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

NATHANIEL BORRELL DYER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION FILE
	:	NO. 1:18-CV-03284-CAP
ATLANTA INDEPENDENT SCHOOL SYSTEM,	:	
	:	
Defendant.	:	
	:	

RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff respectfully opposes the defendant's motion to dismiss. The complaint states a claim for relief under 42 U.S.C. § 1983[1] and the plaintiff has standing to bring his claim because of the defendant's denial of the plaintiff's constitutional rights which has already chilled the exercise of his rights to free

[1] Plaintiff brought this action for relief under 42 U.S.C. § 1983, seeking protection of his constitutional rights to free expression and due process. The Due Process Clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, Sec. 1. The Supreme Court's interpretation of this clause explicates that the amendment provides two different kinds of constitutional protection: procedural due process and substantive due process. Cf. *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990). A

expression. O.C.G.A. § 9-11-11.1 (2010) finds and declares that it is in the public interest to encourage participation by the citizens of Georgia in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances.

ARGUMENT

I. THE COMPLAINT STATES A CLAIM FOR RELIEF

The grounds for defendant's motion to dismiss is their contention that the complaint fails to state a claim for relief. There is no serious question here that the speech that plaintiff typically engages in at Board Meetings constitutes protected speech. *Eichenlaub v. Twp. of Indiana,* 385 F.3d 274, 282-83 (3d Cir. 2004) ("Except for certain narrow categories deemed unworthy of full First Amendment protection—such as obscenity, 'fighting words' and libel—all speech is protected by the First Amendment.").

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violation of either of these kinds of protection may form the basis for a suit under section 1983. *Id.1.*

The defendant bears the burden of establishing that the justifications proffered by the board satisfy the applicable First Amendment standard. *Doe v. City of Albuquerque,* 667 F.3d 1111, 1120 (10th Cir. 2012).

For the purposes of this motion to dismiss, all the allegations in the plaintiff's complaint must be "accepted as true," and the motion to dismiss must be denied unless "it is clear that 'no relief could be granted under *any* set of facts that could be proved consistent with the allegations." *Jackson v. Okaloosa County, Fla.,* 21 F.3d 1531, 1534 (11th Cir. 1994) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984) (emphasis in original). *See Church v. City of Huntsville,* 30 F.3d 1332, 1336 (11th Cir. 1994) (motion to dismiss challenging standing).

II. THE PLAINTIFF HAS STANDING, AND THIS CASE PRESENTS A CLEAR AND IMMEDIATE CONTROVERSY UNDER ARTICLE III

The allegations of the plaintiff's complaint demonstrate the existence of a live controversy and establish that the plaintiff is a proper party with standing to bring his claims.

Moreover, the "[r]ules of standing have been expanded in the area of First Amendment rights and special considerations are granted to litigants seeking to preserve rights of free expression." *American Booksellers Ass'n v. McAuliffe,* 533 F. Supp. at 55.

Even where a First Amendment challenge could be brought by one engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected expression. *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 956-57 (citation omitted). In this context, "the alleged danger of [the] statute is, in large measure, one of self censorship; a harm that can be realized even without an actual

prosecution." *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 394 (1988).

Standing therefore exists for challenges to statutes restricting the exercise of First Amendment rights when the operation or potential enforcement of the challenged statute "interferes with the way the plaintiff would normally conduct his affairs." *International Soc. for Krishna Consciousness v. Eaves,* 601 F.2d 809, 819 (5th Cir. 1979). The former Fifth Circuit held, for example, that standing clearly existed where a religious organization had ceased disseminating its religious materials and seeking contributions at the Atlanta city airport to comply with a challenged ordinance. *Id.*

Where a plaintiff alleges that he desires to engage in expression apparently prohibited by the challenged statute, but the plaintiff is deterred from doing so for fear of violating the statute, he has standing to bring the claim. *Jacobs v. Florida Bar,* 50 F.3d at 904-05 & n. 12.

INTRODUCTION

Defendant alternatively moves to dismiss on the grounds that the Plaintiff fails to state a claim, but their weak arguments on this score cannot be squared with the Plaintiff's specific and documented complaint detailing defendant's numerous constitutional violations. AISS has the erroneous notion that the Constitution affords a local municipality Sovereign Immunity to violate the Plaintiff's constitutional rights with malicious intent. The defendant's history has been proven in court to possess a culture of fear and intimidation during the Atlanta Public Schools Cheating Scandal trial from 2009. The relevance of this case pertains to the defendants credibility and malicious intent.

AISS has viciously slandered the Plaintiff on the premise that his sole purpose is to cause disruption by uttering racial slurs, publicly demeaning AISS employees and calling all the children within the AISS district Sambos at Board Meetings. The board only allows 2 or 4 minutes for public comment, but this is what the defendant claims that the Plaintiff does in regards to his alloted time to speak. This is a clear misrepresentation of the Plaintiff's character and motive. Evidence of AISS's volatile and malicious intent can be proven in a letter, dated February 8, 2018, informing Plaintiff of the following: "You are not to set foot on Atlanta Public Schools ("APS") property during this one-year suspension. If you do, you will be arrested for trespassing. You are further instructed not to have any communication whatsoever with any employee or representative of the ABOE or APS for the duration of this suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication." (Doc 1-1 at ¶52; Pl. Ex. J) The letter represents

Plaintiff speaking less that the 2 minutes alloted for public comment because he was rudely interrupted by Board Chair Jason Esteves and General Counsel Glenn Brock. (Doc 1-1 at ¶¶ 48, 49 Pl.) For the record, AISS does not record audio or video of the public comment portion of the meeting. Nor do they transcribe the comments.

In response to an open records request to obtain video footage of the public comment portion of the meeting, AISS Research Assistant Brigetta Perry stated in an email "No, there is no audio, video or transcribed recordings of the public comments." As of August 13, 2018, the defendant has no significant record of finding based on the email in question. This should explain the defendants malicious attempt to defame Plaintiff's character because they lack material evidence for their defense.

Finally, the defendant mentions in their Motion to Dismiss that Plaintiff does not deny uttering racial slurs, epithets, and insults at public Board Meetings. The Plaintiff can prove that the speech used is protected under the Constitution. The defendant chose not to mention how complicit Nelson Mullins' Attorney Laurance Warco and former Chief Marqueta Sands-Hall were in issuing a warrantless Criminal Trespass Warning to the Plaintiff on February 29, 2016. (Doc 1-1 at ¶36, Pl. Ex. G) This could explain why the defendant would like to have this issue time-barred from the complaint. Plaintiff received a Criminal Trespass Warning for just walking into a school building for a community meeting as he and his former Senior Patrol Leader of Boy Scout Troop 181 had a seat. Plaintiff never uttered a word before having a seat but was surrounded by AISS police officers and escorted out of the meeting on February 2, 2016.

(Doc 1-1 at ¶32) Attorney Warco turned a blind eye to what was an unjustified violation of the Plaintiff's rights by former Chief Sands-Hall. Plaintiff did not remember the attorney as referenced in his complaint. (Doc 1-1 at ¶36) Plaintiff only recognized Attorney Warco who is listed as Deputy Counsel under General Counsel Glenn Brock on the AISS organization chart after visiting the website of Nelson Mullins.

AISS leadership such as Board Chair Jason Esteves, General Counsel Glenn Brock, Deputy Counsel Laurance Warco, former AISS Chief Marquenta Sands-Hall, AISS Police Chief Ronald Applin and Superintendent Meria Carstarphen were all culpable and acted under the color of law in carrying out these malicious violations of the Plaintiff's rights. Plaintiff has video evidence which is notated in his complaint.

The Plaintiff's Complaint not only meets but exceeds the standards governing the form of a complaint as required by Federal Rule of Civil Procedure 8(a). Specifically, this Court has personal jurisdiction over the Defendant, and the complaint sufficiently alleges causation and harm. Accordingly, Defendant's motion should be denied.

STATEMENT OF FACTS

I. BOARD OF EDUCATION MEETING RULES AND SCHEDULES VIOLATION OF OPERATIONAL PROCEDURES

The defendant referenced the Board Policy Manual which highlights BC Board Meetings (Def. Ex. A–*Atlanta Board Policy BC*). Plaintiff experienced violations in every category of the community meeting portion of the Policy as he addressed the board. AISS has consistently failed to adhere to Board Meeting

policy and arbitrarily set punishments targeting the Plaintiff. It should also be noted that the defendant does not record audio, video or transcribe the public comment portion of the Board Meeting. See policies and violations below:

Operational Procedures (Def. Ex. A–*Atlanta Board Policy BC*)

A. Conduct at Meetings

> Board members and members of the public will faithfully and impartially conduct themselves in ways that demonstrate mutual respect, fair play, and orderly decorum. In particular, they will treat each other, APS employees, and other citizens with respect and courtesy, even when expressing disagreement, concern, or criticism about any issue or incident. Board members will also refrain from making statements in public meetings that have the direct and intended effect of impugning another person's motives or intelligence, attacking others on a purely personal basis, or disparaging anyone's racial, sexual, social, or religious background.

Both Board Chairs, English and Esteves, impugned the Plaintiff's motives by making statements in a public meeting about his comments. Plaintiff was interrupted a total of 3 times within his alloted time to speak.

- *Courtney English, former APS Board Chair, interrupted the Plaintiff twice and issued two arbitrary suspensions void of Board policy for 6 and 14 months (Doc 1-1 at ¶ ¶17, 39)*
- *Jason Esteves, APS Board Chair, interrupted the Plaintiff once and issued one arbitrary suspension void of Board policy for 12 months (Doc 1-1 at ¶ ¶47 - 49)*

F. Procedures for Hearing from Individuals and Delegations

2. Monthly Community Meeting - Citizens and representatives from organizations are encouraged to appear before and address the board at its community meeting. To address the board, citizens and representatives from organizations should register at a designated place in the building where the meeting is being held. Community members will speak in order of registration.

Plaintiff was the sixth person to sign-up to speak. On this particular night, AISS skipped over Plaintiff to prevent him from speaking. (Doc 1-1 at ¶ 24)

4. Protocol for Community Comments - Any person who has registered to speak to the board shall first be recognized by the chairperson. He/she shall then identify himself/herself and proceed with his/her comments as briefly as the subject permits, but in any case, within a two-minute time period at the community meeting or a three-minute period at a specially called legislative meeting. Community members may defer their comment periods to other speakers, not to exceed a total of four minutes at a community meeting or six minutes at a specially called legislative meeting for any individual speaker addressing the board. Elected officials may be granted a six-minute time period for comments.

Plaintiff has never gone over the time limit for public comment in 12 years of attendance which is a total of 50 to 100 meetings.

To the best of his knowledge, Plaintiff has always followed normal protocol when attending Board Meetings and signing up for public comment since 2006. It is the Board who has created a disruptive climate for AISS meetings when Plaintiff is in attendance. The defendant has been inconsistent in adhering to Board Meeting policy. During the last four Board Meetings attended by Plaintiff, AISS relegated Plaintiff to arbitrary policy decisions which maliciously violated his constitutional rights and subjected him to irreparable harm.

The defendant's malicious intent is evident in a letter written to the Plaintiff which instructs him not to set foot on Atlanta Public Schools property for one year. It also states that Plaintiff is not to have any communication whatsoever with any employee or representative of the ABOE or AISS for the duration of the suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication. (Doc 1-1 at ¶52; Pl. Ex. J)

42 U.S.C. § 1983, commonly referred to as "section 1983" provides:
Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in

such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ARGUMENT AND CITATION TO AUTHORITY

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

THE GEORGIA STATUTE OF LIMITATIONS

The statute of limitations in Georgia is governed by Title 9 Chapter 3 of the Georgia Code. The Georgia legislature has given different types of claims different time limits. For instance, personal injury claims must be filed within two years of the date of the injury, damage to property claims have a four-year time limit, and defamation claims have a one-year time limit.

Importantly, Georgia has adopted the so-called "discovery rule," which means that the statute of limitations will not begin to run until after a Plaintiff realizes or should have realized that they were harmed by the defendant.

Discovery:

Plaintiff's cause of action did not accrue and the statute of limitations did not run against him until he knew or through the exercise of reasonable diligence should have discovered not only the nature of his injury but the causal connection between his injury and the alleged negligence conduct of defendant. *See King v. Seitzingers, Inc.,* 160 Ga.App. 287 S.E.2d 252 (Ga. Ct. App. 1981).

II. AISS VIOLATED PLAINTIFF'S FIRST AMENDMENT RIGHTS WHEN IT TEMPORARILY RESTRICTED HIS ACCESS TO AISS PROPERTY AND EMPLOYEES

"When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural . . ." *Turner Broadcasting System, Inc. v. Federal Commc'n Comm'n,* 512 U.S. 622, 664 (1994). On the record before the Court the interests asserted by the Board as support for its offensive speech policy are purely conjectural.

A. Plaintiff's Speech Was Protected by the First Amendment, So Any Incidental Restriction on His Speech Violated the Constitution.

The *Chaplinsky* decision defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." and concluded that statements such as those uttered by *Chaplinsky* – he called a city marshal a "dammed racketeer" and "a damned Fascist" – were of so little value that government could ban them to preserve order and morality. Although the Court continues to reaffirm the fighting words doctrine, it has not up-held any convictions for using fighting words since *Chaplinsky*. In subsequent cases, the Court has either held that the speech in question does not meet the definition of fighting words or concluded that the statue at issue could be construed to be overbroad or underinclusive.

a. Terminiello v. Chicago (S.Ct. 1945)

Issue: Is speech which stirs people to anger, invites dispute, or bring about a condition of unrest protected by the First Amendment?

Rule: Unless the speech is likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest, the freedom of speech is protected against censorship and punishment.

To Douglas, this represented a view of public speech that was far too restrictive. In typical style, Douglas wrote:

> *A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger . . . That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . There is no room under our Constitution for a more restrictive view.*

The court has subsequently narrowed the definition of fighting words to those that are likely to provoke immediate retaliatory violence. In *Terminiello v Chicago,* 337 U.S. 1 (1949), the Court clarified that speech does not lose First Amendment protection merely because it causes anger. *Terminiello's* speech enraged a large audience by criticizing various political and racial groups, but the Court held that it was protected unless it was "shown likely to produce a

clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Similarly, in *Street v. New York,* 394 U.S. 576 (1969), the Court held that the mere offensiveness of speech does not strip it of constitutional protection. *Street* was convicted of violating a New York state flag desecration statute because, in response to hearing about the murder of civil right lead James Meredith, he burnt an American flag and said " if they let that happen to Meredith , we don't need an American flag. " The Court reversed *Street's* conviction because, although contemptuous, his speech was not "so inherently inflammatory as to come within that small class of 'fighting words' which are likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

In more recent years, the Court has overturned convictions for using fighting words on the grounds that the statutes prohibiting them were constitutionally too overbroad. In *Gooding v. Wilson,* 405 U.S. 518 (1972), the Court cautioned that states must narrowly regulate fighting words so as not to chill protected speech. The *Gooding* court struck down a Georgia statute prohibiting "opprobrious words or abusive language, tending to cause a breach of the peace" because it concluded that the law had been broadly construed to proscribe speech that would not cause an immediate violent response.

The *Brandenburg* test was established in *Brandenburg v. Ohio,* 395 US 444 (1969), to determine when inflammatory speech intending to advocate illegal action can be restricted. In the case, a KKK leader gave a speech at a rally

to his fellow Klansmen, and after listing a number of derogatory racial slurs, he then said that "it's possible that there might have to be some revengeance [sic] taken." The test determined that the government may prohibit speech advocating the use of force or crime if the speech satisfies both elements of the two-part test:

1. The speech is "directed to inciting or producing imminent lawless action," AND

2. The speech is "likely to incite or produce such action."

b. Selected Applications of the Brandengurg Test

The Supreme Court in *Hess v. Indiana (1973)* applied the Brandenburg test to a case in which Hess, an Indiana University protester said, "We'll take the fucking street again" (or "later.") The Supreme Court ruled that Hess's profanity was protected under the Brandenburg test, as the speech "amounted to nothing more than advocacy of illegal action at some indefinite future time." The Court concluded that "since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had a 'tendency to lead to violence."

In *NAACP v. Claiborne Hardware Co.(1982),* Charles Evers threatened violence against those who refused to boycott white businesses. The Supreme Court applied Brandenburg and found that the speech was protected: "Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet

phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."

B. Plaintiff's Speech Was Protected by the First Amendment AISS's Restrictions on Plaintiff Were Unreasonable.

Plaintiff has attended AISS Board Meetings since 2006 and has a reputation for speaking up for children especially in economically challenged neighborhoods of Atlanta. Plaintiff ran for the AISS Board of Education in 2017 and was endorsed by the Atlanta Association of Educators (AAE) whose parent organization is the National Association of Educators (NEA). Both organizations and their representatives have witnessed the Plaintiff in action at Board Meetings. The Plaintiff's mother is a retired educator of 33 years and was a member of the local and national chapter of the NEA. It is uncharacteristic for the Plaintiff to attack AISS students and employees in a demeaning manner as described by the defendant. It is slanderous and defamatory to the Plaintiff's true intent as a community advocate for children.

The Plaintiff's complaint showcases a pattern harassment and the chilling of his speech even when he is not at the monthly Board Meeting. When the Plaintiff entered a room at a community meeting and had a seat, he was immediately accosted and removed by AISS officers without cause. Plaintiff was given a Criminal Trespass Warning. Plaintiff raised his hand to ask a

question at a town hall meeting held by the defendant and was threatened with being escorted out of the meeting. The defendant claimed that the Plaintiff was being disruptive. The defendants unreasonable restrictions on Plaintiff's speech were based on his content critical of the board and the superintendent.

In taking a view of personal attacks, the court in *Dowd v. City of Los Angeles* found that calling the city council president "pathetic and hopeless" and saying that she was "not doing a very good job and you need to get together and lose her" is "political speech at the heart of the First Amendment." No. CV 09-06731 DDP (SSx), 2013WL4039043 *19 (C.D. Cal. Aug. 7, 2013) (internal quotation marks omitted). A court considers a First Amendment challenge to government action "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). The Court agrees with the Court in *Dowd* that the First Amendment limits the power of the government to "sacrifice political speech to a formula of civility." *Id.* at *21. The Court concludes that a ban on personal attacks is likely to be unconstitutional if applied to all speech criticizing individual Board members for their conduct in office.

The Court questions whether a policy against personal attacks truly is content-neutral. In *Acosta,* the Ninth Circuit Court of Appeals, in the course of rejecting a proposed construction of a city council's rule of decorum prohibiting

"personal, impertinent, profane, [or] insolent… remarks," observed that under the proposed construction "a comment amounting to nothing more than bold criticism of City Council members would fall in this [prohibited] category, whereas complimentary comments would be allowed." The Court of Appeals rejected the proposed construction reasoning that the rule of decorum so construed would violate the "bedrock principle . . . that the government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable." *Acosta,* 718 F.3d at 816 (quoting *Texas v. Johnson,* 491 U.S. 397, 414 (1989)).

The notices against trespass issued against Plaintiff restricted his speech at school Board Meetings, which occurred on AISS property. School Board Meetings are limited public fora. *See Jones v. Bay Shore Union Free Sch. Dist.,* 947 F. Supp. 2d 270, 278 (E.D.N.Y. 2013) ("Typically, school Board Meetings are limited public fora."); accord *Hotel Emps. & Rest. Emps. Union,* 311 F.3d at 545 (listing school Board Meetings as an example of limited public fora). In contending that reasonableness review should apply to the restrictions on Plaintiff's speech at school Board Meetings,the AISS appears to take the position that the only restricted aspects of his speech fell outside the limited category of speech for which school Board Meetings were opened to the public. However, a categorical ban on all speech in which Plaintiff wished to engage undoubtedly includes speech related to school governance, the very type of speech for which school Board Meetings are opened to the public.

Consequently, to determine whether the AISS violated Plaintiff's First Amendment right to free expression, the Court considers whether the content-neutral restrictions on Plaintiff's speech are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communications. *See Ward,* 491 U.S. at 791.

Protecting the safety of school staff is undoubtedly a significant government interest. *See Lovern v. Edwards,* 190 F.3d 648, 655-56 (4th Cir. 1999) (school officials have discretion to remove parents from school property in response to a threat of disruption). A categorical ban of a single individual from open school Board Meetings, however, is not narrowly tailored and does not leave open ample alternative channels of communication.

First, a categorical ban on speech is not tailored at all, as it entirely forecloses a means of communication. Cf. *Hill v. Colo.,* 530 U.S. 703, 726 (2000) ("when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal"). In order to be narrowly tailored, a time, place, or manner restriction must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward,* 491 U.S. at 799. Here, ostensibly in order to protect school staff, Plaintiff was banned not only from the AISS school board, but from all premises owned by the AISS. He was not banned only during regular school hours, but at all hours, for two years and eight months.

Furthermore, the tailoring threshold here is even higher than in *Ward,* as a notice against trespass targeting an individual rather than the public generally is equivalent to an injunction against speech, and the Supreme Court has explained, "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Ctr.,* 512 U.S. 753, 764 (1994). Consequently, "when evaluating a content-neutral injunction, . . . standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 765. In the case at hand, the AISS's categorical ban was not tailored to respond to the specific threat that Plaintiff potentially posed, a threat that was never articulated as anything more than allegedly insulting the superintendent and the board at Board Meetings.

The Second Circuit has found that a categorical ban on expressive speech singling out an individual does not even satisfy the lower threshold of reasonableness review. *See Huminski v. Corsones,* 396 F.3d 53, 92 (2d Cir. 2004). In *Huminski,* the court observed that notices against trespass which barred Plaintiff from all state courthouses in Rutland due to a perceived danger "in effect prohibit[ed] indefinitely any and all expressive activity in which [Plaintiff] might want to engage in and around Rutland state courthouses." *Id.* "The defendants' singling out of[Plaintiff] for exclusion, thereby permitting all others to engage in similar activity in and around the courts, suggests to us that

the trespass notices are not reasonable." *Id.* The AISS imposed a similar restriction on Plaintiff here by singling him out and categorically banning him from all AISS property. When a notice against trespass was issued with "virtually no 'tailoring' at all," the efforts of government officials to safeguard AISS "from whatever threat they may have reasonably feared from [Plaintiff] were wildly disproportionate to the perceived threat").

Second, the AISS failed to provide Plaintiff with adequate alternative channels of communication. The defendant suggests that the Plaintiff could continue to create and distribute flyers in the area surrounding AISS property, in the community, in local publications, or via social media. The defendant also suggests Plaintiff can 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, but this kind of participation would not have provided an adequate alternative. As an initial matter, AISS fails to consider the nature of a school Board Meeting. The "intended audience of those participating and speaking at a [school board] meeting is not isolated to district personnel," but includes community members as well. *Teufel v. Princeton City Sch. Dist. Bd. of Educ.*, No. 1:12-cv-355, 2013 U.S. Dist. LEXIS 4923, at *43 (S.D. Ohio Jan. 11, 2013). Participating in another manner would have substantially diminished Plaintiff's ability to communicate not only with the school board, but with community members. *See Bay Area Peace Navy v. United States,* 914 F.2d1224, 1229 (9th Cir. 1990) ("[A]n alternative mode of communication may be

constitutionally inadequate if the speaker's 'ability to communicate effectively is threatened.'") (*quoting Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 812 (1984). Furthermore, his speech may not have had the same effect on the school board or other members in attendance at school Board Meetings were he not physically present. *See City of Ladue v. Gilleo,* 512 U.S. 43, 48 (1994)("regulation of a medium inevitably affects communication itself"); *Kleindienst v. Mandel,* 408 U.S.753, 765 (1972) (stating the argument that technological developments such as "tapes or telephone hook-ups" are effective substitutes for physical presence "overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning"); *Nat'l Funeral Servs., Inc. v. Rockefeller,* 870 F.2d 136, 144 (4th Cir. 1989) (noting that "a salesman's presence over the telephone is less persuasive than it is in person" in addressing a First Amendment claim involving commercial speech). Additionally, since he would lack any "proximity" to the meeting, this alternative was inadequate. *See Marcavage v. City of N.Y.,* 689 F.3d 98, 107 (2d Cir. 2012) ("In this Circuit, an alternative channel is adequate and therefore ample if it is within 'close proximity' to the intended audience.") (citation omitted).

Furthermore, physical participation in open school Board Meetings is a form of local governance, and to the extent that Plaintiff cannot be present at these meetings to communicate directly with elected officials, his First Amendment right of free expression is violated. The Seventh Circuit addressed the

inadequacy of remote participation in political activity in the context of state curfew laws as follows:

[T]o the extent that the curfew prevents a minor from being outside of the home during curfew hours, it does not mean simply that she must shift the exercise of her First Amendment rights to non-curfew hours or to the telephone or the internet; it means that she must surrender her right to participate in late-night activities whose context and message are tied to the late hour and public forum. There is no internet connection, no telephone call, no television coverage that can compare to attending a political rally in person, praying in the sanctuary of one's choice side-by-side with other worshipers, feeling the energy of the crowd as a victorious political candidate announces his plans for the new administration, holding hands with other mourners at a candlelight vigil, or standing in front of the seat of state government as a legislative session winds its way into the night.

Hodgkins v. Peterson, 355 F.3d 1048, 1063 (7th Cir. 2004); see also *Riley v. Nat'l Fed'n of Blind,* 487U.S. 781, 791 (1988) ("[T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.").

In sum, the First Amendment does not permit the AISS to confine Plaintiff's speech to other measures they have suggested by issuing a blanket notice against trespass when less burdensome alternatives exist. *See Madsen,* 512 U.S. at 765.

II. PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM SHOULD NOT BE DISMISSED.

A. Plaintiff Does Have a Protected Interest in Attending Board Meetings.

Plaintiff alleges that the AISS "stripped him of his First Amendment rights without due process when it issued him" the notices against trespass.

"A procedural due process claim is composed of two elements: (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process." *Bryant v. N.Y. Educ. Dep't,* 692 F.3d 202, 218 (2d Cir. 2012). As discussed above, the AISS deprived Plaintiff of his First Amendment right to freedom of expression by barring him from participating in school Board Meetings.

To determine whether the AISS afforded Plaintiff adequate process before barring him from school Board Meetings, "it is necessary to ask what process the [AISS] provided, and whether it was constitutionally adequate." R*ivera-Powell v. N.Y.C. Bd. of Elections,* 470 F.3d 458, 465 (2d Cir.2006) (citation omitted). As part of this analysis, "the Supreme Court has distinguished between (a) claims based on established state procedures and (b) claims based on random, unauthorized acts by state employees." *Id.* (internal quotation marks and citation omitted). A meaningful post-deprivation remedy automatically satisfies deprivations caused by random, unauthorized acts. *Id.* at 465-66. This rule recognizes that state and local governments cannot predict when

deprivations will occur. *Id.* at 465. For deprivations based on established state procedures, a court must balance the three factors identified in *Mathews v. Eldridge,* 424 U.S. 319 (1976), to determine the process due:

> First, the private interest that will be affected by the official action;second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The *Mathews* test also only requires a meaningful, post-deprivation remedy. *See Nnebe v. Daus,* 644 F.3d 147, 158-59 (2d Cir. 2011) (no pre-deprivation hearing necessary to suspend taxi driver following arrest), but a post-deprivation remedy is just not adequate ipso facto. *See Rivera-Powell,* 470 F.3d at 465.

Plaintiff alleges he was deprived of due process when the AISS issued him notices against trespass. The notices against trespass were not issued randomly or without authority, but were decisions approved by Superintendent Meria Carstarphen, Board Chair Jason Esteves, General Counsel Glenn Brock and APS Police Chief Ronald Applin, the top administrators of the school district. Accordingly, the Court weighs the *Mathews* factors.

a. Plaintiff's Private Interest

As previously discussed, Plaintiff has a strong interest in attending school boarding meetings,where he has a right to express himself. *See Berlickij v. Town of Castleton,* 248 F. Supp. 2d 335, 344 (D. Vt. 2003) (stating that Plaintiff "has a First Amendment right not to be excluded from a forum that is generally held open to the public"); *Rowe v. Brown,* 157 Vt. 373, 376 (1991) (same).

b. The Risk of Erroneous Deprivation

The notices against trespass created a high risk of erroneous deprivation because they were not issued pursuant to any protocol, because they did not set out a process to contest the ban, and because Plaintiff did not receive a meaningful opportunity to contest his ban.

First, the fact that there is no protocol in place governing when an AISS official may issue a notice against trespass increases the risk of erroneous deprivation because it grants officials broad discretion to ban members of the public from school premises and, consequently, school Board Meetings. *See Shuttlesworth v. Birmingham,* 394 U.S. 147, 153 (1969) ("[W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.") (*quoting Kunz v. New York,* 340 U.S. 290, 293-94 (1951)).

Second, neither notice against trespass sets out any process for contesting

the notice. Cf. *Catron v. City of St. Petersburg,* 658 F.3d 1260, 1268-69 (11th Cir. 2011) (trespass ordinance that lacked an appeal process is procedurally inadequate). In response to Plaintiff's inquiries following the notice against trespass, the AISS merely informed him that he could do whatever he wanted with it but he had to fight it outside of APS. (Doc. 1-1 ¶ 37.)

Third, Plaintiff did not receive a meaningful opportunity to contest the notices against trespass. *See Wright v. Yacovone,* No. 5:12-cv-27, 2012 U.S. Dist. LEXIS 157544, at *49 (D. Vt. Nov. 2, 2012) ("The opportunity to be heard must thus occur 'at a meaningful time and in a meaningful manner.'") (quoting *Mathews,* 424 U.S. at 333). Neither notice contained any explanation of the basis upon which it was issued.12 *See Taylor v. Rodriguez,* 238 F.3d 188, 193 (2d Cir. 2001)(notice must contain "specific facts underlying the allegation[s]" that led to the government's actions"because a hearing is not 'meaningful' if a [party] is given inadequate information about the basis of the charges against him.").

Because the notices against trespass were not issued pursuant to any protocol, the notices did not set out a process for contesting the notices, and Plaintiff had no meaningful opportunity to contest the notices, the notices posed a high risk of erroneously depriving Plaintiff of his First Amendment right to freedom of expression.

c. The Government Interest

Finally, although the government undoubtedly has a significant interest in protecting the safety of school staff, that interest is not so overwhelming, taxing, or immediate that the AISS did not have time to set out reasons for their decision and provide Plaintiff an opportunity to be heard. *See Huminski,* 396 F.3d at 87 (when a decision to bar someone from a public courthouse is made in advance, "the requirement of particularized findings obtains," as "[i]n that context, findings are a necessary safeguard against arbitrary . . . abridgement of the constitutional right"). Additionally, the AISS could have tailored their response to concerns about Plaintiff in a number of non-burdensome ways, including by posting a police officer at school Board Meetings. *Cf. Henley v. Octorara Sch. Dist.,* 701 F. Supp. 545, 551 (E.D. Pa. 1988) (finding a school's interest in categorically banning two individuals from school grounds to be significant when "[i]mposing any greater procedural or administrative burdens on the defendants before banning a non-student would be fiscally and administratively burdensome").

d. Irreparable Harm

Plaintiff has protected First Amendment interests in receiving information during Board Meetings and in speaking during the public comment segment of each Board Meeting. The loss of First Amendment rights for even a minimal period of time is considered irreparable injury. *Hobby Lobby Stores, Inc., v. Sebelius,* 723 F.3d 1114, 1145 (10th Cir. 2013). The harm to Plaintiff's First

Amendment interest in receiving information is to some extent mitigated by Plaintiff's ability to view the Board's meeting over the internet on the APS website. However, Plaintiff has no adequate substitute for speaking during the public comment segment of Board Meetings, where his remarks are heard not only by the members of the Board, but also by the members of the public attending the meeting or watching the proceedings on APS's website. The Court finds that Plaintiff has established that he will suffer irreparable harm if the Court does not issue a preliminary injunction prohibiting the Board from enforcing the ban in the September 1, 2010 letter.

e. Balance of Equities

When governmental action is likely unconstitutional, the interest of the public in sustaining the government's position does not outweigh the individual plaintiff's interestin protecting his constitutional rights. Hobby Lobby Stores, 723 F.3d at 1145 (citation omitted). The Court emphasizes that an injunction against enforcement of the September 1, 2010 letter will not tie the Board's hands with respect to future meetings of the Board. Unquestionably, the Board has the authority, consistent with the First Amendment, to expel an attendee who actually disrupts or impedes the orderly conduct of the Board business. The First Amendment leaves the Board with considerable latitude to adopt rules of order so long as they are reasonable and viewpoint neutral, and to enforce those rules even-handedly at future meetings.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights[.]" Hobby Lobby Stores, 723 F.3d at 1145 (citation omitted). The public has an interest in seeing public meetings conducted in a manner that respects attendees' First Amendment rights.

B. Plaintiff Has A Due Process Claim, the Georgia Open Meetings Act Provides No Adequate Remedy Under State Law.

The Georgia Open Meetings Act legislates the methods by which public meetings are conducted. Chapter 14, Statutes 50.14.1-6 of the Georgia Code define the law. The public at all times shall be afforded access to meetings declared open to the public pursuant to subsection (b) of this Code section. It is unclear whether the right to attend public meetings includes the right to participate or comment. As a matter of practice, however Atlanta Public Schools gives the public an opportunity to speak at meetings. When Plaintiff contacted the Office of the Attorney General, they stated they had no remedy for his situation.

Plaintiff has protected First Amendment interests in receiving information during Board Meetings and in speaking during the public comment segment of each Board Meeting. The loss of First Amendment rights for even a minimal period is considered irreparable injury. *Hobby Lobby Stores, Inc., v. Sebelius,* 723 F.3d 1114, 1145 (10th Cir. 2013). The harm to Plaintiff's First Amendment interest in receiving information is to some extent mitigated by Plaintiff's ability to view the board's meeting over the internet. However, Plaintiff has no

adequate substitute for speaking during the public comment segment of Board Meetings, where his remarks are heard not only by the members of the board, but also by the members of the public attending the meeting or watching the proceedings on television.

The defendant's motion to dismiss for failure to state a claim should therefore be denied.

VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS DOES NOT PROTECT DEFENDANT'S RIGHT TO SOVEREIGN IMMUNITY.

AISS blatantly disregarded Plaintiff's constitutional rights and was emboldened to put the following statement on an official government document which reads:

> "You are not to set foot on Atlanta Public Schools ("APS") property during this one-year suspension. If you do, you will be arrested for trespassing. You are further instructed not to have any communication whatsoever with any employee or representative of the ABOE or APS for the duration of this suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication." (Doc 1-1 at ¶52; Pl. Ex. J)

This was done with the approval of Jason Esteves (Board Chair), Meria J. Carstarphen (Superintendent), Ronald Applin (APS Chief of Police) and D. Glenn Brock (General Counsel). These defendants wish to bar Plaintiff's Claims for Slander, Discrimination and Retaliation, and Harassment due to Sovereign Immunity granted by the Georgia Constitution.

Claims arising under federal law

Given the complexity of the topic, a few points will have to suffice regarding lawsuits under 42 USC § 1983 for deprivation of federal rights. Although the 11th Amendment to the United States Constitution generally bars federal lawsuits against the states, local governments are not considered an arm of the state and are therefore not entitled to immunity from § 1983 actions. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Local governments may be sued for federal constitutional violations attributable to their official policies or customs. Individual local government officers and employees also may be sued under § 1983. Legislative or judicial immunity – discussed below – may shield public officials sued individually from liability for legislative, judicial, or quasi- judicial acts. Other public officials may have a qualified immunity/good faith defense, which means they are subject to payment of monetary damages only if they knew or should have known that their acts were unlawful. There are three main exceptions to the sovereign immunity of a state. First, The Eleventh Amendment does not stop a federal court from issuing an injunction against a state official who is violating federal law. Although the state official may be abiding by state law, he is not permitted to violate federal law, and a federal court can order him to stop the action with an injunction.[Ex Parte Young, 209 U.S. 123 (1908)] Money damages are possible against the state officer, as long as the damages are attributable to the officer himself, and are not paid from the state treasury. *Scheuer v. Rhodes,* 416 U.S. 232 (1974).

The Eleventh Amendment does not automatically protect political subdivisions of the state from liability. *Moor v. County of Alameda,* 411 U.S. 693 (1973). The main factor is whether the damages would come out of the state treasury. *Hess v. Port Authority Trans-Hudson Corp.,* 115 S. Ct. 394 (1994), If the state would have to pay for damages from the state treasury, then the Eleventh Amendment will serve as a shield from liability. Other factors may include the amount of state control and how state law defines the subdivision, although the Supreme Court has never issued a comprehensive guideline. Eleventh Amendment immunity does not protect municipal corporations or other governmental entities that are not political subdivisions of the state, such as cities, counties, or school boards.

Finally, the states surrendered a portion of the sovereign immunity that had been preserved for them by the Constitution when the Fourteenth Amendment was adopted. Therefore, Congress may authorize private suits against non-consenting states to enforce the constitutional guarantees of the Fourteenth Amendment. The Eleventh Amendment is a constitutional limit on federal subject matter jurisdiction, and Congress can override it by statute only pursuant to the § 5 enforcement power of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons and all others discussed in Plaintiff's Complaint, the present Motion to Dismiss should be denied.

Respectfully submitted this 15th day of August, 2018.

Nathaniel Borrell Dyer
Pro Se

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 15th day of August, 2018.

Nathaniel Borrell Dyer
Plaintiff Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2018, a copy of the document entitled **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** was delivered by first class mail to:

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