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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

DAVID & CARLY HELD individually and
on behalf of their minor child N.H.;
VERONICA BERRY individually and on
behalf of her minor child J.B.; RED AND
SHEILA FLORES individually and on behalf
of their minor child C.F.; JAOUAD AND
NAIMI BENJELLOUN, individually and on
behalf of their minor children N.B.1, N.B.2,
and N.B.3; KIMBERLY AND CHARLES
KING individually and on behalf of their
minor children L.K.1 and L.K.2; NEVADA
CONNECTIONS ACADEMY,

Plaintiffs,

v.

STATE OF NEVADA, ex rel. STATE
PUBLIC CHARTER SCHOOL
AUTHORITY, a political subdivision of the
State of Nevada, and PATRICK GAVIN, in
his official capacity as Director of the State
Public Charter School Authority,

Defendants.

Case No. 16 OC 00249 1B

Dept. No. I

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR
LEAVE TO CONDUCT LIMITED PREHEARING DISCOVERY**

Plaintiffs, David & Carly Held individually and on behalf of their minor child N.H.;
Veronica Berry individually and on behalf of her minor child J.B.; Red and Sheila Flores

1 individually and on behalf of their minor child C.F.; Jaouad and Naimi Benjelloun, individually
2 and on behalf of their minor children N.B.1, N.B.2, and N.B.3; Kimberly and Charles King
3 individually and on behalf of their minor children L.K.1 and L.K.2; and Nevada Connections
4 Academy (“NCA” and collectively “Plaintiffs”), by and through their undersigned counsel,
5 Davis Graham & Stubbs LLP, hereby respond to the State Public Charter School Authority’s (the
6 “Authority’s”) and Patrick Gavin’s opposition to Plaintiffs’ motion for leave to conduct limited
7 pre-hearing discovery. This reply is filed in good faith and based upon the Memorandum of
8 Points and Authorities included in the initial motion for leave to conduct limited pre-hearing
9 discovery and all papers and pleadings filed in this action.
10

11 I. ARGUMENT

12 Plaintiffs bear the burden of proof at the November 30, 2016 evidentiary hearing before
13 this Court to establish a likelihood of success on the merits and that absent the requested relief
14 they will suffer irreparable harm. Plaintiffs similarly bear the burden of proof at the hearing to
15 demonstrate that, in the alternative, they are entitled to writ relief. Preparation for this
16 evidentiary hearing includes some limited pre-hearing discovery as certain information is within
17 the control of Defendants who, in a continuing pattern of asserting absolute power, now seek to
18 deprive Plaintiffs of discovery and evade providing any testimony to support the Agency’s
19 threatened closure of a school serving more than 3,200 students statewide. The issues for the
20 November 30 hearing before this Court focus on the lawless behavior of the Authority –
21 threatening a school and its students with closure of NCA based solely on NCA’s unwillingness
22 to waive its constitutional and statutory rights; the Authority turning a blind eye to Nevada
23 Virtual Academy’s (“NVVA”) selective enrollment in violation of state law; the Authority
24 proceeding with closing a K-12 school with no statutory authority to do so, based on a single
25 data point related to only the high school. The Director has made statements that these attempts
26 to close schools are politically motivated, which also requires discovery to prove elements of
27 Plaintiffs’ claims, including a breach of the covenant of good faith and fair dealing. The Director
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1 also told NCA in a September 2015 meeting to discuss this very issue that he had “bigger fish to
2 fry,” suggesting NCA need not worry about imminent closure proceedings based on the single
3 data point of a four-year cohort graduation rate.

4 The timing of this discovery and the hearing on Plaintiffs’ motion is dictated by the
5 Authority’s December 16, 2016 hearing date on closure proceedings against NCA.¹ If the
6 Authority elects to delay this hearing until after the holidays, the parties could work together on a
7 discovery and hearing schedule with the Court to accommodate the Defendants’ scheduling
8 issues and the holidays. If the Authority is unwilling to do so, it should not then be allowed to
9 hide behind scheduling conflicts to avoid providing material information and evidence to this
10 Court.

11 **A. Discovery from Steve Canavero at NDE is relevant to the December 16**
12 **hearing and the graduation rate at issue**

13 Plaintiffs’ request for prehearing discovery rightfully included deposing Steve Canavero,
14 the State Superintendent of Instruction and head of the Nevada Department of Education
15 (“NDE”) which is responsible for establishing calculation of the four year cohort graduation rate
16 at issue. In addition, Dr. Canavero made material statements relative to the evaluation of the
17 graduation rate under Senate Bill 509 in the 2015 Legislative Session (now codified at NRS
18 388A.330) to Nevada legislators and to NCA representatives and also was the Authority Director
19 at the time of NCA’s charter renewal in 2013, which the Authority has now raised as a material
20 issue to Plaintiffs’ equitable estoppel claim. Moreover, discovery is not limited to parties named
21 in the lawsuit and the Authority cites no legal authority to support its assertion to the contrary.
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23 Nevada's discovery rules grant broad powers to litigants promoting and expediting the
24 trial of civil matters by allowing those litigants an adequate means of discovery. *Maheu v.*
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26 ¹ Notably, the Authority has engaged in a pattern of scheduling such hearings during
27 holidays and school breaks that make it more difficult for students, families and other
28 stakeholders to attend. The notice of closure hearing in March 2016 occurred on Good Friday
over the Spring Break, forcing families to disrupt their vacations and religious holiday in order to
voice their concerns and participate in the administrative hearing.

1 *District Court*, 88 Nev. 26, 42, 493 P.2d 709, 719 (1972). NRCP 26(a) permits discovery of
2 information in a variety of methods including "depositions upon oral examination." Such
3 depositions are governed by NRCP 30, which allows a party to depose "any person" by oral
4 examination. NRCP 30(a)(1). There are enumerated limitations on discovery, including
5 depositions set forth under NRCP 30(b)(2), but relevancy is not one of them – nor are any of the
6 other reasons the Authority cites to attempt to deprive Plaintiffs of pre-hearing discovery.
7

8 The Court's starting point for resolving a discovery dispute is NRCP 26(b)(1), which
9 states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant
10 to the subject matter involved in the pending action." "Relevant evidence" means evidence
11 having any tendency to make the existence of any fact that is of consequence to the
12 determination of the action more or less probable than it would be without the evidence. *See*
13 NRS 48.015 (2007). This definition is set forth in Nevada's statutory title governing witnesses
14 and evidence and guides the discovery process. All of the discovery Plaintiffs seek is aimed at
15 existence of facts of consequence to this Court's determination on Plaintiffs' motion.
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17 Discovery rules are designed to afford parties broad access to information. *Palmer v.*
18 *Pioneer Inn Assocs., Ltd.*, 118 Nev. 943, 952, 59 P.3d 1237, 1243 (2002). Mutual knowledge of
19 all the relevant facts gathered by both parties is essential to proper litigation. To that end, either
20 party may compel the other to disgorge whatever facts he has in his possession. The deposition-
21 discovery procedure simply advances the stage at which the disclosure can be compelled from
22 the time of trial to the period preceding it, thus reducing the possibility of surprise – and making
23 the trial or evidentiary hearing, in this case, more efficient. While the concept of relevance
24 informs problems concerning the admissibility and discoverability of evidence, the issues and
25 consequential facts are often clearer at trial than during the pretrial discovery process. So during
26 discovery proceedings, relevance is not narrowly restricted to the precise issues raised by the
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1 pleadings. See, e.g., *In re Folding Carton Antitrust Litig.*, 76 F.R.D. 420, 425-26 (N.D. Ill.
2 1977). Instead, it extends to "the subject matter involved in the pending litigation," a broader
3 concept that presumptively allows discovery of "any matter that bears on, or that reasonably
4 could lead to other matter that could bear on, any issue that is or may be in the case." See
5 *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978).
6

7 Here, discovery requests to the NDE are relevant to Plaintiffs' claims. While the
8 Authority correctly points out that it, not NDE, will evaluate NCA's potential closure at the
9 December 16 hearing, the Authority fails to note that the NDE is responsible for establishing the
10 method for calculating Nevada's high school graduation rates—the single issue which the
11 Authority cites as the basis for its closure proceedings (which Plaintiffs dispute).² Moreover, Dr.
12 Canavero was involved in and testified to the Nevada Legislature during the 2015 Legislative
13 Session relative to the provisions to close charter schools and legislators' concerns with
14 penalizing schools for serving some of our most at-risk youth, credit deficient students. Dr.
15 Canavero made representations to State legislators and to NCA's counsel that the trigger for
16 closing a charter high school based on a single-year graduation rate would not be applied in the
17 arbitrary manner that would penalize schools for enrolling and serving credit deficient high
18 school students. Dr. Canavero made statements that are material to this Court's interpretation of
19 the statute, consideration of information relevant to the Authority's evaluation of potential
20 closure, and may lead to admissible evidence in this proceeding.
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24 ² Plaintiffs note that the Authority purports to rely solely upon NCA's graduation rate as
25 calculated by the NDE despite the NDE's recent rating identifying NCA's middle school as a "4
26 star school" based on student achievement information and evidence demonstrating that **over
27 40% of the non-graduates in the 2015 cohort were enrolled in NCA for less than three-
28 fourths of the year.** See Motion for TRO/Prelim. Inj. at 6. While the Authority touts
"accountability" in public venues it is clear the Authority is holding the wrong school
accountable for these numerous students who come to NCA credit deficient and have been with
the school for less than a year and, in some instances, for just weeks, yet are counted against
NCA's graduation rate.

1 Furthermore, when NCA met with the Authority Director Patrick Gavin in September
2 2015, he directed that with respect to calculation of the four-year cohort graduation rate and
3 concerns about providing schools some sort of credit for serving credit deficient students (or at
4 the very least not penalizing them), NCA must work with the NDE on that issue. NCA has been
5 doing so and believes Dr. Canavero's testimony will be material to establishing that qualitative
6 information is in fact relevant to the determination of whether to close a charter school, and that
7 NCA should not be punished for serving some of Nevada's most at-risk youth.
8

9 Also material to this case, Dr. Canavero was the Director of the Authority when NCA's
10 charter was renewed in 2013 – a proceeding Defendants themselves have raised as important to
11 Plaintiffs' claims. *Oppo.* at 7. During Dr. Canavero's tenure as Authority Director, Dr. Canavero
12 recommended renewal of NCA's charter even with the four-year cohort graduation rate issue,
13 based at least in part on his understanding of this policy concern – that NCA not be penalized for
14 enrolling and serving credit deficient students. The Authority has briefed this issue and made
15 assertions about NCA's obligations with that charter renewal in its Response to the Plaintiffs'
16 Motion for Preliminary Injunction. *Id.* Therefore, the Authority itself has made Dr. Canavero a
17 material witness due to its reliance upon statements about NCA's 2013 renewal, which
18 Dr. Canavero oversaw.
19

20 Contrary to the Authority's contentions, information related to the NDE and its officers is
21 undoubtedly relevant to Plaintiffs' claims and given Plaintiffs' burden of proof at the November
22 30 evidentiary hearing, pre-hearing discovery is necessary and will make that hearing more
23 efficient.
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25 **B. Plaintiffs need not plead an equal protection claim to conduct discovery on**
26 **the Authority's arbitrary actions**

27 Plaintiffs are not barred from discovery relevant to its claims simply because Plaintiffs
28 have not yet pled a claim for violation of the Equal Protection clauses of the Nevada and Federal

1 constitutions. NRCP 15(b) permits amendments to conform to the evidence. A party may move
2 for such an amendment at any time. NRCP 15(b). Here, the Authority's decision not to enforce
3 Nevada law against another statewide online school is especially relevant given the Authority's
4 continuous assertions about accountability purportedly being the purpose of the closure
5 proceedings against NCA and with respect to Plaintiffs, establishing that the Authority is acting
6 in an arbitrary and unlawful manner based on politics rather than substantial evidence.

7 Under NRS 388A.150, the purpose of the Authority is to expand opportunities for
8 Nevada students, including those who are at risk. To that end, the Authority must safeguard the
9 interests of those students and the community, and "[s]erve as a model of the best practices in
10 sponsoring charter schools and foster a climate in this State in which all charter school,
11 regardless of sponsor, can flourish." NRS 388A.150(1)-(2). Plaintiffs expect discovery will lead
12 to evidence demonstrating the Authority is violating this fundamental purpose for its creation.

13 The Authority's focus on Plaintiffs' decision not to file an Equal Protection claim is
14 misguided. Plaintiffs have alleged that the Authority has acted in an unlawful and discriminatory
15 manner against NCA by failing to enforce laws equally, so as to render the Authority's decision
16 arbitrary, capricious, and in violation of the covenant of good faith and fair dealing under NCA's
17 contract. Complaint ¶¶ 7, 22, 23. Further, the Authority's decision-making tactics exhibit
18 preferential treatment for certain schools, violating NRS 388A.150's mandate that the Authority
19 foster a climate which allows **all** charter schools to flourish. The Authority's Director has made
20 statements to NCA about only instituting closure proceedings against NCA in an effort to treat
21 NCA the same as Beacon Academy and "NVVA. However, the Authority has inexplicably
22 elected not to proceed with closure proceedings (or any other enforcement action) against NVVA
23 despite Director Gavin's and the Authority's public statements of concern about NVVA violating
24 Nevada law by refusing to enroll credit-deficient high school students. The Authority itself
25 stated concerns in a public meeting with NVVA not enrolling certain high school students and
26 then attempting to compare NVVA's graduation rate relative to NCA's. Motion for
27 TRO/Prelim. Inj. Ex. 18. In this regard, the Authority itself has demonstrated the relevance of
28 this discovery given its reference to "other schools" that it has worked with on improving

1 graduation rate – as NVVA is one of those schools. Oppo at 4-5. The other is Beacon Academy
2 which waived its right to judicial review at the Authority’s insistence.

3 Contrary to the Authority’s argument, Plaintiffs are not limited by the contents pleading
4 in this instance. Depending on information discovered, Plaintiffs may seek leave to amend and
5 add an equal protection claim pursuant to NRCP 15(b).

6 Furthermore, while the Authority correctly argues that it is statutorily authorized to
7 consider closure of a charter school whose graduation rate falls below 60% in a preceding year
8 (based on substantial and compelling evidence, not a single misleading data point with no
9 explanation), the Authority ignores two critical points: (1) NCA is a K-12 school and the statute
10 allows only for closure of a charter **high school** based on a high school graduation rate below
11 60%; and, (2) the Authority is not permitted to use the 60% trigger as a subterfuge to retaliate
12 against NCA for its refusal to waive its constitutional and statutory rights to judicial review.
13 Evidence of arbitrary and retaliatory treatment is set forth in Plaintiffs’ complaint, and NCA
14 should be permitted to conduct discovery to ascertain information regarding the cause of this
15 unequal treatment, which has resulted in immediate harm to Plaintiffs.³

17 **C. Plaintiffs’ justiciable claims raise issues of both law and fact**

18 **i. The Authority misstates and oversimplifies Nevada precedent**
19 **regarding pre-decisional process**

20 The Authority’s argument that “[P]laintiffs cannot seek discovery from a government
21 agency regarding its pre-decisional process for making decisions” because “[t]he Authority’s
22 investigation of NCA, or any other charter school, prior to making a decision about whether to
23 revoke a charter is privileged” mischaracterizes the Nevada Supreme Court’s holding in *DR*
24

25 _____
26 ³ Upon information and belief, in or around March 2016, NVVA or its counsel made
27 allegations of misconduct against Director Gavin and, as a result, the hearing on potential
28 issuance of a notice of closure of NVVA was delayed from the March 2016 agenda. Ever since
that time, NVVA has received preferential treatment as compared with NCA.

1 *Partners v. Board of County Commissioners of Clark County*, 116 Nev. 616, 622-623, 6 P.3d
2 465, 469 (2000). See Opposition at 5. *DR Partners* concerned Clark County's partial
3 compliance with public records requests, submitting documents with redacted phone numbers
4 and claiming confidentiality based upon "deliberative process" privilege. 116 Nev. at 619-620, 6
5 P.3d at 467. The Nevada Supreme Court compelled disclosure of the unedited records, holding
6 that the common-law deliberative process privilege was inapplicable. *Id.* at 622, 6 P.3d at 469.
7 According to the Court, "[t]he deliberative process or 'executive' privilege is one of the
8 traditional mechanisms that provide protection to the deliberative and decision-making processes
9 of the executive branch of government and is preserved in 'Exemption 5' of the Freedom of
10 Information Act, 5 U.S.C. § 552 (1994)." *Id.* The privilege effectively "shields from
11 mandatory disclosure inter-agency or intra-agency memorandums or letters which would not be
12 available by law to a party other than an agency in litigation with the agency." *Id.* (quoting
13 *Paisley v. C.I.A.*, 712 F.2d 686, 697 (D.C.Cir.1983) (internal quotation marks omitted)). The
14 privilege "protects materials or records that reflect a government official's deliberative or
15 decision-making process" to encourage frank discussion between agency members when forming
16 policy, without the threat of public disclosure. *Id.* at 623, 6 P.3d at 469.

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19 The Court established that it is the agency's burden to establish the existence of a
20 privilege, that the privilege should be applied narrowly, and that the privilege does not protect
21 purely factual matters. *Id.* at 621-23, 6 P.3d at 468-69. Further, "[t]o qualify for non-disclosure
22 under this privilege, the requested documents must be both predecisional and deliberative"—
23 where the agency bears the burden of demonstrating details related to the nature of the
24 documents and their role in relation to the agency decision at issue. *Id.* at 623, P.3d at 469-70.
25 Finally, the Court effectively conducts a balancing test regarding the degree to which disclosure
26 might chill agency decision-making. *Id.* at 634, P.3d at 470. Here, no such balancing can be
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1 conducted because the Authority has failed to meet its burden to establish the existence of a
2 privilege or even identify what, if any, information or documents might fall within the narrowly
3 applied privilege.

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5 Moreover, in contrast, Nevada's Open Meeting Law requires that all meetings of a public
6 body such as the Authority be open and public and "written notice of all meetings," including an
7 agenda listing all items on which action may be taken, "must be given at least 3 working days
8 before the meeting." N.R.S. 241.020(1)-(2). Action of any public body, such as the SPCSA,
9 "taken in violation of any provision" of the Nevada Open Meeting Law "is void." N.R.S.
10 241.036. Nevada's Attorney General Manual sheds further light on the policy underlying this
11 principal: "[a]n informal conference or caucus permits crystallization of secret decisions to a
12 point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic, pre-
13 meeting conference except to conduct some part of the decisional process behind closed doors.
14 Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of
15 official action, can an open meeting regulation frustrate these evasive devices. As operative
16 criteria, formality and informality are alien to the law's design, disposing it to the very evasions
17 it was designed to prevent." 69 Cal.Rptr. at 485.

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19 The Authority's brief argument regarding *DR Partners* fails for two reasons. First, the
20 Authority improperly invokes deliberative process privilege, oversimplifies the framework
21 outlined in *DR Partners*, and, in doing so, fails to provide support to bear its burden to invoke
22 the privilege. The Authority's cursory reliance on common-law deliberative process privilege
23 demonstrates a disregard for the tenets of Nevada's Open Meeting Law. In the alternative,
24 should this court determine that the Authority's argument regarding *DR Partners* has merit, the
25 Authority cannot invoke the privilege because Plaintiffs seek factual information, as outlined in
26 the reasons for requesting prehearing discovery. *See* Motion for Leave to Conduct Limited
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1 Prehearing Discovery at 2. Therefore, the request does not invoke deliberative process privilege
2 as outlined in *DR Partners*. The Authority's broad and vague attempt to invoke such total
3 secrecy about its attempt to close a public school is unlawful but consistent with its ongoing
4 abuse of power which should be corrected by this Court.

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6 Moreover, the Authority mischaracterizes the facts. NCA is not aware of any
7 "investigation" and the Authority did not raise this issue when NCA made the public records
8 request about how the Authority pursued enforcement against NVVA for having apparently
9 violated state law on open enrollment of students. See **Exhibit 1** (9/30/2016 Public Records
10 Request to SPCSA regarding NVVA's enrollment practices), **Exhibit 2** (SPCSA Receipt of
11 request, which does not raise any privilege objection), and **Exhibit 3** (10/21/2016 Email with
12 link to responsive documents, which also raises no privilege objection). Accordingly, the
13 Authority either failed to provide a full response to the public records request and did not
14 disclose it was withholding public documents, or it waived the argument it now seeks to raise.
15 The Authority's flawed argument regarding *DR Partners* appears to be an attempt to avoid
16 accountability as an executive branch agency that has and continues to exceed its authority.
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18 **ii. Plaintiffs' claims are justiciable, and present mixed issues of law and**
19 **fact.**

20 Contrary to the Authority's argument, Plaintiffs' claims are justiciable and present mixed
21 questions of fact and law. Declaratory relief is available where procedures entitled under the
22 statute were not afforded. See *Clark Cty. Sch. Dist. v. Riley*, 116 Nev. 1143, 1146 (2000) (The
23 Court affirmed the lower court granting of summary judgment for a declaratory relief claim
24 which was appropriate where a teacher was not afforded the procedures to which he was entitled
25 by statute which made the school district's attempt to terminate the teacher invalid). Moreover,
26 courts grant injunctive or writ relief against public officials who act illegally, exceed their
27 statutory authority, or arbitrarily or unreasonably exercise their discretion. The question whether
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1 a public official is acting legally and within his power is normally a question of fact. *See*
2 *Wallace v. Shields*, 854 P.2d 1152, 1159 (Ariz. 1992).

3 Here, the elements of declaratory relief are met. The SPCSA did not follow the statutory
4 requirement to post an agenda of its consideration of an amendment to NCA's charter and had no
5 legal authority to force NCA to convert its charter to a contract because it never requested an
6 amendment in the first place. Indeed, the Authority never mentioned the possibility of an
7 "amendment" to NCA's charter until, during the public meeting in July 2016, when NCA's
8 counsel questioned the legal basis to force NCA to convert its charter to a contract, Authority
9 Member Conaboy suggested perhaps the school has sought an amendment which allowed the
10 Authority to require conversion to a contract.⁴ Motion for TRO/Prelim. Inj. Ex. 22; Errata at 5-6.
11 The problem with this idea presented for the first time during this public meeting where the
12 Authority voted to force such a conversion of the NCA charter is that (1) it was never on an
13 agenda and, therefore, violated the open meeting law; (2) there were no regulations in place at
14 the time to require an amendment of the charter for implementation of the graduation rate
15 improvement plan and, therefore, this was *ad hoc rulemaking*;⁵ and (3) there was never any
16 amendment application filed or processed. Thus, a justiciable controversy exists as NCA claims
17 that the SPCSA's July decision to force NCA to convert its charter to a contract was invalid,
18 which the SPCSA disputes.

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22 Second, Plaintiffs have a legally protectable interest in the controversy because the
23 SPCSA's attempted action compromises NCA's ongoing operations. Third, the issue is ripe for

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25 ⁴ Member Conaboy is a material witness for the Authority and also has been the lobbyist
for NVVA's EMO.

26 ⁵ The Authority just within the last few weeks adopted regulations governing
27 amendments that would now appear to arguably require a charter amendment for the graduation
28 rate improvement plan – demonstrating the need for such regulations (though, as adopted, they
exceed the agency's statutory authority and jurisdiction) and the obvious absence of them in July
2016.

1 adjudication as plaintiffs and defendants are contesting whether the Agency violated the Open
2 Meeting Law and whether the Agency's actions are therefore void. Lastly, a determination by
3 this Court that the Agency's July decision was in violation of the Open Meeting Law and was
4 therefore void, will promote "efficiency in the litigation process or might lead to a meaningful
5 pre-trial settlement" because it was this decision that positioned the Agency to then mandate
6 certain terms in that same contract with NCA – including that NCA waive certain rights to
7 judicial review – and then issue a Notice of Closure when NCA did not acquiesce to the
8 Agency's demands. Therefore, under NRS 30.010 through NRS 30.160 the Court has the
9 authority to enter a declaratory judgment regarding the above.
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11 Additionally, contrary to the Authority's argument, several issues of fact are before this
12 court. For example, the Authority suggests in its briefing that the school's refusal to waive its
13 rights to judicial review was not the reason the notice of closure issued, which creates a timeline
14 issue that is material, disputed, and ripe for discovery. This contractual term seeking waiver is
15 not moot given that the Authority made it clear that, should NCA refuse to sign on to the waiver,
16 then the Authority would vote on a notice of closure. Motion for TRO/Prelim. Inj. Ex. 26; Errata
17 at 2-3. After NCA refused to agree and the Authority issued the notice of closure, the Authority
18 identified agreeing to the waiver as NCA's only means to "cure" and avoid closure. In
19 discussions leading up to the September 23 hearing the Authority made clear to NCA that if the
20 school did not agree to waive its rights to judicial review the agency would proceed with
21 potential closure. Thus, the controversy regarding whether an agency can force a school to waive
22 its constitutional and statutory right to judicial review or suffer retaliatory Authority action is
23 justiciable. Prehearing discovery would allow NCA to ascertain information to support its belief
24 and understanding that the closure proceedings are a direct response to the refusal to waive its
25 rights to judicial review, which would bolster Plaintiffs' ability to establish its claims regarding
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1 the breach of covenant of good faith and fair dealing and equitable estoppel.

2 Further, the Authority's continued reliance upon its statutory right to consider closure,
3 while ignoring the Graduation Rate Improvement Plan that NCA has implemented, presents
4 disputed material factual issues. For example, while the Authority asserts that an essential
5 element of equitable estoppel is lacking with respect to NCA being allowed time to implement
6 the graduation rate improvement plan, Authority Board Member Mackedon asserted during a
7 public hearing that because the Authority told the school to prepare the Graduation Rate
8 Improvement Plan, it was required to give the school time to implement the plan. *See* Motion for
9 Prelim. Inj. Ex. 20; Errata ¶ 2. The Authority also incorrectly summarizes its statutory rights, as
10 NRS 388A.330(1) does not bestow on the Authority the right to close a K-12 school based solely
11 on a high school graduation rate, nor does it permit threatening closure to force waiver of a
12 NCA's right to judicial review. Finally, the Authority argues that NCA was obligated to prepare
13 the Graduation Rate Improvement Plan in 2013, but provides no citation to support this assertion
14 or any explanation as to why, if that was the case, the Authority never raised this during the prior
15 hearing on a notice of closure in March 2016. Therefore, what exactly was required in the 2013
16 renewal is now a ripe and material issue based on the Authority's own arguments which
17 Plaintiffs dispute. Yet again, the Authority's arguments reveal the need for discovery on these
18 disputed material factual issues.
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22 **D. Plaintiffs' discovery requests are material to the November 30 hearing**

23 As explained herein, several issues regarding the Authority's arbitrary and capricious
24 actions will be addressed at the upcoming hearing, many of which warrant prehearing discovery.
25 These issues include the Authority threatening NCA and its students with closure based solely on
26 NCA's unwillingness to waive its constitutional and statutory rights; the Authority persistently
27 turning a blind eye to NVVA's selective enrollment in violation of state law; the Authority
28 instituting proceedings to close a K-12 school based on a single data point related to one segment

1 of the school, despite its complete lack of statutory authority to do so; statements that reveal that
2 the closure attempts are politically motivated; and whether the Authority can violate its own
3 State Performance Framework and proceed with closure hearings in violation of the Agency's
4 policies, regulations, and NCA's existing charter agreement. *See* Motion for Prelim. Inj. at 16-
5 18.

6 **E. Witness unavailability is not dispositive and scheduling is within the**
7 **Authority's control**

8 The Authority seeks to close a K-12 school that serves more than 3,200 students
9 statewide and, at the same time, evade providing material witnesses to this Court's review of the
10 issues raised herein. This argument demonstrates the Authority's flippant attitude toward
11 eliminating what thousands of Nevada students consider their school of choice and their avenue
12 to academic success. Plaintiffs' counsel reached out to collaborate on scheduling depositions at
13 a time before Director Gavin left the state. *See* Motion for Discovery Ex. 2. Despite Director
14 Gavin's presence in Reno for a conference last Friday, his counsel refused to coordinate dates
15 during which Plaintiffs might obtain testimony. The Authority's blatant evasion should raise
16 concern with this court regarding its motives and pledge of good faith. In addition, it is the
17 Authority that has necessitated the short timeframe for this Court's action – preceding the closure
18 hearing set by the Authority for December 16. If the Authority's Director, board members and
19 material witnesses truly are completely unavailable prior to that date to provide this Court
20 testimony on issues material to this proceeding then Plaintiffs are open to the Authority delaying
21 the December 16 hearing to allow more time for this Court's proceedings and reasonable limited
22 pre-hearing discovery. Otherwise, it offends justice, public policy and the discovery rules to
23 allow the Authority to initiate closure proceedings against a public school and then hide behind
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1 “prior obligations” to evade any accountability for its unlawful and arbitrary conduct.

2 Respectfully submitted this 22nd day of November, 2016.

3 DAVIS GRAHAM & STUBBS LLP

4
5 By: 

6 Laura K. Granier (NSB 7357)
7 Erica K. Nannini (NSB 13922)
8 50 W. Liberty Street, Suite 950
9 Reno, Nevada 89501
10 (775) 229-4219 (Telephone)
11 (775) 403-2187 (Fax)

12 *Attorneys for Plaintiffs*

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Davis Graham & Stubbs LLP and not a party to, nor interested in, the within action; that on November 22, 2016, a true and correct copy of the foregoing document was enclosed in a sealed envelope, and served as listed below:

Gregory D. Ott, Esq.
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701

Attorneys for Defendants

VIA U.S. MAIL AND EMAIL


Jeanette Sparks

EXHIBIT 1
Public Records Request
Dated September 30, 2016

EXHIBIT 1
Public Records Request
Dated September 30, 2016

DAVIS
GRAHAM &
STUBBS

Laura K. Granier
775 473 4513
laura.granier@dgsllaw.com

September 30, 2016

Via Electronic Mail

State Public Charter School Authority
1749 N. Stewart Street, Suite 40
Carson City, Nevada 89706

Re: Public Records Request

Dear Director Gavin,

Under NRS 239.0107, on behalf of Nevada Connections Academy, we are requesting electronic copies of the following public records in the legal custody and control of your office:

All communications, correspondence, documentation, notes or information of any kind regarding the Authority staff, representatives or agents evaluating, researching, investigating or otherwise following-up on the admission by Nevada Virtual Academy (NVVA) school leader McIntosh that NVVA had made a decision to stop enrolling new 12 graders until the school had a more robust credit recovery program (as documented in the attached Minutes from the SPSCA Meeting at 19).

All documentation, notes, information or communications of any kind regarding or reflecting the Authority staff, representatives or agents undertook any efforts to evaluate how it could measure NVVA versus other online schools with regard to graduation rate in light of NVVA having limited accepting new 12th graders while other online schools had not as discussed during the September 2015 Authority meeting (see Minutes from SPSCA Meeting at 19, Exhibit A).

All documentation, notes, information or communications of any kind regarding or reflecting why the Authority staff, representatives or agents allowed NVVA additional time to negotiate a contract including accountability measures related to performance concerns beyond September 19, 2016, in contrast to deadlines placed on other online schools in Nevada.

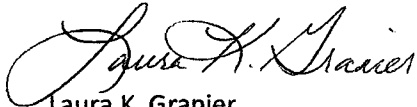
Information stored on computer hard drives or copied onto microfilm is as much a public record as information contained in filing cabinets. Thus, we specifically request that you provide copies of any of the foregoing, regardless of the method by which such information is stored or maintained.

Please provide the requested records by no later than October 5, 2016. I understand there is a charge for copies of public records. I understand I will receive a written estimate for production of the records indicated above if the estimated cost is expected to be over \$100.00, which I will be required to pay in full prior to inspection or reproduction.

State Public Charter School Authority
September 30, 2016
Page 2

Thank you in advance for your cooperation in this matter. If you have any questions or require additional information, please advise.

Sincerely,

A handwritten signature in cursive script that reads "Laura K. Granier".

Laura K. Granier
Partner for
DAVIS GRAHAM & STUBBS LLP

LKG:js

cc: Greg Ott, Nevada Attorney General's Office

EXHIBIT 2
Email Receipt of Public Records Request
Dated October 5, 2016

EXHIBIT 2
Email Receipt of Public Records Request
Dated October 5, 2016

Sparks, Jenny

From: Danny Peltier <dpeltier@spsca.nv.gov>
Sent: Wednesday, October 05, 2016 12:04 PM
To: Granier, Laura; Sparks, Jenny
Cc: Patrick Gavin; gott@ag.nv.gov
Subject: Nevada Connections Academy Public Record Request #1
Attachments: 2016-09-30 Public Records Request to SPCSA.PDF

Good afternoon,

The SPCSA is in receipt of your record request dated 9/30/2016 regarding NVVA documents. The SPCSA will provide these documents on Friday October 21 by 5pm. Any further questions or requests should be sent to me as I am handling the Public Record Requests for the agency. If you have questions or concerns please feel free to contact me.

Thank you,

Danny Peltier
Management Analyst I
State Public Charter School Authority
dpeltier@spsca.nv.gov
775-687-9178
775-687-9113 (fax)

CONFIDENTIALITY - This message and accompanying documents are covered by the electronic Communications Privacy Act; 18 U.S.C. §§ 2510-2521, may be covered by the Family Educational Rights and Privacy Act (FERPA) 20 U.S.C. § 122g; 34 CFR Part 99 and may contain confidential information or Protected Information intended for the specified individual(s) only. If you are not the intended recipient or an agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this document in error and that any review, dissemination, copying, or the taking of any action based on the contents of this information is strictly prohibited. Violations may result in administrative, civil, or criminal penalties. If you have received this communication in error, please notify sender immediately by e-mail, and delete the message. The Nevada Department of Education will not accept any liability in respect of such communication that violates our e-mail policy.

EXHIBIT 3
Email Response to Public Records Request
Dated October 21, 2016

EXHIBIT 3
Email Response to Public Records Request
Dated October 21, 2016

Sparks, Jenny

From: golfer6685@gmail.com
Sent: Friday, October 21, 2016 9:12 PM
To: Sparks, Jenny
Subject: Daniel Peltier shared 'Nevada Connections Academy Public Record Requests' with you

Hi, Here's a link to 'Nevada Connections Academy Public Record Requests' in my Dropbox:
https://www.dropbox.com/sh/e192stlemzr9x1b/AADtDTEf_ZPsFIXISUKiEidca?dl=0

Sent from my iPhone