APPENDIX
APPENDIX A

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-10115
Non-Argument Calendar

D.C. Docket No. 1:18-cv-03284-TCB
NATHANIEL BORRELL DYER,
Plaintiff - Appellant,
versus
ATLANTA INDEPENDENT SCHOOL SYSTEM,
Defendant - Appellee.

Appeal from the United States District Court for the
Northern District of Georgia
(March 22, 2021)

Before MARTIN, BRANCH, and LAGOA, Circuit Judges.
PER CURIAM:

Nathaniel Dyer, *pro se*, appeals the district court's order granting summary judgment in favor of Atlanta Independent School System ("AISS"). Dyer filed this action against AISS asserting claims under the First and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, as well as three state-law tort claims. After dismissing the tort claims, the district court granted summary judgment in favor of AISS on Dyer's § 1983 claims. Finding no violations of his constitutional rights, we affirm.

I. FACTUAL AND PROCEDURAL HISTORY

Since 2006, Dyer, a graphic designer by trade, worked directly with schools in the Atlanta area and also operated independent youth organizations, which provided services to children in the Atlanta area. His working relationship with the Atlanta school system, however, soured sometime

in 2007 when he allegedly witnessed administrators at one middle school engaging in "unethical and unprofessional manner which violated federal laws." Dyer took his concerns directly to AISS.

AISS holds various types of monthly meetings, including "community meetings." The community meetings are open to the public where, at reserved times, members of the community can offer "input . . . regarding policy issues, the educational program, or any other aspect of AISS business except confidential personnel issues." If a member of the community wishes to speak during the public-comment portion, he or she must register in person prior to the meeting, and the chairperson must recognize the person before he or she may speak. To maintain proper decorum and avoid disruptive meetings, AISS established several policies with which members of the public in attendance are expected to comply. For example, AISS board policy BC-R(1) prohibits those in attendance from applauding, cheering, jeering, or engaging in speech that "defames individuals or stymies or blocks meeting progress." Such conduct may even be "cause for removal from the meeting or for the board to suspend or adjourn the meeting."

Sometime in 2009, Dyer's relationship with AISS devolved from vocal criticism to ugly opposition. For instance, outside of one of the community meetings, he distributed a flyer depicting the former superintendent of AISS in a Ku Klux Klan robe. In his own words, this flyer was meant to be a way of engaging in "psychological warfare." Doubling-down on that effort, he created other flyers depicting AISS board members as flying monkeys and clowns. The timeline is not particularly clear, but these actions began years—up to a decade—of heated, over-the-top rhetoric from Dyer directed towards the AISS board members.

The situation reached a tipping point when Dyer directed racially-charged, derogatory epithets like the "N-word," "coons," and "buffoons" toward the board at the January 2016 community meeting. This episode marked the beginning of Dyer receiving multiple suspensions from

speaking at, and later attending, the AISS community meetings. In a January 15, 2016, letter, AISS suspended Dyer from speaking at meetings for six months. Nonetheless, he attended the February 2016 community meeting, where he was not permitted to speak and was escorted to his seat by police. After this first suspension ended in July 2016, AISS again suspended Dyer in October 2016, this time for over a year, for "inappropriate and disruptive behavior" at the October 2016 meeting. AISS warned him that similar conduct in the future would result in a permanent suspension of his speaking privileges at community meetings. Dyer's third suspension came in February 2018 after AISS claimed he again used racial slurs at a prior meeting. Under the terms of this last suspension, Dyer could not enter AISS property or communicate with any AISS employee for a year. He contends that he was not told how to, or even if he could, contest any of the suspensions.

Dyer filed a five-count complaint in state court in Fulton County, Georgia, alleging violations of the First Amendment and due process under the Fourteenth Amendment under 42 U.S.C. § 1983, as well as three state-law claims of slander, discrimination and retaliation, and harassment. He sought declaratory relief, an injunction prohibiting AISS from enforcing its no-trespass warning, $10,000,000 in damages, and a public apology. AISS removed the action to federal court and then moved to dismiss the complaint for failure to state a claim, raising several arguments not relevant to this appeal. The district court agreed in part, determining that Dyer's claims predating June 4, 2016, were barred by the two-year statute of limitations and that his state law claims were barred by sovereign immunity. AISS then moved for summary judgment on Dyer's constitutional claims. In its view, the community meetings AISS holds are "limited public forums" because participation was limited to registered speakers and topics relating to the school system. Although conceding Dyer's offensive speech was "protected" under the First Amendment, AISS argued

there was no genuine dispute that, as a matter of law, its suspending Dyer from attending community meetings was lawful because that offensive speech was disruptive and violated its policies on proper decorum. In other words, AISS insisted that it removed Dyer from its community meetings "not because it disagreed with Dyer's message, but because it regarded his use of racially-insensitive language to be . . . *disruptive* to the meeting." (emphasis added). As for Dyer's due process claim, AISS argued that the claim failed because it was duplicative of the First Amendment claim.

In support of its motion, AISS submitted a declaration from its deputy superintendent. Among many other things, the deputy superintendent stated that, at the October 16 community meeting, Dyer refused to leave the speakers' podium when instructed to do so. Following Dyer's refusal, police officers escorted Dyer from the meeting, and Dyer continued to shout and curse outside of the meeting room. AISS also submitted the three suspension letters: one from January 15, 2016, one from October 11, 2016, and one from February 6, 2018. In the January 15 letter, AISS told Dyer that he was suspended because his use of racial slurs was "outside the bounds [of] decorum," "offensive," and "failed to advance any meaningful discourse." In the October 11 letter, AISS stated that Dyer's use of the word "sambos" was "completely outside the bounds of civility," "offensive," and "failed to advance any meaningful discourse." AISS informed Dyer that he was suspended from participating in meetings or entering AISS property until December 31, 2017. AISS also told Dyer that, if he entered school property, he would be arrested for trespassing and warned him of additional consequences if his conduct continued, including permanent suspension of his privilege to speak during meetings. In the February 6 letter, AISS again suspended Dyer from meetings and prohibited him from entering school property because of his "inappropriate and disruptive behavior." The suspension and trespass warning were for the remainder of the term of the letter's author, and the letter again told Dyer that, if he entered

school property, he would be arrested. It stated that his flyers were offensive and "failed to advance any meaningful discourse."

On December 5, 2019, the district court granted AISS's motion for summary judgment on both remaining constitutional claims. For the First Amendment claim, the district court found that AISS's restrictions on Dyer were content-neutral, as AISS "cut off Dyer's speech because he expressed himself in a hostile manner that disrupted meeting progress." The district court also found the restrictions were narrowly-tailored to advance a substantial government interest, as AISS had a substantial government interest in "preserving meeting decorum" and the suspensions were necessary because Dyer continued to disrupt meetings when he was on school property, regardless of whether he was able to speak or enter the meeting room. As to the Fourteenth Amendment claim, the district court found that, although Dyer had a protected liberty interest in attending the AISS community meetings, AISS had no requirement to provide him a *pre*-deprivation remedy because he had an adequate *post*-deprivation remedy in the Georgia Open Meetings Act ("GOMA"). *See* Ga. Code Ann. § 50-14-1. Therefore, the district court found that there was no procedural due process violation. Dyer timely filed his notice of appeal.

II. STANDARD OF REVIEW

We review *de novo* a district court's order granting summary judgment. *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1185 (11th Cir. 2002). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011). We view all evidence and all reasonable inferences drawn therefrom in "a light most favorable to the non-moving party." *Guideone Elite Ins. Co. v. Old Cutler Presbyterian*

Church, Inc., 420 F.3d 1317, 1325–26 (11th Cir. 2005) (quoting *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998)).

III. ANALYSIS

On appeal, Dyer argues that the district court erred in granting summary judgment in favor of AISS on his First Amendment and Fourteenth Amendment claims brought under 42 U.S.C. § 1983.[1] We find Dyer's arguments without merit.

A. The First Amendment Claim

Dyer argues that the district court erred as a matter of law when it found that AISS had not violated his right to free speech under the First Amendment. Specifically, he contends that AISS placed restrictions on his speech that

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[1] Dyer further asserts that the district court erred by not finding that AISS had "altered and falsified evidence in violation of Georgia Code § 16-10-20.1 and ABA Model Rule of Professional Conduct Rule 3.3.(a)(3)." Specifically, Dyer contends that there is a dispute between the February 6 letter and a different letter dated February 8. It appears that Dyer presumed that the February 6 letter shown to him at his deposition was actually the February 8 letter and AISS deliberately misled him. He then argued to the district court, and only passingly here on appeal, that AISS "falsified" this evidence.
While we construe pro se briefs liberally, *Harris v. United Auto. Ins. Grp., Inc.*, 579 F.3d 1227, 1231 n.2 (11th Cir. 2009), *pro se* parties are still required to follow the rules of court, *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008). "A party fails to adequately 'brief' a claim when he does not 'plainly and prominently' raise it." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–82 (11th Cir. 2014) (quoting *Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 530 (11th Cir. 2013)). This occurs when the party only casually raises an issue, makes passing reference to the claim, or fails to elaborate the argument in the brief's argument section. *Id.; see also* Fed. R. App. P. 28(a)(8)(A) (explaining that a brief must contain an "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). Beyond a conclusory assertion, Dyer fails to adequately explain—and cite to legal authority demonstrating—how AISS falsified evidence and how that alleged falsification constituted violations of section 16-10-20.1 and rule 3.3(A)(3). We therefore deem this argument abandoned.

were neither content-neutral nor narrowly tailored. He also argues that the speech and conduct that AISS complained of were "satire" and protected under the First Amendment. As an initial matter, we will address only Dyer's first claim—whether AISS's restrictions were content-neutral. We offer no comment on the issues of narrow-tailoring or satire because Dyer has failed to brief the issue adequately or failed to raise it below to the district court. See *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–82 (11th Cir. 2014) (noting that "[a] party fails to adequately 'brief' a claim when he does not 'plainly and prominently' raise it."); *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (explaining that an issue raised for the first time in an appeal will not be considered by this court).

Although the First Amendment protects individuals' freedom of speech, there are certain limitations to that right. See *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989). Indeed, "the First Amendment does not guarantee the right to communicate one's 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). For instance, it is "well settled that the government need not permit all forms of speech on property that it owns and controls." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

Because Dyer's claim is based on private speech on government property, we apply the three-step analysis established by the Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985). First, because not all speech is protected, we must determine if Dyer engaged in speech protected by the First Amendment. *Id.* at 797. Second, if that speech was protected, "we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* Finally, we must determine whether AISS suspending Dyer from its public meetings satisfied "the requisite standard" that is applied to the forum identified in step two. Id. The first and second steps are uncontested.

AISS concedes Dyer's speech was protected by the First Amendment, and we agree. *See Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). We also agree with the parties' other concession—that an AISS community meeting is a "limited public forum." *See Cambridge Christian Sch. Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1237 (11th Cir. 2019) ("[W]e have identified the public-comment portions of school board meetings, among other things, as limited public forums.").

We next turn to the proper standard against which AISS's restrictions must be assessed. "The government may restrict access to limited public fora by content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993)). "[A] content-neutral ordinance is one that 'places no restrictions on . . . 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) (second alteration in original) (quoting *Hill v. Colorado*, 530 U.S. 703, 723 (2000)).

Here, the AISS board policies outlining how someone may speak at a community meeting, prohibiting disruption, and requiring decorum are content-neutral policies. We agree with the district court's determination that AISS did not regulate Dyer's speech based on its content, i.e., because it was offensive. Rather, AISS regulated Dyer's offensive speech because it was disruptive. The letters sent by AISS explained that his suspensions were the result of his conduct "fail[ing] to advance any meaningful discourse." The fact that AISS also told Dyer that his comments were "abusive, abhorrent, [and] hate-filled" was merely support

for the suspensions for disruptive and unruly behavior; the offensiveness of the comments themselves was not the basis for his suspension. We have made this distinction before, and we believe it is a meaningful one. *See, e.g., Jones*, 888 F.2d at 1332 ("The district court found that Jones had complied with the time, place and manner restrictions imposed on the meeting and was silenced because of the content of his speech. We disagree. In our opinion, the mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion.").

Moreover, AISS's actions seem justified as, by Dyer's own admission, his aggressive and offensive choice of words were calculated to "send a message" and engage in "psychological warfare." Removing Dyer for his disruptive behavior and lack of proper decorum at an AISS community meeting was content-neutral and, thus, permissible. The district court therefore did not err in granting AISS summary judgment as to the First Amendment claim.

B. The Fourteenth Amendment Claim

Regarding his Fourteenth Amendment claim, Dyer argues the district court erred as a matter of law when it found he had an adequate post-deprivation remedy in the form of the GOMA. We disagree.

The Fourteenth Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The most basic tenets of procedural due process are notice and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). To state a claim for such a violation, a plaintiff must show three elements: "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Arrington v. Helms*, 438 F.3d 1336, 1347 (11th Cir. 2006) (quoting *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003)). It is undisputed that AISS's actions constitute state action.

As for the protected liberty or property interest, the

district court noted that Dyer does not expressly argue or identify any such interest. But, again, liberally construing this *pro se* appeal, we interpret his claim as alleging a deprivation of a liberty interest in attending public school board meetings. We, however, have never recognized such a liberty interest. Although the district court held that such an interest is protected, relying on, *Cyr v. Addison Rutland Supervisory Union*, 955 F. Supp. 2d 290, 295–96 (D. Vt. 2013), we need not reach this issue today because Dyer's due process claim fails on the third element—there was an adequate post-deprivation remedy available.

Dyer argues that "some kind of a hearing" is required "before the State deprives a person of liberty or property." *See Zinermon v. Burch*, 494 U.S. 113, 127 (1990). But this is not necessarily true all of the time. The Supreme Court has recognized that a pre-deprivation process may be "impracticable" in some cases, as a public body cannot always know when a deprivation will occur. *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). If a pre-deprivation hearing is impracticable, we must determine whether the plaintiff had an "adequate post-deprivation remedy" for the alleged violation. *Id.* at 534; *see also Goss v. Lopez*, 419 U.S. 565, 582 (1975) (holding that post-deprivation remedies may be constitutionally adequate in situations where prior notice and hearing cannot be provided, including situations where there is a continuing danger to persons or property or an ongoing threat of disruption).

AISS argues that a pre-deprivation hearing would not have been possible here because it could not have anticipated how or when Dyer would disrupt its community meetings. We agree. Here, similar to the situation in Goss, pre-deprivation remedies were not practicable as AISS could not have predicted when and how Dyer would act at the community meetings and because Dyer posed an ongoing threat of disruption. Moreover, Dyer had an adequate post-deprivation remedy in state law under GOMA, which authorizes an individual to file a civil suit when he or she is affected by a violation of the statute, including the requirement that government meetings be

open to the public. See Ga. Code Ann. § 50-14-1. Through GOMA, Dyer could seek an injunction or other equitable relief to challenge his trespass notice. *See id.; see also McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (holding that an adequate state remedy providing for a post-deprivation process is sufficient to cure a procedural deprivation). Because a pre-deprivation remedy was impracticable in this situation and because GOMA provides an adequate post-deprivation remedy, Dyer's Fourteenth Amendment claim fails.

IV. CONCLUSION

For the reasons discussed, we affirm the district court's order granting summary judgment in favor of AISS.

AFFIRMED.

APPENDIX B

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

NATHANIEL BORRELL DYER,
Plaintiff,
v.
ATLANTA INDEPENDENT SCHOOL SYSTEM
(Atlanta Public Schools),
Defendant.

CIVIL ACTION FILE
NO. 1:18-cv-3284-TCB

O R D E R

This case comes before the Court on the motion [34] for summary judgment of Defendant Atlanta Independent School System a/k/a Atlanta Public Schools ("APS").

I. Background

Plaintiff Nathaniel Dyer is a graphic designer by trade but spends much of his time as a community advocate for issues related to children and education in the Atlanta area. Over the past decade or more, Dyer has repeatedly found himself at odds with Atlanta schools and their leadership.

A significant incident in this rocky relationship occurred in 2006, while Dyer was volunteering at John F. Kennedy Middle School. He alleges that APS caused him to be prosecuted for false arrest after he broke up a violent fight between two students. The charges were eventually dismissed, but Dyer was no longer allowed to volunteer at the school.

After this disruptive episode, Dyer remained engaged with APS. He considered it his mission to police APS and

its officials for "federal violations and problems plaguing the district . . . ." [1-1] at ¶ 12.

In 2009, Dyer distributed a flyer that depicted former interim superintendent of APS Erroll Davis in a Ku Klux Klan robe. Dyer argues that Davis's role in reassigning students to different schools is akin to the activities of the KKK and contends that he is engaging in "psychological warfare" to draw the public's attention to the APS system. [82] at 21–24. Dyer would subsequently make other flyers containing inflammatory rhetoric. One depicts members of the APS board of education as flying monkeys; another calls the APS board members buffoons and clowns.

Dyer's activism continued to get him in trouble with APS and its officials. In addition to his messaging via printed flyers, Dyer would deliver his criticisms of APS during public comment sessions at APS board meetings. Though Dyer attended many school board meetings, three are particularly relevant.

In January 2016, Dyer attended an APS school board meeting in which he admits to using the words "nigger," "coons," and "buffoons," all in reference to the board members. The board subsequently suspended Dyer from attending board meetings until July 2016, noting that the comments failed to advance any meaningful discourse at the meetings and that the language was inappropriate—in the board's view—to use in front of the children who were present. In the letter informing Dyer of his suspension, he was warned that if he spoke at another meeting using similar language, he might be permanently suspended.[1]

After the conclusion of his first suspension, Dyer attended another board meeting on October 10, 2016. During the public comment portion of that meeting,

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[1] At the motion-to-dismiss stage of this litigation, the Court concluded that the two-year statute of limitations barred Dyer's claims predating June 4, 2016. Accordingly, the Court's review of Dyer's First Amendment claim is limited to violations occurring after June 4. Because a portion of Dyer's suspension following the January 15 letter falls within the applicable limitations period, however, the Court will also consider that portion of Dyer's first suspension.

he used the word "Sambos"[2] in reference to children at APS. Arguing that he was not given an opportunity to finish or expound upon his statement before being asked to step down, Dyer refused to leave the podium. Police were ultimately notified, and they escorted Dyer from the meeting amidst his shouting.

The next day, Dyer received a letter informing him that he had been suspended from speaking at APS board meetings for fourteen months, through December 31, 2017. He was warned that similar conduct in the future would result in a permanent suspension of speaking privileges. The letter also served as a trespass warning, instructing Dyer not to set foot on APS property until January 1, 2018, or risk being arrested for trespassing.

On February 5, 2018, Dyer attended another board meeting. This time, Dyer was, in his word, "harassed" by resource officers for attending. [1-1] at ¶ 23. Dyer did not speak during that board meeting, but he passed out photoshopped fliers containing the tagline "unnigged coming soon" and a photo of APS Superintendent Meria J. Carstarphen wearing a football jersey superimposed with the word "FALCOONS." The next day, Dyer received a suspension letter that accused him of using "racist and hate-filled epithets," [1-1] ¶ 47, that "fail[ed] to advance any meaningful discourse." [34-6] at 45. He was suspended for the remainder of board chair Jason Esteves's term and warned again that he would be arrested for trespassing if he stepped onto APS property during that same period. Dyer was also warned a second time that any further such conduct might result in a permanent suspension of his speaking privileges at board meetings. On June 7, Dyer filed this suit under 42 U.S.C. § 1983 against APS for violations of his right to free speech under the First

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[2] At times, Dyer does not deny using the term "Sambos." [34-6] at 22–24. At other times, he insists that he instead used the term "Samboed." [36] at 33. To the extent Dyer is arguing that his conversion of the term into the past tense cleanses it of its racial undertones, the Court is unconvinced.

Amendment (count 1) and right to procedural due process under the Fourteenth Amendment (count 2). He also alleged state-law claims, but the Court dismissed the state-law claims in its order [22] granting in part and denying in part APS's motion [2] to dismiss for failure to state a claim. Now, APS has moved [34] for summary judgment. Dyer has filed objections [35].[3]

II. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). There is a "genuine" dispute as to a material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). The first is to produce "affirmative evidence demonstrating

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[3] As part of his response to APS's motion for summary judgment, Dyer provided the Court with his "Statement of Undisputed Material Facts . . . in support of its [sic] opposition and cross-motion for summary judgment." [37], [38] at 1. Because Dyer makes no other mention of a cross-motion for summary judgment and offers no argument or evidence in support of such a motion, the Court will treat Dyer's Statement of Undisputed Material Facts solely as support for his opposition to APS's motion, rather than as a separate cross-motion.

that the nonmoving party will be unable to prove its case at trial." *Id.* at 1438 (citing *Celotex Corp.*, 477 U.S. at 331). The second is to show that "there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex Corp.*, 477 U.S. at 324). If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. Id. At this point, the nonmoving party must "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (quoting *Celotex Corp.*, 477 U.S. at 324).

III. Discussion

Dyer's remaining claims concern two alleged constitutional violations brought pursuant to § 1983. Section 1983 creates no substantive rights. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Rather, it provides a vehicle through which an individual may seek redress when his federally protected rights have been violated by an individual acting under color of state law. *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994).

To state a claim for relief under § 1983, a plaintiff must satisfy two elements. First he must allege that an act or omission deprived him of a right, privilege, or immunity secured by federal law. *Hale v. Tallapoosa Cty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). Second, he must allege that the act or omission was committed by a state actor or a person acting under color of state law. *Id.*

Here, the issue of state action is uncontested, so the Court need only consider whether Dyer was deprived of his federal constitutional rights.

Dyer first contends that APS's suspensions infringed upon his First Amendment right to free speech. Second, he contends that his rights were suspended without due process of law as required by the Fourteenth Amendment.

A. First Amendment Claim

Dyer alleges that APS violated his First Amendment right to free speech by excluding him from public property and instructing him not to communicate with APS officials during the suspensions.

First Amendment claims proceed in three steps. First, the Court determines whether Dyer's "speech [was] protected by the First Amendment ..." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). If so, the Court next "must identify the nature of the forum" in which Dyer spoke. *Id.* Then the Court asks "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.* For a limited public forum, the standard is reasonableness. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

APS does not contest in its motion for summary judgment that Dyer's speech is protected, and the parties do not dispute that the school board meetings were limited public fora. Accordingly, the operative question is whether APS's regulation of Dyer's speech was reasonable.

To be reasonable, restrictions on speech in limited public fora must be "content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Crowder v. Hous. Auth. of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993). The restrictions must also "leave open ample alternative channels for communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The Court will address each of these requirements in turn.[4]

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[4] Dyer also urges that the restrictions on his speech are a prior restraint. A prior restraint is a type of content-based restriction on free speech that occurs when the government has "den[ied] access to a forum before the expression occurs." *Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004) (quoting *United States v. Frandsen*, 212 F.3d 1231, 1236–37 (11th Cir. 2000)). Prior restraints are disfavored because "the enjoyment of protected expression [becomes] contingent upon the approval of government officials." *White v. Baker*, 696 F. Supp. 2d 1289, 1306 (N.D. Ga. 2010) (citing *Near v. Minnesota*, 283 U.S. 697, 711–12 (1931)). Courts in this circuit have found that banning a member of the public from attending or speaking at meetings for a period of less than a year because of past

1. Content Neutrality

"The restriction of speech is content-neutral if it is justified without reference to the content of the regulated speech." *Harris v. City of Valdosta, Ga.*, 616 F. Supp. 2d 1310, 1322 (M.D. Ga. 2009) (internal quotation marks and citation omitted). "In determining whether a restriction is content-neutral, the Court's controlling consideration is the purpose in limiting the Plaintiffs' speech in a public forum." *Id.* (internal quotation marks and citation omitted). "As long as a restriction serves purposes unrelated to the content of the expression, it is content-neutral even if it has an incidental effect upon some speakers or messages but not others." *Id.* (internal quotation marks and citation omitted).

Here, APS stopped Dyer from speaking at meetings because his use of racial epithets "offended the Board, staff, and audience members." [34-2] at 6.

While school officials cannot restrict public comments simply because the content is offensive or controversial, *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 509 (1969) (finding that school officials' decision to prohibit students from wearing black armbands in protest of the Vietnam War was a First Amendment violation), if such speech causes a material disruption, a substantial disorder, or invades of the rights of others, that speech is "not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. Here, APS officials were not regulating Dyer's speech

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commentary is a prior restraint. *See Brown v. City of Jacksonville, Fla.*, No. 3:06-cv-122-J-20MHH, 2006 WL 385085, at *4 (M.D. Fla. Feb. 17, 2006) (citing *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 507 (6th Cir. 2001)).

However, a prior restraint is not per se unconstitutional. *Frandsen*, 212 F.3d at 1237. Instead, a prior restraint must "meet the requirements for reasonable time, place, and manner restrictions of protected speech in public fora." *Coal. for the Abolition of Marijuana v. City of Atlanta (CAMP)*, 219 F.3d 1301, 1318 (11th Cir. 2000). Accordingly, the Court's conclusion regarding the reasonableness of the restrictions on Dyer's speech is also determinative of Dyer's claim regarding APS's use of a prior restraint.

because they were offended by and attempting to silence his criticism of APS. Other attendees had previously expressed criticism of APS without incident. Dyer himself before and since the incidents in question—has been allowed to freely criticize APS policy decisions and board members when he has done so without the use of racial slurs.

Here, however, Dyer admits that he attempted to "send a message" by engaging in "psychological warfare" that involved the use of racial slurs. [33-1] at 74, 82. Accordingly, APS cut off Dyer's speech because he expressed himself in a hostile manner that disrupted meeting progress. *See Arnold v. Ulatowski*, No. 5:10-cv-1043 (MAD/ATB), 2012 WL 1142897, at *5 (N.D.N.Y. Apr. 4, 2012) (finding that a disruption occurred where the plaintiff admitted he was speaking loudly and angrily), *cf. Hammond v. S. Carolina State Coll.*, 272 F. Supp. 947 (D.C.S.C. 1967) (constraint of protest on state college campus was unconstitutional because the protest was orderly and non-disruptive).

Thus, APS's restriction on Dyer's free speech was content-neutral. *See Tinker*, 393 U.S. at 509; *Barnes v. Zaccari*, No. 1:08-cv-77-CAP, 2008 WL 11339923, at *6 (N.D. Ga. Nov. 19, 2008) (finding that a restriction on free speech in a school was appropriate where "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"); *Kirkland v. Luken*, 536 F. Supp. 2d 857, 875–76 (S.D. Ohio 2008) (holding that there was no First Amendment violation where the speaker's microphone was turned off and the speaker was removed from a public hearing for using inappropriate language and shouting).

2. Narrowly Tailored to Advance a Substantial Interest

Even if content-neutral, the restrictions on Dyer's speech must also be narrowly tailored to advance a substantial government interest.

Courts have generally found that there is a strong government interest in preserving decorum at board

meetings. *See Kirkland*, 536 F. Supp. 2d at 876 (finding that "[t]he interest in conducting orderly meetings of the City Council was a compelling state interest"); *Scroggins v. Topeka*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) ("[T]he Council's interest in conducting orderly, efficient, and dignified meetings and in preventing the disruption of those meetings is a significant governmental interest."). In schools, this interest is designed to prohibit "the sort of uninhibited, unstructured speech that characterizes a public park." *Lowery v. Jefferson Cnty. Bd. of Educ.*, 586, F.3d 427, 432 (6th Cir. 2009).

APS codified its interest in orderly meetings through board policy BC-R(1), which provides that "[a]pplause, cheering, jeering, or speech that defames individuals or stymies or blocks meeting progress will not be tolerated and may be cause for removal from the meeting . . . ." [34-3] at 3. Such rules of decorum "serve[] the important government interest of preventing disruptions to its meetings." *Scroggins*, 2 F. Supp. 2d at 1373.

Although Dyer appears to concede that his removal served APS's legitimate interest in conducting an orderly and efficient meeting, he attacks the facial constitutionality of BC-R(1). He contends that it establishes an unconstitutional prohibition on critical speech because Defendants describe it in their briefing as prohibiting a speaker from "mak[ing] defamatory statements about an [APS] official" [34–3] at 27.

When ripped out of context, this fragment of APS's statement could be read to suggest that the policy prohibits speakers from engaging in critical commentary about board members.[5] However, APS's statement regarding BC-R(1)

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[5] Dyer appears to argue that prohibiting defamation is equivalent to prohibiting a personal attack on an individual. Defamation is not protected by the First Amendment, *see United States v. Stevens*, 559 U.S. 460, 468–69 (2010), so a board policy prohibiting defamation does not give rise to a constitutional claim. However, district courts have found that school board policies prohibiting personal attacks on board members violate the First Amendment because the policies distinguish

reads in full as follows:

> Nathaniel Dyer has spoken at numerous community meetings, often making disparaging remarks about [APS]'s policy decisions and the performance of various [APS] officials and Board members. [APS] did not stop Mr. Dyer from making those comments. However, participants at public comments may not use certain types of speech. *For instance*, a speaker could not use profanity, make defamatory statements about an [APS] official . . . ."

Id. (emphasis added). In other words, the policy prohibits defamatory statements—such as Dyer's—that concern APS officials because the policy prohibits *all* defamatory statements. The Supreme Court has found that regulating defamatory speech is permitted under the Constitution. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004).

Accordingly, the Court finds that APS board policy BC-R(1) is constitutional and that APS had a substantial government interest in preserving meeting decorum.

Dyer also argues that his suspensions constitute an overbroad, "categorical ban," rather than being narrowly tailored. [35–1] at 13.

For a restriction on speech to be narrowly tailored to achieve a substantial government interest, the restriction "need not be the least restrictive or least intrusive means of" serving the interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Instead, the government is prohibited from "regulat[ing] expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* at 799. Here, the record reflects that when Dyer was asked to refrain from using racial slurs

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unfavorable comments from neutral or favorable ones. *See MacQuigg v. Albuquerque Pub. Sch. Bd. of Educ.*, No. 12-1137 MCA/KBM, 2015 WL 13659218, at *4 (D.N.M. Apr. 6, 2015); *see also Moore v. Asbury Park Bd. of Educ.*, No. Civ.A.05–2971 MLC, 2005 WL 2033687, at *11–13 (D.N.J. 2005).

during meetings, he responded by shouting at the board and continuing to cause a disruption. In the October 2016 meeting, police were ultimately required to remove Dyer from the meeting after he refused to leave the podium; even after he was removed from the meeting room, he does not dispute that he continued to cause a disruption by shouting outside of the room. When he was prevented from speaking during a subsequent meeting, he passed out flyers containing racial slurs. Because Dyer continued to disrupt meetings when he was on school property, regardless of whether he was permitted to speak or enter the meeting room, his suspensions were necessary to preserve meeting decorum. Accordingly, APS's suspensions of Dyer were narrowly tailored to serve APS's legitimate interest in maintaining order during the meetings.

3. Alternative Channels for Communication

The last requirement for a constitutionally valid restriction is that there remain ample alternative channels of communication. *See Jones v. Heyman*, 888 F.2d 1328, 1334 (11th Cir. 1989). Dyer operated a public-access television show throughout his suspensions from APS board meetings. He acknowledges that the concerns he previously expressed during the public comment portion of the board meetings comprised the "main brunt" of his show and that as a result of the show, he was still able to publicly criticize APS policies and officials. [33-1] at 188. As a result, another channel of communication was available to Dyer during the suspensions.[6]

Accordingly, APS's removal of Dyer and suspension from board meetings did not violate Dyer's right of free speech,

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[6] There may be a dispute regarding APS's February 2019 letter(s) to Dyer. One letter, dated February 6, does not ban all forms of communication with APS officials. The other, dated February 8, does include such a ban. Though Dyer contends in his response to APS's motion for summary judgment that APS "submitt[ed] tampered evidence" and committ[ed] "perjury" by offering the February 6 letter into evidence, [35-2] at 25, he authenticated and acknowledged receipt of the February 6 letter during his deposition.

and the Court will grant Defendants' motion for summary judgment as to Dyer's First Amendment claim.

B. Procedural Due Process Claim

Dyer also makes a procedural due process claim alleging that APS violated his right to due process when it prohibited him from participating in board meetings and issued notices against trespass in its October and February letters.

The Fourteenth Amendment protects individuals from deprivations of life, liberty, or property without due process. U.S. CONST. Amend. XIV, § 1. A procedural due process claim requires a showing of (1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). There is no dispute that APS's involvement constitutes state action. However, the parties debate whether there was a deprivation of a constitutionally protected interest. Dyer also argues that he received inadequate process. The Court will address each of these arguments in turn.

1. Liberty or Property Interest

Dyer does not explicitly argue that APS has deprived him of any interest. However, he appears to contend that APS deprived him of a liberty interest—his First Amendment right to access school property in order to express himself at board meetings. Courts generally have found that members of the public lack a constitutionally protected interest in accessing school property. *See Hannemann v. S. Door Cnty. Sch. Dist.*, 673 F.3d 746, 755–56 (7th Cir. 2012); *Martin v. Clark*, No. 3:10-cv-1500, 2010 WL 4256030, at *2 (N.D. Ohio Oct. 21, 2010) (finding no authority in any jurisdiction "that establishes [that] he has a liberty interest in attending school functions or being on school property"); *Pearlman v. Cooperstown Cent. Sch. Dist.*, No. 3:01-cv-504, 2003 WL 23723827, at *3 (N.D.N.Y. Apr. 6, 2003); *Lovern v. Edwards*, 190 F.3d 648, 655–56 (4th Cir. 1999); *see also Carey v. Brown*, 447 U.S. 455,

470–71 (1980) (finding that state officials can limit access to school grounds "to protect the public from boisterous and threatening conduct that disturbs the tranquility of . . . schools") (quoting *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring)). Accordingly, Dyer has no protected liberty interest in unfettered access to school property.

However, even if Dyer cannot assert a liberty interest in accessing school property generally, the notice against trespass prohibited his participation in a school board meeting on school property. As the Court noted at the motion-to-dismiss stage of this litigation, a district court in an analogous case found that such a trespass notice deprived an individual of a constitutionally protected liberty interest in engaging in public comment at school board meetings. *See Cyr v. Addison Rutland Supervisory Union*, 955 F. Supp. 2d 290, 295–96 (D. Vt. 2013). APS contends that the Court need not reach this issue because Dyer's due process claim is duplicative of his First Amendment claim. APS argues that, because there is no First Amendment violation, the related due process claim is without merit.

Though not in as many words, APS argues in favor of an expansive interpretation of the Graham rule. That rule "requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1988) (internal quotations omitted). While the Supreme Court applies the Graham rule to substantive due process claims only, lower courts are split as to whether the rule should be extended to a procedural due process claim, which "seeks to redress the process by which a liberty or property interest is denied, not the actual denial of that right." *Cyr*, 955 F. Supp. 2d at 295–96; *cf. Ritchie v. Coldwater Cmty. Sch.*, No. 1:11-cv-530, 2012 WL 2862037 (W.D. Mich. July 11, 2012); *Decker v. Borough of Hughestown*, No. 3:09-cv-1463, 2009

WL 4406142, at *4–5 (M.D. Pa. Nov. 25, 2009). Thus, the question becomes: Is Dyer's claim that the trespass notices violated his First Amendment right a substantive or a procedural due process claim?

Substantive due process "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotations omitted). By contrast, a procedural due process claim challenges the fairness of the procedures through which the government denies a constitutionally protected interest in life, liberty, or property. *Id.* at 125. In other words, the deprivation by itself is not unconstitutional, but due process of law is required in order to deprive an individual of such an interest. *Id.* Here, Dyer's allegation clearly asserts a procedural due process claim, and the Court declines to apply the Graham rule to that procedural due process claim. Accordingly, the Court will determine whether APS afforded Dyer constitutionally adequate process in regard to the October and February trespass notices.

2. Constitutionally Adequate Process

A procedural due process claim requires consideration of whether a claimant had an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). As noted above, Dyer appears to argue that he did not receive a meaningful opportunity to contest the two trespass notices/warnings. APS does not argue in its summary judgment briefing that Dyer was afforded an adequate opportunity to be heard, instead relying entirely on its contention that Dyer's First Amendment and due process claims are redundant.

While the Court declines to find that the claims are redundant under the Graham rule, the Court nevertheless disagrees with Dyer's contention that he did not receive an adequate opportunity to contest his notices against trespass.

"Due process is a flexible concept that varies with the particular situation." *Cryder v. Oxendine*, 24 F.3d 175,

177 (11th Cir. 1994); *see also Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) ("The nature of the hearing should vary depending upon the circumstances of the particular case."). As a general rule, if "the state is in a position to provide for predeprivation process," *Hudson v. Palmer*, 468 U.S. 517, 534 (1984), it must do so. However, under "rare and extraordinary" circumstances, *Goss v. Lopez*, 419 U.S. 565, 582 (1975), "postdeprivation remedies made available by the State can satisfy the Due Process Clause," *Parratt v. Taylor*, 451 U.S. 527, 538 (1985), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327, 330 (1986).

One such "rare and extraordinary" circumstance occurs when an individual presents an "ongoing threat of disrupting the educational process." *Castle v. Marquardt*, 632 F. Supp. 2d 1317, 1332 (N.D. Ga. 2009) (citing Goss, 419 U.S. at 582). At the motion-to-dismiss stage of this litigation, the record did not reflect that such an extraordinary circumstance existed.

However, Dyer clearly presented such a threat when he shouted racial slurs in front of children present at the board meetings, accused school board officials of committing crimes akin to murder, and tried to "send a message" that school officials were "just as destructive" as members of the Ku Klux Klan. [33-1] at 79–80; *see Hill v. Bd. of Trs. of Mich. State Univ.*, 182 F. Supp. 2d 621, 630 (W.D. Mich. 2001) (approving a student's suspension with only a post-deprivation remedy where the student was arrested for inciting a riot). Consequently, a post-deprivation remedy is all that is required.

Dyer had such a post-deprivation remedy available to him through the Georgia Open Meetings Act ("GOMA"), O.C.G.A. § 50-14-1 et seq. Section 50-14-1 authorizes an individual to file a civil suit when he or she is affected by a violation of GOMA, such as the requirement that government meetings be open to the public. Through GOMA, Dyer could seek an injunction or other equitable relief to challenge his trespass notice. *See Scott v. Atlanta Indep. Sch. Sys.*, No. 1:14-cv-01949-ELR, 2015 WL

12844305, at *4–5 (N.D. Ga. Sept. 14, 2015).

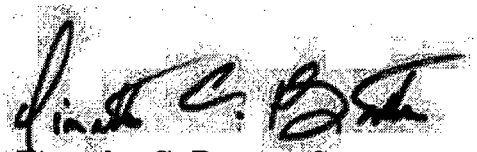
Thus, an adequate state remedy existed to provide Dyer with an opportunity[7] to contest the notices against trespass. Such a procedural remedy cures APS's failure to provide Dyer with a post-deprivation hearing, for a procedural due process claim brought pursuant to § 1983 can stand only when "the state refuses to provide a process sufficient to remedy the procedural deprivation," *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994).

Accordingly, the Court will grant APS's motion for summary judgment as to Dyer's procedural due process claim.

IV. Conclusion

For the foregoing reasons, Defendants' motion [34] for summary judgment is granted. To the extent that Dyer intended to file a cross-motion [37] for summary judgment, that motion is denied.

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



Timothy C. Batten, Sr.
United States District Judge

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

APPENDIX B

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

NATHANIEL BORRELL DYER,
Plaintiff,
v.
ATLANTA INDEPENDENT SCHOOL SYSTEM
(Atlanta Public Schools),
Defendant.

CIVIL ACTION FILE
NO. 1:18-cv-3284-TCB

O R D E R

This case comes before the Court on the motion [2] of Defendant Atlanta Independent School System a/k/a Atlanta Public Schools ("APS") to dismiss Plaintiff Nathaniel Dyer's complaint for failure to state a claim.

I. Background[1]

Dyer is a graphic designer by trade but spends much of his time as a community advocate for issues related to children and education in the Atlanta area. Over the past decade or more, Dyer has found himself at odds with Atlanta schools and their leadership.

A significant incident in this rocky relationship occurred in 2006, while Dyer was volunteering at John F. Kennedy Middle School. He alleges that APS charged him with disorderly conduct after he broke up a violent fight between two students. The charges were eventually dismissed, but Dyer was no longer allowed to volunteer at that school.

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[1] At the motion-to-dismiss stage, the Court accepts as true all of Dyer's well pleaded allegations.

After this disruptive episode, Dyer remained engaged with APS.

He considered it his mission to police APS and its officials for "federal violations and problems plaguing the district ... "[1-1] ,i 12. He would often deliver his criticisms during public comment sessions at APS school board meetings.

Dyer's activism continued to get him in trouble with APS and its officials. He attended several school board meetings and, based on his conduct at these meetings, was suspended multiple times. The suspensions restricted him from participating in public comment, stepping foot upon any APS property, or communicating with any APS personnel.

The first suspension occurred on January 15, 2016. The suspension letter alleged that Dyer used racial slurs and derogatory terms that violated the rules of decorum for school board meetings. The suspension lasted six months, until July 2016.

Nevertheless, Dyer attended the next meeting, which was on February 1. He was not allowed to speak during the public-comment segment and was, in his words, "harassed" by resource officers for attending. *Id.* ¶ 23.

APS suspended Dyer again on October 11, 2016. He was told this suspension was based, at least in part, on his use of the word "Sambos" to refer to APS students during a public comment session. He does not deny using this term. Instead, he contends he was not given an opportunity to finish or expound upon his statement before being asked to step down. Dyer was led out of the meeting by APS officers while he tried to explain his use of the term.[2] This suspension lasted fourteen months, until December 31, 2017.

On February 8, 2018, APS suspended Dyer a third time. The suspension letter accused Dyer of using

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[2] Dyer avers that several witnesses say they did not hear him refer to children as "Sambos" but appears to admit that he did, in fact, use the word.

"racist and hate-filled epithets," [1-1] ¶ 47, based on photoshopped fliers containing the tagline "unnigged coming soon" and a photo of APS Superintendent Meria J. Carstarphen wearing a jersey superimposed with the word "FALCOONS." Dyer claims he used no racially insensitive language in his verbal comments and that the suspension was based only on the literature distributed at the meeting. The suspension was for one year.

Dyer alleges myriad other ill treatments following from or in addition to the suspensions, all allegedly in retaliation for his self-appointed ombudsman role. For example, he alleges that an APS employee referred to him as "the pedophile," [1-1] at 9, when a parent inquired about him. He was also running for election to the board of education in 2018, but due to the APS suspensions was prohibited from participating in a candidate forum because it was held on APS property.

Dyer brings this suit under 42 U.S.C. § 1983 against APS for violations of his right to free speech under the First Amendment (count 1) and right to procedural due process under the Fourteenth Amendment (count 2). He also alleges claims that the Court construes as arising under state law for slander per se (count 3), discrimination and retaliation (count 4), and harassment (count 5).
APS has moved to dismiss all of Dyer's counts for failure to state a claim.

II. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Chandler*

v. Sec'y of Fla. Dep't of Transp., 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); see also *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324-25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level ... " *Twombly*, 550 U.S. at 555-56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." Id. at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiffs legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Thus, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

The Court liberally construes the facts in favor of Dyer, a pro se plaintiff, in its review of the motion to dismiss. *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

III. Discussion

APS's motion comes in three parts. First, it argues that a number of Dyer's federal claims are barred by the statute of limitations. Second, it argues that it did not violate

Dyer's constitutional rights under the First or Fourteenth Amendments. Third, it argues that Dyer's state-law claims are barred by sovereign immunity. These are taken in turn.

A. Statute of Limitations

APS contends that Dyer's claims are governed by a two-year statute of limitations. Dyer initially argued that Georgia's "discovery rule" applies and that under this rule all of his claims are timely.

However, in his "amended response" [18] in opposition to the motion to dismiss, he "does not dispute that the two-year statute of limitations bars claims predating June 4, 2016." [18] at 5. Accordingly, the Court holds that all claims arising from Dyer's suspensions prior to June 4, 2016 are time-barred.[3]

B. Constitutional Claims Pursuant to Section 1983

Now the Court turns to Dyer's alleged constitutional violations brought pursuant to§ 1983. Section 1983 creates no substantive rights. *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). Rather, it provides a vehicle through which an individual may seek redress when his federally protected rights have been violated by an individual acting under color of state law. *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994).

To state a claim for relief under§ 1983, a plaintiff must satisfy two elements. First, he must allege that an act or omission deprived him of a right, privilege, or immunity secured by federal law. *Hale v. Tallapoosa Cty.*, 50 F.3d

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[3] Even if Dyer did not concede the issue, the Court would conclude that, under federal law, Dyer's contention that Georgia's discovery rule applies is without merit. See Lovett v. Ray, 327 F.3d 1181, 1182 (11th Cir. 2003) (holding that federal law governs the commencement of§ 1983 statute of limitations). Dyer's § 1983 claim began to run at the time when his alleged constitutional violations occurred because a reasonably prudent person with regards for their rights would have known that his rights were violated at that time. *See id.*; *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

1579, 1582 (11th Cir. 1995). Second, he must allege that the act or omission was committed by a state actor or a person acting under color of state law. *Id.* The issue of state action is uncontested, so the Court need only consider whether Dyer was deprived of his federal constitutional rights. Dyer first contends that APS's suspensions infringed his First Amendment right to free speech. Second, he contends he was suspended from school board meetings without due process of law as required by the Fourteenth Amendment.

1. First Amendment

In light of the Court's decision on the statute-of-limitations issue, the Court's review of Dyer's First Amendment claim is limited to violations occurring after June 4, 2016. Thus, the universe of alleged violations includes APS's October 11, 2016 suspension lasting through December 31, 2017, as well as APS's February 8, 2018 suspension lasting through February 8, 2019. Based on these two incidents,[4] the Court considers whether APS violated Dyer's First Amendment rights.

First Amendment claims proceed in three steps. First, the Court determines whether Dyer's "speech [was] protected by the First Amendment ... " *Cornelius v. NAACP Legal Def & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985). If so, the Court next "must identify the nature of the forum" in which Dyer spoke. *Id.* Then the Court asks "whether the justifications for exclusion from the relevant forum satisfy the requisite standard." *Id.*

APS argues that Dyer's speech was not protected by the First Amendment, and that even if it was protected, the restrictions were reasonable. The parties do not dispute that the school board meetings were limited public fora.

a. Protected Speech

APS argues, and Dyer contests, that his speech at the school board meetings was not protected by the First

[4] It is also possible that a portion of the January 15, 2016 suspension may fall within the applicable limitations period.

Amendment. First, APS alleges that Dyer's reference to "Sambos" was not protected as it was "insulting, racially-insensitive language" used in reference to APS students. [2-1] at 4-5. Second, APS alleges that Dyer's distribution of flyers containing the phrase "unnigged" and "FALCOONS"[5] was not protected because it involved "offensive and racially-charged" language aimed at "mocking" a school board official. *Id.* at 17.[6]

The First Amendment "is a guarantee to individuals of their personal right 'to make their thoughts public and put them before the community.'" *Belyeu v. Coosa Cty. Ed. of Educ.*, 998 F.2d 925, 930 (11th Cir. 1993) (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149 (1967)). "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas on matters of public interest and concern." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). "[T]he freedom to speak one's mind is not only an aspect of individual liberty-and thus a good unto itself-but also is essential to the common quest for truth and the vitality of society as a whole." *Id.* at 50-51 (alteration in original) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984)).

Consistent with these principles, the Court must also consider that the First Amendment protects speech that society may not like or finds unpopular. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)) ("If there is a bedrock principle underlying the First Amendment, it is that the

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[5] Dyer is African-American.

[6] APS also appears to argue that Dyer's use of the word "buffoon" or other derogatory terms to criticize the school board falls outside the First Amendment's protections. The Court soundly rejects such an argument. It is beyond peradventure that a citizen has a First Amendment right to criticize government officials. *Trulock v. Freeh*, 275 F.3d 391, 404 (4th Cir. 2001) ("The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government and government officials.").

government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Indeed, and contrary to APS's contention regarding offensive speech, "the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001). The protection of such offensive speech is arguably one of the most important functions of the First Amendment.

There is no question that Dyer's use of "Sambos" and "unnigged" was patently offensive. But no matter how despicable the rhetoric may be, it cannot be said that such speech is categorically unprotected by the First Amendment. Unprotected categories of speech are confined to a "well-defined and narrowly limited" list. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942); *see also United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (listing the categories of traditionally unprotected speech).

"The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." Stevens, 559 U.S. at 470. Given the centrality of First Amendment freedoms to the constitutional guarantees inhered to every citizen of this country, Courts should be wary of expanding the list of unprotected speech or too readily finding that speech has wandered from the warm hedgerows of First Amendment protection into the wild dells of unprotected speech. *See id.* at 471 (declining to exclude animal cruelty from First Amendment protection or analyze the First Amendment protectability "on the basis of a simple cost-benefit analysis"). The Court is reluctant to do so here. A decision that Dyer's speech is per se unprotected by the First Amendment would be a weighty and heavy-handed determination at this stage of the case. This is particularly true when, as here, the Court construes Dyer's

alleged speech as political speech regarding local school governance; this category of speech finds First Amendment protection at "its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (quoting *Grant v. Meyer*, 828 F.2d 1446, 1457 (10th Cir. 1987)).

APS has pointed the Court to no case in which speech similar to Dyer's was found categorically outside First Amendment protection. For example, APS's attempts to analogize its regulation of Dyer's speech to the regulations of prostitution or other illegal sex acts upheld in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), is unpersuasive. The regulations in *Arcara* had only an incidental effect on protected expression because the unlawful regulations were primarily aimed at unlawful conduct. Dyer was engaged in lawful conduct at the school board meetings from which he was eventually banned. Thus, *Arcara* is in apposite.
The Court also finds APS's reliance on *Wright v. City of St. Petersburg*, 833 F.3d 1291 (11th Cir. 2016), misplaced. In that case the plaintiff engaged in street ministry and outreach to the poor and homeless. He noticed a man being interrogated by the police and attempted to engage the officers, asking what the man had done wrong and telling the police to stop harassing him. A police officer instructed the plaintiff to not interfere, but he did not comply. The officers then arrested him for obstruction and issued him a trespass warning. The warning, barring him from going on to that same park for a year. The plaintiff filed suit alleging the ordinance pursuant to which he was issued a trespass warning violated the First Amendment. The Eleventh Circuit held that it did not.

APS cites this case for its argument that Dyer's speech was unprotected. But the Eleventh Circuit's decision was more nuanced than this. It clearly held that the plaintiff engaged in protected speech while ministering and advocating for the less fortunate. *See id.* at 1293 ("There is no question that the First Amendment protects Wright's ministerial outreach and political speech."). However, in upholding the plaintiffs arrest and the trespass warning, the court concluded that the warning was not issued in

response to his protected speech; rather, it was issued because he failed to obey the lawful command of a police officer, which was not expressive conduct. Thus, it was his failure to obey the officer, not his street ministry, that prompted the officer to issue the trespass warning. Contrastingly, when viewing the complaint in the light most favorable to Dyer, APS's suspensions were issued in direct response to Dyer's alleged protected speech at the school board meetings. This distinguishes our case from Wright.

In the absence of cases supporting APS's contention that Dyer's speech was unprotected, the Court believes it more prudent to follow other cases where extraordinarily offensive speech, such as Dyer's, was found to be protected by the First Amendment. *See Cohen v. California*, 403 U.S. 15, 18 (1971) (reversing conviction that was based solely on "the asserted offensiveness of the words [the defendant] used to convey his message to the public" on a jacket that read "Fuck the Draft"); *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (holding that professor's racially charged commentaries were protected by the First Amendment because "the government may not silence speech because the ideas it promotes are thought to be offensive"); *see also Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001) (professor's use of the word "nigger" protected by the First Amendment because it was germane to subject-matter of college lecture); *Bonnell v. Lorenzo*, 241 F.3d 800, 820-21 (6th Cir. 2001)(discussing constitutional rights to use words that, depending on the context, may be considered vulgar or offensive).

The Court wants to make abundantly clear that the terms Dyer used are abhorrent. But abhorrence does not ipso facto bring them outside the First Amendment's protection.

Moreover, at this stage the record is too undeveloped for the Court to even determine the full extent of what Dyer said at these meetings because the complaint supports only the conclusion that he used the word "Sambos" and "unnigged" in his comments at school board meetings. He

appears to deny the use of other slurs as alleged by APS or the characterization and context of such usage as alleged by APS. E.g., [1-1] ¶ 48 (Dyer did not use any language that could be considered a racial epithet during his public comment[.]"); id. ¶ 39 ("Courtney English ... *claimed* that Mr. Dyer called children "Sambos" during the public comment portion of the meeting." (emphasis added)).

Similarly, to the extent APS contends that Dyer's speech was unprotected because it constituted "'fighting' words, that is, words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Wilson v. Attaway,* 757 F.2d 1227, 1246 (11th Cir. 1985) (quoting *Chaplinsky,* 757 F.2d at 1242), the Court finds it inappropriate to make a determination on this issue at the motion-to-dismiss stage. The Eleventh Circuit has made clear that determining "whether the tendency of words is to provoke violence" is an issue "of fact." *Id.* While the Court is acutely aware of the radioactive nature of Dyer's words, the facts and inferences drawn in the light most favorable to Dyer do not permit the Court to conclude, at this stage, that his words constituted unprotected fighting words.

Thus, the Court is driven to the conclusion, based on the cases argued and the stage of factual development in this case, that Dyer's speech was protected by the First Amendment. However, it reserves a final determination on this issue after further factual development. *Cf. King v. Ed. of Cty. Comm'rs*, No. 8:16-cv-2651-T-33TBM, 2018 WL 515350, at *2 (M.D. Fla. Jan. 23, 2018) ("[T]he legal question of whether speech is protected by the First Amendment is highly fact-specific.").

This of course has no bearing on whether APS may properly restrict Dyer's speech, the issue to which the Court now turns.

b. First Amendment Scrutiny-Limited Public Fora

There is no dispute that APS's suspensions restricted Dyer's protected speech. These restrictions must now pass through the relevant level of scrutiny, which asks whether

the regulations on Dyer's speech were reasonable based on the forum in which he was speaking.

"[I]n evaluating a citizen's right to express his opinion on public property, the Court has established certain boundaries within which it balances a citizen's First Amendment rights and the government's interest in limiting the use of its property." *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989).

> Courts use "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. In forum analysis, we identify the type of government forum involved and then apply the test specific to that type of forum in evaluating whether a restriction violates the First Amendment.

Barrett v. Walker Cty. Sch. Dist., 872 F.3d 1209, 1223-24 (11th Cir. 2017) (citation omitted) (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015)).

The parties agree that school board meetings are limited public fora, so there is no dispute as to the relevant standard of scrutiny. Restrictions on speech in limited public fora must be "content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest." *Crowder v. Hous. Auth. of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993). The restrictions must also "leave open ample alternative channels for communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

APS's purported justifications suffer from the same procedural malady as the protected-speech issue analyzed above. Its resolution requires a level of analysis that is inappropriate at the motion-to-dismiss stage. APS implicitly relies on facts not derived from or contrary to those found in Dyer's complaint; or it calls for inferences adverse to Dyer. For example, APS references a commotion in the audience caused by Dyer's speech at the school board meetings. It argues that Dyer's speech disrupted the meetings when he refused to leave, [2-1] at 10, and that

these disruptions prevented APS from efficiently moving through meeting topics, *id.* at 15. Dyer, however, contests the disruptiveness of his speech at the school board meetings, and at this stage an inference of disruption, even if present in the complaint, may not be drawn in APS's favor. And whether there was a disruption due to Dyer's speech is directly relevant to APS's contention that its suspension was justified under First Amendment scrutiny. Such disputes on material issues, among others, preclude judgment for APS at the motion-to-dismiss stage.

The Court is also mindful that APS bears the burden of showing that it survives the limited public fora scrutiny. *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("[T]he State bears the burden of justifying its restrictions" on protected speech.); *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (holding that "the burden is on the government to show the existence of its interest in regulating protected speech); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012) ("The City has the burden of proof in this inquiry."). And "since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Fox*, 492 U.S. at 480 (citation omitted).[7]

Though APS does not present its justifications for restricting Dyer's speech as an affirmative defense in the traditional sense, it functions much the same. It is generally inappropriate to decide affirmative defenses on a motion to dismiss unless they "clearly appear□ on the face

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[7] The restrictions are also a form of prior restraint on Dyer's speech. Such restraints occur when the Government has "den[ied] access to a forum before the expression occurs." *Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004)(quoting United States v. Frandsen, 212 F.3d 1231, 1236-37 (11th Cir. 2000)). And 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) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). This weighs in favor of requiring APS to further develop the record before deciding the constitutional validity of the suspensions.

of the complaint." *Quiller v. Barclays Am.I Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984). The same principle operates here. Because APS's justifications are not clear from Dyer's complaint, the Court cannot rule in its favor on the issue of First Amendment scrutiny when it bears the burden on that issue. *See Asociacion de Educacion Privada de P.R., Inc. v. Echevarria-Vargas*, 385 F.3d 81, 86 (1st Cir. 2004) (reversing a granted motion to dismiss "in the absence of any evidence about the nature and weight of the burdens imposed and the nature and strength of the government's justifications" in a First Amendment challenge).

As APS has not had a chance to develop the record regarding its restrictions on Dyer's speech, the Court defers its scrutiny of APS's restrictions on Dyer's speech to the summary judgment stage. It may well be appropriate for APS, in a limited public forum, to prohibit baselevel rhetoric such as that Dyer was accused of using. But the final resolution of this issue must wait for summary judgment after the facts have become clearer.

2. Procedural Due Process

Dyer also contends that the suspensions were issued without due process of law as required by the Fourteenth Amendment. APS argues that Dyer fails to state a claim.

A procedural due process claim requires a showing of (1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process. Grayden v. Rhodes, 345 F.3d 1225, 1232 (11th Cir. 2003). Only the first and third prongs are contested.

a. Deprivation of a Constitutionally Protected Interest

First, the Court determines whether Dyer has shown either a liberty or a property interest protected by the Due Process Clause. APS contends that Dyer lacked a property interest in attending school board meetings. Even

if this was correct, APS does not argue that Dyer has no constitutionally protected *liberty* interest, and the Court holds that he does.

First Amendment rights are among the liberty interests protected by the Due Process Clause of the Fourteenth Amendment. *Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359, 1367-68 (11th Cir. 2011)(finding a liberty interest arising from a First Amendment right to access inmates). Construing both Dyer's complaint and his rights under the First Amendment broadly, *see id.* at 1367, Dyer has alleged at least a plausible liberty interest derived from the First Amendment to participate in school board meetings.

However, this does not mean that Dyer has a First Amendment right to access school property as a general matter. The opinion in *Cyr v. Addison Rutland Supervisory Union,* 955 F. Supp. 2d 290, 295-96 (D. Vt. 2013), is instructive. There, the district court rejected a plaintiffs contention, similar to Dyer's, that a school board's issuance of a notice against trespass on school property violated his procedural due process rights. Like Dyer, the plaintiff asserted a liberty interest[8] to access school property.

The district court rejected in part this argument. It held that even though the plaintiff lacked a general liberty interest in accessing school property, the notice against trespass nevertheless "deprived him of First Amendment rights without sufficient process" to the extent it prohibited his participation in a school board meeting on school property. *Id.* at 296.

Following *Cyr,* this Court does not hold that Dyer "possesses a liberty interest-independent of the First Amendment-in accessing school property." *Id.* It does, however, allow his claim to proceed on the basis that he had a liberty interest in engaging in public comment at school board meetings.

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[8] Dyer has not done this in so many terms, but construing the complaint liberally the Court concludes that this is indeed Dyer's contention.

b. Constitutionally Inadequate Process

Dyer must also demonstrate that the alleged deprivation of his liberty interest was done without due process. APS contends that Dyer had an adequate, post-deprivation remedy under state law to challenge the suspensions. Though not entirely clear, the Court construes Dyer's response to be that he was entitled to some process before, rather than after, the alleged deprivation. The Court once again agrees.

The parties' disagreement raises an issue that was not thoroughly briefed by either party, namely whether Dyer was entitled to pre- or post-deprivation process before APS suspended him from public comment. APS's argument depends on a presumption that no pre-deprivation hearing was required because it offers the Court only a post-deprivation remedy to correct the alleged due process violation. Because APS does not further develop this issue, the Court cannot resolve the motion in its favor at this time.

Generally, "some kind of a hearing" is required "*before* the State deprives a person a liberty or property interest." *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). But this is not always the case. In *Parratt v. Taylor*, 451 U.S. 527, 538 (1985), *overruled on other grounds by Daniels v. Williams*, 4 74 U.S. 327, 330 (1986), the Supreme Court recognized that in certain circumstances "post-deprivation remedies made available by the State can satisfy the Due Process Clause." *See also Zinermon*, 494 U.S. at 128 ("In some circumstances, however, the Court has held that a statutory provision for a post-deprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process."). These situations are often ones in which "a State must act quickly, or where it would be impractical to provide pre-deprivation process ... "*Gilbert v. Hamar*, 520 U.S. 924, 930 (1997).

APS asks the Court to apply *Parratt's* principles here and hold that the Georgia Open Meetings Act ("GOMA"), O.C.G.A. § 50-14-1 *et seq.*, provides an adequate state remedy to Dyer's alleged deprivation. GOMA authorizes

anyone to file a civil suit when he or she is affected by a violation of GOMA, such as the requirement that government meetings be open to the public.

However, a cause of action under GOMA is only a post-deprivation remedy in the form of a civil suit. This is insufficient here.

Parratt and the adequate-state-remedy doctrine have no application "when the state is in the position to provide predeprivation process." *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 801 (11th Cir. 1988); see also Rittenhouse v. DeKalb Cty., 764 F.2d 1451, 1454 (11th Cir. 1985) ("Since predeprivation process was not feasible [in *Parratt*], the Court held that the appropriate analysis for a procedural due process claim would focus on post-deprivation remedies."); *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983) ("[E]ven if a state tort action is adequate to redress the damage to [plaintiffs] property, we would have to find that a pre-deprivation hearing was impractical in order to invoke the adequate state remedy doctrine of *Parratt*."); *Branch v. Franklin*, No. 1:06-cv-1853-TWT, 2006 WL 3335133, at *2 n.1 (N.D. Ga. Nov. 15, 2006) (noting the limitation of *Parratt's* deprivation hearing was required and concluding it does not apply when a deprivation "was not a random or unauthorized act"). That is, if "pred-eprivation procedures were practicable ... post-deprivation remedies cannot provide due process." *Burch*, 840 F.2d at 801.

Thus, the Court must consider the threshold question of whether a pre-deprivation remedy was practical here. The "controlling inquiry" for determining whether a pre-deprivation hearing is required is "whether the state is in a position to provide for pre-deprivation process." *Hudson v. Palmer*, 468 U.S. 517, 534 (1984). The Eleventh Circuit has put it this way: "[A] pre-deprivation hearing is practicable when officials have both the ability to predict that a hearing is required *and* the duty because of their state-clothed authority to provide a hearing." *Burch*, 840 F.2d at 802.

Dyer has alleged sufficient facts, which APS has not rebutted, to make it at least plausible that a pre-

deprivation remedy was practical before he was suspended. APS's suspensions were not issued immediately or as an emergency measure to stop a live disruption. E.g., [1-1] at 45 (suspending Dyer on October 11 for conduct at an October 10 meeting). APS was able to predict that a hearing was required before suspending Dyer because it took the time to create a letter that applied prospectively to him. Moreover, as APS has presumably been clothed with the state's authority to suspend persons from attending public meetings, it is its "duty ... to provide pre-deprivation process." *Burch*, 840 F.2d at 802 n.10.

To sum up, Dyer's allegations make it plausible that he was entitled to a hearing before APS deprived him of his liberty interest. Under these circumstances, a post-deprivation remedy, such as GOMA, will not satisfy due process. Dyer's procedural due process claim will therefore be allowed to proceed.[9]

C. State-Law Claims and Sovereign Immunity

Dyer also alleges counts that appear to arise under state law for slander per se (count 3), discrimination and retaliation (count 4), and harassment (count 5). APS contends that these claims, if legally cognizable at all, are barred by sovereign immunity.

A school district is a political subdivision of the State of Georgia and can avail itself of sovereign immunity, which can be waived "only by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of the waiver." *Wellborn v. DeKalb Cty. Sch. Dist.*, 489 S.E.2d 345, 347 (Ga. Ct. App. 1997). Dyer bears the burden of demonstrating the existence of a waiver. *Bomia u. Ben Hill Cty. Sch. Dist.*, 740 S.E.2d 185, 188 (Ga. Ct. App. 2013).

Dyer has pointed to no waiver of sovereign immunity that would cover APS. While he correctly contends that

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[9] Because the Court's decision here is based on underdeveloped briefing of the issues, APS is free to renew its arguments at summary judgment on these issues.

sovereign immunity does not apply to his claims under§ 1983, it is applicable to his state-law claims, and he has failed to rebut this argument. Thus, APS is entitled to judgment on Dyer's state-law claims. *Accord Davis u. DeKalb Cty. Sch. Dist.*, 996 F. Supp. 1478, 1484 (N.D. Ga. 1998) ("The Georgia Tort Claims Act provides for a limited waiver of the state's sovereign immunity for the torts of its officers and employees, but it expressly excludes school districts from the waiver. Therefore, the Georgia Tort Claims Act ... does not divest the School District of its sovereign immunity." (citation omitted)).

IV. Conclusion

For the foregoing reasons, APS's motion [2] to dismiss for failure to state a claim is granted in part and denied in part. Dyer's§ 1983 claims under the First Amendment (count 1) and the Fourteenth Amendment Due Process Clause (count 2) may proceed. His state-law claims (counts 3 through 5) are dismissed as barred by sovereign immunity.[10]

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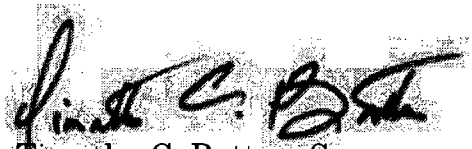
[10] The Court also grants Dyer's motion (11] for leave to file excess pages. The Court denies his motions [14, 20] to allow late filings. Dyer has not shown good cause for his late filings or successive and repetitive briefing of issues, nor will this be allowed in future filings. Dyer is directed to this Court's Local Rule 7.1 regarding the filing of motions. Dyer should not file successive motions or responses to motions without first obtaining leave of the Court and showing good cause.

Dyer is also required from this point forward to comply Local Rule 5.l(C) regarding formatting, spacing, and font for filings with this Court. Dyer is specifically warned that the Court will disregard any future filings that are not 14-point, double-spaced, and in an approved font. Failure to comply with this Order or the local rules may result in sanctions including and up to dismissal of this case.

The Court denies APS's motion [13] and objections [19] as moot due to the foregoing rulings.

Accordingly, APS is ordered to file a responsive pleading to counts 1 and 2 by April 4.

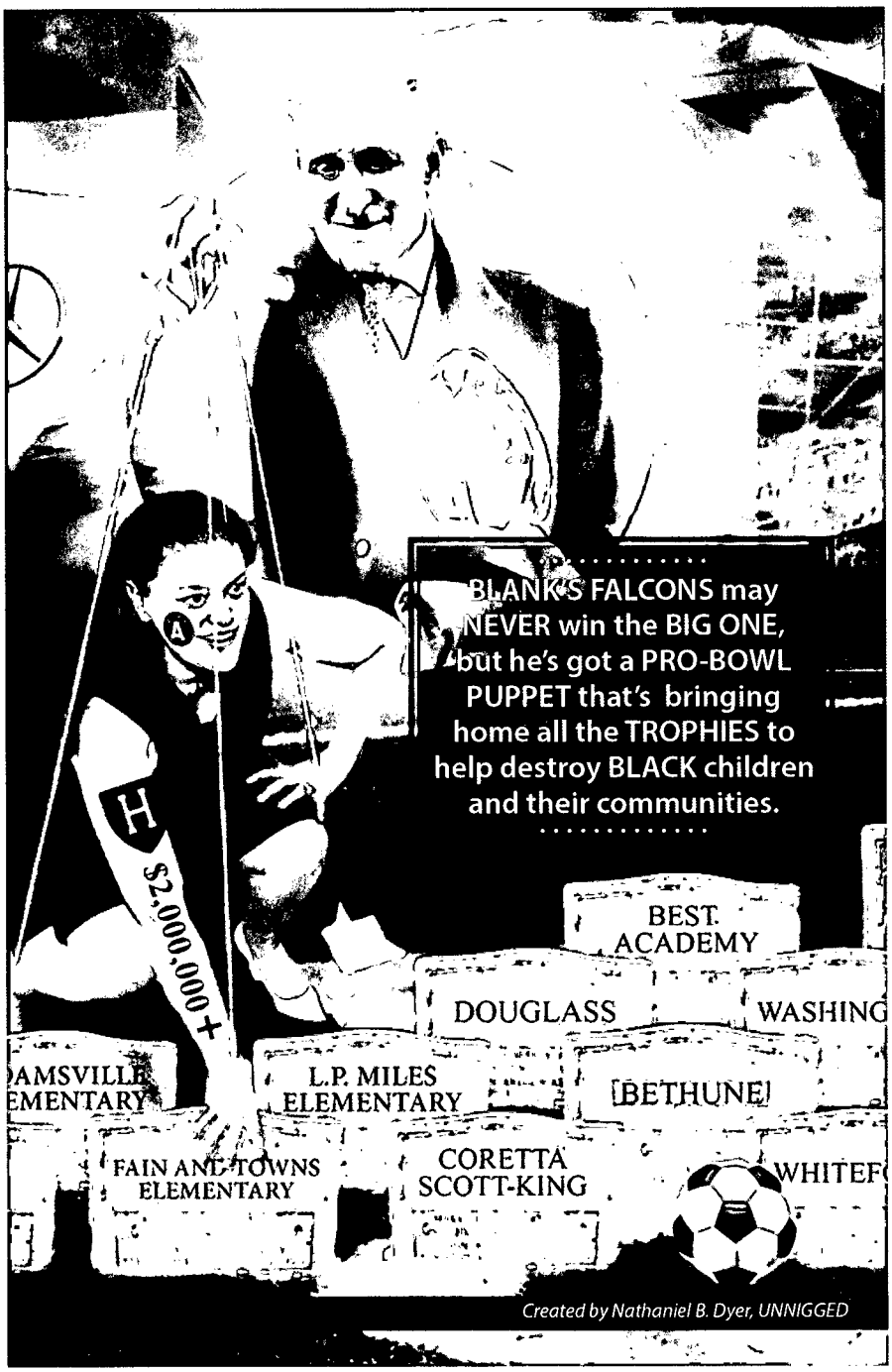
IT IS SO ORDERED this 14th day of March, 2019.

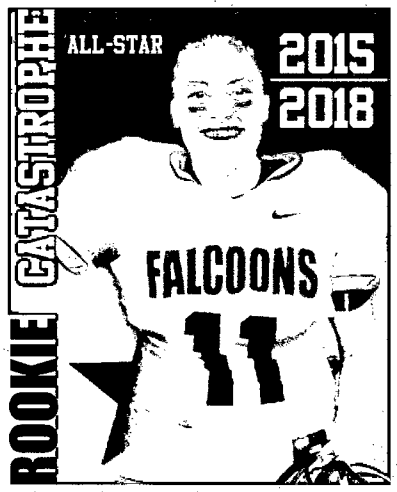


Timothy C. Batten, Sr.
United States District Judge

APPENDIX D

Mr. Dyer's Satirical Flyer





SUPERINTENDENT *Meria Catastrophe's* TOP 10 CATASTROPHIC PLAYS

1. **SELLING SCHOOLS** - She tackles the issues of deeds from the city to sell them to developers for gentrification of Black neighborhoods.
2. **CLOSING SCHOOLS** - She closed schools such as Bethune ES and Kennedy MS located in the midst of a minimum of five billion dollars in development which includes Arthur Blank's Mercedes Benz Stadium Project.
3. **MERGING SCHOOLS** - She has merged Black students together into overcrowded situations while proposing options to alleviate overcrowding for White students.
4. **PRIVATIZING SCHOOLS** - She gives private operators, Purpose Built Communities and Kindesi, carte blanc and long contracts with little to no accountability.
5. **CHARTER SCHOOLS** - She places Kindesi and KIPP schools in the heart of neighborhoods where she claims there is low student population. Her latest KIPP move will kill Douglas High School.
6. **OPPORTUNITY SCHOOL DISTRICT (OSD)** - She hired the architect of Gov. Nathan Deals' OSD proclaiming to save schools from takeover but she closed them instead.
7. **AGE DISCRIMINATION** - More than 100 teachers over 40 are suing this rookie for age discrimination. The culture of fear and intimidation still exists within Atlanta Public Schools and it may have intensified.
8. **POLICE FORCE** - She created a police force claiming they are to aid with mentoring students. To date, bullying and discipline issues are still prevalent within APS at an all-time high.
9. **BODY CAMERAS FOR OFFICERS** - Offering little money for exposure and resources to help children, this rookie wants to expose them in a hi-tech manner to be legally profiled for life.
10. **INEQUITIES** - She caters heavily to White communities through whatever measures it takes to help them maintain stability and an uninterrupted learning experience. Anything to the contrary, this would cause White Flight. And Lawdy, She's Sho nuffin Don't Wants Dat!

It's time to retire this rookie. A new contract cannot be an option for what this third year rookie has done to Atlanta's children who possess so much promise and potential.

UNNIGGED COMING SOON! For more information, please contact Nathaniel B. Dyer at 404.964.6427 or email district7@nathanielbdyer.com.