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

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

SURREPLY TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE CLAIM

Plaintiff respectfully opposes the defendant's motion to dismiss. The complaint states a claim for relief under 42 U.S.C. § 1983 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 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.

MOTION TO DISMISS STANDARD

A motion to dismiss under Rule 12(b)(6) should be granted only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson,* 335 U.S. 41, 48 (1957) (emphasis added); see also Fed. R. Civ. P. 12(b)(6); *Bell Atlantic Corp v. Twombly,* 550 U.S. 540, 570 (2007). A motion under Rule 12(b)(6) merely tests the legal sufficiency of a complaint, requiring a court to construe the complaint liberally, assume all facts as true, and draw all reasonable inferences in favor of the plaintiff. *Twombly,* 550 U.S. at 556-57. A complaint should never be dismissed because the court is doubtful that the plaintiff will be able to prove all of the factual allegations contained therein. *Id.*

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."). 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.

II. THE TWO-YEAR LIMITATIONS PERIOD BARS ALL CLAIMS BASED ON EVENTS THAT PREDATE JUNE 4, 2016

The Plaintiff does not dispute that the two-year statute of limitations bars claims predating June 4, 2016. However, the Plaintiff's goal for inclusion of these incidents in his Complaint was to accurately portray the malicious intent and history of harassment inflicted by the Defendant. The chronological time-line reveals what the Plaintiff endured which was a destructive and consistent pattern of constitutional rights violations, harassment, slander, discrimination and retaliation. These unconstitutional and malicious measures were instituted by the decision makers of AISS which includes Board Chair Jason Esteves, Superintendent

Meria Carstarphen, General Counsel D. Glenn Brock and the Chief of Police Ronald Applin because of their frustration with the Plaintiff's protest rallies, harsh criticisms of their policies during public comment and his depiction of them in satirical flyers. (Exhibit C - February 5, 2018 Flyer)

The Defendant's trespass warning dated February 8, 2018 undoubtedly falls clearly within the statute of limitations. Furthermore, this trespass warning comprises all of the claims the Defendant has violated according to the Plaintiff's Complaint. The trespass warning in question also includes the January 5, 2016 suspension letter issued by former Board Chair Courtney English. Although predated before June 4, 2016, the Defendant chose to reference the January 5, 2016 letter of suspension to support their argument of past allegations against the Plaintiff by the Board. Moreover, the government cannot prohibit future expressive activity as a result of past unlawful conduct. *Polaris Amphitheater Concerts, Inc. v. City of Westerville,* 267 F.3d 503, 507 (6th Cir.2001) ("where a law sets out primarily to arrest the future speech of a defendant as a result of his past conduct, it operates like a censor, and as such violates First Amendment protections against prior restraint of speech").

Although vague and with overbreadth, former Board Chair Courtney English arbitrarily suspended the Plaintiff's ability to speak at AISS Board's Community Meetings for six months. Defendant's letter states that the Plaintiff was still allowed to come to Board Meetings and enter AISS properties but he was not allowed to speak during the public comment portion of the Board's community meeting. To maliciously ban or suspend the Plaintiff's right to free speech for six months while allowing him to attend future meetings is a classic example of prior restraint and viewpoint discrimination. A prior restraint of expression "exists when the government can deny access to a forum before the expression occurs." *Bourgeois v. Peters,* 387 F.3d 1303, 1319 (11th Cir.2004). Such a "prior restraint of expression comes before [the] court with 'a heavy presumption against its constitutional

validity." *Universal Amusement Co. v. Vance,* 587 F.2d 159, 165 (5th Cir.1978) (citing *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963); *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971)).

The Plaintiff interprets the illegal and unconstitutional actions by the Defendant predating June 4, 2016 as being relevant in supporting the facts of his claims. All claims are based on the February 8, 2018 trespass warning and is well within the statue of limitations. *M.H.D. v. Westminster Sch.,* 172 F.3d 797, 802-03 (11th Cir. 1999). Pursuant to federal law, a cause of action accrues, and thereby sets the limitations clock running, when "the facts which would support a cause of action are apparent or should be apparent" to a reasonably prudent person. *Brown,* 335 F.3d at 1261.

III. AISS'S RESTRICTION ON PLAINTIFF'S SPEECH WERE NOT REASONABLE

Both parties agree that the Board's public comment sessions constitute a limited public forum. (Doc. 2-1 at 11-13; Doc. 8 at 18). "In limited public forums, to avoid infringing on First Amendment rights, the government regulation of speech only need be viewpoint-neutral and 'reasonable in light of the purpose served by the forum."' *Galena v. Leone,* 638 F.3d 186, 198 (3d Cir. 2011). To determine whether a restriction on speech in a limited public forum passes constitutional muster, the court must analyze whether the restriction on speech is a valid time, place, or manner restriction. *Id.* at 199. A restriction on speech is a valid time, place, or manner restriction if it (1) is justified without reference to the content of the regulated speech, (2) is narrowly tailored to serve a significant governmental interest,[2] and (3) leaves open alternative channels for communication of the information. *Id.* Defendant's restriction on Plaintiff's speech were a violation of his First and Fourteenth Amendment Rights.

a. The Board's Restriction on Plaintiff's Speech Was Not Content-Neutral but Viewpoint Discrimination

The Defendant's contention that the restriction on Plaintiff's speech was content-neutral is completely nullified by the trespass warning dated February 8, 2018. In a feeble attempt to prove their case, the Defendant's painstakingly searched every case in U.S. History using the keywords disruptive, offensive and combative to discredit the Plaintiff's valid claims protected by the U.S. Constitution.

For example, in *Eichenlaub v. Twp. of Indiana,* the Defendant points out that the speaker was "repetitive and truculent" and repeatedly interrupted the chairman of the meeting." until he was removed. Four years later, in *Olasz v. Welsh,* the speaker was removed to constrain his constant interruptions, "badgering and disregard for the rules of decorum." Then the Defendants conveniently dig up *Mesa v. Hudson County Board of Chosen Freeholders* where the speaker in this predictable scenario "insisted on speaking on a topic not under discussion and then refused to sit down". The comparisons get even worse as the Defendant states that Plaintiff's behavior at Board Meetings is equally disruptive, if not worse than the plaintiffs in *Eichenlaub, Olasz and Mesa*. With their poor choice of references, the Defendant has not proven or accomplished anything beyond doing a fantastic job of sensationalizing their uninformed viewpoint of the case and misrepresenting the Plaintiff's character with malicious intent.

The February 8, 2018 trespass warning was issued to the Plaintiff for a flyer that he created. The flyer, commonly known as satire, depicted Superintendent Carstarphen as a puppet on a string for Billionaire Arthur Blank's business developments around Vine City and English Ave. which are located in downtown Atlanta, Georgia. The tombstones represented the schools Superintendent Carstarphen has closed and/or merged on the neighborhood children during her

tenure. The back of the flyer has a photoshopped image of the superintendent wearing a football jersey with the word Falcoons on it and a list with the caption "Superintendent Meria Carstarphen's Top Ten Catastrophic Plays". Being a community activists and a seasoned graphic designer for 30 years, the Plaintiff uses his artistic capability to protest bad policies governed by the Superintendent and elected officials that are unfavorable to the children of AISS. For close to 10 years, the Plaintiff has designed up to 20 satirical flyers which have been instrumental in impact Board policy. As common practice at AISS Board's Community Meetings, Plaintiff printed hundreds of colorful copies at his own expense and distributed them to the Board, Superintendent and to those in the audience who would accept them. Plaintiff was not repetitive, truculent, or disruptive. Nor did the Plaintiff interrupt a Board member or refuse to sit down unlike *Eichenlaub, Olasz and Mesa*. An insiders view to the process as how to address the AISS Board is as follows:

- Community members are encouraged to sign up to address the board
- Alloted time to speak is for 2 minutes or 4 if another person has signed up and yields their time
- Speakers are required to sign up between 5 and 5:50 p.m.
- Meeting is scheduled to start at 6 p.m. but rarely starts on time
- When the meeting begins, the Board calls the names of the speakers in the order they signed up which is supposedly Board policy (Doc. 8 at 9)

With these safeguards in place, there was ample opportunity for the Plaintiff to air his grievances within the time frame alloted to speak without resorting to disruptive behavior like *Eichenlaub, Olasz and Mesa*.

On the date in question, Plaintiff was only a minute into his presentation before he was cut-off by AISS General Counsel D. Glenn Brock, Nelson Mullins and Scarborough and AISS Board Chair Jason Esteves concerning the flyer. The trespass warning dated February 8, 2018 states in part "Nevertheless, on

February 5, 2018, you once again introduced racist and hate-filled epithets at an ABOE meeting. Specifically, you passed out flyers to audience members that contained the phrase "unnigged coming soon" and that contained a picture of Superintendent Carstarphen wearing a photoshopped football jersey with the name "FALCOONS" on it. (Exhibit C - February 5, 2018 Flyer). The insulting references are completely out of bounds of civility and, as before, were offensive to the Board,our Superintendent, and our staff and community. These references fail to advance any meaningful discourse upon which the Board or Superintendent could possibly act. We cannot and we will not allow such abhorrent and hate-filled behavior in a meeting of an organization whose sole purpose is to educate children. I once again further advise you that any further demonstration of such conduct may result in additional consequences, including permanent suspension of your privilege to speak a APS Board Meetings." (Doc 1-1 at 52; Pl. Ex. J) Defendant's animosity toward the substance of Plaintiff's speech and the arguable absence of an objective basis for excluding Plaintiff, a reasonable jury could find that the justifications offered by Defendant for banning Plaintiff were pretexts masking viewpoint discrimination, and that Defendant targeted Plaintiff precisely "because of" Plaintiff's unwelcome criticism of the Superintendent and the Board of AISS. *Pahls,* 718 F.3d at 1230.

The current state of First Amendment jurisprudence, as articulated in *Brandenburg v. Ohio,* 395 U.S. 444, 447-49 (1969) (per curiam), prohibits restrictions on mere advocacy and requires the government to prove that the expression it would sanction is intended to incite imminent lawless action and is likely to produce such action. (The Government may not retaliate against individuals or associations for their exercise of First Amendment rights.); see also *Singer v. Fulton County Sheriff,* 63 F.3d 110, 120 (2d Cir. 1995) (retaliatory prosecution goes to the core of the First Amendment).

The Supreme Court has long identified the suppression of speech by public officials to be unlawful: It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys (citations omitted)…When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. (Citations omitted.) *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819, 828-830 (1995) (forbidding viewpoint discrimination regardless of nature of forum).

Both AISS Board Chair Jason Esteves and AISS General Counsel D. Glenn Brock, Nelson Mullins Riley and Scarborough LLP ordered the Plaintiff removed by law enforcement even after he explained that the flyer was satire which is protected by the First Amendment. *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d. 41 (1988): Hustler Magazine published a parody of a liquor advertisement in which Rev. Jerry Falwell described his "first time" as a drunken encounter with his mother in an outhouse. The Court held that political cartoons and satire such as this parody "have played a prominent role in public and political debate. And although the outrageous caricature in this case "is at best a distant cousin of political cartoons," the Court could see no standard to distinguish among types of parodies that would not harm public discourse, which would be poorer without such satire[1].

Plaintiff's comments during the community meeting contained no language that could be misconstrued as being a racial-slur or epithet. Nonetheless, Plaintiff was served with a trespass warning in retaliation for the satirical flyer and his harsh criticism of the Superintendent's policies. Just as the First Amendment protects

[1]Satire is a genre of literature that uses wit for the purpose of social criticism. Satire ridicules problems in society, government, businesses, and individuals in order to bring attention to certain follies, vices, and abuses, as well as to lead to improvements. Irony and sarcasm are often an important aspect of satire.

freedom of expression, it prohibits actions by state officials to punish individuals for the exercise of that right. *Bennett v. Hendrix,* 423 F.3d 1247, 1255 (11th Cir. 2005) (This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights.); *Georgia Ass'n of Educators v. Gwinnett County Sch. Dist.,* 856 F.2d 142, 145 (11th Cir. 1988); "To establish a First Amendment retaliation claim, the plaintiff must show 'first, that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech.'" *Keeton v. Anderson–Wiley,* 664 F.3d 865, 878 (11th Cir. 2011) (*quoting Bennett v. Hendrix,* 423 F.3d 1247, 1250 (11th Cir. 2005)).

Defendant falsely states that "Under our facts, Plaintiff directed racially charged insults at the Board and AISS employees. This behavior clearly violated Board Policy BC's requirement that members of the public "demonstrate mutual respect, fair play, and orderly decorum". [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. *Bridges v. California,* 314 U.S. 252, 270-71 (1941). Indeed, the First Amendment represents 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 v. Sullivan,* 376 U.S. 254, 270 (1964).

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. (Doc. 8 at 6) Therefore, it can be easily presumed that the Defendant's arguments are based purely on hearsay and innuendo.

The Defendant's arbitrary and vague manner of banning the Plaintiff can be seen by the inconsistency of suspension times. The January 5, 2016 suspension was for 6 months. The October 10, 2016 trespass warning was for 14 months and the February 8, 2018 trespass warning was for 12 months. Not one trespass warning included a way to contest the bans. Defendants suspensions lacked procedural due process. Due process is ordinarily absent if a party is deprived of his or her property or liberty without evidence having been offered against him or her in accordance with established rules. In *re Application of Eisenberg,* 654 F.2d 1107, 1112 (5th Cir.1981); Most important, due process requires a neutral and detached hearing body or officer. *Gagnon v. Scarpelli,* 411 U.S. 778, 786, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

b. <u>The Restriction on Plaintiff's Speech Was Not Narrowly Tailored to Serve the Board's Interest in Holding Orderly and Civil Meetings.</u>

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 because of a satirical flyer, Plaintiff was banned not only from the AISS school grounds, but from all premises owned by the AISS. He was not banned only during regular school hours, but at all hours, for a total of

2 years and 8 months (32 months). More over, overbreadth and prior restraint can be seen in this egregious statement ordered by the Defendant which states "Furthermore, he is not to have any communication whatsoever with any employee or representative of the ABOE or APS for the duration of the suspension. This prohibition on communication includes, but is not limited to, verbal, written, electronic, or in-person communication from February 6, 2018 through February 5, 2019". (Doc. 1 at Appx J) In addition to proscribing certain conduct by the Visors, the injunctions also prohibited "mak[ing], post[ing] or distribut[ing] comments, letters, faxes, flyers or emails regarding [Hansen or Streeter] to the public" at large. This broad restriction expressly forbidding future speech is a classic example of a prior restraint. *See Alexander v. United States,* 509 U.S. 544, 550 (1993). Prior restraints, which we have characterized as "the most serious and least tolerable infringement on First Amendment rights," carry a heavy presumption of invalidity. *Nash v. Nash,* 232 Ariz. 473, 481–82, ¶ 32, 307 P.3d 40, 48–49 (App. 2013). A restriction like this based on the content of speech is permissible only if narrowly tailored to achieve a compelling state interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). Because of the dangers of prior restraints, even content-neutral injunctions should not burden more speech than necessary to serve a significant government interest. *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994). Here, the injunctions at issue were not narrowly tailored and were overbroad because they prohibited all public speech regarding Hansen or Streeter.

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).

A potentially serious problem with Defendant's reliance on this rationale is that it incorporates Plaintiff's conduct leading up to his ejection from the November 4, 2009 Board Meeting. As explained above, there is a view of the evidence by which a jury could find that Defendant ejected Plaintiff from the January 2016 Board Meeting without constitutionally adequate justification. Under this view of the evidence, Defendant's reliance on the earlier incident as grounds for banning Plaintiff from future Board Meetings compounds his initial violation of Plaintiff's constitutional rights.

Defendant's reliance on Plaintiff's behavior at the October 2016 committee meeting is similarly problematic. As noted above, the test applicable to a limited public forum comprises two prongs: any restriction on speech must be (1) viewpoint neutral and (2) reasonable given the purposes of the forum. Under the second prong of the test, Defendant's understanding that Plaintiff had engaged in conduct justifying his ejection from October 2016 meeting need not be right, but it must have been reasonable. There is a noticeable absence of evidence as to what information Defendant had about the events of October 2016. Given the allocation of the burden of persuasion on justification to the governmental defendant, a reasonable jury could find that Defendant has not shown that his reliance on Plaintiff's alleged misconduct at the October 2016 meeting was objectively reasonable.

The third ground for banning Plaintiff from future meetings cited by Defendant in his February 8, 2018 trespass warning states "were offensive to the Board, our Superintendent, and our staff and community." The Court does not doubt that at least some Defendants and AISS employees could be offended by the Plaintiff's presentation. But to justify the exclusion of Plaintiff from a limited public forum on grounds of being offended, Defendants' apprehension of harm must be reasonable, not merely subjectively genuine. "Listeners' reaction to speech is not a content-neutral basis for regulation.... Speech cannot be ... punished or banned[ ] simply

because it might offend a hostile" member of the Santa Cruz City Council. *Forsyth Cnty., Ga. v. Nationalist Movement,* 505 U.S. 123, 134–35 (1992). The council members should have known that the government may never suppress viewpoints it doesn't like. *See Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Though defendants point to Norse's reaction to Councilman Fitzmaurice as the "disruption" that warranted carting him off to jail, Norse's calm assertion of his constitutional rights was not the least bit disruptive. The fact that others might have seen the jacket and been offended was not enough to criminalize the speech in the absence of an actual disruption. For the government to "shut off discourse solely to protect others from hearing it" in the absence of "a showing that substantial privacy interests are being invaded in an essentially intolerable manner ... would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California,* 403 U.S. 15 (1971)

The Defendant states that on several occasions, Plaintiff refused to leave without being escorted by law enforcement officers, causing further disruption to an already diverted meeting. It was well established in 1988, when the cause of action arose, that members of the public had a right to attend a public school Board Meeting. *See Madison Joint Sch. Dist.,* 429 U.S. at 176; *Mosley,* 408 U.S. at 96. A reasonable police officer in the position of Officer Tiburzio would have known that he could not exclude members of the public from a school Board Meeting solely on the basis of their viewpoints. Based on these cases, Defendant removal of the Plaintiff was unjustified.

c. <u>Plaintiff Has Sufficient Alternative Channels to Communicate His Message.</u>

The Defendants remits that the Plaintiff's proposition that he does not have adequate alternate channels to communicate his message are unpersuasive because

the vast majority of cases were decided before 1990. Defendant further states that prior to 1990, Plaintiff's argument that "physical presence" and "proximity" are vital attributes of an alternative mode of communication may have made sense. However, the widespread use of modern technology negates that argument. Finally the Defendant suggests that Plaintiff has ample channels through which he can communicate with community members and other elected officials. The Defendant failed to acknowledge the blaring fact that the trespass warning forbids any contact with AISS elected officials or APS employees which could be considered community. In this instance, Plaintiff could have access to the most antiquated technology of the past to the latest tech-no gadgets of the future but it would it inadequate according to AISS Board Chair's directives in the trespass warning dated February 8, 2018. The Defendant's nasty and malicious tone of the letter states in part "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) In American jurisprudence, the overbreadth doctrine is primarily concerned with facial challenges to laws under the First Amendment. American courts have recognized several exceptions to the speech protected by the First Amendment (for example, obscenity, fighting words, and libel or defamation), and states therefore have some latitude to regulate unprotected speech. A statute doing so is overly broad (hence, overbreadth) if, in proscribing unprotected speech, it also proscribes protected speech. Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment

rights of others. See, e.g., *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 483 (1989), and *R. A. V. v. City of St. Paul,* 505 U.S. 377 (1992). Overbreadth is closely related to vagueness; if a prohibition is expressed in a way that is too unclear for a person to reasonably know whether or not their conduct falls within the law, then to avoid the risk of legal consequences they often stay far away from anything that could possibly fit the uncertain wording of the law. The law's effects are thereby far broader than intended or than the U.S. Constitution permits, and hence the law is overbroad.

The "strong medicine" of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court. *See U.S. v. Stevens,* 130 S.Ct. 1577, 1592 (Alito, J., dissenting). The overbreadth doctrine is to "strike a balance between competing social costs". *U.S. v. Williams,* 553 U.S. 285, 292. Specifically, the doctrine seeks to balance the "harmful effects" of "invalidating a law that in some of its applications is perfectly constitutional" as a possibility that "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech". The one year (12 months) suspension levied by the Defendant was not reasonable making suspensions barring the Plaintiff total 2 years and 8 months (32 months) issued consecutively.

IV. PLAINTIFF PROCEDURAL DUE PROCESS CLAIM HAS MERIT BECAUSE PLAINTIFF WAS NOT GIVEN A MEANINGFUL OPPORTUNITY TO CONTEST THE BAN.

Plaintiff alleges that the Defendant "stripped him of his First Amendment rights without due process when it issued him" the trespass warnings. (Doc 1-1 at 52; Pl. Ex. J) "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 Defendant deprived the Plaintiff of his First Amendment right to freedom of expression by barring him from participating in school Board Meetings.

To determine whether the Defendant 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." *Rivera-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 Defendant issued him

trespass warnings. The trespass warnings were not issued randomly or without authority, but were decisions approved by AISS Superintendent Carstarphen, the chief administrator of the school district, Jason Esteves, AISS Board Chair and D. Glenn Brock, AISS General Counsel. Accordingly, the Court must weigh the *Mathews* factors. A single decision or course of action, even if "tailored to a particular situation and not intended to control decisions in later situations," may give rise to municipal liability if it was "properly made by that government's authorized" policymakers. *Pembaur,* 475 U.S. at 481.

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 trespass warnings 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 Defendant official may issue a trespass warning 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 apermit upon broad criteria unrelated to proper regulation of public places.") (*quoting Kunz v. NewYork,* 340 U.S. 290, 293-94 (1951)).

Second, neither trespass warning 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). 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). Because the letters serving as trespass warnings 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.

The notices against trespass violated Plaintiff's due process rights by depriving him of his First Amendment right to express his views at school Board Meetings without adequate process.

The Defendant argued in its initial brief that the Georgia Open Meetings Act (GOMA) provided an adequate state remedy. The GOMA is limited in its capacity to handle a matter such as this. The GOMA's solutions provide a state remedy as the Defendant so eloquently pointed out. The claim at hand involves questions of federal law which is outside of the GOMA's purview. The Plaintiff is seeking redress for violations of his First and Fourteenth Amendment Rights. He is also seeking damages for the claims slander, harassment, discrimination and retaliation. Under U.S. law, prior restraint is forbidden.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of

the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

V. PLAINTIFF HAS NOT FAILED TO POINT TO A WAIVER OF AISS'S SOVEREIGN IMMUNITY FROM HIS STATE-LAW CLAIMS.

The Civil Rights Act of 1871 is a federal statute, numbered 42 U.S.C. § 1983, that allows people to sue the government for civil rights violations. It applies when someone acting "under color of" state-level or local law has deprived a person of rights created by the U.S. Constitution or federal statutes. 42 U.S.C. § 1983.

The Defendant does not contend that it is not immune from Plaintiff's federal claims. Instead, the Defendant maintains that Sovereign immunity under the Georgia Constitution, Ga Const. Art. I, § 2, ¶ IX bars the Plaintiff state law claims for slander, discrimination, retaliation, and harassment. Plaintiff is well aware that these claims fall under state law, however under Article III of the Constitution, federal courts can hear "all cases, in law and equity, arising under this Constitution, [and] the laws of the United States ..." U.S. Const, Art III, Sec 2. The Supreme Court has interpreted this clause broadly, finding that it allows federal courts to hear any case in which there is a federal ingredient. *Osborn v. Bank of the United States,* 9 *Wheat.* (22 U.S.) 738 (1824).

In addition, 28 U.S. Code § 1367 provides: (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or

intervention of additional parties. Supplemental Jurisdiction is the authority of the U.S. federal courts to hear additional cases. see USC 1367; *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966),[1] was a case in which the Supreme Court of the United States held that in order for a United States district court to have pendent jurisdiction over a state-law cause of action, state and federal claims must arise from the same "common nucleus of operative fact" and the plaintiff must expect to try them all at once. This case was decided before the existence of the current supplemental jurisdiction statute, 28 U.S.C. § 1367.

The Defendant sites cases *Bomia v. Ben Hill County School District,* 320 Ga. App. 423, 426, 740 S.E.2d 185, 189 (2013) and 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). These examples completely miss the mark in comparison to the claims presented by the Plaintiff in his complaint. State and federal claims must arise from the same "common nucleus of operative fact". Plaintiff's claims present violations of his First and Fourteenth Amendment Rights. The Civil Rights Act of 1871 is a federal statute, numbered 42 U.S.C. § 1983, that allows people to sue the government for civil rights violations. It applies when someone acting "under color of" state-level or local law has deprived a person of rights created by the U.S. Constitution or federal statutes.

Municipalities are liable under § 1983 only if an official policy or custom causes the denial of a constitutional right. *See Wray v. City of N.Y.,* 490 F.3d 189, 195 (2d Cir. 2007) (citation omitted); see also *Monell,* 436 U.S. at 691. Section 1983 liability is definitively narrower in scope than respondeat superior; in order to prevail, "a plaintiff must demonstrate that, through its deliberate conduct, the municipality was the `moving force' behind the alleged injury." *Roe v. City of Waterbury,* 542 F.3d 31, 37 (2d Cir. 2008) (*quoting Bd. of County Comm'rs v. Brown,* 520 U.S. 397, 404 (1997)). Thus, "recovery from a municipality is

limited to acts that are, properly speaking, acts `of the municipality' — that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986); *see also Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 125 (2d Cir. 2004) ("Demonstrating that the municipality itself caused or is implicated in the constitutional violation is the touchstone of establishing that a municipality can be held liable for unconstitutional actions taken by municipal employees.").

The case should not be dismissed.

CONCLUSION

For the foregoing reasons and all others discussed above and in Plaintiff's Complaint, the present Defendant's Motion to Dismiss for Failure to State Claim should be denied.

Respectfully submitted this 15th day of October, 2018.

Nathaniel Borrell Dyer
Plaintiff 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 October, 2018.

Nathaniel Borrell Dyer
Plaintiff Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2018, a copy of the document entitled **PLAINTIFF'S SURREPLY TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** was delivered by first class mail to:

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