CASE NO. 20-10115

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nathaniel Borrell Dyer,

Plaintiff-Appellant,

v.

Atlanta Independent School System,

Defendant-Appellee.

Appeal from the United States District Court
Northern District of Georgia, Atlanta Division
No. 1:18-cv-03284-TCB

APPELLEE'S RESPONSE BRIEF

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APPELLEE'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Appellate Rule 26.1 and Eleventh Circuit Rule 26.1, Appellee Atlanta Independent School System ("AISS") lists the trial judge(s) and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Atlanta Independent School System, appellee/defendant
2. Batten, Timothy C., U.S. District Court Judge
3. Dyer, Nathaniel Borrell, appellant/plaintiff
4. Moulard, Brandon O., attorney for AISS
5. Warco, Laurance J., attorney for AISS
6. Nelson Mullins Riley & Scarborough LLP, attorneys for AISS

No publicly traded company or corporation has an interest in the outcome of this appeal.

This 21st day of October, 2020.

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APPELLEE'S STATEMENT REGARDING ORAL ARGUMENT

The Appellant requested oral argument. AISS disagrees that oral argument is necessary or will be useful. As reflected in AISS's response brief, the district court decided the dispositive issues in AISS's favor. The parties have thoroughly presented the facts and legal arguments related to this case in their respective briefs. Thus, oral argument is unlikely to aid the Court in the decisional process. *See* Fed. R. App. P. 34(a)(2)(B)-(C).

This 21st day of October, 2020.

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JURISDICTIONAL STATEMENT

The Appellant, Nathaniel Dyer, appeals a decision by the United States District Court for the Northern District of Georgia. He challenges the district court's order of December 5, 2019, in which the court granted AISS's Motion for Summary Judgment as to his claims for violations of his (1) right to free speech under the First Amendment and (2) right to procedural due process under the Fourteenth Amendment. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, which grants jurisdiction to the courts of appeal over appeals from all final decisions of the United States district courts.

STATEMENT OF THE ISSUES

1) Did the district court properly conclude that AISS did not violate Dyer's First Amendment rights when it suspended Dyer from Atlanta Board of Education meetings because he repeatedly used racial slurs and other highly offensive, racially derogatory language at public meetings?
2) Did the district court properly conclude that, even if Dyer had a liberty interest in attending Atlanta Board of Education meetings, he suffered no deprivation of procedural due process because he had a meaningful chance to contest his suspensions through the Georgia Open Meetings Act?

INTRODUCTION

The central dispute of this case concerns what a public entity may do, within constitutional bounds, to curb the misbehavior of an individual who refuses to stop disrupting its meetings. From 2016 to 2018, Dyer repeatedly derailed public meetings of the Atlanta Board of Education by referring to AISS employees and students with racial slurs and other offensive epithets. In response, AISS imposed three incrementally more restrictive suspensions on Dyer and demanded that he refrain from using racial slurs at community meetings. But after each suspension ended, Dyer returned to the meetings and continued to use racially inflammatory speech in front of the Board, AISS officials, and other meeting attendees.

Dyer later sued AISS, claiming that his temporary suspensions from the meetings violated his rights to free speech under the First Amendment and procedural due process under the Fourteenth Amendment. The district court granted summary judgment in AISS's favor, and Dyer now appeals. His claims are meritless. The law does not require AISS to tolerate disruptive, incendiary behavior like Dyer's. And the restrictions that AISS placed on his speech were necessary to prevent his increasingly offensive behavior. If he wished to contest the restrictions, Georgia law afforded him a sufficient post-deprivation remedy. For those reasons, this Court should affirm the district court's grant of summary judgment to AISS.

STATEMENT OF THE CASE

I. Proceedings and Disposition of the Lower Court.

Dyer, proceeding *pro se*, sued AISS in the Superior Court of Fulton County. ECF No. 1. Dyer challenged the Atlanta Board of Education's ("Board") decision to suspend him from AISS meetings after he used offensive language during its public meetings. *Id*. at 14-15. He asserted a violation of his First Amendment rights, a violation of his procedural due process rights, and three claims under state law. *Id*. On July 9, 2018, AISS removed the case to the United States District Court for the Northern District of Georgia. *Id*. at 1-5, 76-80.

After removing the case, AISS moved to dismiss Dyer's claims. ECF No. 2. On March 14, 2019, the district court entered an order on AISS's motion to dismiss, granting it, in part, and denying it, in part. ECF No. 22. The district court dismissed Dyer's state-law claims based on sovereign immunity. *Id*. at 31-33. The court denied AISS's motion to dismiss Dyer's First Amendment and procedural due process claims. *Id*. at 24, 31.

AISS moved for Summary Judgment on Dyer's remaining First Amendment and procedural due process claims. ECF No. 34. On December 5, 2019, the district court granted AISS's Motion for Summary Judgment. ECF No. 42. The district court found that AISS's restrictions on Dyer's speech were content-neutral, were narrowly tailored to achieve a significant government interest, and allowed him ample

alternative channels of communication. *Id*. at 9-19. The district court also found that because Dyer had a meaningful chance to contest his suspensions though the Georgia Open Meetings Act, AISS did not violate Dyer's right to procedural due process under the Fourteenth Amendment by not giving him a pre-suspension hearing. *Id*. at 19-27. As a result, the court entered judgment for AISS. Dyer now appeals that ruling.

II. Statement of Facts.

a. Procedure and decorum at Atlanta Board of Education meetings.

The Board holds monthly meetings, which include a work session, a community meeting, and a legislative meeting. ECF No. 34-3 at 2. The community meetings are open to the public and allow the Board "to receive input from community members regarding policy issues, the educational program, or any other aspect of AISS business except confidential personnel issues." *Id*.

The Board reserves a portion of each meeting for public comment, during which members of the public may address the Board directly. ECF No. 34-3 at 3. If a person wishes to speak during the public-comment portion of the meeting, he or she must register to speak in person before the meeting, and the chairperson must recognize the person before he or she may speak. *Id*. Upon being called to the podium, speaker must identify themselves and make their comments "as briefly as the subject permits." *Id*.

The Board has promulgated policies to govern decorum at the public meetings. Members of the public who attend Board meetings must "faithfully and impartially conduct themselves in ways that demonstrate mutual respect, fair play, and orderly decorum," and must be respectful and courteous "even when expressing disagreement, concern, or criticism." ECF No. 34-3 at 3. Board Policy BC-R(1) prohibits "[a]pplause, cheering, jeering, or speech that defames individuals or stymies or blocks meeting progress." ECF No. 33-1 at 114-155, 247-254; ECF No. 34-3 at 3. That conduct "will not be tolerated and may be cause for removal from the meeting or for the board to suspend or adjourn the meeting." ECF No. 34-3 at 3. All individuals who speak at public comment must abide by those policies. ECF No. 33-1 at 115; ECF No. 34-3 at 2.

Topics of discussion at the public meetings may include "controversial issues or matters of deep community concern." ECF No. 34-3 at 2. Attendees commonly express criticism of AISS, the Board, and AISS officials during public comment. *Id*. at 4. AISS never stops or impedes individuals from leveling criticism during public comment. *Id*. Dyer, in particular, has spoken at many community meetings, often making disparaging remarks about AISS's policy decisions and the performance of various AISS officials and Board members. *Id*. AISS did not stop Dyer from making those comments. *Id*.

AISS does restrict some speech at public comment. For instance, speakers may not use profanity, utter defamatory statements about an AISS official, or make threats. ECF No. 33-1 at 115-116; ECF No. 34-3 at 4. And AISS and the Board consider the use of racial slurs, such as the "n-word," to be inappropriate, disruptive speech and prohibit the use of such slurs during public comment. ECF No. 33-1 at 117; ECF No. 34-3 at 5.

b. Dyer used racially offensive language about AISS employees before 2016.

The events giving rise to his Complaint were not the first time that Dyer directed racially charged insults at AISS employees. In 2009, he created a flyer depicting former Superintendent Erroll Davis in the robes of the Ku Klux Klan. ECF No. 33-1 at 70-72, 85. Dyer testified that he opposed AISS's decision to close schools as part of its redistricting process and that he equated those decisions to the acts of the Ku Klux Klan burning schools and churches. *Id*. at 73-76. He also stated that he believed that Superintendent Davis was as destructive as the Ku Klux Klan, so he created the flyer as a way to engage in "psychological warfare" with AISS. *Id*. at 80, 83. The flyer received so much attention that a local news organization published an article about it. *Id*. at 80, 235-237. He has also created flyers depicting Board members as flying monkeys and clowns. *Id.* at 85, 92, 172. In the past, he has

hosted a public-access television show in which he shared his concerns about the treatment of AISS students and criticized the Board. *Id*. at 189.

c. Dyer uses racial slurs at a Board meeting in January 2016.

In 2016, Dyer began using racially offensive language at public Board meetings. In January 2016, Dyer attended a Board meeting and spoke during public comment. ECF No. 33-1 at 122. While addressing the Board, Dyer used the "n-word," the word "coons," and the word "buffoons" in reference to the Board members and then-AISS Superintendent Meria Carstarphen. ECF No. 33-1 at 122-123, 137-140; ECF No. 34-3 at 5. Dyer acknowledged the "n-word" and "coons" are racial slurs. ECF No. 33-1 at 123. As soon as those slurs came out of his mouth, the Board shut off Dyer's microphone and police officers escorted him from the meeting. ECF No. 34-3 at 5. Dyer's speech offended the Board members and other AISS staff in attendance. *Id*. It also violated Board policy governing decorum and appropriate conduct at community meetings. *Id*.

The Board acted in response to Dyer's offensive behavior at the January Board meeting. On January 15, 2016, Board Chair Courtney English sent Dyer a letter that suspended him from speaking at Board meetings until July 2016. ECF No. 33-1 at 121-122, 255. The letter notified Dyer that uttering racial slurs at the January 2016 meeting was "disrespectful" and "offensive to the board, the superintendent and the

staff." *Id*. at 141, 255. The letter warned Dyer that if used similar offensive language at a future meeting, the Board might permanently suspend him. *Id*. at 142, 255.

d. Dyer again uses a racial slur at a public meeting.

Dyer's suspension did not deter his inappropriate behavior. A few months after the first suspension ended, Dyer spoke at another Board meeting on October 10, 2016. ECF No. 33-1 at 143. This time, while speaking during the public-comment portion of the meeting, he referred to AISS students with the racially derogatory term "sambo." *Id*. at 143, 146. Upon hearing Dyer again use a racial epithet during public comment, English directed Dyer to leave the podium. ECF No. 34-3 at 6. Dyer refused and began to shout at the Board. *Id*. Police officers then escorted him from the meeting. *Id*. After they removed him, Dyer continued to shout outside the meeting room. *Id*.

The day after the meeting, English sent Dyer another letter informing him of his suspension from Board meetings until December 31, 2017. ECF No. 33-1 at 142-143, 257-260. The letter explained that AISS suspended Dyer because of his "inappropriate and disruptive behavior" at the Board meeting on October 10, 2016. *Id*. at 257-260. The letter specifically cited Dyer's use of the term "sambo" at the meeting as the basis for his suspension. *Id.* English advised Dyer that "further demonstration of such conduct may result in additional consequences." *Id*. at 259.

e. Dyer's third use of racial epithets at a Board meeting.

After his second suspension, Dyer used racial slurs at a public meeting a third time. At a public meeting on February 5, 2018, Dyer distributed a double-sided flyer that depicted various images, including one of Arthur Blank holding marionette strings attached to Dr. Carstarphen. ECF No. 33-1 at 151-152, 271-274. On one side of the flyer, the word "UNNIGGED" appeared at the bottom, right-hand corner. *Id.* Dyer explained at his deposition that the word "unnigged" means "never been a nigger." *Id*. at 153-154, 271-274. The other side of the flyer featured a photoshopped image of Dr. Carstarphen wearing football pads and a football jersey with the word "FALCOONS" emblazoned on the front, a play on the Atlanta Falcons' jerseys. *Id*. at 155-158, 271-274.

After distributing the flyer to audience members, Dyer began to speak at the podium during public comment. ECF No. 33-1 at 151; ECF No. 34-3 at 6. Soon after he began, the Board's general counsel directed his microphone to be shut off because Dyer's flyer contained racial slurs. ECF No. 34-3 at 7. Police then escorted Dyer out of the meeting because of his offensive, disruptive behavior. *Id*.

Board Chair Jason Esteves sent Dyer a third letter, which suspended him from attending Board meetings until February 6, 2019. ECF No. 33-1 at 150, 261-270. The letter explained that AISS had suspended Dyer for a third time because of his "inappropriate and disruptive behavior" at the meeting on February 5, 2018. ECF

No. 33-1 at 261-270. The letter highlighted Dyer's distribution of the flyer, which contained "racist and hate-filled epithets." *Id.* That language, the letter continued, was "offensive to the Board, our Superintendent, and our staff and community." *Id.*

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, applying the same legal standards used by the district court. *Seff v. Broward Cty., Fla.*, 691 F.3d 1221, 1222-23 (11th Cir. 2012). This Court will affirm the district court's decision if, after construing the evidence in the light most favorable to the non-moving party, it finds that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*.

SUMMARY OF THE ARGUMENT

Dyer has a long history of publicly criticizing AISS without repercussion. But in 2016, he crossed the line by repeatedly uttering racial slurs at community meetings. Within a two-year period, Dyer used the "n-word," the word "coons," the word "buffoons," and the word "sambo" in reference to Board members and AISS employees and students during the public-comment portion of two Board meetings. At a third meeting, he distributed a flyer to meeting attendees that contained the word "UNNIGGED" and a photoshopped image of the AISS Superintendent wearing a football jersey with the word "FALCOONS" across the front. Although

the Board tolerates most speech during its public comment sessions, it does not abide the use of racial slurs.

AISS has a compelling public interest in maintaining decorum and order at its public meetings. So when Dyer disrupted a meeting, AISS suspended his ability to speak at future Board meetings for a finite period. But as soon as each suspension expired, Dyer returned to the public meetings with new, more offensive language. AISS was left in the untenable position of either allowing Dyer to continue to disrupt Board meetings, or to place incrementally more restrictive suspensions on his ability to attend those meetings. AISS chose the latter.

Those suspensions did not violate Dyer's rights under the First Amendment. In a limited public forum like a school board meeting, the school board may restrict a speaker's speech so long as the restriction (1) is content-neutral, (2) is narrowly-tailored to achieve a significant governmental interest, and (3) leaves ample alternative channels for the speaker to convey his message. AISS's restrictions on Dyer's speech meet all these requirements. First, the suspensions were content-neutral because AISS was not regulating Dyer's speech because it was offensive or controversial. Rather, AISS temporarily barred him public meetings because he continually refused to stop disrupting meetings by using racial slurs and offensive epithets. Second, AISS had a substantial interest in conducting orderly meetings, and its decision to suspend Dyer from participating in meetings was narrowly tailored to

achieve that interest. As Dyer's behavior became increasingly disruptive, AISS had few options to prevent it beyond banning him from the meetings for a limited period. Finally, Dyer could still communicate his message through other public meetings, through social media, and through a television program that he hosted. For those reasons, the district court properly granted summary judgment on Dyer's First Amendment claim.

The district court also correctly granted summary judgment on Dyer's procedural due process claim under the Fourteenth Amendment. No court in this Circuit has found that individuals have a liberty interest in participating in school board meetings. And any liberty interest that Dyer did have was *de minimis* when weighed against AISS's interest in conducting an orderly meeting. Dyer had a meaningful post-deprivation opportunity to contest the suspension through the Georgia Open Meetings Act.

As a final attempt to save his case, Dyer claims that AISS counsel falsified an exhibit that it presented to him during his deposition. The allegations are false. Dyer himself authenticated the document he now claims AISS falsified. And even if a different version of the document exists, it would not change the outcome of the district court's decision.

ARGUMENT AND CITATION TO AUTHORITY

I. The District Court Ruled Correctly in Granting AISS's Motion for Summary Judgment as to Dyer's First Amendment Claim.

The First Amendment guarantees individuals the right to free speech, even if the speech is spoken, written, or made through expressive conduct. *Virginia v. Black*, 538 U.S. 343, 358 (2003). But the freedom of expression protected by the First Amendment has limits. *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989). "[T]he First Amendment does not guarantee persons the right to communicate their views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981).

Analyzing Dyer's First Amendment claim requires answering three questions. First, was Dyer's speech protected by the First Amendment? *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). Second, what was the forum in which Dyer spoke? *Id.* Third, did AISS satisfy the requisite constitutional standard when it excluded Dyer from speaking at public meetings. *Id.* As for the first factor, AISS concedes that the First Amendment protects Dyer's offensive speech. As for the second factor, the parties also agree that the speech at issue occurred in a limited public forum. The parties' dispute centers on the third factor.

The Constitution permits public entities to impose reasonable time, place, and manner regulations on speech in limited public forums. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983). Such restrictions must be content-

neutral and narrowly tailored to achieve a significant government interest. *Id.* The restrictions must also leave open alternative channels of communication. *Id.* The restrictions placed on Dyer's speech satisfy those criteria.

a. <u>The restrictions on Dyer's speech were content-neutral.</u>

The most important consideration when determining content-neutrality is whether the government limited a person's speech because of disagreement with the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A content-neutral restriction is one that does not restrict "either a particular viewpoint or any subject matter that may be discussed." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 (11th Cir. 2005).

Even if a regulation incidentally affects some speakers or messages but not others, it is still neutral if it serves a legitimate government purpose. *Heyman*, 888 F.2d at 1332. The government has a legitimate interest in curtailing speech that disrupts or impedes the orderly, efficient meeting of public bodies. *Id.* at 1332-33. And a policy that ensures "the decorum of the entire assembly" is a content-neutral regulation. *Cleveland v. City of Cocoa Beach, Fla.*, 221 F. App'x 875, 879 (11th Cir. 2007).

Board Policy BC passes constitutional muster both in writing and in practice. It requires speakers at public meetings to conduct themselves in ways that reflect "mutual respect, fair play, and orderly decorum," and to show respect and courtesy

"even when expressing disagreement, concern, or criticism." ECF No. 34-3 at 3. Under Policy BC-R(1), the Board will not tolerate "[a]pplause, cheering, jeering, or speech that defames individuals or stymies or blocks meeting progress." ECF No. 33-1 at 114-115, 247-254; ECF No. 34-3 at 3. Those policies apply to all individuals who speak at community meetings. ECF No. 34-3 at 2.

Dyer repeatedly violated those policies by using racial slurs and epithets at public meetings on January 15, 2016; October 11, 2016; and February 6, 2018. At the meeting in October 2016, when told to leave the podium, Dyer refused and began shouting at the Board. ECF No. 34-3 at 6. AISS removed him from each of those meetings and suspended him from speaking at future meetings. AISS did so not because it disagreed with Dyer's message, but because it regarded his use of racially insensitive language as highly offensive and disruptive to the meeting. Before and after these three meetings, AISS permitted Dyer to speak critically of AISS without restriction. *Id*. at 3, 4. And other attendees routinely express criticism of AISS and Board without incident. *Id*. at 3. AISS does not favor one viewpoint over another; but it does insist that participants at public comment refrain from using racial slurs.

The court in *Kirkland v. Luken* explicitly held that the First Amendment permits a city council to restrict racially charged comments like Dyer's. 536 F. Supp. 2d 857 (S.D. Ohio 2008). There, while speaking during the public-comment portion of a public council meeting, the plaintiff used the term "Nigganati," which the

plaintiff later described as "part of a political 'training' exercise." *Id.* at 862. After the mayor ruled the plaintiff out of order and ordered his microphone shut off, the plaintiff stepped toward the mayor while shouting. *Id*. After the plaintiff refused to leave, he was arrested, charged with criminal trespass, tried, and convicted. *Id.* The court held that the mayor's decision to stop the plaintiff's comments and remove him from the meeting for using a "high offensive and degrading racial slur" was "objectively reasonable and proper." *Id.* at 876.

Dyer's use of the "n-word," "coons," "unnigged," and "falcoons" are comparable—if not worse—than the *Kirkland* plaintiff's use "Nigganati." Like the mayor's reaction in *Kirkland*, AISS and the Board found Dyer's language to be highly offensive and disruptive. And as was the case in *Kirkland*, the offensiveness and disruptiveness of Dyer's comments, not the obscure content of his message, prompted AISS's decisions to remove Dyer from the meetings. AISS's restriction was content-neutral, and Dyer even admits this fact in his opening brief. Appellant's Br., p. 12. ("AISS does not favor one viewpoint over another.") Dyer has not argued that the district court ruled improperly on this issue, so this Court should not reverse its decision on this basis.

b. AISS has a significant government interest in conducting orderly meetings.

AISS and its Board must maintain order and decorum at its public meetings. "Unstructured, chaotic school board meetings not only would be inefficient but also

could deny other citizens the chance to make their voices heard." *Lowery v. Jefferson Cty. Bd. of Educ.*, 586 F.3d 427, 433 (6th Cir. 2009). A government's interest in maintaining order extends to those in the audience, as well. *See Cleveland*, 221 F. App'x at 878 (holding city "has the right to maintain the decorum of the entire assembly, not just of those at the podium or in front of the television camera"). Although the undersigned has not found a case in this Circuit in which a speaker has used speech as egregious as Dyer's, the Southern District Court of Ohio held in *Kirkland* that the city council had a significant interest in conducting an orderly meeting, which included restricting speakers from using racial slurs. *Kirkland*, 536 F. Supp. 2d at 875.

AISS had a legitimate interest in maintaining decorum and preventing Dyer's repeated use of racial slurs at its meetings. Board meetings are open to the public, and AISS employees and students often attend. ECF No. 34-3 at 5, 7-8. At these meetings, the Board addresses "controversial issues" and "matters of deep community concern," and when Dyer caused a disruption, refused to stop his behavior, or refused to leave the meeting, the public-comment session went longer than anticipated, and the Board was delayed in reaching important issues on its agenda. *Id*. at 2-3. Because Dyer continued to disrupt Board meetings by using racial slurs and other offensive language, AISS had a legitimate interest in curtailing his conduct.

c. Dyer's suspensions were narrowly tailored.

The restrictions that AISS placed on Dyer's speech were narrowly tailored to advance AISS's interest in running orderly meetings. A restriction on speech is narrowly tailored "so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. A restriction need not be the least intrusive way to further a governmental interest, "since a less-restrictive-alternative analysis has never been…a part of the inquiry into the validity of a time, place, or manner regulation." *Id.* at 782-83. Instead, the government may burden as much speech as necessary to serve its legitimate interests. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Courts should defer to a government's reasonable determination if it has met that standard. *Ward*, 491 U.S. at 782-83.

In a concurring Supreme Court opinion, Justice Stewart stated that a school board "is not prohibited from limiting discussion at public meetings to those topics that it believes will be illuminated by the views of others" and that will "best serve its informational needs while rationing its time." *City of Madison, Joint Sch. Dist. v. Wisc. Employment Relations Comm'n*, 429 U.S. 167 (1976) (Stewart, J., concurring). This Court relied on Justice Stewart's opinion in holding that a mayor's decision to remove a disruptive speaker from a public meeting is a narrowly tailored response to achieve a city council's interest in conducting an orderly, efficient meeting.

Heyman, 888 F.3d at 1333. And although this Circuit has not addressed the use of a racial slur in a public meeting, the Southern District of Ohio held that muting the microphone and removing a plaintiff from a meeting "was narrowly tailored…to prevent the meeting from becoming disorderly as a result of plaintiff's use of a racial slur." *Kirkland*, 536 F. Supp. 2d at 876.

AISS repeatedly requested that Dyer refrain from using racial slurs. But Dyer ignored AISS's requests and returned to public meetings with equally, if not more offensive, language. At the meeting on October 10, 2016, after uttering the epithet "sambo," Dyer ignored the Board chair's directive to leave the podium. ECF No. 33-1 at 143, 146. His conduct forced the Board to halt its meeting while law enforcement physically removed Dyer from the meeting. *Id.*

And merely prohibiting Dyer from speaking at public comment would not have sufficed to stop him from disrupting the meetings with offensive, racially charged comments. At the February 2018 meeting, he distributed flyers that contained racial slurs. ECF No. 33-1 at 151-152, 271-275. To prevent Dyer from disrupting future meetings, AISS needed to stop him from even entering the room in which these meetings occurred because Dyer was equally disruptive at the podium as he was when sitting in the audience. Thus, the district court correctly found that "his suspensions were necessary to preserve meeting decorum." ECF No. 42 at 18.

It follows that AISS's suspensions of Dyer were narrowly tailored to serve AISS's legitimate interest in maintaining order during its meetings.

d. Dyer had alternative channels of communication.

A lawful restraint on speech must leave open adequate alternative channels of communication through which individuals can convey their message or participate in their chosen activity. *City of Ladue v. Galileo*, 512 U.S. 43, 56-58 (1994). The Supreme Court has found that no First Amendment violation occurs when the government bars citizens from exchanging views in formal settings when opportunities for informal communication also exist. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 n.4 (1984).

None of the suspensions imposed on Dyer prevented him from contacting community members, whether by telephone, email, or other written correspondence, to express his views. While suspended from Board meetings, Dyer could have distributed flyers in the area immediately surrounding AISS property, in the community, or in local publications. He could have attended meetings of local organizations and neighborhood associations to share his concerns about AISS. The various social media websites, including YouTube, Facebook, and Instagram, provided him with many platforms to express his views. Dyer even had his own public-access television show in which he shared his perspective on AISS and the Board's performance. ECF No. 33-1 at 188-189. In fact, Dyer could share more of

his views through his television show than through public comment because he was not restricted by the Board's time restrictions or content limitations. *Id*. at 189-190. Those alternative channels, as the district court found, provided Dyer with ample ways to communicate his message during his temporary suspension from attending Board meetings. ECF No. 42 at 18-19.

AISS's restrictions on Dyer's speech were content-neutral, were narrowly tailored to achieve a significant government interest, and left ample alternative channels of communications. Thus, the suspensions did not violate his right to free speech under the First Amendment.

II. The District Court Properly Dismissed Dyer's Procedural Due Process Claim.

AISS did not violate Dyer's rights to procedural due process under the Fourteenth Amendment. To prevail on a procedural due process claim, a plaintiff must establish: (1) that he or she possessed a protected liberty or property interest; (2) governmental deprivation of that interest; and (3) denial of adequate procedural protections. *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006). Dyer has not made this showing.

a. Any denial of Dyer's liberty interest was *de minimis*.

Dyer does not assert that AISS denied him a protected property interest. Instead, he claims that he had a liberty interest in attending and speaking at public Board meetings. The undersigned counsel cannot find a case within this Circuit has

addressed whether a community member has a liberty interest in participating in the public comment portion of a school board meeting, and other district courts are divided on the issue. *See Hirt v. Unified Sch. Dist. No. 287*, 2:17-CV-02279-HLT, 2019 WL 1866321, at*9 (D. Kan. 2019) (holding there is no liberty interest in attending a school board meeting); *but see Cyr v. Addison Rutland Supervisory Union*, 955 F. Supp. 2d 290, 295-96 (D. Vt. 2013) (holding there is a protected liberty interest in engaging in public comment at school board meetings).

The Supreme Court, however, has held that some restrictions on individual liberty rise only to a "*de minimis* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). And the Second Circuit has held that even if citizens have a protected interest in attending school board meetings, that interest must be weighed against the school district's interest and may be "de minimis and insufficient to sustain a due process claim." *Jones v. Bay Shore Union Free Sch. Dist.*, 666 F. App'x 92, 95 (2d Cir. 2016). For instance, where a school district required a former employee who was suspected of sexual misconduct with minors to provide notice before attending a school board meeting, the Second Circuit found that any interest the former employee had was *de minimis* and insufficient to sustain a due process claim. *Id*.

AISS has a significant interest in conducting orderly meetings free of racially offensive language. AISS tried less restrictive suspensions on Dyer's speech to no

avail. Because its suspensions are narrowly tailored to achieve a significant government interest, any interest Dyer may have in attending Board meetings is "*de minimis* and insufficient to sustain a due process claim."

b. Dyer had adequate post-deprivation protections.

If this Court finds that Dyer had more than a *de minimis* liberty interest in attending Board meetings, the district court properly held that AISS did not violate Dyer's right to procedural due process. ECF No. 42 at 26, 27.

"[I]f the state is in a position to provide for predeprivation process…it must do so." *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). In some cases, though, a pre-deprivation process is "impracticable" since the public body "cannot know when such deprivations will occur." *Id*. at 518. If a pre-deprivation hearing is impossible, the court must determine whether the plaintiff had an "adequate post-deprivation remedy" for the alleged violation of his interest. *Id*. at 534.

A pre-deprivation hearing would not have been possible here. AISS could not anticipate how or when Dyer would disrupt Board meetings. Thus, providing Dyer with a pre-suspension hearing was not a feasible option.

Dyer did, however, have an adequate post-deprivation remedy available through the Georgia Open Meetings Act, O.C.G.A. §§ 50-14-1, *et seq.* ("GOMA"). GOMA requires all regularly held meetings of public agencies like AISS and the Board to be open to the public. O.C.G.A. § 50–14–1(b)(1)-(c)(1); *see Slaughter v.*

Brown, 269 Ga. App. 211, 213, 603 S.E.2d 706, 708 (2004) (holding board of education is subject to GOMA). GOMA contains an enforcement provision and grants Georgia superior courts jurisdiction over enforcement suits and the power to grant injunctions or other equitable relief. O.C.G.A. § 50-14-5(a).

If Dyer wished to contest his exclusion from public Board meetings, the GOMA authorized him to file a suit in the Superior Court of Fulton County, claim that his suspension violated his access to public meetings, and, if he prevailed, obtain an injunction against AISS's enforcement of his suspensions. That injunction would have fully cured the alleged procedural deprivation he asserts here. To be sure, in an analogous case, the Northern District of Georgia recognized that GOMA affords an adequate state law remedy for an alleged procedural due process violation resulting from exclusion from a public meeting of AISS officials or the Board. *Scott v. Atlanta Indep. Sch. Sys.*, No. 1:14-CV-01949-ELR, 2015 WL 12844305, at *4-5 (N.D. Ga. Sept. 14, 2015). Because he had a post-deprivation remedy available to him, the district court properly found that AISS did not violate his right to procedural due process.

III. The District Court Did Not Err in Relying on the February 6, 2018 Letter.

Dyer falsely claims that AISS doctored the February 2018 suspension letter and tricked him into authenticating it during his deposition. Appellant's Br., p. 5. The evidence does not support Dyer's allegations. And Dyer has not explained why

the supposed discrepancy between the two letters justifies a reversal of the district court's decision.

a. AISS did not falsify evidence.

Dyer falsely accuses AISS of doctoring evidence. Appellant's Br., p. 5. During his deposition, AISS presented a February 6, 2018 letter to Dyer for his review, and Dyer testified that he recognized the letter. ECF No. 33-1 at 150, 261-270. Dyer answered multiple questions about the letter but never suggested that it was either inauthentic or that another version of the letter existed. *Id*. at 150-151.

His story changed after his deposition. In his response to AISS's Motion for Summary Judgment, Dyer presented a different letter, dated February 8, 2018. ECF No. 36 at 19. The February 8 differed from the February 6 letter in that the former prohibited Dyer from contacting any AISS employee or Board member during his suspension. ECF No. 33-1 at 261-263; ECF No. 35-2 at 25-26. Dyer claims that because the two letters differ, AISS must have falsified the February 6 letter. ECF No. 36 at 19.

Dyer's allegation is meritless. In his own deposition, Dyer testified that he was familiar with the February 6, 2018 letter:

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

ECF No. 33-1 at 150, 261-270. Dyer never stated during his deposition that the letter he examined at his deposition differed from the version of the letter he received. And Dyer did not submit a declaration or point to any other testimony establishing that the February 8, 2018 letter is the correct copy. Instead, Dyer waited until responding to AISS's Motion for Summary Judgment—two months after his deposition—to question whether the version of the letter he authenticated under oath was the correct one.

Dyer has still presented no evidence showing that AISS tampered or falsified evidence to support its Motion for Summary Judgment, and AISS vehemently denies the suggestion of such wrongdoing. AISS simply relied on Dyer's testimony that he recognized and received the suspension letter dated February 6, 2018. The February 6, 2018 letter is the only authenticated letter in the record, and Dyer was the one who

authenticated it. He cannot authenticate the letter in one moment and claim that it is false in the next.

b. <u>The district court's decision would be the same regardless of the letter on which it relied.</u>

The district court acknowledged that the parties dispute whether the February 6 or February 8 letter is the correct letter. ECF No. 42 at 19, n. 6. But the district court relied on the February 6 letter because Dyer "authenticated and acknowledged receipt of the February 6 letter during his deposition." *Id*. Neither the district court nor this Court should rely on an unauthenticated letter rather than one that Dyer himself testified he received.

Dyer does not explain how the district court's reliance on the February 6 letter altered its decision to grant summary judgment on his First Amendment claim. Both the February 6 and February 8 versions of the letter banned Dyer from speaking at Board meetings and from entering AISS property. Although the February 8 letter prohibited Dyer from communicating with Board members and AISS employees, such a restriction would still pass constitutional muster under the First Amendment because it would still be narrowly tailored to achieve AISS's interest. Further, Dyer could have leveled the same slur-laden attacks against the Board through alternative channels of communication. His flyers have garnered the attention of a local news organizations, and he has a wide platform through television and social media to gain the Board and AISS's attention. ECF No. 33-1 at 80, 235-237.

In short, there is no evidence that AISS falsified the letter. Rather, Dyer himself authenticated the letter during his deposition and he has not argued why the district court's decision would be different depending on which letter the court reviewed. For these reasons, this Court should disregard Dyer's accusations. The district court properly relied on evidence that Dyer authenticated This Court should not reverse the district court's judgment because Dyer now questions his own testimony.

CONCLUSION

Dyer used some of the most—if not *the* most—racially offensive language in the English language. And he used these epithets in reference to AISS employees and students in their presence at public meetings. AISS tried to curtail his speech with less restrictive means, but they did not succeed. As a result, AISS limited his speech so that it could conduct orderly meetings. If Dyer was unhappy with the suspensions, he could have sought a hearing through the Georgia Open Meetings Act, but he did not do so. Or, he could have simply stopped using racial slurs at Board of Education meetings.

The district court did not err in granting summary judgment on Dyer's First or Fourteenth Amendment claims. Thus, AISS asks this Court to affirm the district court's decision.

Respectfully submitted this 21st day of October, 2020.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6,449 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in size-14 Times New Roman.

Respectfully submitted this 21st day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **APPELLEE'S RESPONSE BRIEF** by depositing a copy of same in the United States Mail in a properly addressed envelope with sufficient postage affixed thereto to ensure delivery to the following:

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This 21st day of October, 2020.

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