

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

GEORGE ANDERSON,
CAROL VASKO SIMPSON,
JAMES SATCHER, JIM STETSON,
and ENLIGHT ATLANTA,

Plaintiffs,

vs.

COBB COUNTY SCHOOL DISTRICT;
et., al.,

Defendants,

CIVIL ACTION
FILE NO. 1:02-CV-1893-ODE

**PLAINTIFFS' BRIEF IN SUPPORT OF
SUMMARY JUDGMENT ON ALL CLAIMS**

Plaintiffs file this brief in support of their motion for summary judgment and show that the former Cobb County School District (CCSD) rule allowing government officials unbridled discretion to determine whether non-residents could speak at CCSD meetings violated the United States and Georgia Constitutions on its face and as applied to Plaintiff Anderson, and show that the current CCSD policy completely barring non-residents from speaking about issues relevant, germane or critical to the work of the CCSD violates the United States and Georgia Constitutions on its face and as applied to all plaintiffs because it excludes speech falling within

a designated public forum without a factually-supported compelling justification for doing so.

STATEMENT OF MATERIAL FACTS

Plaintiff George Anderson is the President and founder of the Ethics In Government Group, a non-profit organization that investigates and monitors governmental action for ethical violations. (Anderson Aff. ¶ 3.) Mr. Anderson, as President of Ethics In Government, educates citizens on ways to take an active role in monitoring their government. Id. As an Ethics Watchdog, he monitors, and at times complains, if laws are broken. Id. He encourages lawmakers to pass ethics laws that are clear and concise, with no gray areas and he promotes ethical behavior by elected officials. Id. Mr. Anderson files ethics complaints and conducts seminars in an effort to hold government officials accountable for their conduct. Id. at ¶ 4. Over the past five years, he has filed 298 ethics complaints; approximately 80% of the complaints resulted in a finding or admission of an ethics violation. Id. As a result of his advocacy, Mr. Anderson has been the subject of numerous local and national news articles, editorials and news programs. See e.g. CNN Live From the Headlines, May 2, 2003; “Let’s Join Ethics Watchdog’s Effort,” Atlanta Journal Constitution, Dec. 4, 2002 (“George Anderson, has made it his life's mission to shine the light on government wrongdoing.”).

Several parents of students attending Cobb County district schools have

ethical concerns about the conduct of CCSD employees and the Cobb County Board of Education and wish to address the Board publicly. However, these parents have hesitated to speak at Board meetings out of fear that any criticism of school district employees or Board members will result in retaliation by the Board or school district employees against the parents' schoolchildren. (Vasko Simpson Aff. ¶ 12; Westrich Aff. ¶ 7.) Because of Mr. Anderson's knowledge on the subject of ethics in government and also because of the parents' fear of reprisal, these parents asked Mr. Anderson to speak on their behalf during a public meeting of the Board of Education. (Vasko Simpson Aff. ¶ 6; Westrich Aff. ¶ 7.)

After extensive investigation into ethical concerns raised by Cobb County residents, and unsuccessful attempts to negotiate a response to these concerns with CCSD, Mr. Anderson filed several ethics complaints against the Board and its members. (David Burch, "Complaint filed vs. Cobb schools cites Lassiter band," Marietta Daily Journal, May 24, 2002, 3B; Letter from State Ethics Commission to Mr. Anderson dated July 24, 2002; Letter to Gov. Roy Barnes from Mr. Anderson dated May 23, 2002.)

Thereafter, Mr. Anderson attended a meeting of the Cobb County Board of Education intending to speak during the meeting's public comment period about ethical issues concerning Cobb County School District employees. (Anderson Aff.

at ¶ 5-6.) CCSD's policy at the time allowed non-residents to speak with the permission of the Board. Although only four other people signed up to speak, the Board denied Mr. Anderson permission to speak. (Public Participation Sign-in Sheet dated May 23, 2002.) The Board was well aware of the fact that Mr. Anderson was critical of their actions and wished to raise ethical concerns when they denied him permission to speak. (Statement of Cobb County School District regarding complaint filed by George Anderson.) In fact, CCSD employee Jay Dillon was holding a copy of the complaint Anderson filed against the school board when he denied his request to speak. (Anderson Aff. ¶ 6; Original Complaint ¶ 5.) At the same meeting, the Board allowed Plaintiff James Satcher, a non-resident who is not employed by the district, to speak during the public comment period. (Satcher Aff. ¶ 6; Anderson Aff. ¶ 6.)

Anderson attended the Board's June 27, 2002 meeting and again was denied permission to speak. (Anderson Aff. ¶ 7; Orig. Complaint ¶¶ 6, 9.) Plaintiff Carol Vasko Simpson, who resides within the school district and is the parent of a student attending a district school, requested that Anderson be allowed to speak on her behalf. (Vasko Simpson Aff. ¶ 8; Original Complaint ¶ 10; Electronic mail from Ms. Vasko Simpson to Mr. Anderson with copy of letter from Ms. Vasko Simpson to Mr. Beers.) Cyndie Westrich, a district resident and parent of a child attending a district

school, also wanted the Board to allow Anderson to speak. (Westrich Aff. ¶ 6.) The Board denied Vasko Simpson's and Ms. Westrich's request that Anderson be allowed to speak on their behalf. (Simpson Aff. ¶ 8.)

At the August 22, 2002 meeting of the Board, Anderson again was denied permission to speak. (Anderson Aff. at ¶ 9.) Just as it had at the May 23, 2002 meeting, the Board allowed James Satcher to speak at the August 22, 2002 meeting despite the fact that Satcher does not live within the district nor work for the school district. (Id.; Satcher Aff. ¶ 6.)

Anderson filed this suit pro se against the Board on July 9, 2002. (Original Complaint; Court Order dated Oct. 02, 2003, at *1.) The Defendants moved this Court to dismiss the action and in so doing attempted to justify their exclusion of Anderson and other non-residents based on time limitations. (Memorandum of Law in Support of Def.'s Motion for Sanctions, p. 8) ("These measures have been reasonably designed in order to limit the amount of time allotted to the public comment section.")

Cobb County School District has set aside 30 minutes "to hear from any interested citizen and/or employee of the school district." (Cobb County Policy on Public Participation in Board Meetings.) The policy's guidelines provide that each speaker be limited to five minutes of speech, allowing sufficient time for **at least** six

people to speak during the time set aside for public participation. (Original Guidelines For Public Speaking.)

An examination of the relevant documents provided by Defendants reveals that:

- 98.65% of meetings had six or less speakers; (Followill Aff. at ¶6.)
- 23 non-residents, not employed by CCSD, signed-up to speak between October 1998 and the filing of this action July 9, 2002; (Id. at ¶7.)
- the Board allowed 86.96% of these non-residents to speak; (Id. at ¶8.)
- only 3 non-residents' names were crossed off the sign-in sheets; (Id.)
- George Anderson was the **only** non-resident whose name was crossed off when there were less than 6 people signed up to speak. (Id. at ¶9.)

This Court denied Defendant's motion to dismiss Mr. Anderson's first amendment claim and indicated the likely unconstitutionality of Defendant's policy. (Order at *5.) The Defendants changed their interpretation of the policy, which has not changed since 1996 (Def. Reply to Plaintiffs' First Req. to Admit, ¶ 29), to completely exclude non-residents from speaking. (Guidelines for Public Speaking; Def. Response to Plaintiff's Req. to Admit.)

As a result of the filing of this lawsuit and or this Court's Order, the clause allowing non-residents to obtain permission to speak was deleted from the

guidelines. (Revised Guidelines For Public Speaking.) All non-residents are now completely barred from speaking on issues germane to the workings of CCSD. Plaintiff Anderson amended his complaint to include several parties that are now adversely affected by the current policy which was changed to justify the Defendant's actions in silencing Plaintiff Anderson. (Amended Complaint.)

Plaintiff Satcher is a non-custodial parent whose children attend Cobb County Schools. He can not now speak on behalf of his children who attend Cobb County schools. Plaintiff Enlight Atlanta is likewise now barred from exercising their free speech rights. They are a non-profit organization that works to end bias and harassment of metro Atlanta students because of their actual or perceived sexual orientation or gender identity. (Lowry Aff. ¶ 2.) Members of Enlight Atlanta have spoken at various school board meetings in efforts to raise awareness of bias and harassment in schools and wish to speak at a public meeting of the Cobb County Board of Education about anti-gay bias pervasive in the school system. Id. at ¶ 6. Enlight Atlanta members speak at school board meetings on behalf of parents who often fear the potential backlash associated with discussing controversial topics such as sexual orientation and bigotry. Id. at ¶ 7. Several non-resident parents of gay CCSD students are associated with Enlight Atlanta and wish to speak at a public meeting of the Board about the need to combat discrimination and promote

diversity in the school district. Id. at ¶ 8.

Plaintiff Jim Stetson lives outside of the school district but has children attending district schools. (Stetson Aff. ¶¶ 2, 3, 10.) The Board’s current policy, however, does not allow Stetson the opportunity to speak at meetings because he does not live within the school district. (Id. at ¶ 10.) Despite Stetson’s interest in his children’s education, the Board of Education’s policy prohibits him from speaking at Board meetings about issues that impact his children. Id. at ¶ 12. Because Stetson is a non-custodial parent, he often does not receive critical information from his children’s schools. Id. at ¶ 10. Stetson believes that it is important to his children’s education that he be allowed to speak at a public meeting of the Board of Education and state his concerns directly to the Board, and the policy’s bar against him speaking harms his children’s education. Id. at ¶ 16.

ARGUMENT AND AUTHORITY

I. Defendant’s Former Policy was Unconstitutional Because it Allowed Unbridled Government Discretion.

As this Court ruled when considering Defendants’ motion to dismiss, “the Board created a limited public forum, thus requiring that the Board follow certain standards when regulating speech.” Order at *6. This requirement is based on clear, unambiguous precedent obligating the government to provide objective guidelines upon which to base decisions denying speech. Forsyth County v. Nationalist

Movement, 505 U.S. 123, 131 (1992) (“The reasoning is simple: If the permit scheme ‘involves appraisal of facts, the exercise of judgment, and the formation of an opinion,’ Cantwell v. Connecticut, 310 U.S. 296, 305, (1940), by the licensing authority, ‘the danger of censorship and of abridgment of our precious First Amendment freedoms is too great’ to be permitted.” (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)(a law subjecting the exercise of First Amendment freedoms to permission “must contain ‘narrow, objective, and definite standards to guide the licensing authority’”); Sentinel Communications Co. v. Watts, 936 F.2d 1189, 1207 (11th Cir. 1991) (“[government cannot] take an utterly discretionary, ‘seat of the pants’ regulatory approach towards activity that is entitled to first amendment protection.”); Crowder v. Housing Auth. of the City of Atlanta, 990 F.2d 586, 591 (11th Cir. 1993) (“A restriction which vests unlimited discretion in a government actor opens the way to arbitrary suppression of particular points of view.”).

As this Court noted, CCSD’s “overly broad discretionary power allows the Board to grant or deny Plaintiff’s speech based on whether it favors his ideas and input.” Order at *6. Here, there were absolutely *no* standards guiding the hand of the government in deciding which non-resident would be permitted to speak.

Regardless of whether the Board unfairly exercised its discretion – and there

is strong evidence that it did – the policy was unconstitutional on its face. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (“It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.”); see also Sugarman v. Village of Chester, 192 F. Supp. 2d 282, 296 (S.D.N.Y. 2002.) (“The danger, of course, is that the ordinance permits a rogue decision maker to delay the issuance of a sign permit for any reasons he or she deems appropriate. By failing to protect against this possibility, Greenwood Lake has rendered its sign ordinance unconstitutional.”).

This Court already determined that the Board’s “overly broad discretionary power” allowed it “to grant or deny Plaintiff’s speech based on whether it favors his ideas and input.” Order at *6. The Board even admits that its former policy allowed non-residents to speak upon the unguided discretion of their agents. (Joint Prel. Report and Discovery Plan, Jan. 27, 2003.) The Court should find the former policy, on its face and as applied to Plaintiff Anderson, unconstitutional and grant summary judgment with respect to this issue.

II. Revised “Policy” Does Not Moot Plaintiff Anderson’s Equitable Relief Claim.

The voluntary repeal of an unconstitutional policy does not moot challenges to it, “because without a judicial determination of constitutionality the particular governing body remains free to reinstitute the law at a later date.” National Adver.

Co. v. Town of Babylon, 900 F.2d 551, 554 n.2 (2nd Cir. 1990). Although this court held that Plaintiff Anderson stated a valid first amendment claim, it did not enter declaratory and injunctive relief on this issue. Order at *6. (“[T]he court finds that Plaintiff has successfully stated a free-speech claim for which relief might be granted.” (emphasis added)).

The standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: “A case might become moot if subsequent events made it **absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur.” Friends of the Earth, Inc. v. Laidlaw Evtl. Servc., Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Exp. Assn., 93 U.S. 199, 203 (1968))(emphasis added). “It is well settled that ‘a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.’” Friends of the Earth 528 U.S. at 189 (quoting City of Mesquite v. Aladdin’s Castle, 455 U.S. 283, 289 (1982)). Defendants bear the burden of proving that the conduct “cannot reasonably be expected to start up again.” Id.

Defendants’ actions suggest that they will return to their unlawful behavior in the future. Not only is there evidence that the Defendants invoke their discretion based on the content of non-resident speech, the Board also has not changed its

policy for determining who may speak. (Cobb County Policy on Public Participation in Board Meetings; Defendants Response to Plaintiff Request to Admit, ¶ 29.) It has merely removed one line from a “Guideline for Public Speaking” handout after this court’s intermediate ruling. (Cobb County Policy on Public Participation in Board Meetings.) Also, they did not, and still do not, require speakers to provide identification to ensure that they are Cobb County residents, nor do they check the residential status of prospective speaker. (Id.; Defendants Response to Plaintiffs First Set of Interrogatories, ¶7.) Thus, the content and viewpoint of the speaker remains the primary motivating factor for the Board’s sporadic exercise of its policy regarding non-resident speech, and likely will be used again.

Significantly, the Board’s official policy, by its plain language, does not create an absolute bar to non-residents.¹ The Defendants admit that this policy has not changed since 1996. (Def. Reply to Plaintiffs’ First Request to Admit, ¶ 29.) Only the transitory *interpretation* of it changed after this Court’s ruling. (Jnt. Prel. Report and Discovery Plan at 1(b).) Since the Board’s discretionary power was exercised only when non-residents wished to speak on topics that the Board did not want publicly

¹ Cobb County Policy provides that, “The Cobb County Board of Education welcomes visitors and will hear any interested citizen and/or employee of the school district.” The ambiguous language used indicates either that 1) the Board will hear from **any** interested citizen, or an employee of the school district; or 2) the Board will hear from any interested citizen of the school district or employee of the school district.

addressed, there is nothing to stop the Board from *re-interpreting* its policy in order to accommodate a nonresident whose viewpoint they agree with – either informally, periodically, or by changing one line and printing new unofficial “Guidelines for Public Speaking” as they did after the court’s ruling in October 2002.

The constitutionality of the former policy has not yet been resolved. Indeed, without a definitive legal ruling in this case, the CCSD policy could be amended back – “the defendant is free to return to [its] old ways.” Friends of the Earth, 528 U.S. at 189 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)). Defendants have not shown, as required, that it is “absolutely clear” that it will not return to picking and choosing among non-residents in deciding who may speak during the public meetings. The “heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.” Id.

The Defendants’ exercise of their “overly broad discretionary power” denied Plaintiff Anderson the right to speak on matters of public importance based on an unconstitutional policy. Without a ruling on the constitutionality of the former policy, there is nothing to assure the Court which similar conduct which arbitrarily censors speech will not reappear in the future. The court should enter declaratory and injunctive relief on the issue of the unconstitutionality of the former policy and

practice in order to avoid this possibility and a later lawsuit on the issue.

III. Plaintiff Anderson Is Entitled to Nominal Damages Because He Was Excluded under the Former Unconstitutional Policy and Practice .

Defendants' new interpretation of their policy is no barrier to a damage award for constitutional violations occurring under the old policy and practice. Richmond v. J.A. Croson Co., 488 U.S. 469, 478(1989) (holding that expiration of law did not moot case where parties had continuing controversy over question whether prior application of ordinance entitled plaintiff to damages); Taxpayers for Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1479 (10th Cir.1984)("Indeed, by definition claims for past damages cannot be deemed moot."); accord O'Connor v. City and County of Denver, 894 F.2d 1210 (10th Cir.1990).² The loss of First Amendment freedoms, for even minimal periods of time, constitutes an actionable injury. See Elrod v. Burns, 427 U.S. 347, 373 (1976); New York Times Co. v. United States, 403 U.S. 713, (1971).

Indeed, free speech violations constitute a particularly compelling justification for a damage award. Memphis Comty Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (Marshall, J., concurring) ("When a plaintiff is deprived, for example, of the opportunity to engage in a demonstration to express his political views . . . [t]here

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is no reason why such an injury should not be compensable in damages.”); see also Dellums v. Powell, 566 F.2d 167, 184-185 (D.C.Cir. 1977) (holding that the loss of an opportunity to stage a lawful demonstration on the Capitol steps was compensable in damages); Tatum v. Morton, 562 F.2d 1279, 1282-83 (D.C.Cir.1977) (finding plaintiffs could recover damages for the loss of the opportunity to communicate their anti-war message to the public in the manner they had selected).

A nominal damage award ordinarily follows a judicial finding of a constitutional violation. Stachura, 477 U.S. at 308-09 n. 11 (“By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed.”)(quoting Carey v. Piphus, 435 U.S. 247, 266, (1978)); see also Irish Lesbian and Gay Org. v. Giuliani, 143 F.3d 638, 649 (2nd Cir. 1998) (“Nominal damages are available in actions alleging a violation of constitutionally protected rights, even without proof of any actual injury.”); Trewhella v. City of Lake Geneva, Wis., 249 F.Supp. 2d 1057, 1070 (E.D.Wis. 2003) (“[B]ecause the Defendants, acting pursuant to an unconstitutional ordinance, denied Long his right to speak on a matter of public interest, Long is entitled to nominal damages.”).

Nominal damages perform two valuable functions: they compensate the plaintiff for loss of his constitutional rights and ensure that the defendant will not

return to its former, unconstitutional policy. The Defendant's former policy denied Plaintiff Anderson the right to speak based on an unconstitutional rule and its application. The Court should enter an award of nominal damages suffered as a result of the Defendants exclusion of Anderson pursuant to an unconstitutional policy and practice.

IV. The Current Policy Unconstitutionally Limits Speech in a Designated Public Forum Without a Compelling Justification.

In analyzing free-speech claims involving governmental meetings, the court must determine (1) whether Plaintiffs' intended speech is protected by the First Amendment; (2) the nature of the forum; and (3) whether the Defendants' justification for limiting Plaintiffs' speech satisfies the requisite First Amendment standard. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

A. Plaintiffs' Intended Speech is Protected by the First Amendment.

Plaintiffs are each denied the opportunity to speak on matters of public concern regarding the expenditure of public money - speech traditionally protected under the First Amendment. Speech on political matters and governmental affairs rests "on the highest rung of the hierarchy of First Amendment values." Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 381 (1984). Furthermore, "there is practically universal agreement that a major purpose of [the

First] Amendment was to protect free discussion of governmental affairs.” Burson v. Freeman, 504 U.S. 191, 196 (1992) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)). Plaintiffs wish to speak on the subjects of ethics, unethical conduct by school district employees, students’ safety, clients’ concerns and school district policies – all clearly constitute discussion of governmental affairs, and as such are entitled to First Amendment protection.

The First Amendment represents our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.” New York Times v. Sullivan, 376 U.S. 254, 270 (1964); see also Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (“Speech concerning public affairs is more than self-expression; it is the essence of self-government.”). Town hall type meetings, such as school board meetings that invite public comment, are essential for our deliberative democracy in which free speech is a primary aspect of democratic participation and self-governance.³ Meyer v. Grant, 486 U.S. 414, 421-22 (1988) (stressing that the First Amendment affords the highest level of protection to

³ See also Cass R. Sunstein, *Democracy and the Problem of Free Speech* 241-52 (1993); *Deliberative Democracy* (Jon Elster ed., 1998); *Deliberative Democracy: Essays on Reason and Politics* (James Bohman & William Rehg eds., 1997); *Deliberative Politics: Essays on Democracy and Disagreement* (Stephen Macedo ed., 1999); John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2000); Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (1996).

discussions of a desire for political change or the merits of the proposed changes).

Plaintiffs intend to speak on issues that affect their children, their property values, school safety and ethical concerns in a public town-hall type forum. These issues affect society and speech on them are essential to the democratic process by which citizens determine their elected Board members. Their speech clearly falls within speech protected by the First Amendment.

B. Plaintiffs' Intended Speech Falls Within the Scope of the Forum that Defendants Created.

The Supreme Court has identified three categories of government property: (1) the traditional public forum; (2) the designated, created, or limited public forum;⁴ and (3) the nonpublic forum. Searcey v. Crim, 815 F.2d 1389, 1391 (11th Cir. 1987) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983)). The constitutionality of speech regulations on government property depends on the type of forum in which the speech occurs. Id.

A designated public forum is created when the Government intentionally opens a nonpublic forum for expression. Cornelius, 473 U.S. at 802. Although the government has no obligation to provide a forum for public comment, once it does

⁴ The Eleventh Circuit has stated that the term "limited" public forum is misleading and therefore has identified "designated" or "created" public forum as the more appropriate terms for this category of fora. Id. at 1391 n.4 (citing M.N.C. of Hinesville, Inc. v. United States Dep't of Defense, 1466, 1472 n.2 (11th Cir. 1986)).

so the state bears a heavy burden to justify the exclusion of specified groups. Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”).

As this court noted, the Board intentionally set aside time to hear from interested citizens and employees and in so doing created a designated public forum. Order at *6. The Defendants admit the scope of the public forum created: “the Board decided to open the public comment section specifically for those members of the public whom its decision directly affect.” (Memorandum of Law in Support of Def. Motion for Sanctions, p. 8; Order at *5.) Although some non-residents are directly affected by the decisions the Board makes, (Anderson Aff. ¶5; Lowry Aff. ¶6-8; Satcher Aff. ¶9-14; Stetson Aff. ¶9-20), they nonetheless create an illogical and indiscernible category limited to residents. The Board even signals that the forum was created to hear from non-residents citizen by routinely allowing, in both policy and practice, non-residents to speak – that is, until George Anderson attempted to speak on ethical violations involving Board members. Order at *5-6. The Defendants’ disingenuous justification is belied by the facts:

- 23 non-residents, not employed by CCSD, signed-up to speak between October 1998 and the filing of this action; (Followill Aff., ¶7.)

- Defendants allowed all but 3 of these non-residents to speak; (Id. at ¶8.)
- George Anderson was the **only** non-resident whose name was crossed off when there were less than 6 people signed up to speak. (Id. at ¶9.)

Although the Defendants recently changed their policy after this court signaled its unconstitutional nature, the court must look behind the government's words to their actual practice in defining the type and scope of the forum created. Cornelius, 473 U.S. at 802 (“[The Court looks] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.”); Widmar v. Vincent, 454 U.S. 263, 267 (1981) (“Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups” despite its policy of prohibiting religious organizations.); Crowder v. Housing Auth., 990 F.2d 586, 597 (11th Cir. 1993) (finding that public housing auditorium was a limited public forum because “[m]anagement opened the auditorium to a wide range of expressive activities”); Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1391 (11th Cir. 1993) (en banc) (Capitol Rotunda was a designated public forum because “Georgia has granted diverse groups, both secular and religious, access to and permission to speak.”); Hopper v. City of Pasco, 241 F.3d 1067, 1076 (9th Cir. 2001) (“A policy . . . is no policy at all for purposes of public forum analysis, if, in practice, it is not

enforced or if exceptions are haphazardly permitted.”).

Defendants admit creating a designated public forum for expression on matters relevant to the workings of CCSD. (Order at *5; Memorandum of Law in Support of Def. Motion for Sanctions, p. 8.) They not only previously allowed non-residents to address the Board, but encouraged them to do so. (Cobb County Policy on Public Participation in Board Meetings.) Their only current justification for excluding non-residents is based on time limitations. (Order at *5; Memorandum of Law in Support of Def. Motion for Sanctions, p. 8.) Yet, the allotted time set aside for public comment is unused *nearly 99%* of the time. (Followill Aff. ¶6; Minutes to Board Meetings January 2000-July 7, 2002.)

Having created a designated forum, the government “is bound by the same standards as apply in a traditional public forum.” Perry Educ. Ass’n, 460 U.S. at 46. Any regulation of speech in this forum must be content and viewpoint neutral, support a compelling state interest, and be narrowly tailored to that interest. City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm’n, 429 U.S. 167 (1976); United States v. Kokinda, 497 U.S. 720, 726-27 (1990); Blackstone v. Alabama, 30 F.3d 117 (11th Cir. 1994); Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989).

Far from providing a compelling interest, Defendants fail to satisfy even rational basis scrutiny. Although Defendants admit they created a forum for public

comment for “those directly affected by its decisions,” (Memorandum In Support of Defendants’ Pre-Answer Motion to Dismiss at *8) persons directly affected by Board decisions – such as non-resident parents of children who attend CCSD schools – are prohibited from addressing the Board. To create a forum for public comment yet bar persons wishing to address subjects germane to the Board’s decisions and functions is without rational or logical justification. As discussed, the time limitation justification is belied by the facts. Further, until George Anderson filed ethics complaints against board members and requested permission to publicly question the Board on these matters, only 2 of 22 non-residents were ever denied permission to speak, and then only when more than twice as many people were signed up to speak as time allotted. (Id. at ¶8; Public Participation Sign-in Sheets, Oct. 1998–July 2002.)

As to the constitutionality of a policy that completely excludes non-residents from participation, the law is also clear: “the participation in public discussion of public business cannot be confined to one category of interested individuals.” City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm’n, 429 U.S. 167,175 (1976); see also Crowder, 990 F.2d at 593 (holding that housing authority’s restriction of plaintiff’s bible study meetings to Fridays nights was not narrowly tailored means when facilities were unoccupied during other times of the

week); Princeton Educ. Ass'n v. Princeton Board of Educ., 480 F.Supp. 962 (S.D.Ohio 1979) (where school district provided public comments period ostensibly limited to residents, but allowed non-residents occasionally to speak, the court held that public participation section of meetings a designated public forum and the Board's exclusion of non-resident teachers unconstitutional).

Plaintiffs wish to speak about ethical concerns, expenditure of school district funds, their children's education, student safety issues, and legal matters that concern the CCSD. These subjects clearly fall within the scope of the forum that Defendants created. The Defendants can neither provide a compelling reason to silence plaintiffs speech, nor can they show that their new regulation is narrowly tailored to effect their purported purpose.

There are numerous ways the Board could have met their alleged purpose that are more narrowly tailored. As examples, the Board could 1) exclude non-residents only if the time allotment is full; 2) exclude non-residents if their topic is not deemed germane; 3) not exclude non-resident parents whose students are in CCSD; 4) not exclude non-residents who are speaking on behalf of residents; and 6) restrict public participation to issues that affect Cobb County residents and employees without regard to the residency of the speaker.⁵

⁵ The Plaintiffs offer these scenarios without conceding the constitutionality of each.

The non-resident exclusion is not supported by a compelling, or even rational, reason. It is neither narrowly tailored nor necessary to its purported justification. The limitation is merely a smokescreen created by the Defendants as a result of this court's decision and a further effort to prevent Plaintiff Anderson, a committed citizen advocate, from publicly confronting the Board on sensitive issues. The Court should see through this attempt to silence speech on important matters.

CONCLUSION

For all the above reasons the Court should find that 1) the Defendants created a designated public forum for interested citizens to comment on matters relevant to CCSD; 2) the current policy unconstitutionally burdens speech without a compelling, or even rational, reason; 3) enter declaratory and injunctive relief judgment and damages to the plaintiffs on this issue; and 4) grant plaintiffs summary judgment on all issues.

This the ____th day of June, 2003.

Respectfully Submitted,

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