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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

KNOWLEDGE ACADEMIES, INC., Plaintiff, v. METROPOLITAN NASHVILLE PUBLIC SCHOOLS and THE METROPOLITAN NASHVILLE PUBLIC SCHOOLS BOARD OF EDUCATION, Defendants.	)	CASE NO. 19-722-II

METROPOLITAN GOVERNMENT'S TEMPORARY INJUNCTION HEARING BRIEF

The Metropolitan Government files this Brief in opposition to Plaintiff's Motion for a Temporary Injunction. This Brief will show that a temporary injunction is not appropriate and will only serve to delay the fact-gathering that is necessary in order for MNPS to determine whether or not Knowledge Academies (KA) should remain open.

FACTS

Metropolitan Nashville Public Schools Board of Education Chair Dr. Gentry provides this summary of how the executive session came about and what occurred during that meeting:

> Any member of the Board may request an executive session with the Board attorney. In this case, Board member Will Pinkston requested an executive session with the Board's legal counsel, to learn the board's duties and legal options for dealing with the Knowledge Academy (KA) issues reported in the Tennessean. An executive session was scheduled.
>
> The executive session took place January 11, 2019. I attended the executive session. Board attorney Corey Harkey and Charter Schools Executive Office Director Dennis Queen were present. The remainder of the attendees were Board members and Interim Director of Schools Adrienne Battle. No one else was present in the room.
>
> The Board members asked several questions in the executive session of Ms. Harkey and Mr. Queen. The questions focused on the types of allegations that have been reported by the Tennessean newspaper for the last several month

(see 4/24/19, 5/29/19, and 6/10/19 articles, attached as Exhibit A to Dr. Gentry's Declaration). The questions also asked about the process under state law for revoking charters and sought advice from Ms. Harkey on the strengths and weaknesses of any revocation action against Knowledge Academies.

There was no Board vote during the executive session, and I did not observe the board members discussing with each other whether or not to revoke Knowledge Academy's charter. They were gathering facts about the situation and the legal process involved in revoking a charter.

After the executive session, our regularly scheduled Board meeting was held. Board member Fran Bush stated, at the announcement section of the meeting, that she wished to have the revocation of KA's charter placed on a Board agenda. At that meeting, KA will have the opportunity to address the Board and the Board will deliberate on a decision. There has been no Board decision about revocation. KA is mistaken in its assertion that a decision has been made.

(Declaration of Sharon Gentry, submitted with Notice of Filing).

Board member Fran Bush provides this information about the meeting:

I was elected the School Board Member of District 6 on August 2, 2018. Knowledge Academies (KA) resides in my district. KA is a Charter School that has grades 5th thru 12th. KA was founded by Art Fuller, who was the CEO until April of 2019.

On March 5, 2019, I was contacted by a KA parent expressing major concerns regarding the academic direction of KA and the oversight of CEO Art Fuller. This parent asked to meet with me, along with other parents. I scheduled a time to meet with him and the other two parents on March 12, 2019 at 5:30 p.m. at the Southeast Library in Antioch, TN.

During the meeting, the parents expressed serious concerns about the lack of certified teachers, not having enough substitute teachers to fill teacher vacancies, teachers not being paid on time, lack of text books and access to on line text books, inaccurate transcripts, missing scholarship money that was promised to the first graduating class and poor communication to the parents. I told the parents that I would follow up with Mr. Fuller, along with the middle and high school principals.

I reached out to Mr. Fuller and we scheduled a meeting on April 1, 2019 at KA. I met with Mr. Fuller, Dr. Newman, High School Principal and Dr. White, Middle School Principal. I went over the parents' concerns and wanted to get some feedback. Mr. Fuller felt they didn't have problems that were mentioned by

the parents except there were some system problems with the grades that were being corrected by Dr. Newman.

Dr. Newman showed me the stack of transcripts that she was working on to correct, with the help of central office at the Board of Education. Dr. Newman also advised me that her priority was to get the senior grades fixed first and work backwards correcting the lower grades.

Mr. Fuller did speak regarding the scholarship money and said the guidance counselor Ms. Lemon was working with the seniors to give them the scholarship information so that they can apply for them. Mr. Fuller couldn't answer my question regarding the $500,000 in scholarship money that was promised to the first senior class.

I asked if they would put together a senior meeting and invite the parents so that they could ask questions and get the information they needed. They all agreed to put together the meeting. I later discovered the parent meeting never took place.

The meeting with Mr. Fuller, Dr. Newman and Dr. White lasted less than an hour. I left the meeting in hopes things would improve. Later I read the stories published in the Tennessean, starting in April, and was very concerned. Mr. Fuller left the CEO position in April 2019. I found out on June 11th at an executive session about more major concerns.

In the June 11th executive session we were only allowed to ask questions regarding the circumstances surrounding KA to our attorney Corey Harkey and Dennis Queen. Board members asked questions. There were so many infractions raised, such as academic deficiencies surrounding student achievements, teachers being let go, missing funds, teachers not being paid, side businesses for profit and mismanagement of money. It was very concerning.

After the executive session, and in the best interest of our students, I made an announcement on the Board floor to give public notice that I would be making a motion at the next Board meeting to move forward on closing the charter.

(Declaration of Fran Bush, submitted with Notice of Filing).

Dennis Queen, Executive Officer of the Charter Schools Office of School Improvement and Support for Metropolitan Nashville Public Schools, provides this information about the meeting:

As part of my duties, I am responsible for supporting the work of charter schools and providing accountability for contract and Tennessee charter law compliance.

On June 11, I was asked to attend an executive session called by the MNPS Board Chair to discuss the status of Knowledge Academies' charter schools (KA). KA has three charter schools in Davidson County – two middle schools and one high school – that operate essentially as one unit, in the same building.

I attended the executive session from the beginning of the session. Board attorney Corey Harkey was present. The remainder of the attendees were Board members and Interim Director of School Adrienne Battle.

The Board members asked me several questions in the executive session. The questions focused on the types of problems that have been reported by the Tennessean newspaper for the last several months (see 4/24/19, 5/29/19, and 6/10/19 articles, attached as Exhibit A to Mr. Queen's Declaration). These articles reported side businesses being run out of the school by the CEO, low academic ratings, failures to pay teachers, unaccounted for finances, and the transfer of management to Noble Education Initiative (NEI). The questions also asked about the process under state law for revoking charters (T.C.A. § 49-13-122). This law sets forth specific reasons for how and why a charter school may be closed, and it contains a process for appealing that decision.

After the Board finished asking me questions, I left the meeting.

There was no Board vote during my time in the executive session, and I did not observe the board members deliberating about whether to revoke Knowledge Academies' charter. They were gathering facts about the situation and seeking legal advice from their attorney.

One day after the executive session, I sent a letter to KA's Chairman James Bristol (attached as Exhibit B), and an email to him (attached as Exhibit C) letting him know that my office was responsible for preparing a recommendation to the Board on the possible closure of KA. I asked for financial and organizational documents to help my office know more about the issues raised in the Tennessean articles. I have received no response to this request, to date.

This request was prompted by the Board's obvious interest in having more information about the allegations in the Tennessean articles, my office's duty to prepare a recommendation on the possibility of revocation, and by Board member Fran Bush's statement at the announcement section of the June 11 school board meeting, where she gave notice that she wished to have the revocation of KA's charter placed on a Board meeting agenda.

My office prepared a notice of the board member's announcement and the possibility of revocation to the parents and guardians of KA students, because of concerns that they might be unaware and would be not have a back-up plan for where to attend school, should KA close. On advice of counsel, this letter has not been sent.

(Declaration of Dennis Queen, submitted with Notice of Filing).

LAW

I. AN INJUNCTION IS NOT APPROPRIATE BECAUSE THE COMPLAINT DOES NOT STATE A CLAIM FOR AN OPEN MEETINGS VIOLATION OR BREACH OF CONTRACT.

TENN. CODE ANN. § 8-44-102 defines a "meeting" under the Open Meetings Act 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. Meeting with an attorney for legal advice, or meeting with staff to learn information, are not "meetings" as defined in the Act.

A. BOARDS MAY RECEIVE LEGAL ADVICE.

Boards and commissions may meet with their attorneys in an executive session for legal advice about controversies that may lead to litigation. This principle was recognized in *Smith Cty. Educ. Ass'n v. Anderson*, where the Supreme Court determined that because the legislature cannot enact laws which impair an attorney's ability to fulfill his ethical duties as an officer of the Court, meetings between clients and counsel which discuss present and pending litigation constitute an exception to the Open Meetings Act. 676 S.W.2d 328, 334 (Tenn. 1984). Clients may provide counsel with facts and information regarding the lawsuit and counsel may advise them about the legal ramifications of those facts and information. *Id*.

A few years later, the Supreme Court recognized that a meeting with an attorney for legal advice did not constitute a "meeting" under the Open Records Act. *Cooper v. Williamson Cty. Bd. of Ed.*, 746 S.W.2d 176, 183 (Tenn. 1987) (informal gathering attended by a quorum of Board of Education to consult with Board's attorney concerning the legal ramifications of bringing charges against Plaintiff principal, at which no action was taken by the Board, was not a

meeting within the meaning of Tenn. Code Ann. 8-44-102(c); if it met the definition of meeting, it fell into the attorney-client privilege exception.).

And in 1991, the Supreme Court determined that a Board of Education has right to meet with its attorney to discuss pending controversy likely to result in litigation, even where no lawsuit is pending. *Van Hooser v. Warren Cty. Bd. Of Ed*., 807 S.W.2d 230 (Tenn. 1991).

The attorney-client exception for public meetings has been applied by the Court of Appeals several times since. *Baltrip v. Norris*, 23 S.W.3d 336, 342 (Tenn. Ct. App. 2000) ("We hold that the Board did not violate the Act in this case when it met with its attorney. When the Board met with its counsel, there was a "pending controversy that was likely to result in litigation," *i.e.*, a charge of unprofessional conduct had been lodged, and was then pending, against Baltrip."); *Putnam Cty. Educ. Ass'n v. Putnam Cty. Comm'n*, No. M2003-03031-COA-R3CV, 2005 WL 1812624, at *9 (Tenn. Ct. App. Aug. 1, 2005) ("the closed pre-meeting with the Commission's legal counsel pertained to threatened litigation and did not violate the Open Meetings Act.").

The presence of staff members (or even non-staff members) who are agents of the client does not destroy the attorney-client privilege. *Smith Cty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984) ("When the Board discussed the present lawsuit with its attorney on September 3 and 16, 1982, it did so in the presence of Dr. Fields. As chief negotiator for the Board, Dr. Fields was the Board's agent; therefore, the confidentiality of those communications was not waived by his presence."). *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019) (A court may find that a third-party nonemployee is the functional equivalent of an employee for purposes of attorney-client privilege).

B. BOARDS MAY RECEIVE INFORMATION.

Staff may provide information to a governing body without violating the Open Meetings Act. *Johnston v. Metro. Gov't of Nashville & Davidson Cty.*, 320 S.W.3d 299, 312 (Tenn. Ct. App. 2009); Tenn. Op. Atty. Gen. No. 99-0090, 1999 WL 239028 (Tenn.A.G.) (an exit conference between the State Comptroller and members of a governing body, such as a city council, to impart information to the local government officials of an audit or other subject was not a meeting of a governing body subject to the requirements of the Act. Deliberation under the Act refers to discussing, debating, and considering an issue for the purpose of making a decision and does not include a discussion solely for the purpose of information gathering or fact finding).

C. CONCLUSORY ALLEGATIONS THAT DELIBERATIONS OCCURRED ARE NOT SUFFICIENT, AS A MATTER OF LAW, TO STATE A CLAIM.

The Complaint presents the following conclusory statement: "On June 11, 2019, the MNPS Board deliberated upon, and decided to initiate, a process to close three separate public charter schools owned by KA ..." (Complaint, ¶ 1). The Complaint repeats this allegation many times, with no evidentiary support.

The conclusory allegation of deliberation appears based on paragraph 27 of the Complaint, which recites only that Mr. Queen was asked questions:

> Mr. Queen spoke with Mr. Bristol on the telephone late in the afternoon of June 12 to discuss the document production his email sought. During their conversation, Mr. Queen said he had attended a portion of the private June 11 meeting, during which he was quizzed by MNPS Board members about allegations against KA that had been published in the (Nashville) Tennessean news stories, referenced, supra. Mr. Queen said that he had responded to the MNPS Board members' inquiries but added that MNPS did not have enough data to answer the Board members' questions, hence the request for documents.

This paragraph appears based on paragraph 27 from Mr. Bristol's affidavit (filed with the Application for Temporary Restraining Order), which also states that Mr. Queen was *asked questions:*

> 27. On the evening of June 12, Mr. Queen spoke with me by telephone regarding the document production requested he had emailed me earlier in the day. I told Mr. Queen I was surprised by the events of the previous 24 hours because I believed MNPS and KA were communicating well about developments at the KA Schools. Mr. Queen then told me that he had been present for a portion of the closed June 11 meeting, during which he was asked numerous questions by Board Members about stories appearing in recent articles in *The* (Nashville) *Tennessean* concerning KA.

Plaintiffs have taken the KA Board Chair's sworn statement that Mr. Queen was "asked questions" and have extrapolated to speculate that the Board deliberated. Similarly, they have taken Board members' justifiable concerns about the issues raised by the Tennessean newspaper and extrapolated without basis to assume a decision has been made to revoke their charter.

Conclusory statements are not treated as true, especially when they are contradicted by the KA Board Chair's own testimony that only questions were asked:

> In ruling on a motion to dismiss, the court was not required to assume that the petition's conclusory allegation that the use is the "same" is true. *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 40 (Tenn. Ct. App. 2006) (holding that "[a]lthough we are required to construe the factual allegations in Plaintiff['s] favor, and therefore accept the allegations of fact as true, we are not required to give the same deference to conclusory allegations.") (citing *Riggs* 941 S.W.2d at 48).

Brown v. Metro. Gov't of Nashville, No. M201701207COAR3CV, 2018 WL 6169251, at *7 (Tenn. Ct. App. Nov. 26, 2018).

The Complaint's implication that receiving information creates a presumption of deliberation is without merit, as shown in a case where an informational meeting was incorrectly characterized a "back room meeting":

> The Appellants term the April 5, 2005 gathering in the Council's back conference room a "back room meeting," and argue that deliberations must have taken place there, and therefore the "back room meeting" constituted an additional violation of the Open Meetings Act. The trial court concluded that nothing in the record showed that deliberations occurred in the Council conference room; instead, the purpose of the gathering was to make information available to Council members, especially newer members with no prior experience with historic overlays.
>
> We agree with the holding of the trial court. Despite the Appellants' ominous characterization of the gathering as a "back room meeting," the record indicates only that the conference room was utilized to make information available to Council members. Unless the activities in the back conference room went beyond the provision of information, and extended to substantive discussion of positions and attempts to develop a consensus, then this gathering did not constitute a "meeting," did not involve "deliberation," and did not violate the Open Meetings Act.

Johnston v. Metro. Gov't of Nashville & Davidson Cty., 320 S.W.3d 299, 312 (Tenn. Ct. App. 2009) (emphasis added).

Contrary to Plaintiff's assumption that there was an open meetings violation, public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law. *West v. Schofield*, 460 S.W.3d 113, 131 (Tenn. 2015). KA Board Chair's testimony that the Board members asked questions of Mr. Queen *supports* this presumption, rather than rebutting it.

II. AN INJUNCTION IS NOT APPROPRIATE BECAUSE THE FOUR FACTORS WEIGH AGAINST A TEMPORARY INJUNCTION.

There are four factors to be considered by a trial court in deciding whether to issue a temporary injunction:

> [T]he threat of irreparable harm, the balance between the harm to be prevented and the injury to be inflicted if the injunction issues, the probability that the applicant will succeed on the merits, and the public interest. *Moody v. Hutchison,* 247 S.W.3d 187, 199–200 (Tenn.Ct.App.2007).

Curb Records, Inc. v. McGraw, No. M2011-02762-COA-R3CV, 2012 WL 4377817, at *4 (Tenn. Ct. App. Sept. 25, 2012). In this case, all four factors weigh against issuing a temporary injunction.

The executive session held in this case was for the purpose of meeting with the Board attorney and a staff member who serves as the Board's agent on charter school matters, to ask questions and receive information regarding legal issues associated with Knowledge Academies' charter, given the newspaper stories of financial mismanagement and other controversies involving the school. (Declarations of Sharon Gentry, Fran Bush, and Dennis Queen).

An Open Meetings Act violation occurs when a governing body meets "in order to make a decision or deliberate toward a decision." T.C.A. § 8-44-102. This did not occur.

A. PROBABILITY OF SUCCESS ON THE MERITS.

Plaintiffs do not have a high probability of success at the trial of this matter. The Board of Education received legal advice and information from staff at its July 11th meeting. As explained above, neither of these actions violate the Open Meetings Act.

Nor is there a likelihood of success on the breach of contract claim. TKA correctly states that the Board must follow TENN. CODE ANN. 49-13-122 in order to consider revoking KA's Charter. This process is specific about the grounds for revoking a charter:

(b) A public charter school agreement may be revoked at any time by the authorizer if the authorizer determines that the school:

(1) Committed a material violation of any conditions, standards, or procedures set forth in the charter agreement;

(2) Failed to meet or make sufficient progress toward the performance expectations set forth in the charter agreement; or

(3) Failed to meet generally accepted standards of fiscal management.

(c) Thirty (30) days prior to any decision by an authorizer to revoke a charter agreement, the authorizer shall notify the charter school in writing of the possibility of revocation and the reasons for such possible revocation.
(d) If the authorizer revokes a charter agreement, then the authorizer shall clearly state in writing the reasons for the revocation.

TENN. CODE ANN. 49-13-122.

This process includes *de novo* review by the State Board:

(e) No later than ten (10) days after an authorizer adopts a resolution to revoke a charter agreement, the authorizer shall report the authorizer's decision to the department of education and shall provide a copy of the resolution that sets forth the authorizer's decision and the reasons for the decision.

(f)(1) Until 11:59 p.m. on December 31, 2020, a local board of education's decision to revoke a charter agreement may be appealed to the state board of education no later than ten (10) days after the date of the local board of education's decision, except for revocations based on the violations specified in subsection (a). No later than sixty (60) days after the state board of education receives a notice of appeal and after the state board of education provides reasonable public notice, the state board of education, at a public hearing attended by the local board of education or the local board of education's designated representative and held in the LEA in which the public charter school has been operating, shall conduct a de novo on the record review of the authorizer's decision. In order to overturn a local board of education's decision to revoke a charter agreement, the state board of education must find that the local board of education's decision was contrary to § 49-13-122. If the state board of education overturns the local board of education's decision to revoke a charter agreement, then the state board of education shall remand the decision to the local board of education and the local board of education shall remain the authorizer. The decision of the state board of education is final and is not subject to appeal.

(Id., emphasis added).

School Board member Fran Bush's notice that she wishes KA's charter to be placed on a board agenda is the very first step in the process. Notice that this issue will be discussed is not a breach of contract or a violation of the state law process. There is no prohibition in the charter agreements or state law on giving this notice.

Nor would sending notice of the possible closure to parents violate any conditions of the charter agreement[1] or state law. To the contrary, it would be responsible governing – to assure that parents know about the possibility of closure, have a plan if KA closes, and have an opportunity to participate and comment during the decision-making process.

The Board has justifiably sought information and legal counsel to understand how it makes these determinations. The MNPS Charter School Office, through its Executive Director Mr. Queen, has asked KA for more information, so it can learn all the relevant facts and prepare a recommendation to the Board. This is evidence that the state law process is being followed, not that there has been a breach of contract.

B. BALANCE BETWEEN HARM TO BE PREVENTED AND INJURY TO BE INFLICTED IF THE INJUNCTION ISSUES AND THREAT OF IRREPARABLE HARM.

KA claims it will suffer irreparable harm it is known publicly that its charter may be revoked. But this threat has already hung over KA for several months, since the Tennessean began publishing articles describing financial mismanagement and changes in school operations. KA cannot be surprised that these articles have led to concerns by the Board of Education, which has a duty to supervise charter schools.

[1] ¶ 11.3 of the KA Charter agreements provides that MNPS may "timely notify parents and teachers" of a closure decision. It does not prohibit MNPS from notifying them earlier and giving them a chance to participate in the closure decision. Sending this letter would not constitute a breach of contract.

To date there has been a public notice that revocation of KA's charter will be considered at a later date. No revocation has taken place, and KA continues to operate. The process of revoking a charter is set by state law and provides for public engagement and an appeal process. This process has just started. KA will have a fulsome chance to present its evidence, be heard, and to appeal and have a *de novo* hearing, if it is dissatisfied with the result. The balance of harms therefore favors the Board of Education, which is statutorily responsible for supervising charters and providing an adequate education to the students of Davidson County.

C. PUBLIC INTEREST.

KA appears to be trying to halt the information gathering, by filing this lawsuit and refusing to provide the information requested by Mr. Queen. But the public interest is served by permitting the investigation of KA to continue unabated, so that state law may be followed and the possibility of revocation can be investigated, reviewed, and acted upon by the Board of Education.

The public interest is served by assuring that students are being educated properly and that public funds are used properly. If the investigation reveals that the factors in Tenn. Code Ann. 49-13-122 are met, state law provides that it is not in the public interest for KA to continue operating.

CONCLUSION

KA is asking the Court to stop the Board of Education from fulfilling its duty to oversee its school and to investigate serious allegations of wrongdoing. The four factors to consider in evaluating a temporary injunction weigh heavily against enjoining MNPS' process and strongly favor allowing MNPS' investigation of the facts to continue.

For these reasons, the Metropolitan Government asks that the Motion for Temporary Injunction be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been emailed to:

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on this the 24th day of June, 2019.

/s/ Lora Fox
Lora Barkenbus Fox