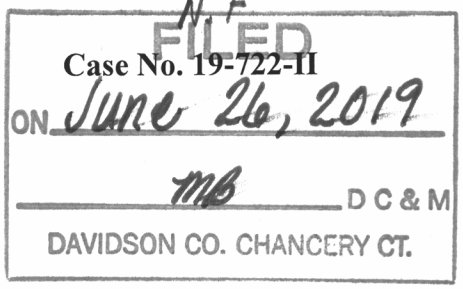
IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

KNOWLEDGE ACADEMIES, INC.,	)
	)
Plaintiff,	)
	)
v.	)
	)
METROPOLITAN NASHVILLE PUBLIC SCHOOLS and THE METROPOLITAN NASHVILLE PUBLIC SCHOOLS BOARD OF EDUCATION,	)
	)
Defendants.	)



ORDER

This matter came before the Court on June 25, 2019, upon Plaintiff's request for the conversion of a temporary restraining order into a temporary injunction, and for additional injunctive relief. Additionally, Plaintiff had filed motions for expedited discovery, including requests for admissions and depositions, and to compel depositions of certain of Defendants' representatives. The Court took up all of those motions at the June 25, 2019 hearing; thus Plaintiff's additional Motion for Expedited Hearing is now moot.

The June 17, 2019 temporary restraining order was put in place to maintain the status quo and enjoins the Metropolitan Nashville Public Schools, its Board of Education, Board members, agents and employees (hereinafter "MNPS") pending further proceedings in this Court, from:

a. deliberating toward a decision or making a decision regarding Defendants' intent to revoke the charters of or close the KA Schools other than in a meeting that complies with the Tennessee Open Meetings Act, Tenn. Code Ann. § 8-44-101, et seq.;

b. taking any action to enforce, effectuate, or implement any action to revoke the charters of or close the KA Schools based upon the June 11, 2019, announcement by MNPS Board Member Fran Bush for the Board's next agenda "to take action to revoke" KA's charters; and

c. communicating with students enrolled at the KA Schools, or with the families or guardians of those students, regarding any action by MNPS, pending or threatened, regarding potential revocation of the charters of or closure of the KA Schools.

Plaintiff asserts that simply converting the temporary restraining order into a temporary injunction will not provide meaningful relief and, given MNPS' expressed intentions to date, the injunction should be broadened to truly maintain the status quo, as it sees it. Specifically, Plaintiff asks the Court to enjoin MNPS from taking steps to close the KA Schools[1] until discovery can be taken on the question of whether the pre-Board session in question was a meeting in violation of the Open Meetings Act, Tenn. Code Ann. § 8-44-101, et seq. (hereinafter "the Open Meetings Act").

Legal Considerations for a Temporary Injunction

In reviewing a request for a temporary injunction, a trial court must consider three distinct principles. The first of these principles requires the consideration of four factors, which are: (1) the threat of irreparable harm to the applicant, (2) the balance between the harm to be prevented and the injury to be inflicted if the injunction issues, (3) the probability that the applicant will succeed on the merits, and (4) the public interest. *Curb Records, Inc. v. McGraw*, No. M2011-02762-COA-R3-CV, 2012 WL 4377817 at *3-4 (Tenn. Ct. App. Sept. 25, 2012). A trial court must balance all four of these factors and no single factor is a prerequisite to the

[1] The Court uses this term as it was used in the temporary restraining order, that is, to refer to the Plaintiff's three schools whose charters are at issue in this litigation: Knowledge Academy, KA@the Crossing, and Knowledge High School.

issuance of the temporary injunction. *Young v. Giles Cty. Bd. Of Educ.*, 181 F.Supp.3d 459, 462-63 (M.D. Tenn. 2015).

The second principle that guides a trial court is the recognition that an injunction is an extraordinary and unusual remedy that should only be granted with great caution. *Malibu Boats, LLC v. Nautique Boat Co.*, 997 F.Supp.2d 866, 872 (E.D. Tenn. 2014).

Finally, a trial court should consider that no irreparable injury exists to justify a temporary injunction if the court determines that a full and adequate remedy, such as monetary damages, is available for an injury. *Tennessee Enamel Mfg. Co. v. Hake*, 194 S.W.2d 468, 470 (Tenn. 1946); *Fort v. Dixie Oil Co.*, 95 S.W.2d 931, 932 (Tenn. 1936).

Findings of Fact

At this stage of the proceedings, limited facts have been developed and thus the Court's findings can only be preliminary as they relate to the injunction request. These findings are not binding going forward, but are the Court's best judgment regarding what occurred based on the information it has in the record. The factual material the Court has to consider includes:

a. Exhibits to the sworn complaint, including the charter contracts, and the June 12, 2019 correspondence between Mr. Queen and Mr. Bristol;
b. The affidavit of James Bristol, the Plaintiff's Board President;
c. The declaration of MNPS Board Chair Sharon Gentry;
d. The declaration of MNPS Board Member Fran Bush; and
e. The declaration of MNPS Executive Officer of the Charter Schools Office of School Improvement and Support Dennis Queen.

The three individuals who submitted declarations on behalf of MNPS were at the pre-Board-meeting executive session at issue in this matter.

The two factual and legal issues for the Court to consider are whether the June 11, 2019, pre-board meeting session was a meeting pursuant to the definition in the Open Meetings Act, and if so, whether the participation of MNPS's attorney caused it to fall within the Court-created exception for certain attorney/client communications.

The facts that have been developed to date are as follows:

The KA Schools became authorized charter schools, pursuant to ten-year contracts with MNPS consistent with the requirements of the Tennessee Public Schools Act of 2002, Tenn. Code Ann. § 49-13-101, et seq. ("the Charter Act"), in 2011, 2015 and 2016. The KA Schools have been the subject of MNPS and community concern since early April, 2019, and several articles have run in *The Tennessean* regarding their leadership and business and educational practices. Plaintiff's Board Chair, Mr. Bristol, has had ongoing discussions with MNPS representatives, including Mr. Queen, regarding changes it is making to address these concerns. Mr. Bristol is an attorney in Nashville, but was not acting in a capacity as Plaintiff's attorney, but rather in his capacity as Board Chair. The sworn complaint states, at paragraph 18, that as of June 11 "KA had not initiated, pursued, or threatened to initiate or pursue any litigation, adversary proceedings, or other legal remedies against MNPS." The Complaint further states that the same was true in regard to any action by MNPS against Plaintiff.

In addition to the conversations between Mr. Bristol and Mr. Queen, MNPS Board member Fran Bush, in whose district the KA Schools lies, has been contacted by KA Schools parents and other community members regarding the KA Schools' operations. These contacts began on March 5, 2019, with an initial contact by a parent about the academic direction of the KA Schools and the then-CEO's oversight. Ms. Bush met with those parents and others the next week when additional and more specific concerns were raised. Board member Bush met with

KA Schools representatives, including the then-CEO, on April 1, 2019, to discuss these matters. Board member Bush read the investigatory media stories regarding the KA Schools, published in *The Tennessean* on April 24, May 29 and June 10. This all occurred prior to the June 11, 2019, pre-Board-meeting executive session.

MNPS Board member Will Pinkston requested that the Board meet in executive session on June 11, 2019, prior to its scheduled Board meeting. In attendance were the Board members, Interim Director of Schools Adrienne Battle, Mr. Queen, and Board attorney Corey Harkey. The Board members questioned Mr. Queen and Ms. Harkey regarding the allegations in *The Tennessean* and the state process for revoking charters, and sought advice regarding potential revocation processes against Plaintiff. A vote, according to the MNPS declarations, did not occur. During the discussion, according to Board member Bush, infractions such as academic deficiencies, teacher payroll issues and terminations, missing funds, and other matters were raised. It is unclear what role attorney Harkey took in the meeting other than that she did answer some questions and potentially discussed the Charter Act provisions. No discovery has been made on this meeting to date, and all the Court has is the un-cross-examined statements of the three MNPS witnesses who provided limited information about what occurred.

At the Board meeting following the executive session, Board member Bush announced "Uh, I would like to, uh, give notice, give a notice on the next agenda to take action to revoke Knowledge Academies' charter." There was no other discussion regarding the KA Schools at the meeting.

The next day, Plaintiff received a letter from Mr. Queen referring to Board member Bush's announcement to provide notice of intent to recommend to the Board, after 30 days, a motion to close the KA Schools. The recommendation was "based upon several concerns of

violations within the charter contract and Tennessee charter law". The letter listed potential reasons for revocation as school performance, commission of a material violation as set forth in the charter agreement, and failure to meet generally accepted standards of fiscal management. This list is essentially a recitation of the list included in the Charter Act at section 122(b), which is the revocation portion of that law. However, the letter went on to list specific concerns including recent notices regarding academic performance, engagement of a company to manage the KA Schools prior to MNPS notification or board approval, that company's relationship with an entity called Charter Schools USA, financial mismanagement, and poor governing board oversight. Plaintiff asserts, through Mr. Bristol, that these were not items that MNPS previously discussed with it.

The letter concluded with a statement that "It is imperative that our office works with Knowledge Academies to communicate this motion to school staff and families of students who attend the schools. Our office will be reaching out to school leadership on Wednesday June 12, 2019, to co-develop communication for distribution to families."

Later that same day, Mr. Queen e-mailed Mr. Bristol referencing a recent Board "motion" and "the possibility of a closure recommendation to the Board." He requested a list of ten categories of documents regarding personnel, financial and organizational matters. This was the first such request from MNPS to Plaintiff.

Mr. Bristol, on behalf of Plaintiff, states that "A communication from MNPS to the effect that the Board is about to revoke our charters. . .would in my opinion naturally devastate our families. It is not too much to imagine families, teachers, and staff would leave the KA Schools, months before any final decision could be reached, even assuming MNPS began proceedings to revoke our charters."

Board member Bush made her announcement based upon what she believed was in the best interests of MNPS students who attend the KA Schools. Mr. Queen prepared a notice regarding the possible revocation for parents and guardians of KA Schools students due to concerns they would not have a back-up plan for where those students could attend school should the KA Schools be closed.

Conclusions of Law

The statute upon which the injunction-related claims are based is generally referred to as the Open Meetings Act, which was passed in 1974 to enact "the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret." Tenn. Code Ann. § 8-44-101. It provides that "All meetings of any governing body are declared to be public meetings open to the public at all times, except as provided by the Constitution of Tennessee." Tenn. Code Ann. § 8-44-102(a). The statute contains definitions of the terms "governing body" and "meeting." There is no dispute that MNPS is a governing body. An issue for determination, however, is whether or not the MNPS executive session in this case was a meeting pursuant to the restrictions set out in the Open Meetings Act.

The Open Meetings Act defines a meeting as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." Tenn. Code Ann. § 8-44-102(b)(2). MNPS contends this was not a meeting because the gathering was not to make a decision or deliberate toward a decision. Plaintiff argues otherwise, contending that, at the very least, at this early stage and without the benefit of discovery, the Court should assume such decision making or deliberation occurred.

In cases in which Tennessee appellate courts have analyzed whether particular sessions constituted a meeting under the Open Meetings Act, they have considered and contrasted

circumstances where it was admitted that the advantages and disadvantages of a proposal was weighed, *Neese v. Paris Special School Dist.*, 813 S.W.2d 432 (Tenn. Ct. App. 1990) (violation found), versus only a presentation of information, *Johnston v. Metro*, 320 S.W.3d 299 (Tenn. Ct. App. 2009) (no violation found). These two cases were decided after discovery and depositions regarding what happened during the subject gatherings. As discussed above, this Court does not have the benefit of any information other than the declarations of three executive session attendees. Ms. Gentry describes the meeting as fact gathering without discussion. Ms. Bush describes it as asking questions. Mr. Queen describes himself answering questions, and states that there was no vote or deliberation. It is unclear what, if any, legal advice was given, other than providing information about the state Charter Act revocation process.

In *Baltrip v. Norris*, 23 S.W.3d 336 (Tenn. Ct. App. 2000), the Court of Appeals cautioned that the lack of discussion before a Board vote should not allow the drawing of an inference that unlawful deliberations occurred in a pre-meeting executive session. *Id.* at 341. In that particular case, there was an ongoing disciplinary hearing and, during a recess, the Board conferred with its counsel to obtain information about forms of discipline available. The Board voted to discipline, but the vote was not unanimous and there was no evidence or indication that deliberations had occurred during the closed meeting. *Id.* at 339.

The Court heeds the *Baltrip* court's cautionary statement, but also finds it difficult to believe that there were only questions, and not a decision or deliberation toward a decision, in the closed session at issue in this case, given Mr. Queen's very specific list of "concerns" in his June 12, 2019 letter to Plaintiff. With the limited information provided, the Court cannot make a finding regarding what exactly occurred, and whether or not it was a meeting as defined in the statute, but the Court finds at this stage enough indicia that there was a decision, or deliberation

toward a decision, in the closed session to find a likelihood of success of the allegation that it was a meeting covered by the Open Meetings Act.

MNPS asserts that even if the executive session was a meeting, as defined in the OMA, it was covered by the court-created attorney/client exception. This exception was first recognized by the Tennessee Supreme Court in its 1984 decision in *Smith Co. Educ. Ass'n v. Anderson.* 676 S.W.2d 328 (Tenn. 1984). In that case, based upon the ethical duties of attorneys to preserve client confidences and secrets, as set out in the Ethics Cannons established by the Court, the Court found "It is clear that application of the [Open Meetings Act] to discussions between public bodies and their attorneys regarding pending litigation violates Article II, Section 1 and 2 of the Tennessee Constitution . . . [Thus, the] exception is limited to meetings in which discussion of present and pending litigation takes place." *Id.* at 334.

Three years later, in *Cooper v. Williamson County Bd. of Educ.,* 746 S.W.2d 176 (Tenn. 1987), the Supreme Court applied this exception to two gatherings between a school board and its attorney, first to receive information regarding the legal ramification of terminating a teacher who had been promoted to principal pursuant to prior federal court litigation and a court order, and second to discuss a settlement offer post-termination. The Court found the gatherings were not meetings, but that even if they were, they were protected by the attorney/client exception. The sessions were related to prior litigation and threatened future litigation and the resolution of same. *Id.* at 183.

The Supreme Court again found the exception applied in *Van Hooser v. Warren Co. Bd. Of Educ.,* 807 S.W.2d 230 (Tenn. 1991). The terminated teacher in that case had legal counsel, and had presented a settlement for consideration to the school board. The Board had a meeting with its attorney to discuss settlement, and agreed to accept it, in private session. The Court

found the exception applied because "[T]here was a pending controversy that was likely to result in litigation between the school district and Van Hooser." *Id.* at 237.

In two Tennessee Court of Appeals cases interpreting the exception since then -- *Baltrip*, 23 S.W.3d 336, and *Putman Co. Educ. Ass'n v. Putnam Co. Comm'n*, No. M2003-03031-COA-Rc-CV, 2005 WL 1812624 (Tenn. Ct. App. Aug. 1, 2005), the exception was applied. In *Baltrip*, a discussed above, the meeting with counsel was mid-disciplinary process and was followed by a non-unanimous vote. 23 S.W.3d at 338. In *Putnam Co.*, the Court of Appeals reiterated that this was a narrow exception applicable to "pending or threatened litigation", stating:

> The exception is limited to meetings in which discussion of present and pending litigation takes place. Clients may provide counsel with facts and information regarding the lawsuit and counsel may advise them about the legal ramifications of those facts and the information given to him. However, once any discussion, whatsoever, begins among the members of the public body regarding what action to take based upon advice from counsel, whether it be settlement or otherwise, such discussion shall be open to the public and failure to do so shall constitute a clear violation of the OMA.

2005 WL 1812624, *8. In that case it was undisputed there was a pending controversy and a lawsuit had been threatened.

These cases are distinguishable from the present case because the record reveals no pending or threatened litigation by or against MNPS. The parties were in ongoing conversations about concerns that had come to MNPS's attention regarding the KA Schools, but they cannot credibly be characterized as threatened litigation. In fact, Plaintiff expresses surprise and disappointment at MNPS's actions given the context of the otherwise cordial and cooperative communications. Again, in the above cases there was a robust effort to develop facts for the Court to consider regarding what happened in the subject meeting and to make a reasoned determination about whether the meeting fit within the exception. Given the lack of evidence of

threatened litigation or actual pending litigation in this case, the Court cannot find, at this time, that the discussion at the meeting fell under the attorney/client exception. Thus, the Court finds that Plaintiff is likely to succeed on the merits of its claim that MNPS violated the Open Meetings Act.

Regarding the other factors, the Court is required to consider in relation to a motion for a temporary injunction, the Court finds that irreparable harm to Plaintiff is likely absent an injunction. MNPS stated, in its June 12, 2019 letter to Plaintiff, its intention to notify school families of the motion to revoke the Plaintiff's charter. Such an action would essentially put KA Schools out of business without MNPS having gone through a proper revocation process as mandated by the Charter Act at Tenn. Code Ann. § 49-13-122. The Court also questions whether contacting families at this stage in the revocation process, if it were valid, would be consistent with the closure provisions set out in Tenn. Code Ann. § 49-13-130. While the Court is very concerned about the timing of these actions in relation to the upcoming school year beginning on August 5, 2019, and the effect on MNPS families, the time periods set out in the Charter Act are clear, and the burden on MNPS as it relates to its duties to MNPS families does not outweigh the rights of Plaintiff, as a validly approved charter school, pursuant to the Open Meetings Act and the Charter Act.

Finally, the public interest is best served by enforcing the Open Meetings Act, the purpose of which is to ensure that the public's business is conducted in the public.

The Court therefore converts the temporary restraining order into a temporary injunction until further order of the Court. The Court declines to broaden the terms of the injunction at this time, as requested by Plaintiff. While the Court is aware that the current injunction does not prevent MNPS from reinitiating a process to revoke the KA Schools' charters, Plaintiff has

remedies available to it in the Open Meetings Act pursuant to Tenn. Code Ann. § 8-44-106 including, but not limited to, the imposition of penalties. Plaintiff has the right to continue to pursue its claims under the Open Meetings Act and for breach of contract, but the Court cannot essentially take over the responsibilities of a local board of education, imposed under state law in Tenn. Code Ann. § 49-2-101, *et seq.*, and specifically its duty to regulate charter schools pursuant to the Charter Act. To bar MNPS from, at some time in the future, initiating a process to revoke the KA Schools' charters, would be inappropriate.

The Court therefore converts the June 17, 2019 temporary restraining order into a temporary injunction pursuant to Tenn. R. Civ. Pro. 65.05, and orders that the $1,000 injunction bond remain in place pending further proceedings otherwise.

Discovery Motions

Plaintiff has requested expedited discovery in the form of admissions and depositions, specifically directed to persons in attendance at the meeting in question. The Court has already found a likelihood of success by Plaintiff that the executive session was a meeting, as defined in the Open Meetings Act, and that it did not meet the court created attorney/client exception to that act so as to render it privileged. MNPS limitedly responded to Plaintiff's motion with reference to the attorney/client privilege, and the case of *Vann by Vann v. Stewart*, No. 3:04-CV-493, 2005 WL 8161927 (E.D. Tenn. Nov. 25, 2005). MNPS had a very small window in which to respond on this issue and requested an additional opportunity to address this matter with the Court.

The parties and the Court have thoroughly addressed the issue of the attorney/client privilege exception to the Open Meetings Act, and the Court's findings are set out above. The Court does not believe further briefing will impact its finding in that regard, at this time, without additional facts to consider. All of the Tennessee Open Meetings Act cases discussed herein,

and argued by the parties, involved cases where facts were discovered about what happened at the meetings in question. It defies logic that MNPS is immune from discovery regarding the contents of the meeting given that the nature of the meeting, and what happened, is the crux of the Open Meeting Act claim. MNPS cannot ask Plaintiff, or the Court, to "take its word" that no decision or deliberations toward a decision occurred. This is particularly true since MNPS seeks to rely on declarations from attendees at the meeting about what did and did not occur.

The Court is going to allow Plaintiff to take the depositions of the attendees of the meeting in question other than attorney Corey Harkey. Plaintiff will not be able to inquire as to the substance of information or advice provided by Ms. Harkey. It can, however, inquire generally as to the role of and subject matters addressed by Ms. Harkey. The parties can seek further relief from the Court on this subject if objections arise in the depositions that cannot be resolved otherwise.

The Court does not believe there is a need to expedite discovery at this time. Plaintiff has a temporary injunction in place in regards to the action initiated at the June 11, 2019 MNPS Board meeting. The Charter Act, at Tenn. Code Ann. § 49-13-122, contains a detailed process with time periods associated with each stage of the process. Section 130 of the Charter Act addresses when families are to be contacted after a revocation decision has been made. While it does not bar prior contact with families, doing so appears to be inconsistent with this provision and denies the subject school the opportunity to use the thirty day notice period to address the chartering authority's concerns and potentially avoid revocation. The Court assumes that these time periods and processes, as set out in the Charter Act, would be followed by MNPS in the future if the revocation process is reinitiated, and will allow Plaintiff the opportunity to do meaningful discovery, consistent with the time periods set out in the Tennessee Rules of Civil

Procedure, prior to the conclusion of such a process if that discovery is relevant. The Court will consider future requests for expedited discovery, or mandated scheduling, if requested and necessitated by future events.

It is so ORDERED.

ANNE C. MARTIN
CHANCELLOR, PART II

cc: Thomas H. Lee, Esq.
Katharine B. Fischman, Esq.
Frost Brown Todd LLC
150 Third Avenue South, Suite 1900
Nashville, TN 37201
tlee@fbtlaw.com
kfischman@fbtlaw.com

Lora Barkenbus Fox, Esq.
Catherine J. Pham, Esq.
The Department of Law of the Metropolitan
Government of Nashville and Davidson County
Metro Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 37219-6300
Lora.fox@nashville.gov
Cate.pham@nashville.gov