the claim showing the pleader is entitled to relief in order to give the defendant fair notice of what the…claim is and the ground upon which it rests." *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). In *Bell Atlantic Corp. v. Twombly*, the Supreme Court clarified that Rule 8(a)(2) requires that a complaint contain sufficient factual content to state a claim "that is plausible on its face." 550 U.S. 544, 570 (2007).

To satisfy this plausibility standard, a plaintiff must set forth "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Federal Rules require a plaintiff to "provide the 'grounds' of his 'entitlement to

INTRODUCTION

This lawsuit is premised on the erroneous notion that the Constitution grants Plaintiff the right to utter racial slurs at community meetings and publicly demean AISS employees, including the superintendent, and AISS students. From January 15, 2016, to January 30, 2018, Plaintiff attended four public meetings of the Atlanta Board of Education ("Board") and other AISS officials. At each of these meetings, he uttered racist terms like the "n-word" and "coons." He called AISS officials "buffoons." He referred to AISS students with the racial epithet "sambos." He distributed a flier featuring the words "unnigged coming soon" and an altered photo of AISS Superintendent Meria Carstarphen wearing a football jersey with the word "FALCOONS" emblazoned on the front. He even accused Dr. Carstarphen of helping to "destroy black children and their communities." AISS

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relief' [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. That is, a complaint must present "a statement of circumstances, occurrences, and events in support of the claim presented." *Id.* at 556 n. 3.

Where the factual allegations in a complaint do not permit an inference beyond the mere *possibility* of misconduct, the complaint has not shown that the pleader is entitled to relief. *See Iqbal*, 556 U.S. at 679. "Pleadings must be something more than an ingenious academic exercise in the conceivable." *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1271 (11th Cir. 2004). Furthermore, while a court is required to accept as true the factual assertions contained in a complaint, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Iqbal*, 556 U.S. at 678.

ultimately suspended Plaintiff from AISS meetings for one year because of his blatantly offensive speech.

Plaintiff now sues to challenge that suspension, asserting claims for violation of his First Amendment and procedural due process rights, and claims under state law. Plaintiff's claims are meritless. The First Amendment did not protect Plaintiff's racially insensitive, demeaning speech. Even if it did, his one-year suspension was a reasonable restriction on his speech. And AISS did not violate Plaintiff's procedural due process rights, because he has no protected property interest in attending public meetings. Plus, the Georgia Open Meetings Act provided him an adequate remedy under state law. Lastly, Plaintiff's state-law claims are barred by sovereign immunity. Those reasons, which are explored in detail below, warrant dismissal of Plaintiff's claims.

STATEMENT OF FACTS

I. BOARD OF EDUCATION MEETING SCHEDULE AND RULES.

The Atlanta Board of Education ("Board") holds monthly meetings, which include a work session, a community meeting, and a legislative meeting. (Def. Ex. A—*Atlanta Board Policy BC*).[2] The community meetings are open to the public

[2] The Court may consider this document and all other documents cited without converting this Motion to Dismiss into a motion for summary judgment because (1) Plaintiff references this policy in his Complaint in arguing that he followed the

and allow the Board "to receive input from community members regarding policy issues, the educational program, or any other aspect of AISS business except confidential personnel issues." *Id.* The Board may also decide to allow discussion regarding "controversial issues or matters of deep community concern." *Id.* Members of the public who attend Board meetings are required to "faithfully and impartially conduct themselves in ways that demonstrate mutual respect, fair play, and orderly decorum," and must be respectful and courteous "even when expressing disagreement, concern, or criticism." *Id.*

If a person wishes to address the Board during the public comment portion of the meeting, he or she must register to speak in person before the start of the meeting, and the chairperson must recognize the speaker before he or she can speak. *Id*; *see also* (Def. Ex. B—*Board Meeting Calendar*). Upon being called to the podium, the speaker must then identify himself/herself and make his or her comments "as briefly as the subject permits." (Def. Ex. A).

II. PLAINTIFF'S OFFENSIVE CONDUCT AT MEETINGS.

On at least four occasions since January 2016, Plaintiff has disrupted and violated the decorum of Board meetings by using insulting, racially-insensitive

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"normal protocol" whenever he spoke in public comment sessions and was wrongfully interrupted or prevented from speaking; (Doc. 1-1 at ¶¶ 15.1, 24, 25, 48); (2) the authenticity of these documents is not disputed; and (3) the policy is integral to Plaintiff's claims. *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005).

language.[3] During a January 2016 Board meeting, Plaintiff used racial slurs including "the 'N' word," "coons," and "buffoons." (Doc. 1-1 at ¶ 18; Pl. Ex. E). Following that meeting, Board Chairman Courtney English sent Plaintiff a letter referring to his comments as "abusive," "abhorrent," and "hate-filled," and stating that he would not allow members of his staff and children attending Board meetings to be subjected to such language. (Pl. Ex. E). Mr. English issued a six-month suspension preventing Plaintiff from speaking at any meeting sponsored by the Board until July 2016. *Id.* Following the January 2016 incident, Plaintiff disrupted a town hall meeting led by senior AISS staff, which prompted AISS to issue a criminal trespass warrant against Plaintiff. (Doc. 1-1 at ¶ 32; Pl. Ex. H).

Four months after the first suspension ended, Plaintiff disrupted another Board meeting by referring to AISS students with a racial slur—"sambos"—and refusing to leave the meeting when asked. *Id.* This behavior led Mr. English to issue a second suspension until December 31, 2017. *Id.*

On February 5, 2018, only two months after the second suspension ended, Plaintiff attended a Board meeting and distributed to unsuspecting meeting attendees a two-page flyer that contained the phrase "unnigged coming soon" and a doctored image of Dr. Carstarphen wearing a football jersey with the name

[3] Notably, in his Complaint, Plaintiff does not deny uttering a variety of racial slurs, epithets, and insults at public Board meetings.

"FALCOONS," instead of "Falcons," on the back. (Pl. Ex. J). This flyer accused Dr. Carstarphen of being a puppet to "help destroy BLACK children and their communities." *Id.* Following Plaintiff's distribution of the flyers at the February 5 meeting, current Board Chairman Jason Esteves sent Plaintiff a letter and a trespass warning notifying him that he may not enter AISS property or speak to AISS employees for one year as a result of his behavior. (Doc. 1-1 at ¶ 52; Pl. Ex. J). Law enforcement officers have had to escort Plaintiff from meetings on multiple occasions, causing further disruption to the meetings. (*Id*. at ¶¶ 25, 32, 40, 49)

ARGUMENT AND CITATION TO AUTHORITY

I. ALL CLAIMS BASED ON EVENTS THAT OCCURRED BEFORE JUNE 4, 2016, ARE TIME-BARRED.

Counts 1 and 2 of Plaintiff's Complaint assert two federal constitutional claims under 42 U.S.C. § 1983, while counts 3, 4, and 5 assert personal injury claims under state law. All of those claims are subject to a two-year statute of limitations. O.C.G.A. § 9-3-33 (establishing Georgia's two-year limitations period for personal injury claims); *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) ("All constitutional claims brought under § 1983 are tort actions, subject to the statute of limitations governing personal injury actions in the state where the § 1983 action has been brought.").

Plaintiff filed this lawsuit on June 4, 2018. (*See* Doc. 1-1). Therefore, only claims that accrued on or after June 4, 2016, are within the statute of limitations. Plaintiff's Complaint, however, identifies several incidents that occurred before that cut-off date, including the following: (1) Plaintiff allegedly experienced retaliatory acts in December 2006 (*Id.* at ¶¶ 7-9); (2) on January 15, 2016, AISS suspended Plaintiff from public comment for six months (*id.* at ¶¶ 17-21); (3) on February 1, 2016, Plaintiff was prohibited from speaking at a Board meeting and escorted out of the meeting (*id.* at ¶¶ 23-27); (4) on February 2, 2016, Plaintiff was escorted out of a community meeting at an AISS elementary school and issued a no-trespass warning (*id.* at ¶¶ 32-25); and (5) on February 29, 2016, AISS issued Plaintiff a second no-trespass warning (*id.* at ¶ 36). Each of those incidents occurred more than two years before Plaintiff filed this suit. Insofar as Plaintiff seeks to assert a claim based on any of those incidents, any such claim is time-barred and must be dismissed.

II. AISS DID NOT VIOLATE PLAINTIFF'S FIRST AMENDMENT RIGHTS WHEN IT TEMPORARILY RESTRICTED HIS ACCESS TO AISS PROPERTY AND EMPLOYEES AFTER HE REPEATEDLY USED RACIAL SLURS AND INSULTS AT PUBLIC MEETINGS.

The First Amendment guarantees individuals the right to free speech, regardless of whether the speech is spoken, written, or made through expressive

conduct. *Virginia v. Black*, 538 U.S. 343, 358 (2003). However, "the First Amendment does not guarantee persons the right to communicate their 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)). Rather, the extent to which speech may be restricted depends on the type of speech and the forum in which the speech occurs. *Harris v. City of Valdosta*, 616 F. Supp. 2d 1310, 1322 (M.D. Ga. 2009).

a. Plaintiff's Offensive Speech Was Not Protected by the First Amendment, so Any Incidental Restriction on His Speech Is Constitutional.

Because "[t]he protections afforded by the First Amendment…are not absolute…the government may regulate certain categories of expression consistent with the Constitution." *Black*, 538 U.S. at 358-59 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.")). Among the categories of speech which can be restricted are obscene or offensive speech that is "of such slight social value…that any benefit that may be derived from [the speech] is clearly outweighed by the social interest in order and morality." *Black*, 538 U.S. at 539. More specifically, the First Amendment permits restrictions on speech

considered "lewd and obscene," "profane," "libelous," or "insulting," because such speech has a high likelihood of offending the speaker's audience and provoking a response. *Chaplinsky*, 315 U.S. at 572, 574.

The holdings in *Arcara v. Cloud Books, Inc.* and *Wright v. City of St. Petersburg* demonstrate that there is no First Amendment violation if a person's free-speech rights are incidentally effected by a governmental entity's reaction to behavior that is not protected by the First Amendment. In *Arcara*, the state of New York sought to close an adult bookstore at which prostitution and illegal sexual acts were occurring. 478 U.S. 697, 698 (1986). The owners of the bookstore challenged the store's closing because it "impermissibly interfere[d] with their First Amendment right to sell books on the premises." *Id.* at 700. The Supreme Court held that the illegal activity that prompted the closure of the store was not protected and, therefore, the closure of the store did not violate the First Amendment. *Id.* at 707. The Court noted that punishment for violation of a law could have incidental effects on a person's First Amendment rights, but that alone does not necessitate First Amendment scrutiny. *Id.* at 706.

Similarly, in *Wright*, a preacher was arrested and barred from entering a park for a year after he refused to back away from a man he believed was being harassed by the police. 833 F.3d at 1293. The preacher argued that the one-year

ban violated his First Amendment rights because he could not participate in ministerial outreach or advocacy work in the park. *Id.* The court held that because he could not show that he was engaged in conduct with a significant expressive element or conduct that intimately related to expressive conducted protected by the First Amendment when he was arrested, the ordinance under which he was arrested and banned did not violate the First Amendment. *Id.* at 1297.

Here, Plaintiff repeatedly used highly offensive language that the First Amendment does not protect. Plaintiff disrupted *four separate* Board meetings by directing a variety of racial slurs and insults at AISS employees and students (including "the 'N' word," "coons," "buffoons," and "sambos") and then refusing to peaceably leave the meeting when directed to do so. (Pl. Ex. E, H, J). Plaintiff's repeated use of racial slurs, epithets, and abusive remarks would be offensive in any context. However, Plaintiff's use of those words in public meetings in reference to AISS students and Dr. Carstarphen is beyond the pale. Plaintiff's incendiary, demeaning speech meets the definition of offensive speech, which the Constitution does not protect. Because Plaintiff's expression was not protected by the First Amendment, this Court need not analyze whether AISS's reaction to his expression violated Plaintiff's First Amendment rights.

b. Even if Plaintiff's Speech Was Protected by the First Amendment, AISS's Restrictions on Plaintiff's Speech Were Reasonable.

Even if Plaintiff's speech was protected, AISS was still authorized to place reasonable restrictions on it. A government entity like the Board "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," and leave open ample alternative channels of communication. *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989).

To determine whether a governmental entity's time, place, or manner restriction is constitutional, courts must first determine the type of forum in which the speech is made. Recent cases establish that public comment sessions like the ones from which Plaintiff was excluded are limited public fora. For limited public fora, courts conduct a four-pronged analysis to determine whether a restriction on expression within that fora is constitutional. The Board's public comment policy and AISS's issuance of a trespass warning to Plaintiff meet those requirements.

i. Board meetings and other AISS-related meetings constitute limited public forums.

Before determining the extent to which speech may be restricted, courts undergo a "forum analysis" to "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). Four types of government forums exist: (1) the traditional public forum; (2) the designated public forum; (3) the limited public forum; and (4) the nonpublic forum." *Id.* at 1224.

A traditional public forum is government property, like streets and parks, which have historically been held for public use for purposes of assembly, thought exchange, and discussion. *Id.* A designated public forum is "government property that has not traditionally been regarded as a public forum but is intentionally opened for that purpose." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2250 (2015). A limited public forum "exists where a government has reserved a forum for certain groups or for the discussion of certain topics." *Barrett*, 872 F.3d at 1224. In order to speak at a limited public forum, "each individual member must obtain permission from the governmental proprietor of the forum, who in turn has discretion to grant or deny permission." *Id.* at 1225.

In *Barrett v. Walker County School District*, the Eleventh Circuit determined that a school board's public comment session constituted a limited public forum because the board meetings was limited to "issues of concern," and speakers were prohibited from complaining about Board employees or engaging in "abusive or disruptive" speech." 872 F.3d at 1225. The school board also required speakers to

satisfy substantive and procedural requirements prior to the meeting. *Id.* The court noted that while the public comment sessions are open to the public, "they are not open to the public at large for discussion of any and all topics." *Id.*

The public comment portions of Board and AISS meetings are also a limited public forum. Board Policy BC restricts the topics upon which speakers may speak to matters of public policy, educational programs, or other aspects of AISS business. (Def. Ex. A). Similar to the Walker County Board of Education's policy, Board Policy BC prohibits community members from speaking about confidential personnel issues and issues that have no connection to AISS. *Id.* Hence, like the public comment sessions in *Barrett,* Board meetings are a limited public forum.

Because the Board's public comment sessions are a limited public forum, the Court must now analyze whether the Board's restriction on Plaintiff's speech satisfies the four requirements of (1) being content-neutral; (2) being aimed at a significant government interest; (3) being narrowly tailored to that interest, and (4) leaving ample alternative channels of communication for Plaintiff. *Jones*, 888 F.2d at 1331. As shown below, all four requirements are met, so any restriction on Plaintiff's speech is constitutional.

ii. <u>The restrictions on Plaintiff's speech were content-neutral.</u>

A policy is content-neutral if it applies to speech or expressive conduct

regardless of the content; whereas, a policy is content-based if it is intended to regulate specific speech or activities because of its content. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). For instance, in *Jones*, a citizen alleged that a mayor expelled him from a city commission meeting based on the content of his speech. 888 F.2d at 1332. The Eleventh Circuit found that the mayor's actions were content-neutral because he expelled the speaker from the meeting after he exhibited disruptive conduct and failed to adhere to the agenda item under discussion. *Id.*

Like the plaintiff in *Jones*, Plaintiff was prohibited from entering AISS property or communicating with AISS officials because of the offensive nature of his speech, not because of the content of the speech itself. Because Board meetings are a limited public forum, the Board may limit the topics on which speakers may speak, as it did in enacting Board Policy BC. In each of the instances in which AISS issued a suspension letter to Plaintiff, the issuance of the letter was immediately precipitated by an outright violation of Board Policy BC by Plaintiff through racially-charged, offensive language targeted at AISS students and employees. Accordingly, the temporary restrictions placed on Plaintiff's speech were content-neutral based on his use of racial slurs.

iii. AISS has a significant interest in conducting orderly, efficient meetings.

Government entities have a significant interest in conducting orderly, efficient meetings. *Rowe v. City of Cocoa*, 358 F.3d 800, 803 (11th Cir. 2004). The Eleventh Circuit applied this reasoning in *Jones v. Heyman*, when it found that a mayor had a significant interest in controlling a city commission meeting agenda and preventing the disruption of the meeting when he expelled a speaker who spoke beyond his allotted time on a topic which was not before the commission. *Jones*, 888 F.2d at 1333. "To hold otherwise—to deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting—would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions." *Id.*

Like the mayor in *Jones*, the Board also has an interest in curtailing disruptive speech. But, unlike the plaintiff in *Jones*, Plaintiff has been far more disruptive to meetings than speaking beyond his allotted time or speaking on an irrelevant topic. Plaintiff has disrupted multiple meetings by attacking AISS students and employees with offensive, racially-charged language. The Board covers numerous topics in one meeting, and to make sure that it is able to move through its agenda efficiently, it must prevent disruptions. Further, AISS has an interest in maintaining decorum during its meetings, which are often attended by

AISS students, parents, and employees. As such, AISS has a significant interest in ensuring its meetings are orderly, and this second prong is satisfied.

iv. The restrictions on Plaintiff's speech were narrowly tailored.

Having tried unsuccessfully for two years to prevent Plaintiff from disrupting Board meetings, AISS's decision to issue a trespass warning and prevent Plaintiff from communicating with AISS employees was narrowly tailored to achieve AISS's interest in having efficient, orderly meetings. This prong is satisfied "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rock Against Racism*, 491 U.S. at 799. The Board is not required to prove that its reaction was the least restrictive means of furthering the Board's interest, "since a less-restrictive-alternative analysis has never been - and is here, again, specifically rejected as – a part of the inquiry into the validity of a time, place, or manner regulation." *Id.* at 782-83. The Supreme Court directs courts to defer to a government's reasonable determination if these standards are met. *Id.*

Prior to its February 2018 decision to prevent Plaintiff from entering AISS property or speaking to AISS employees, AISS issued a series of suspensions to prevent Plaintiff from disrupting meetings. These attempts were unsuccessful because they did not prevent Plaintiff from returning with equally, if not more

offensive language. At the February 2018 Board meeting, Plaintiff further escalated his behavior by not only speaking at the podium, but by distributing offensive and racially-charged flyer mocking Dr. Carstarphen to meeting attendees. (Doc. 1-1 at ¶¶ 46 – 47; Pl. Ex. J). Plaintiff disrupted meetings not only through his spoken and written speech, but also through his refusal to leave without being escorted by law enforcement officers. (Doc. 1-1 at ¶¶ 25, 32, 40, 49).

The Board has attempted, in vain, to curtail Plaintiff's disruptive comments through short-term suspensions, but those attempts were unsuccessful. Plaintiff has repeatedly shown a blatant disregard for AISS's interest in conducting efficient, orderly meetings. To prevent Plaintiff's continued disruption of its meetings, AISS must prohibit Plaintiff from even entering the room in which these meetings are held because Plaintiff is equally disruptive at the podium as he is when he is sitting in the audience. AISS attempted to employ less restrictive burdens on Plaintiff's unprotected speech, but these less restrictive measures were unsuccessful. Accordingly, AISS's response to Plaintiff's behavior was narrowly tailored to achieve AISS's interest in having orderly meetings. Because AISS's response was narrowly tailored, the third prong of the analysis is satisfied.

v. Plaintiff has sufficient alternative channels of communication.

A lawful restraint on speech must leave open adequate alternative channels

of communication through which individuals can convey their message or participate in their chosen activity. *City of Ladue v. Galileo*, 512 U.S. 43, 56, 58 (1994). Plaintiff still has sufficient means through which he can convey his message.

In *Arcara*, the court held that the bookstore owners whose adult bookstore was closed by the state of New York had ample alternative channels to exercise their First Amendment rights because they were free to sell the same materials at another location. 478 U.S. at 705. And in *Wright*, the Eleventh Circuit held that despite being told he could not enter a particular park, a preacher had alternative channels to exercise his First Amendment rights in other places, even if the park from which he was banned was his favorite park, because he could still enter the sidewalks around the park or enter any of the other parks in the city. 833 F.3d at 1298.

Here, Plaintiff can continue to create and distribute flyers in the area immediately surrounding AISS property, in the community, in local publications, or via social media. He can also attend neighborhood, city, county, state, or organization meetings to share his concerns regarding AISS so long as those meetings do not occur on AISS property. The various social media platforms provide him with virtually limitless venues in which to express his views. Plaintiff

can reach the same audience he is able to reach at Board meetings through these alternative means.

AISS's restriction is content-neutral, narrowly tailored in furtherance of a significant interest, and leaves Plaintiff ample alternative channels through which he can express his beliefs. Thus, the one-year suspension from entering AISS property and communicating with AISS employees and Board members is a constitutional restriction of Plaintiff's First Amendment rights.

III. PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM SHOULD BE DISMISSED.

Plaintiff's Complaint fails to state a due process claim. The Due Process Clause of the Fourteenth Amendment provides no state "shall…deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. To state a colorable claim for relief for denial of procedural due process, a plaintiff must plausibly allege the following: (1) that he or she possessed a protected liberty or property interest; (2) governmental deprivation of said interest; and (3) denial of adequate procedural protections. *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006).

Plaintiff's due process claim fails for two reasons. First, AISS never deprived Plaintiff of a constitutionally protected property interest. Second, the Georgia Open Meetings Act provides Plaintiff with an adequate state-law remedy.

a. Plaintiff Does Not Have a Protected Property Interest in Attending Board Meetings.

Plaintiff's due process claim should be dismissed because the Complaint presents no allegations showing that AISS deprived Plaintiff of a protected property interest. In *Board of Regents v. Roth*, the Supreme Court outlined the contours of a constitutionally protected property interest, holding that to have a property interest in a benefit, a person "must…have a legitimate claim of entitlement to it." 408 U.S. 564, 577 (1972). The Court explained that such entitlements originate not in the Constitution, but instead from "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("The hallmark of property…is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'").

Plaintiff alleges that AISS violated his procedural due process rights on three incidents. The first two occurred on February 2 and 29, 2016, when AISS alleged issued "criminal trespass orders" to Plaintiff. (Doc. 1-1 at ¶¶ 35, 36, p. 8,; Pl. Ex. F & G). The third incident took place on February 8, 2018, when AISS issued Plaintiff a letter instructing him "not to have any communications whatsoever with any employee or representative of the [Board] or [AISS] for the duration of the suspension." (*Id*. at ¶¶ 46-52). None of those events furnishes a basis for recovery under 42 U.S.C. § 1983.

As noted in Section I above, Plaintiff cannot recover on any incidents that occurred before June 4, 2016, because any claims based on incidents that occurred before that date are time-barred. Such incidents include both criminal trespass warnings, which AISS allegedly issued on February 2 and 29, 2016, respectively. Accordingly, any § 1983 claim based on either of the trespass warnings is barred by the two-year statute of limitations.

Plaintiff's due process claim based on the February 5, 2018, suspension letter fares no better. Plaintiff does not allege that AISS or the Board revoked or otherwise made a decision that affected any of his benefits during any of the meetings it prohibited him from attending. Instead, Plaintiff contends he had a constitutionally protected property interest in simply attending public meetings.

For instance, in Plaintiff's view, the law entitled him to notice and a hearing each time AISS sought to exclude him any of the Board's bi-weekly public meetings. Plaintiff is mistaken. State law neither vested Plaintiff with a "liberty" or "property" interest in being present at Board meetings nor prescribed procedural safeguards that the Board needed to provide Plaintiff before excluding him from a public meeting. The Complaint, therefore, lacks factual allegations showing that AISS deprived Plaintiff of a property interest without due process. Absent allegations to satisfy that essential element, the Complaint fails to state a plausible due process claim.

Aside from that fact that Plaintiff had no property interest in attending public meetings, Plaintiff's due process claim warrants dismissal for a second reason: he has an adequate remedy under state law.

b. Plaintiff Has No Due Process Claim, Because the Georgia Open Meetings Act Provides an Adequate Remedy under State Law.

If state law affords adequate procedures to remedy a deprivation of a protected property interest, a plaintiff may not assert a procedural due process claim. *Cotton v. Jackson*, 216 F.3d 1328, 1331 n. 2 (11th Cir. 2000) ("procedural due process violations do not even exist unless no adequate state remedies are available"). "The state's remedial process 'need not provide all relief available under Section 1983; as long as the remedy "could have fully compensated the

[claimant] for the property loss he suffered," the remedy satisfies procedural due process.'" *Barr v. Jefferson Cty. Barber Comm'n*, 250 F. Supp. 3d 1245, 1256 (N.D. Ala. 2017), appeal dismissed *sub nom. Geta Barr v. Jefferson Cty. Barber Comm'n*, No. 17-12336-G, 2017 WL 9496056 (11th Cir. June 23, 2017) (quoting *McKinney v. Pate*, 20 F.3d 1550, 1564 (11th Cir. 1994)). The adequate state remedy rule "looks to the existence of an opportunity-to whether the state courts, if asked, generally would provide an adequate remedy for the procedural deprivation the federal court plaintiff claims to have suffered. If state courts would, then there is no federal procedural due process violation regardless of whether the plaintiff has taken advantage of the state remedy or attempted to do so." *Horton v. Bd. of Cty. Comm'rs of Flagler Cty.*, 202 F.3d 1297, 1300 (11th Cir. 2000)

Plaintiff alleges that AISS deprived him of his right to attend public meetings held by the AISS and the Board. Plaintiff may not sue under § 1983 for that alleged deprivation, because The Georgia Open Meetings Act, O.C.G.A. §§ 50-14-1, *et seq.* ("GOMA"), provided an adequate state remedy. GOMA requires all meetings of certain public agencies to be open to the public and mandates that the public must have access to all open meetings. O.C.G.A. § 50–14–1(b)(1)-(c)(1). Regularly-held meetings of school system officials and board members are subject to GOMA. *See Slaughter v. Brown*, 269 Ga. App. 211, 213, 603 S.E.2d

706, 708 (2004) (finding sufficient evidence to conclude the Stewart County Board of Education violated GOMA).

O.C.G.A. § 50-14-5, which sets forth GOMA's enforcement provisions, authorizes "any person, firm, corporation, or other entity" to file an enforcement suit. O.C.G.A. § 50-14-5(a). It also grants Georgia superior courts jurisdiction over GOMA enforcement suits jurisdiction and the power to grant injunctions or other equitable relief. *Id.*

The sole injury Plaintiff claims AISS inflicted on him is exclusion from public meetings of the Board and AISS officials. That is precisely the type of harm that GOMA is designed to remedy. GOMA authorized Plaintiff to file a suit in the Superior Court of Fulton County, claim that his suspension violated his access to public meetings, and, if he prevailed, obtain an injunction against AISS's enforcement of Plaintiff's one-year suspension. That injunction would fully cure the alleged procedural deprivation Plaintiff asserts in this case. To be sure, in an analogous case, this Court previously recognized that GOMA affords an adequate state law remedy for an alleged procedural due process violation resulting from exclusion from a public meeting of AISS officials or the Board. *Scott v. Atlanta Indep. Sch. Sys.*, No. 1:14-CV-01949-ELR, 2015 WL 12844305, at *4-5 (N.D. Ga.

Sept. 14, 2015). The existence of an adequate state remedy requires dismissal of Plaintiff's procedural due process claim.

IV. SOVEREIGN IMMUNITY BARS PLAINTIFF'S CLAIMS FOR SLANDER, DISCRIMINATION AND RETALIATION, AND HARASSMENT.

In addition to his federal constitutional claims, Plaintiff also advances claims for slander, "discrimination and retaliation," and "harassment." (Doc. 1-1 at pp. 8-9). The latter three claims fail as a matter of law because neither state nor federal law authorizes members of the public to bring a general cause of action for discrimination, retaliation, or harassment. Because no source of law authorizes those claims, this Court should dismiss them.

Even if state law allowed some cause of action akin to discrimination, retaliation, or harassment, those claims, along with Plaintiff's claim for slander, are barred by sovereign immunity. The Georgia Constitution grants sovereign immunity to all state entities, including school districts. Ga. Const. art. I, § II, ¶ IX(e); *S.W. v. Clayton Cty. Pub. Sch.*, 185 F. Supp. 3d 1366, 1380 (N.D. Ga. 2016); *Bomia v. Ben Hill Cty. Sch. Dist.*, 320 Ga. App. 423, 424, 740 S.E.2d 185, 188 (2013). Sovereign immunity, unless waived, provides absolute protection from legal action by depriving courts of subject matter jurisdiction to consider claims

against the state. *Cameron v. Lang*, 274 Ga. 122, 126, 549 S.E.2d 341, 346 (2001); *Dep't of Transp. v. Dupree*, 256 Ga. App. 668, 671, 570 S.E.2d 1, 5 (2002).

Sovereign immunity can only be waived by a legislative act. Ga. Const. art. I, § 2, ¶ IX(e); *Davis v. DeKalb Cty. Sch. Dist.*, 996 F. Supp. 1478, 1484 (N.D. Ga. 1998), aff'd, 233 F.3d 1367 (11th Cir. 2000). To constitute a waiver of sovereign immunity, a legislative act must (1) "specifically provide[ ] that sovereign immunity is thereby waived" and (2) identify "the extent of such waiver." Ga. Const. art. I, § 2, ¶ IX(e). The party seeking to overcome sovereign immunity bears the burden of pointing to a legislative act that satisfies that two-prong test. Ga. Const. art. I, § II, ¶ IX(e); *Bomia*, 320 Ga. App. at 426, 740 S.E.2d at 189.

Plaintiff has cited no statute that waives AISS's sovereign immunity from his claims for libel, discrimination, retaliation, and harassment, and the undersigned knows of none. Moreover, the Georgia Court of Appeals has repeatedly held that sovereign immunity protects school districts from libel and slander claims. *See Gamble v. Ware Cnty. Bd. of Educ.*, 253 Ga. App. 819, 824, 561 S.E.2d 837, 842 (2002) (holding sovereign immunity barred libel claim against board of education); *Bd. of Pub. Safety v. Jordan*, 252 Ga. App. 577, 584, 556 S.E.2d 837, 843 (2001) (holding Board of Public Safety had sovereign immunity from libel and slander claims). Because the Georgia General Assembly has never

passed a legislative act that waives AISS's sovereign immunity from state-law claims for slander, discrimination, retaliation, or harassment, those claims must be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth above, AISS asks this Court to grant this Motion and dismiss Plaintiff's claims with prejudice.

Respectfully submitted this 16th day of July, 2018.

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CERTIFICATE OF COMPLIANCE

I 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 16th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2018, I served a copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** upon the following via CM/ECF and first-class mail:

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