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2 **BEFORE THE STATE PUBLIC CHARTER SCHOOL AUTHORITY**
3 **STATE OF NEVADA**

4 In Re:

5 Nevada Connections Academy Notice of
6 Closure or Possible Board Reconstitution

Hearing Dates (Phase I): May 25-27, 2017

7 Closing Argument: August 23, 2017

8 **NEVADA CONNECTIONS ACADEMY'S**
9 **WRITTEN CLOSING ARGUMENT**

10 **I. Introduction**

11 *"Reaching out to and embracing these kids is critical. It is tough; it is often unsuccessful,*
12 *but it sometimes works . . . and the measuring stick we use to assess these schools should*
13 *consider the larger circumstances of their students and missions."* Senator Becky Harris, 2015
14 Senate Committee on Education Hearing, **Ex. G** at R0205. At the heart of this proceeding is
15 whether NCA will be penalized and Nevada families denied their school of choice because NCA
16 serves a large population of vulnerable youth who likely would drop out entirely but for NCA.
17 This issue cannot be taken lightly and must not be decided based on a single data point that does
18 not truly reflect NCA's performance, but instead the failures of other schools that led to NCA's
19 2016 cohort consisting of nearly 1 in 2 students who enrolled at NCA one semester or more
20 behind.
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22 Authority Staff ("Staff") recommends closure of this school based solely on the high
23 school's four year cohort graduation rate. Since the inception of these proceedings, including the
24 decision to issue the notices of closure, Staff has refused to consider that 49% of the students in
25 the 2016 cohort arrived at NCA one semester or more behind in credits – or any other evidence
26 or performance data other than the four year adjusted cohort graduation rate. This approach is
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1 contrary to Nevada law, the Nevada Charter School Performance Framework (“CSPF”), and well
2 established education policy and evidence demonstrating that this single data point is not a
3 reliable indicator of a school’s performance, particularly under the circumstances here. As
4 Director Gavin admitted, the CSPF mandates “comprehensive information for data-driven and
5 merit based” decisions on charter renewal and revocation. Transcript of May 26, 2017 Hearing,
6 Vol. III at 221.¹ Director Gavin even admonished that “the most important measure of school
7 performance, is how [the school is] actually impacting the students it gets.” *Id.* at 217. Yet, he is
8 ignoring his own admonition by failing to consider that 49% of NCA’s 2016 cohort was credit
9 deficient when they enrolled at NCA – notwithstanding his acknowledgment that enrolling credit
10 deficient students adversely impacts graduation rate. *Id.* at 124. NCA is asking the Authority to
11 not ignore Director Gavin’s admonition. The Authority’s decision here will impact more than
12 3,200 Nevada students and should be based on substantial and compelling evidence of NCA’s
13 performance (including what Member Snow described as “impressive” test scores), as well as
14 evidence of those factors outside NCA’s control that negatively impact its four year cohort
15 graduation rate – specifically its high high-school transfer in rate of severely credit deficient
16 students.
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19 Staff has failed to point to a single factor warranting closure beyond the single flawed
20 numerical trigger of the four year adjusted cohort graduation rate, and in fact concedes that it has
21 not adequately considered NCA’s data and cure proposals, and does not find NCA’s performance
22 problematic. *See* Vol. III, at 216-17. NCA has demonstrated that the circumstances weigh
23 against proceeding with possible closure or board reconstitution of this K-12 school: NCA is
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26 ¹ The hearing transcripts will be cited and attached as follows: **Brief Exhibit B** is comprised of
27 transcript pages from the May 25, 2017 hearing transcript, and will be cited as “Vol. II”; **Brief**
28 **Exhibit C** is comprised of transcript pages from the May 26, 2017 hearing and will be cited as
“Vol. III”; and **Brief Exhibit D** is comprised of transcript pages from the May 27, 2017 hearing
and will be cited as “Vol. IV.”

1 serving its students on par or above the state average both historically and in recent years; NCA
2 has cured the single alleged deficiency through multiple innovative cures; and, but for receiving
3 nearly half of its cohort credit-deficient, NCA's graduation rate would exceed 80 percent. Staff
4 failed to prove by a preponderance of evidence that NCA's cure is inadequate to address the
5 alleged deficiency in the graduation rate. The evidence shows that no action should be taken to
6 reconstitute the NCA board or to close the school based on this single uninformed data point.
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8 II. Evidentiary Standard

9 As this Board has recognized, adjudication of contested cases such as this must be based
10 on a preponderance of the evidence. NRS 233B.121(9); 233B.125. The preponderance of
11 evidence standard requires that Staff, as the party with the burden of proof, present "**reliable,**
12 **probative, and substantial evidence** of such **sufficient quality and quantity** that a reasonable
13 [administrative fact-finder] could conclude that the existence of the facts supporting the claim
14 are more probable than their nonexistence." *Id.* at 491 (quoting *U.S. Steel Mining Co. v. Dir.,*
15 *Office of Workers' Comp. Programs*, 187 F.3d 384, 389 (4th Cir. 1999)) (emphases added).
16 Here, Staff has failed to prove through "reliable, probative and substantial evidence" that NCA
17 has not cured the single deficiency staff has identified—NCA's graduation rate.
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19 III. Argument²

20 A. Staff failed to demonstrate that NCA's cure is inadequate

21 1. Staff has violated Nevada law and the Charter School Performance Framework

22 While NCA disputes Staff's reliance on the federally-calculated graduation rate, even
23 given the Authority's vote in May adopting the federal calculation as the correct measurement
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25 ² While NCA disputes the Authority's decision that the four year federal cohort graduation rate applies to
26 the determination at issue with no consideration to the student population in that cohort, NCA
27 understands based on the Board's direction and vote at the May hearing that the Board will apply that
28 definition for purposes of this proceeding, and NCA should focus its arguments appropriately. Accordingly, NCA reserves all legal rights relative to that decision, but in accordance with the Chair's and board members' directives at the hearing, herein focuses on the issue of the adequacy of the cure.

1 here, that single data point is merely a trigger for the Authority to consider whether closure,
2 reconstitution, or no action is appropriate under NRS 388A.330. Staff concedes that the
3 graduation rate is the only concern with NCA's performance – and the sole basis for this
4 proceeding but erroneously argues this single data point means NCA is not adequately serving its
5 students. NCA presented overwhelming evidence to demonstrate the school is serving its
6 students well—either on par or outperforming other Nevada schools, as discussed herein.
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8 NRS 388A provides that the Authority "may" consider closing a high school if its
9 graduation rate³ for the previous year is below 60%. This provision was revised from a
10 mandatory ("shall") provision in an earlier draft of the bill (SB 509) that would have mandated
11 closure of a high school if the preceding year's graduation rate was less than 60%. First Draft of
12 SB 509 (March 23, 2015), **Ex. F**. Rather than mandate closure, the Legislature afforded the
13 Authority discretion to consider the possibility of closure or board reconstitution, or no action, if
14 compelling and substantial evidence supported such a decision. During a 2015 Senate
15 Committee on Education meeting, several legislators expressed concerns of unfairly penalizing
16 schools that serve at-risk students. Senator Harris stated: "The NDE and others are aware of the
17 plight of schools serving at-risk children"—many of which, she stated, do not qualify for the
18 limited definition of an alternative framework but who provide "their services to students who
19 have washed out of the local school district." *See Ex. G* at R0204-R0205 (Excerpts from
20 4/3/2015 Minutes of Senate Education Committee Meeting). Senator Harris continued:
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23 ***Reaching out to and embracing these kids is critical. It is tough; it is often***
24 ***unsuccessful, but it sometimes works.*** . . . The problem for these schools is that
25 the Nevada School Performance Framework and the charter school automatic-
26 closure provision do not recognize the circumstances of these students adequately.
27 If a high school has a student population made up entirely of students who have
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³ Chair Guinasso and other board members asserted they seek to treat all schools the same and will use the same measure for "graduation rate" for purposes of NRS 388A.330 – which constitutes a rule of general applicability and requires compliance with the rulemaking requirements under NRS 233B which have not been satisfied here.

1 washed out of the school district and if that high school is able to get a third of its
2 students through to graduation, even if it takes an extra year or two, should we
3 close that school, or should we celebrate its good work? At the very least, the
4 work should be given a further look, *and the measuring stick we use to assess
these schools should consider the larger circumstances of their students and
missions.* *Id.* at R0205 (emphases added).

5 In response to those concerns also raised by NCA and other schools, Dr. Steve Canavero
6 indicated “the NDE can create, through regulation if necessary, a flexible graduation rate
7 requirement.” **Ex. G**, at R0206. Director Gavin responded to legislators' concerns about
8 penalizing schools for serving Nevada's at-risk youth with assurances that the Authority would
9 consider all evidence necessary to truly evaluate the four-year cohort graduation rate—if the
10 Legislature allowed just that data point to be used as a trigger for possible closure. *See Ex. B-8*
11 (excerpts from 5/27/2015 Minutes of Assembly Education Committee Meeting). Though never
12 mentioned to the Legislature, Director Gavin now claims what he meant to be “compelling
13 evidence” should be limited to natural disasters, consideration of the fifth year cohort rate, and
14 schools that qualify for the alternative performance framework – though he has not sought to
15 promulgate regulations in compliance with NRS 233B to create such a rule restricting what will
16 be considered as such “compelling evidence” in these proceedings. This position lacks any
17 credibility and is completely inapposite to his testimony that “the CSPF mandates
18 “comprehensive information for data-driven and merit based” decisions on charter renewal and
19 revocation (Vol. III, at 221) and “the most important measure of school performance, is how [the
20 school is] actually impacting the students it gets” (Vol. III, at 217). Accordingly, application of
21 such a standard would not only conflict with common sense, the statute, and the Authority
22 Staff's promise to Nevada legislators, but also would constitute ad hoc rulemaking in violation of
23 Nevada law.

24 Staff concedes that NCA's high school graduation rate is the single basis for these
25 proceedings and that NCA's other academic metrics are entirely acceptable. *See, e.g.,* Vol. III, at
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1 132 (SPCSA Staff's Attorney Greg Ott stipulates that "the only issue that the Authority is
2 considering relative to NCA's deficiency is the graduation rate, not test scores or other factors of
3 school performance"); Vol. III, at 220-21 (Director Gavin states that he did not need to consider
4 data-driven and merit-based comprehensive information beyond the graduation rate prior to
5 recommending closure); Vol. III, at 226-227 (Director Gavin admits that, prior to recommending
6 that the Authority issue a notice of closure to NCA, he did not consider the collective record,
7 violating SPCSA's own Performance Framework regarding high stakes decisions).⁴ As such, not
8 only would the Authority violate the legislative intent behind NRS 388A.330 in closing a school
9 or reconstituting the board based upon a single data point, but the Authority violated its own
10 Performance Framework in issuing the notices of closure without following the intervention
11 ladder and considering the school's collective academic record in the first place.⁵
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14 ⁴ Gavin testified that "as a matter of law" the Charter School Performance Framework ("CSPF") does not
15 apply to NCA (Vol. II at 152-153) – yet the Framework expressly states that it "provides the
16 accountability mechanism for *all* charter schools sponsored by the SPCSA." **Ex. E** at 2 (Introduction).
17 The CSPF requires that "The Authority will consider the collective record of a school's academic,
18 financial, organizational and mission-specific performance when making high stakes decisions through
19 the academic performance framework." **Ex. E** at 7.

20 ⁵ Contrary to Director Gavin's assertions during the May hearing, the Performance Framework applies to
21 all charter schools the SPCSA sponsors, pursuant to the plain language of the document. *Compare* Vol.
22 III, at 166 (Director Gavin states that the Performance Framework only applies to charters that have a
23 performance contract), *with Ex. E* at 2. In fact, the SPCSA violated its own Performance Framework in
24 more ways than one-- the SPCSA failed to issue a "Notice of Concern" or "Notice of Breach," or any of
25 the intervention measures that must precede a "Notice of Closure" pursuant to the Intervention
26 Framework. *See Ex. E and Supp. Ex. A*, Declaration of Steve Werlein, at 5. This is compelling
27 evidence to demonstrate that the Authority has treated NCA differently from other schools it sponsors and
28 violated Nevada law. *See* Vol III, at 224-225 (conceding that the SPCSA issued the proper notices to
NVVA, but did not do so for NCA); and Vol. III at 226 (conceding that notice of concern/breach remains
part of the process even following codification of SB 509). In addition, although Director Gavin
concedes it was discretionary whether to even issue the notices to initiate this process, the Board did so
based solely on Gavin's representations about the 4-year cohort graduation rate without so much as
allowing NCA to make any presentation or consider any other information about the school's
performance or the population it serves. *See id.* While Director Gavin acknowledges mitigating
factors would exist such that he might not recommend issuing a notice of closure, he emphasizes
his belief that it should be for the board to decide, in its discretion – when presented with the
information. Vol. III at 275. However, in this case, he refused to share material and relevant
information on mitigating factors repeatedly raised by NCA and then refused to allow NCA to
speak during the Board's deliberation on whether the notice of intent to close should issue. At
the May 2017 hearing, for the first time he indicated that a 5th year cohort graduation rate could
be important but he never provided that information for NCA's 2015 and 2016 graduation rates.

1 Contrary to his assurances to the legislature, Director Gavin refuses to consider evidence
2 NCA has submitted to the Authority demonstrating its academic performance with students
3 while they're at the school—including evidence that NCA serves a large population of displaced
4 students who come to NCA behind in credits.⁶ Director Gavin testified to the Legislature that
5 “we want to make sure that we are making thoughtful and judicious decisions. To that end, we
6 have also endeavored to make sure that anything above that “three strikes and you are out” level
7 is discretionary on the part of the Authority or sponsor board **so that we can take into account**
8 **those kinds of nuances.** . . . [I]n cases where a school has a 27 or a 37 percent graduation rate . .
9 . we need to ensure that **we are looking very carefully at why that is and if there is some kind**
10 **of compelling explanation, certainly taking that into account . . .”).**⁷ Yet, now that the
11 Authority is faced with this high stakes decision, he testifies to this Board that “there is no
12 information that is relevant to these proceedings” other than the four-year adjusted cohort
13 graduation rate. Vol. III, at 174. Not only has Director Gavin failed to consider the substantial
14 information NCA presented (which was validated by an independent third party as Director
15 Gavin requested), but his testimony reveals that the Authority has failed to collect and analyze all
16 data results of NCA’s students on statewide exams, in violation of NRS 388A.229 and the
17 CSPF.⁸ See Vol. III, at 173-174 (stating that the *only* data he collected and submitted for
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21 ⁶ See **Supp. Ex. D**, Declaration of Gina Hames, at 3 (stating that “a common term among these students is
22 ‘counseled out’—meaning that the schools they attended prior to NCA advised the students to try online
23 school and essentially counseled them out of the traditional school setting after those students had spent 3
24 years and sometimes even part of their 4th year at the their zoned high school, all the while falling behind
25 in credits”—effectively “pushing credit-deficient students toward NCA when the schools discover that
26 those students will not graduate on-cohort.”); see also **Supp Ex. A**, Declaration of S. Werlein, at 3
27 (“Students are routinely ‘counseled’ out of their zoned schools when it is ascertained that they will not
28 graduate within the 4-year cohort window. These students are generally disengaged, and view graduation
as an unattainable goal.”)

⁷ See **Ex. B-8** (Excerpts from 5/27/2015 Minutes of Assembly Education Committee Meeting).

⁸ NRS 388A.229 requires that the sponsor of a charter school must ensure collection, analysis, and reporting of all data results of pupils enrolled in the charter school on statewide exams **to determine whether the charter school is meeting the performance indicators, measures, and metrics** for the achievement of proficiency of pupils.

1 analysis was the four-year adjusted cohort graduation rate). Gavin's testimony demonstrates that
2 he failed to consider the obstacles of schools that enroll a large number of credit-deficient
3 students prior to making a recommendation to the Authority, to consider the impact of
4 withdrawn students on NCA's graduation, or anything other than the single number itself—a
5 position that is blatantly inconsistent with his testimony to the Legislature.
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7 Likewise, **Director Gavin admits that qualitative factors influencing the graduation**
8 **rate would be relevant to his decision as to whether to recommend closure** based on a
9 school's graduation rate falling below 60 percent. *See* Vol. III, at 231-32. For example, he states
10 that he would consider the following: whether the credit deficient students enrolled in 11th or 12th
11 grade, "the number of kids who got caught up [credit-wise,]" . . . "the degree that this school was
12 continuing to keep the student engaged, . . . kids who are taking summer school, doing whatever
13 else, loading on more credits to be able to get caught up – that would certainly be important. And
14 that would likely result in a lot more kids graduating on time." Vol. III at 231-233. He also
15 admits that the 5-year cohort rate could be compelling evidence to consider for a high school
16 because "such a school is demonstrating that it is taking students who were behind and is
17 keeping them engaged and getting them on track to a diploma in five years, which is a great
18 outcome for those kids." *See* Vol. III, at 239-240. However, Director Gavin did not look at this
19 information prior to recommending issuance of a notice of closure or that NCA's cure is
20 inadequate during these high stakes proceedings, despite that NCA has submitted all of this
21 information and more in relation to these proceedings and its proposed cures and despite that
22 NCA went to Director Gavin as early as September 2015 to proactively invite discussions with
23 the Authority related to the causes leading to its low graduation rate. For example, he fails to
24 disclose to the Authority that for the 2014-15 cohort, the 5th year graduation rate was nearly 7
25 percent higher than the 4-year cohort rate – as it was 42.22%. Instead, Gavin has only
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1 considered a single data point. Vol III, at 174 (stating that “there is no information that is
2 relevant to these proceedings” other than the four-year adjusted cohort graduation rate). Not
3 only has Staff failed to meet its burden of proof to demonstrate that NCA’s cure proposal is
4 inadequate, Gavin has admitted that NCA has addressed several material factors that would
5 increase its graduation rate, and, pursuant to his own testimony, the Authority should consider
6 evidence NCA has presented beyond just the single data point and disregard Director Gavin’s
7 contradictory recommendation.
8

9 NCA’s cure proposals – which Director Gavin has refused to consider – strike a balance
10 that addresses both the need to serve at-risk students, and the SPCSA’s focus on “outputs.” For
11 example, Director Gavin has refused to entertain NCA’s innovative proposals that would cure
12 the single issue Staff has identified—graduation rate—such as the “school within a school
13 proposal”—which would cause NCA’s graduation rate to immediately rise to 87%, and still
14 enable NCA to accept and serve students who require additional assistance with credit recovery,
15 as Nevada law obligates it to do. *See* Vol. III, at 242 (Director Gavin stated that “there is no
16 current policy that permits that”). In contrast, Director Gavin has allowed other charter schools
17 to contravene Senator Harris’s stated intention behind NRS 388A.330—focusing solely on
18 numbers and actually discouraging schools from serving at-risk students. *See* Vol. III, at 88-90
19 (demonstrating that Nevada Virtual Academy—a school that was previously subject to closure
20 proceedings stopped enrolling 12th graders, and is no longer subject to closure proceedings).
21 Director Gavin’s refusal to consider factors outside NCA’s control that have a substantial impact
22 on NCA’s graduation rate as part of the decision making process as to whether to even bring
23 closure proceedings (never mind recommend closure) violates the Nevada legislature’s intent in
24 amending the language from the mandatory “shall” to the discretionary “may” and, is a clear
25 abuse of the Authority’s discretion.
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1 **2. Staff improperly seeks to limit the evidence the Authority can consider**

2 Contrary to his reliance on a single flawed statistic, Director Gavin admitted during his
3 testimony that that the Authority does have discretion under NRS 388A.330. Director Gavin
4 opines that the Authority should exercise this discretion in the event of a natural disaster that
5 displaces children. *See* Vol. II, at 191. Director Gavin admits that compelling evidence should
6 be considered but then imposes his ad hoc opinions as to what might be “compelling” – limiting
7 circumstances to natural disasters that displace students. The arbitrary application of his
8 limitation is evident from the fact that NCA’s graduation rate is a result of displaced students
9 who enroll at NCA credit-deficient—often as the result of being “counseled out” of their
10 previous schools due to their credit status—which, as NCA has demonstrated, and Director
11 Gavin and his staff have acknowledged, is the cause for NCA’s graduation rate falling below 60
12 percent. Therefore, the Authority should reject Director Gavin’s improper reading of NRS
13 388A.330 and arbitrary ad hoc rulemaking to limit what he considers to be “compelling
14 evidence” this Authority should consider relative to whether to exercise its discretion in seeking
15 closure of NCA due its four year cohort graduation rate being below 60%.

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18 Director Gavin concedes that there is a substantial difference between a credit-deficient
19 student who became credit-deficient at NCA, and a student who enrolls in NCA credit-deficient.
20 Vol. III, at 286. NCA is fully accountable for the former category, but should not be penalized
21 for the latter⁹ NCA has demonstrated that 49 percent of its 2016 cohort were one or more
22 semesters behind when they enrolled at NCA and that most of these credit deficient students
23 enrolled late in their high school career – junior and senior year – when NCA had little or no
24 opportunity to help these students catch up and graduate on cohort. *See* Vol. IV, at 155-56. The
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27 _____
28 ⁹ NCA’s position is consistent with Senator Harris’s concerns as expressed in the 2015 legislature and the subsequent revision to allow the Authority discretion regarding school closure decisions.

1 Authority's exercise of discretion to consider all compelling factors must include consideration
2 of the types of students enrolling in NCA in order to provide context and substance to its
3 graduation rate, rather than looking at a number without any understanding of the students it
4 represents.

5 NCA has presented overwhelming evidence that it is serving its students well (including
6 impressive performance on statewide testing) and would have a graduation rate at above 87% but
7 for the hundreds of credit-deficient students it receives which Staff has failed to refute by a
8 preponderance of evidence.¹⁰

9
10 **3. Staff failed to meet its burden of proof to prevail in Phase I**

11 Staff failed to demonstrate by a preponderance of evidence that NCA has not adequately
12 cured the single alleged deficiency. Staff's chief witness offered testimony that was
13 unsupported, contradictory, and demonstrated that Staff had not adequately considered NCA's
14 cure proposals or the data necessary to render a discretionary determination prior to
15 recommending NCA's closure. Staff failed to present any evidence to the Authority that NCA's
16 four year cohort graduation rate in fact represents NCA's achievement failures, and actually
17 **concedes that NCA's academic performance is not problematic.** See Vol. III, at 216-17
18 (Director Gavin admits that nothing in NCA's performance data currently available rises to the
19 level of concern to warrant closure); see also Ex. Y, at R0878 (Gavin states that "other than on
20 this matter of grad rate, the school is currently – was in good standing as of the most recent full
21 framework.").

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24 Staff's case-in-chief featured two witnesses -- Director Gavin and Russ Keglovitz, where
25 the latter testified only to the graduation rate calculation. Director Gavin's testimony provided

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¹⁰ Moreover, NCA asks that the Authority consider that closure of an entire K-12 school based solely on
28 the graduation rate of its high school violates NRS 388A.330(1)(e)-(f), which outlines different triggers
for closure of different grade levels.

1 only a bare assertion that NCA's multiple comprehensive cure proposals have been inadequate.
2 Direct Gavin offered his opinion of cure proposals as submitted by NCA, though at the same
3 time he admits that he has not reviewed one of NCA's cure proposals at all because he
4 considered it a settlement proposal rather than a cure, and that he did not provide the same
5 feedback to NCA as that which he has provided to other schools in the past due to litigation with
6 NCA. *See, e.g.*, Vol. III, at 124; Vol. II, at 158-59.

7
8 Director Gavin also testified that Staff has provided feedback on its recommendations for
9 similarly-situated schools' proposed cures in the past, but then goes on to explain that he has
10 failed to consider one of NCA's proposed cures entirely¹¹—admitting that Staff has failed to treat
11 NCA in the same manner in which it has treated similarly-situated schools. Vol. II, at 154, 155
12 (Director Gavin states that he “felt it was important to be conservative with regard to what
13 information, what was stated from my side” due to parallel litigation with NCA, which caused
14 him to deviate from the recommendations he would typically make and the collaboration he
15 would generally engage in to assist a school with its cure). Vol. II, at 158. Director Gavin
16 admits he limited feedback and collaboration with NCA: “we were in – there's a litigation that is
17 technically, I guess, still ongoing. So that was certainly an area of concern.” Vol. II, at 159.
18 Staff retaliated against NCA for seeking judicial review, and treated NCA differently when
19 compared to other schools subject to closure.
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22 Director Gavin admits that he has not reviewed or considered NCA's several cure
23 proposals prior to concluding they are inadequate and recommending the same to the Authority.
24 *See, e.g.*, Vol. III, at 124 (stating that he did not review documents NCA presented to the
25 Authority in conjunction with a previous cure proposal, specifically—documents prepared by Dr.
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27 ¹¹ Director Gavin testified that he is unaware of the percentage of credit-deficient students NCA serves,
28 despite NCA's prominent inclusion of this information in each of its cure proposals. *See* Vol. III, at 35-36.

1 Garza, NCA’s third-party data validator). Director Gavin could not testify that he reviewed data
2 that NCA had submitted to demonstrate the number of credit-deficient students it served, and
3 testified that he instead made his recommendations regarding NCA based solely on “anecdotal
4 information”—a term which he does not describe further—regarding NCA’s credit deficiency in
5 comparison with other Nevada schools. Vol. III, at 43. When asked what evidence Director
6 Gavin reviewed relative to his determination whether or not NCA had cured in response to the
7 February 2017 notice of intent, he stated that he reviewed the cure letter NCA submitted in
8 March 2017, and for each bullet point in the letter, Director Gavin merely provides his opinion as
9 to why each is inadequate but fails to support his opinions with valid law or evidence.¹² See Vol.
10 III, at 198.
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12 NCA has already addressed many of Director Gavin’s stated concerns – which have been
13 a moving target. NCA outlines Director Gavin’s purported “deficiencies” in NCA’s March 2017
14 cure proposal below to demonstrate Staff’s failure to meet its burden of proof:
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16 • **Lack of Board Approval of Initially Proposed Cure**

17 Director Gavin testified that he was concerned with NCA’s proposed cure presented in
18 2016 because it was not already approved by the NCA board. Vol. II, at 154-55. This was the
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20 ¹² The only proposal as part of the March cure letter for which Director Gavin explains his rejection is
21 NCA’s proposal to implement financial penalties for a failure to meet benchmarks, for which he states
22 that he does not have the statutory authority to assess a financial penalty on the school. Vol. III, at 54.
23 However, this criticism is belied by Staff’s previous attempts to require schools to enter into contract
24 containing measures for which it has no statutory authority—namely, requiring NCA to waive its right to
25 judicial review. Compare **Ex. B-11** (Contract Staff proposed as an acceptable cure to NCA, which would
26 have required NCA to waive its rights to judicial review), and Vol. III, at 61-63 (where Director Gavin
27 responded “[y]es” to the questions: “[w]as it your intention that the school would not be able to raise
28 certain arguments about the trigger for appointment of a receiver to a judge with the provision included in
that contract that I referred to as a judicial waiver?”), with Vol. III, at 66 (Director Gavin concedes that he
is unaware of a statute providing authority for the same), and NRS 388A generally (providing no
statutory authority for the same). This criticism is further belied by Director Gavin’s subsequent
admission that he does not believe that Authority or Authority Staff needs express statutory authority for
any provision included in a contract with a charter school, and that charter schools in other states are
subject to the same financial mechanisms as those which NCA proposed and which Director Gavin had
inexplicably deemed ungrounded in statute and “inappropriate.” Vol. III, at 71-73.

1 only concern raised in Staff's prehearing brief in December. *See* SPCSA Prehearing Brief,
2 December 13, 2016, at 11. Yet, after NCA's Board approved the proposed cure, Director Gavin
3 then raised new concerns.

4 • **Reimbursement penalty**

5 In response to Gavin's repeated (unsubstantiated) assertions that NCA's graduation rate
6 puts "millions of taxpayer dollars at risk," NCA proposed a reimbursement penalty as part of its
7 March 2017 cure proposal. Director Gavin stated during the May hearing that he does not
8 believe that a reimbursement penalty would increase the likelihood that students will graduate
9 because it takes dollars out of the classroom and away from children, but does not dispute that
10 other states have successfully implemented the same concept. Vol. III, at 73. It also highlights
11 the prejudicial manner in which Director Gavin has exercised his authority with respect to NCA.
12 He refuses to engage NCA on what is an acceptable cure, something member Guinasso rightly
13 identified as highly problematic (*see* Vol. III, at 272¹³), and what little insight he does provide,
14 he uses as a weapon against NCA when it attempts to provide a cure responsive to that feedback.

15 Moreover, Director Gavin's rejection of this facet of the cure again demonstrates the
16 Authority's disparate treatment of NCA when compared with similarly-situated charter schools.
17 Director Gavin testifies that there is no statutory authority for the SPCSA to implement a
18 financial penalty, though he has entered into contractual cures with other charter schools, such as
19 Beacon Academy with provisions unauthorized by statute, and states that he does not believe the
20 SPCSA needs express statutory authority for any provision it includes in a contract with a charter
21 school.

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25 ¹³ "Acting Chair Guinasso: Two more questions and then we'll stop. One of the things I'm
26 troubled by is, when a school finds itself in the position that it's deficient and they're searching
27 for a cure to get back on track and to address the deficiency, how is it they're supposed to know
28 whether what they're proposing will ultimately be acceptable to the board? I mean, how is it
they are -- how is it they're going to know that those factors that you consider attainable,
measurable, leadership, commitment, how are they going to know without some kind of
communication from you in that regard?"

1 school. Vol. III, at 70-72. Thus, Director Gavin’s criticism here is based on an argument he did
2 not deem problematic when recommending the adequacy of cures for other similarly-situated
3 schools.

4 • **Voluntary reconstitution proposal**

5 Director Gavin testified that he does not believe NCA’s voluntary reconstitution proposal
6 in the March 24, 2017, cure letter (also included to respond to Staff’s suggestion), provides for
7 complete reconstitution in a reasonable time, because “a restart of the school’s governing body
8 only works if it is a wholesale change”—but he can point to no nexus between a “wholesale
9 reconstitution” and an improved graduation rate when the sole basis for the need for an improved
10 graduation rate stems from the high numbers of students who enroll in the school already
11 severely credit deficient. Vol. II at 180-182. Director Gavin initially testified to a “growing
12 body of evidence that charter school restart . . . is very strong, and frankly one of the most
13 evidence-based forms of turnaround, one of the few areas, for example, in the school
14 improvement research where we see any material difference or sustained material difference in
15 pupil outcomes. . . . There’s a fair body of data.” Vol. II, at 182. On cross-examination, Director
16 Gavin admits that no such data exists – and was unable to provide specific evidence to support
17 that wholesale restart or massive change in governance improves graduation rate. Vol. III, at 75-
18 77, 80. Such unsupported and contradictory assertions do not constitute “reliable, probative, and
19 substantial evidence” as required by law and has absolutely no nexus between the proposed
20 remedy and the demonstrated problem attempting to be remedied – a low graduation rate
21 stemming solely from high numbers of students transferring into NCA during their high school
22 years already severely credit deficient.

23 Director Gavin also testified that NCA’s voluntary reconstitution proposal is “no
24 different really than what we see in the bylaws of a lot of schools.” Vol. III at 74. However, he
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1 later recants that assertion when he is unable to identify a single Nevada school with an
2 aggressive voluntary reconstitution plan similar to that which NCA proposed—replacing at least
3 one board member every year—so as to allow for a reasonable transition that will not disrupt
4 operations. *See* Vol. III, at 74; *see also* **Ex. B**, March 24, 2017 cure letter, at 5.

5
6 Further undercutting Gavin’s unsupported assertions that total reconstitution is tied to an
7 increase in graduation rate is ample evidence NCA has presented demonstrating that NCA’s
8 board is composed of members who are dedicated, highly experienced, and devoted to constantly
9 improving the school’s performance and graduation rate. *See* Declaration of Steve Werlein, at 4
10 NCA’s president, Dr. Jafeth Sanchez, is a research assistant professor with a primary focus on
11 “developing high-quality school leaders within our state and beyond” (*see* Vol. IV, at 220-24)
12 whom NDE Superintendent Steve Canavero asked to serve on a governance advisory team
13 because, under her leadership, NCA served as a “very strong model for effective board
14 governance.” Vol. IV, at 230. Under Dr. Sanchez’s leadership, the NCA Board has overseen
15 changes that have resulted in great strides in NCA’s ability to serve its students. *See* Vol. IV, at
16 225-26 (explaining its close oversight of, *inter alia*, the expanded summer school funding for
17 credit-deficient students and those who would benefit from course acceleration, introducing new
18 tutoring programs, and each facet of the graduation rate improvement plan). Further, Dr.
19 Sanchez’s testimony regarding the Board’s nuanced approach to data analysis and making data-
20 based decisions in an effort to discern whether modifications to NCA’s approach are necessary
21 going forward demonstrates her higher-level understanding of the challenges NCA faces based
22 on its highly transient and credit-deficient population, and the Board’s commitment to improving
23 within those constraints. *Id.* at 226-27. Finally, Dr. Sanchez testifies that, under this Board’s
24 leadership, NCA has consistently met or exceeded the state standard in terms of academic
25 performance, as NCA has demonstrated herein. *Id.* at 227-29; *see also* **Supp. Ex. HH**, at 2-5.
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1 Of course, Dr. Sanchez has been working diligently with other board members on addressing the
2 four year adjusted cohort graduation rate rate and the undisputed evidence presented to this
3 Authority Board demonstrates clearly that their efforts are yielding positive results and that NCA
4 is also making progress with respect to metric.

5
6 • **Graduation rate improvement plan**

7 Staff has failed to demonstrate that implementation of NCA's graduation rate
8 improvement plan ("Plan") is not an adequate cure, and offers only unsupported, vague concerns
9 with the plan—all of which NCA's successful early implementation of the plan refutes.

10 NCA has proposed as part of its cure proposal implementation of the Plan that it
11 submitted to the Authority in May 2016 (**Ex. B-4**), which this Authority praised (**Ex. Y**).¹⁴ Chair
12 Guinasso asserts that NCA must consider carefully the previous direction of the Authority Board
13 to include a waiver of certain rights to judicial review— which, if applied consistently, should
14 require substantial deference to this Board's request for and then praise of the NCA Graduation
15 Improvement Plan – including direction to implement the plan. As the Authority has recognized,
16 NCA must be afforded time to implement the Plan and see its results¹⁵— which Staff has
17 eclipsed here in a rush to close the school, with no reasonable explanation.¹⁶ NCA already has
18 demonstrated success of the Plan with a near 5% point increase in the graduation rate for 2016
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22 ¹⁴ Specifically, Member Mackedon stated that "...this report is really well done." **Ex. Y**, May 20, 2016
23 Transcript, at 196. Member McCord stated, "I'd really like to congratulate you on that.... I congratulate
24 the school for putting this in there. It speaks to the integrity of the data collection, but it does one other
25 thing. It actually defines the actionable data." *Id.* at 199, 203. Chair Johnson stated: "... if you
26 implement this really stellar plan that I think we've all been impressed by ..." *Id.* at 212.

27 ¹⁵ Member Mackedon has previously expressed the view that "[i]t's their responsibility to put forth the
28 plan, which they did, and to get results on it. And it's our responsibility to make a decision when the
results come out in a year or six months or whenever it is they come out." **Ex. Y**, May 20, 2016 SPCSA
Transcript at 234-235.

¹⁶ As further evidence of the "eclipsed process," NCA notes again that the Authority has failed to follow
its own Charter School Performance Framework—which it applies to all schools the Authority sponsors.
Ex. EE at 2. Namely, in its rush to close NCA as opposed to collaborate towards a cure, the SPCSA
failed to issue a "Notice of Concern" or "Notice of Breach," or any of the intervention measures that
precede a "Notice of Closure" pursuant to the Framework. *See Supp. Ex. A*, Declaration of Steve

1 which Director Gavin calls “encouraging” and “leading indicators,” but then without any
2 evidence simply concludes that they are not “something [the Authority] can rely on to make a
3 determination of whether the school has effectively closed the gap” regarding graduation rate.
4 Vol. III at 80. Director Gavin ignores NCA’s graduation rate improvement between the years
5 2015 and 2016—an increase from 35.63% to 40.9 % (with a 5th year cohort rate of 42.22%) --
6 simply stating his opinion that such an increase over a single year was “inadequate,” while
7 admitting that he conducted no analysis or research regarding the increase. *See id.* at 81-84. In
8 fact, as expert witness Dr. Richard Vineyard testified, a nearly 5 percentage-point increase in the
9 federally-calculated graduation rate is rare and significant when compared with other schools
10 within Washoe County School District. *See* Vol. IV, at 56.

11
12 Accordingly, Staff failed to support its assertion that NCA’s Plan which has already
13 demonstrated success and such an increase in the graduation rate is inadequate to constitute a
14 cure of the graduation rate, and undercuts that assertion by stating that too drastic an increase
15 would merit scrutiny—leaving schools with no viable opportunity to cure a graduation rate
16 pursuant to NRS 388A.330. Vol. III at 84.

17
18 NCA provides concrete data and evidence beyond the 5% increase in graduation rate, all
19 of which demonstrates strides attributable the school’s Plan implementation. For example, the
20 March letter details the progress-to-date of NCA’s Grad Point Recovery Plan, which has grown
21 from the program’s initial piloting of 100 available seats to 500 available seats—offering
22 teachers dedicated solely to credit recovery who provide “individualized learning while not
23 sacrificing exposure to key, standards-drive concepts”—which has elevated credit-deficient
24 students’ completion rate in certain key courses by over 20 percent. *See Ex. B* at 5. NCA’s
25 teachers and personnel who have had a hands-on role in implementing the Plan have testified to
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Werlein, at 5.

1 that success and corroborated these results. *See* **Supp. Ex. C**, Declaration of Lisa Malabago, at
2 2-3 (explaining that, as part of the Plan implementation, each success coach supports and
3 engages a number of students, and, from that: “[a]s a result, these kids are starting to see results.
4 We have seen students who previously passed 1-2 classes in a semester average 4-6 classes
5 passed in our Every Student [Succeeds] Academy. The best part is, these kids are learning to
6 trust that NCA educators do care about what they do and where they are going in life – but we
7 need time to help them”); *see also* **Supp. Ex. D**, Declaration of Gina Hames, at 3 (describing an
8 increase in students’ successful course completions toward graduation).

10 Moreover, NCA’s teachers and personnel confirmed that NCA’s many efforts are
11 working and that the school is analyzing early success to determine how to move forward so that
12 it can best serve these students and increase the four year cohort graduation rate to at least 60%.
13 NCA high school Principal explains implementation and future goals for a successful facet of the
14 Plan, the Every Student Succeeds Academy:
15

16 To further add support for our credit-deficient students, we created what we call
17 the Every Student Succeeds Academy. In order to do this, we have changed our
18 advisory program by adding success coaches. A success coach's main job is to
19 work with off-cohort students to ensure they are staying on track, redeeming
20 failed credits, and graduating. Success coaches monitor their students'
21 performance daily through gradebook checks and bi-weekly calls. In my capacity
22 as principal, I send student performance reports to each student's success coach
23 and to their teachers. The reports include attendance and participation metrics,
24 overall number of contacts with each student, and the student's standing in each of
25 their courses. Our teachers and success coaches work together in their
26 professional learning communities (PLCs) to ensure that each student has an
individual plan moving forward that will help ensure their success. In addition,
NCA counselors complete two transcript checks a year with every student to
make any necessary changes to course placements and ensure students are staying
on track to graduate. We have seen significant success with this program thus far
and have developed changes to be implemented in the 2017-2018 school year to
make it an even more valuable asset for our students and to further improve our
graduation rate.

27 *See, e.g.*, **Suppl. Ex. B**, Declaration of Joe Thomas, at 2-3. Staff offered no evidence to rebut
28 this.

1 Director Gavin actually reinforces the need to allow NCA time to continue
2 implementation of the Plan, stating that “it is impossible” to determine whether NCA’s efforts
3 are sufficient to correct deficiencies at this early juncture. Vol. II at 183-84. The school needs
4 more time to implement these measures, and the Authority itself has previously recognized that
5 implementation will take time. Gavin’s statement is a blatant admission that he lacks any
6 evidence, much less a preponderance of evidence, that NCA’s cure is inadequate – particularly in
7 the face of NCA’s evidence that it is, in fact, working.
8

9 Moreover, Director Gavin testified at the May hearing that there were “gaps” all over the
10 Plan – but failed to articulate any meaningful gaps and also contradicted (under oath) his own
11 prior recommendation in July 2016 that this Board approve the Plan – contingent on NCA
12 entering a contract it had never before seen and that waived certain material rights to judicial
13 review.¹⁷ Director Gavin provides no explanation for this sudden change in position with respect
14 to the substance of the Plan. NCA should be permitted the time necessary to adequately
15 implement the plan, as the SPCSA Board Members expressly contemplated in May 2016,
16 augmented by the additional proposals set forth in the modified cure submitted on August 14,
17 2017 pursuant to this Authority’s order.
18

19 **• NCA’s efforts to locate Withdrawn Students**

20 In response to Director Gavin’s suggestion, NCA hired a private investigator to locate
21 withdrawn students. Director Gavin testified in May that NCA’s efforts were deficient because
22 they lacked certain information necessary for him to fully understand where these students ended
23 up, however, as Director Gavin states, he did not communicate this deficiency to the school.
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26 ¹⁷ See **Ex. Y**, at 53, 60, & 62 (Gavin previously recommended approval of NCA’s graduation
27 rate improvement plan in 2016, where the only “gaps” he identified were a request that the
28 school validate its data and impose measurable benchmarks—both of which the school has done,
and yet Gavin considers its cure proposals mysteriously inadequate); see also **Ex. Q**, Staff
Briefing Memo dated July 29, 2016.

1 Vol. III at 108-09. Nor did he communicate his assertion that the same information would have
2 been helpful in a slightly different format. Vol. III at 119. This is a dereliction of his duties
3 under, *inter alia*, NRS 388A.171(1) and NRS 388A.196(4). Director Gavin added that he did not
4 consider this portion of NCA's cure, or the effect on NCA's graduation rate of those students
5 who were impossible to locate. Vol. III, at 115-16. Thus, he presented no evidence that NCA's
6 diligent approach to track down previously withdrawn students and also track withdrawing
7 students going forward, will result in an increase in NCA's graduation rate though he
8 acknowledges that failure to locate withdrawn students adversely impacts the graduation rate.
9

10 Director Gavin admits that for certain withdrawn students, he cannot form an opinion on
11 NCA's performance in serving students whose enrollment may have lasted anywhere from one
12 day to eight months -- acknowledging a fundamental point that NCA should not be penalized for
13 a "failure" to serve students it has no meaningful opportunity to serve. Vol. III at 111. Yet, a
14 blind adherence to the four year adjusted cohort graduation rate, without an effort to evaluate the
15 students who comprise that cohort, penalizes NCA for a student who was in the school for even a
16 single day. Staff presented no evidence that NCA's increased diligence to identify where
17 withdrawn students end up will close the gap in the graduation rate -- just like it has failed to
18 produce any evidence that demonstrates a reconstitution of the board will close the gap.
19

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21 • **"School within a school" – establishing a separate school or code**

22 Gavin admits to having supported transitioning schools serving high populations of credit
23 deficient students to the Alternative Performance Framework, but insists that will only work for
24 NCA if the school limits enrollment to serve primarily credit deficient students. Gavin provides
25 no evidence to support that NCA must stop enrolling and serving thousands of students who are
26 not credit deficient in order to establish a separate school within a school to serve (or perhaps
27 more importantly -- to demonstrate the legal capacity to do so) its sizeable high population of
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1 credit deficient students. Director Gavin states that he does not believe that NCA's "school
2 within a school" proposal would correct the single deficiency because "it would simply segregate
3 out those students into a separate program of some kind" – something the legislature clearly
4 intended when it carved out this option to serve this exact population – but fails to explain how
5 that is different from other schools he has supported transitioning to the Alternative Performance
6 Framework such as the Beacon Academy. Vol. II at 185. He provides no evidence that
7 bifurcating the school in this manner would not improve NCA's graduation rate. To the
8 contrary, as NCA has previously demonstrated, the proposal would cause NCA's graduation rate
9 to jump to approximately 87% immediately upon implementation. *See Ex. B*, NCA's Cure
10 Letter, March 24, 2017, at 8-9.¹⁸ This proposal has been an important consideration and it was
11 NCA's understanding as part of its agreement to truncate the hearing on Phase I that Board
12 Member Guinasso and Authority Staff would work with the school to understand if NDE would
13 support this approach by allowing student coding for the bifurcation. Yet, following a single
14 phone call during which Member Guinasso indicated he was agreeable to jointly seeking that
15 approval from NDE, Staff suddenly insisted that no further discussions be had with NCA absent
16 a confidentiality agreement– a position that is, to say the least, problematic given that Director
17 Gavin and Staff are adversary parties in an ongoing proceeding at the time such directive was
18 communicated to the Authority. As a result, Member Guinasso improperly and, contrary to the
19 assertions provided to and relied upon NCA at the conclusion of the three days of hearings held
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24 ¹⁸ "The Authority recently did suggest that the school consider bi-furcating its charter to separate out the
25 high school in order to address this issue. If the Authority accepts NCA's proposal to cure as set forth
26 herein, NCA would seek authorization to formally establish an alternative performance framework school
27 under its charter — a 'school within a school' in which it would serve all of its students who enroll at
28 NCA credit deficient and those students would have separate codes and be included in that school's
graduation rate while NCA's general high school population, all students who enroll in NCA on track,
would be included in the NCA high school graduation rate. This properly holds NCA accountable for the
students it serves who come to the school 'on cohort' but allows the school to continue effectively serving
students who come to NCA credit deficient without penalizing NCA for enrolling those students by

1 on May 25-27, 2017, refused to engage in further discussions or to pursue this discussion with
2 NDE and the school – asserting that he thought the difference between “settlement” and a “cure”
3 was a distinction without a difference – although throughout the course of the hearing he
4 acknowledged the cure and its adequacy were not confidential. *See* Vol. III at 67, 69
5 (acknowledging “cure” clearly falls outside settlement); *see also* Vol. III, at 212 (Director Gavin
6 admits he refused to discuss a cure without a confidentiality agreement in place, yet he
7 previously stated that the proposal NCA sent to him in November 2016 was not a “cure” because
8 it was a “settlement”).
9

10 Director Gavin states that NCA’s proposal was inadequate when compared with Beacon
11 Academy’s (“Beacon’s”) similar proposition because Beacon “amended its charter” to “limit its
12 enrollment to those students who were credit-deficient as defined under SB 460 and Nevada
13 regulation,” and “agreed to additional contractual elements as part of that transition.” Vol. II at
14 186-87. With the exception of the “additional contractual element” Director Gavin refers to—
15 the requirement that Beacon waive its right to judicial review—NCA’s proposal as included in
16 the March 24, 2017, cure letter is substantially similar—it would require that NCA amend its
17 charter to identify subcategories of students based on those who arrive at the school credit-
18 deficient pursuant to Nevada law. In addition, NCA stated in the proposal that “if the alternative
19 performance framework school within a school were approved by the Authority as described
20 above, then NCA would apply to the Authority to sever the high school from the K-8 charter as
21 the Authority Staff has requested, in order to resolve the Authority's concern that it cannot, under
22 the statute, close the K-12 school based on the high school graduation rate”—this would also
23 require NCA to amend its charter to create “subcategories” of students, as Director Gavin praised
24 in Beacon’s plan. Moreover, given Director Gavin’s recent proposal regarding oversight of
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 adversely impacting the NCA high school graduation rate. As noted above, NCA anticipates this would

1 separate school campuses, the Every School Succeeds Academy also could be considered as a
2 separate campus of NCA either under an amendment or a new charter application. *See* Proposed
3 Regulation R131.16 (July 31, 2017 SBE Workshop), *available at*
4 [http://www.doe.nv.gov/Boards_Commissions_Councils/Workshops_Hearings/2017/July/
5 Support_Materials/](http://www.doe.nv.gov/Boards_Commissions_Councils/Workshops_Hearings/2017/July/Support_Materials/). These conflicting positions Director Gavin asserts in various venues raises
6 serious questions as to the weight the Board should give to any of his testimony or
7 recommendations.
8

9 Director Gavin testified to a timeline within which NCA must submit applications or
10 amendments to its charter, asserting the timeline was a hurdle because NCA's "school within a
11 school" proposal would not become effective until 2019 at the earliest, but his testimony
12 conflicts with applicable statutes and, his own testimony that he would support a two year period
13 for such a transition. *See* Vol. II, at 187-88; Vol. III, at 239. NAC 386.3269 provides for the
14 amendment of written charter or charter contract, where the request for amendment is not
15 otherwise described in NAC 386.326 to 386.3268, inclusive, which is the case for NCA's
16 proposal for a "school within a school." In that circumstance, "the governing body must submit
17 a written request to the sponsor of the charter school for a determination of whether the proposed
18 amendment" is material or non-material, the sponsor then makes a determination regarding the
19 same, and, if material, "the governing body must obtain approval from the sponsor before the
20 amendment becomes effective." NRS 388A.276 outlines requirements for amendments to a
21 written charter, providing in subsection (2) that "[a] written charter or charter contract may not
22 be amended in any manner described in subsection 1 unless the amendment is approved by the
23 State Public Charter School Authority," but does not require a timeline for the same. Under NRS
24 388A.168(3), the SPCSA is required to adopt regulations that prescribe the submission of an

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28 mean the school immediately has a graduation rate approaching 80%."

1 amendment to a written charter or charter contract, which the SPCSA has done for limited
2 amendment requests. Of the forms that the Application SPCSA has adopted on its website,
3 several require an October 15 deadline, as Director Gavin suggests, but NCA's requested
4 amendment does not fit within any of the categories for which the SPCSA has created deadlines.
5 *See generally* SPCSA's 2017 Fall Amendment Rubric (specifying no deadline for a charter
6 school to request an amendment), *available at* [http://charterschools.nv.gov/](http://charterschools.nv.gov/ForSchools/Resources/)
7 [ForSchools/Resources/](http://charterschools.nv.gov/ForSchools/Resources/).¹⁹ Instead, the amendment contemplated would fall under NAC
8 386.3269's provision for the amendment of written charter or charter contract, where the request
9 for amendment is not otherwise described in NAC 386.326 to 386.3268, inclusive—permissible
10 amendments for which the SPCSA has not adopted rigid timeline. Therefore, NCA may request
11 this amendment to its charter before October 15, 2017, and Director Gavin's testimony objecting
12 to the proposal on that ground lacks merit.²⁰

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15 Finally, Director Gavin testifies the "school within a school" proposal is inadequate
16 because the Authority does not have the power to bifurcate a charter. *See* Vol. III, at 120. Yet,
17 Director Gavin also admitted that he does not believe the SPCSA requires express statutory

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19 ¹⁹ *See also* SPCSA website, "Amendments", *available at* <http://charterschools.nv.gov/ForSchools/Resources/> (providing forms for the "2017 Fall Cycle Request to Amend Charter Contract to Occupy Additional Sites," "2017 Fall Request to Amend Charter Contract to Relocate or Consolidate Campuses," "2017 Fall Cycle Request to Amend Charter Contract to Expand Enrollment in Existing Grades and Facilities," "2017 Fall Schools Requesting to Occupy a Temporary Facility," "2017 Fall Schools Requesting to Purchase or Construct a Facility that will not affect approved enrollment," and "2017 Fall Request to Amend Charter Contract with an EMO"—none of which conform to the amendment NCA seeks in its "school within a school" proposal because, *inter alia*, NCA need not occupy additional sites, construct new facilities, or expand its enrollment pursuant to the proposal. The SPCSA's Model Personnel Policies do not contain information regarding amendments. *See* SPCSA Model Personnel Policies, *available at* <http://charterschools.nv.gov/ForSchools/Resources/>.

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25 ²⁰ Director Gavin's timeline is similarly unsupported by the regulations. *See* NAC 386.130(3) ("Applications may only be submitted on the last 3 business days of August of the fiscal year immediately preceding the fiscal year in which the proposed charter school will begin operation.") Surprisingly, Director Gavin testified to this Board in May that a school could not begin operations in the school year immediately following approval. Vol. II, at 187-88. Contrary to his statements, clearly it can, which means if part of the cure was an Alternative Performance Framework high school to serve this credit deficient population it could be up and running in the two year period Gavin has supported for other schools such as Beacon or perhaps even sooner.

1 authority for any provision included in a contract with a charter school, and that the SPCSA has
2 contracted with charter schools accordingly. *See* Vol. III, at 72-73. Moreover, a school may
3 request to amend its charter in ways that are not statutorily enumerated in NAC 386.326 to
4 386.3268 under NAC 386.3269—and the regulations governing charter amendments do not
5 foreclose a school’s opportunity to request an amendment of any kind. *See generally* NAC 386.
6 Finally, Director Gavin has again contradicted himself by proposing that the Department of
7 Education adopt regulations to allow the SPCSA to carry out this very action.
8

9 Because the only concerns Staff has identified with NCA’s cure proposals are either
10 unsupported in law, belied by the Authority’s allowance of similar unprecedented measures for
11 other schools, or issues which NCA *has already corrected*—the Authority cannot, logically and
12 reasonably, reject NCA’s cure proposals based on any of Staff’s last-ditch “concerns.”
13

14 **4. NCA has addressed Staff’s concerns through multiple innovative cure proposals**

15 NCA has proposed three previous comprehensive cures, and submits a fourth cure
16 proposal along with this closing argument – each one responding to the ever moving goal post
17 presented to it by Director and his Staff – and all of which demonstrate NCA’s persistent
18 willingness to work with the Authority to develop an adequate cure, and have yielded great
19 strides to increase NCA’s four year cohort graduation rate.

20 After the Authority issued a notice of closure on September 30, 2016, ("Notice"), NCA
21 reached out to Mr. Ott via email on October 5, 2016, asking for the Authority’s guidance
22 regarding a proposed cure. *See, e.g., Ex B-1.* Mr. Ott did not respond. After repeated follow-up
23 attempts, Mr. Ott responded to NCA on October 24, 2016, that he did not believe the Authority
24 was obligated to “tell the school how the deficiency may be cured” (*see Ex. B-2*) – an interesting
25 tack given the Authority’s statutory role is to help the schools it oversees to succeed. Without the
26 benefit of any guidance from Authority Staff, NCA prepared a proposed cure and submitted it to
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1 Mr. Ott on November 14, 2016 (“first cure proposal”). After submitting its first cure proposal,
2 NCA received no response from Mr. Ott until November 29, 2016, at which time he stated that
3 Staff did not believe it constituted a cure because it required action by the Authority – that was
4 the extent of the feedback received. On November 30, 2016, NCA requested a meeting with
5 Authority Staff to obtain feedback on NCA's proposed cure. Director Gavin refused to speak
6 with NCA about the cure during the cure period leading up to the December hearing. *See Ex. B-*
7 *3.* On December 2, 2016, NCA submitted a second proposed cure (“second cure proposal”). *See*
8 *Ex. A.* This intransigence is particularly enlightening as to the prejudicial and disparate
9 approach Staff has taken in its dealings with NCA, especially given the disingenuous manner it
10 has engaged NCA since September 2015.²¹
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13 ²¹ In September 2015, Dr. Sanchez and NCA's school leader took the initiative to meet with
14 Director Gavin and address the new legislation that gave rise to this proceeding. Director Gavin
15 told NCA he “had bigger fish to fry” and suggested the school hire a private investigator to find
16 students who had withdrawn, recognizing the impact that had on NCA's graduation rate. The
17 school acted immediately on Director Gavin's suggestion and hired a private investigator. Vol.
18 IV, at 231-234. Then with no further communication, Director Gavin included NCA on the
19 February 2016 agenda for possible issuance of a notice of closure which, to this Board's credit, it
20 tabled given the lack of even a phone call or email notifying the school it was on the agenda.
21 Issuance of this notice also violated the CSPF as the Director did not follow the intervention
22 ladder with a notice of concern and notice of breach and opportunities for the school to cure
23 before escalating to a notice of closure – despite that he provided this process to at least two
24 other schools, Beacon and Nevada Virtual. In March 2016, when Director Gavin again
25 recommended the school be issued a notice of closure, this Board allowed NCA to be heard on
26 the issue and elected not to issue the notice but instead directed NCA to prepare a graduation rate
27 improvement plan which NCA promptly did. As part of the graduation rate improvement plan,
28 Director Gavin advised NCA he wanted the data being analyzed relative to the impact of credit
deficient students on NCA's graduation rate to be validated by a third party. NCA complied
with this request. In May 2016, NCA presented that graduation rate improvement plan to this
Board and was praised for it with all indications the parties had reached a reasonable and
productive resolution to proceed provided NCA worked with Staff to identify measurable
benchmarks for improving NCA's graduation rate, which it did. All still seemed to be
progressing smoothly until the morning of the July 2016 Authority Board meeting when, for the
first time, NCA saw in the Staff report just released to the public that Director Gavin was
proposing that NCA's plan and proposed benchmarks be approved only on the condition NCA
entered into a contract it had never before seen and that waived its rights to judicial review of a
decision to close the school, reconstitute the board, or appoint a receiver. When NCA objected
to this unlawful attempt to force NCA into a contract it had never seen (with no request for any
charter amendment), this Board voted that the terms of such contract should be mutually
agreeable. When Staff still then insisted on the judicial waiver clause in the contract, at Member
Guinasso's suggestion, this Board subsequently voted to mandate that be a provision in the
contract. When this board voted in September to issue the notice of closure to NCA without

1 In Staff's prehearing brief submitted prior to the December hearing, the disingenuous
2 engagement (or lack thereof) of NCA is readily apparent. In that document, the Staff's sole
3 criticism of the second proposed cure was that certain measures had not been approved by the
4 NCA governing board. *See* SPCSA Prehearing Brief, Dec. 13, 2016, at 11. In response to
5 Staff's position, the NCA board reviewed and approved the provisions at its January 2017 board
6 meeting – to no avail – even with board approval that cure was again rejected. Instead, after
7 NCA again requested feedback from Director Gavin, he again raised new questions, to which
8 NCA responded at the time it submitted its most recent Proposed Cure on March 24, 2017 (“third
9 cure proposal”), which again failed to garner any subsequent feedback from the Director.
10

11 The first substantive feedback on its proposed cure was received during the May hearing
12 from the Authority Board members (not Director Gavin – who stood by his arrogant position that
13 the Authority was under no obligation to provide feedback on NCA's proposed cure – a position
14 that Member Guinasso seemed to criticize as being unreasonable.) *See* Vol. III, at 272.
15 Following the May hearing, NCA has worked diligently to create a cure proposal which responds
16 to Authority and Staff statements made during the May hearing. *See* **Brief Exhibit A**, attached
17 hereto. Based on representations from Chair Guinasso, NCA anticipated having the benefit of
18 discussions with Chair Guinasso regarding the cure's contents prior to this submission.
19 However, Chair Guinasso has declined to participate in the discussion due to Staff's refusal to
20 participate on the basis that no confidentiality agreement was in place – even though both Gavin
21 and Guinasso have recognized a clear distinction between settlement discussions and a cure.
22 Regardless, NCA's cure as attached includes a limited waiver of NCA's right to judicial review,
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25
26 allowing NCA to speak or present any evidence or explanation, and relied solely on Director
27 Gavin's representations regarding the school's four year cohort graduation rate, NCA did seek
28 judicial review. In the meantime, NCA prepared for a closure hearing in December and
continued working on a proposed cure. When NCA requested to meet with Director Gavin to
discuss that proposed cure he refused.

1 an enrollment cap, and a formal proposal and timeline for NCA’s alternative framework “school
2 within a school” proposal along with a feasible timeline—to address Staff’s previous criticisms
3 of the same. *See Brief Exhibit A*, attached hereto. The cure proposal also includes ramped-up
4 annual data reporting measures and additional testing proposals maximize NCA’s accountability
5 and transparency with the SPCSA, and updated academic intervention measures, modified to
6 best serve NCA’s unique student population going forward based on NCA’s previous successes
7 and setbacks, including the addition of proactive programs to focus on early intervention
8 measures at the 8th and 9th grade levels. *See Brief Exhibit A; see also Supp. Ex. B*, Declaration
9 of Joe Thomas, at 2-3 (describing NCA’s efforts to analyze data and modify the existing
10 programs in place to better serve students going forward).

11
12 **B. Requiring waiver of judicial review in the cure is unlawful ad-hoc rulemaking²²**

13 NRS 233B.038 describes a “regulation” in terms of being a “standard” of “general
14 applicability” which “effectuates policy.” An agency engages in ad hoc rulemaking where it
15 adopts a policy that is “of such general consequence and impact as to be governed by the rule-
16 making requirement of the Administrative Procedure Act,” and, in doing so, fails to follow the
17 requirements of NRS 233B. *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 99 Nev. 268, 272,
18 662 P.2d 624, 627 (1983) (generally applicable nature of order was “of such major policy
19 concern and of such significance to all utilities and consumers that it cannot be characterized as a
20 simple adjudication in a contested case”). An agency’s rulemaking in this manner is “unlawful
21 procedure which should be declared null and void.” *Id.* at 272, 662 P.2d at 627.
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24 An agency may inadvertently engage in ad-hoc rulemaking where its order or policy is
25 not limited to the parties involved in the instant action or, if it is so limited, would affect the
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27 ²² NCA incorporates herein its prior arguments that such a requirement also is unconstitutional
28 and in violation of Nevada law. *See, e.g.*, NCA’s Prehearing Brief, December 13, 2016, at 13-14
(explaining that the provision violates separation of powers doctrine).

1 rights of other parties who come before the agency, so as to effect policy. *See id.* at 272, 662
2 P.2d at 627; *Gates v. the Com'n on Ethics*, 1999 WL 35128954 (Nev. Dist. Ct. Sept. 9, 1999).
3 For example, the Nevada Supreme Court concluded that an agency engaged in ad-hoc
4 rulemaking by defining, or “[b]y determining the limits of,” what constituted a stretch limousine,
5 because it set “a standard of general applicability which effectuates commission policy.” *Coury*
6 *v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305, 721 P.2d 375, 376–77 (1986).
7

8 Here, by demonstrating that it intends that an adequate cure will require a waiver of rights
9 to judicial review, and has required that of other schools to date such as Beacon Academy,
10 pursuant to the discretionary standard articulated in NRS 388A.330, the SPCSA would be
11 engaging in ad-hoc rulemaking.²³ During the hearing, Chair Guinasso stated that the SPCSA has
12 determined that an adequate cure must include a provision in which NCA waives its rights to
13 judicial review in some form and has required the same of similarly-situated schools during
14 closure proceedings—setting a requirement of general applicability that effect policy regarding
15 what defines an “adequate cure” under NRS 388A.330. *See* Vol. III, at 59 (“as a part of what the
16 Authority wanted as a part of the cure, I mean, that is they wanted to limit judicial review”); *see*
17 *also* Vol. III, at 204 (stipulating to “specific board direction to include a waiver of certain aspects
18 of judicial review for certain issues” pursuant to the same which it has included in a contract
19 with Beacon academy); Vol. III, at 208 (stating that the board determined that the judicial review
20 clause “had to be a part of the contract”); Vol. III, at 347 (“one of the elements of cure that
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23

24 ²³ The SPCSA is regulated by NRS 388A, which gives the SPCSA the limited ability to adopt
25 regulations that prescribe the process and substance for charter schools applications and amendments.
26 Under NRS 388A.171(1)(c), the SPCSA has limited authority to recommend changes in regulations to the
27 Nevada Department of Education “concerning any changes to regulations that would assist charter
28 schools in achieving their academic, fiscal and organizational goals.” Therefore, if the SPCSA wants to
expand the regulations concerning charter schools beyond the current parameters, it must go to the
Department of Education and recommend the same, rather than unilaterally pass regulations. In prior draft
regulations, Patrick Gavin has attempted to limit such judicial review rights and either the agency and/or
the legislative counsel bureau or both have rejected such attempts.

1 we've already decided . . . is that whatever contract was entered into would have some limited
2 judicial review"—stating the same with regard to whether the cures NCA has proposed will be
3 adequate).²⁴ While NCA is not willing to bow to the pressure to waive its right to judicial review
4 as to future actions/conduct, it has proposed a judicial waiver of either party's rights with respect
5 to actions/conduct that occurred up through the date of the cure being accepted, demonstrating
6 again NCA's desire to find a resolution acceptable to both parties and that is ultimately
7 responsive to the only identifiable concern raised by Director Gavin and his staff – a graduation
8 rate that is below 60% due solely to NCA's large population of high school students enrolling in
9 their junior and senior year severely credit deficient.
10

11 **C. The overwhelming evidence demonstrates NCA is performing well**

12 NCA presented evidence that it serves its students exceedingly well when compared with
13 other schools in Nevada²⁵—compelling evidence that the Authority must consider when
14 exercising its discretion to determine whether or not NCA has adequately cured its graduation
15 rate per the central question of this phase of the hearing. Both NCA and Staff presented
16 evidence that this manner of holistic consideration is necessary. *See* Vol IV, at 31, 36-37 (Dr.
17 Vineyard testifies about the importance of growth measures and analysis of multiple metrics to
18 determine whether a school is performing adequately because “any single data point isn't going
19 to give you a full picture of performance of a school . . . it's not a broad enough interpretation of
20 the work of a school”—which, he testifies, was the guiding philosophy behind development of
21 the Nevada School Performance Framework); *see also* Vol. III, at 110-11 (Gavin testifies that
22 what is significant is what the school has done while the student is there). The Authority's full
23 consideration of the evidence behind the single data point is especially necessary and informative
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25

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27 ²⁴ Additional concerns exist with this issue Chair Guinasso says was “already decided” in a previous
meeting given that NCA was not allowed to speak or substantively address the requirement.

28 ²⁵ *See, e.g., Exhibit EE.*

1 where, as NCA has demonstrated here, the average length of enrollment for students in the
2 cohort is 1.5 years. *See* Vol IV, at 143.

3 The Authority does not contest that, aside from NCA's high school graduation rate—
4 NCA is performing well pursuant to its K-12 charter. *See* Vol. III, at 215-17 (Director Gavin
5 admits that nothing in NCA's performance data currently available since the accountability pause
6 in 2014 rises to the level of concern to warrant closure). Moreover, NCA has demonstrated that
7 NCA's middle school is among the highest-achieving schools in the state—the Nevada
8 Department of Education's ("NDE") last rating of NCA's middle school was four-stars (on a five-
9 star scale)—which Staff does not dispute.

10
11 Despite Director Gavin's best efforts to shut down NCA by repeatedly refusing to engage
12 the School's leadership, by refusing to follow his own agency's established process and
13 procedures for engaging schools under its authority that his agency identifies as being at risk, by
14 misleading the legislature with respect to his intentions when members of that body expressed
15 concern about the risk of overreach that could occur if it gave his agency the discretion he
16 sought, NCA has time and again thwarted those efforts by presenting compelling evidence to
17 inform the Authority about the circumstances, student population, and academic achievement
18 behind the federally-calculated four-year cohort graduation rate.²⁶ It did so in March 2016, when
19
20

21 ²⁶ The Authority has elected to utilize the four-year cohort federal calculation of graduation rate despite
22 the fact that NRS 388A.330 does not define graduation rate, the federal definition is not mandatory, the
23 federal calculation does not exclude certain students in violation of Nevada law—including displaced
24 students, students who have received a GED or moved onto adult education, and students who have been
25 with a school for less than 50% of a year. *See, e.g.,* NRS 385A.260, NAC 389.699(3). However, the
26 Authority's decision to utilize the federal calculation *does not foreclose* consideration of the impact on
27 NCA's federally-calculated graduation rate of students for whom the school does not have an adequate
28 opportunity to serve: when these students arrive, in what credit status they arrive, how long they remain
with the school—is key evidence that the Authority must consider in exercising its discretion regarding
potential closure, because it is the only way the Authority may familiarize itself with the information
behind a number that is not designed to measure student transience. As Expert Matt Wicks explained, the
federal four-year cohort graduation rate was intended "to create a standard way across states to measure
graduation rate," designed with students in mind who "were relatively stable within the four-year period."
Vol. IV, at 143. However, as the Authority is aware, "relative stability" is not an accurate description for
many at-risk students who enroll at NCA, and a one-size-fits-all number to measure schools must be

1 Director Gavin first attempted to get a notice of closure – an effort that ended in a tie vote by
2 then members of this Authority Board – and again in May when after three days of testimony the
3 members of this Board clearly were having difficulty grappling with the incongruence of the
4 claims brought by Director Gavin and the evidence presented by NCA.

5
6 For example, in his compelling and unrefuted analysis of NCA’s graduation rate data,
7 Expert Matthew Wicks presented a number of graduation rate calculations, disaggregating the
8 rate to demonstrate the growth of students in many different categories of transience and credit-
9 deficiency—so as to illustrate to the Authority the types of students NCA serves. *See* Vol. IV at
10 147-148 and **Ex. EE**. NCA’s graduation rate is 87.5% for students that have been with the
11 school for all four years of high school—a category of students that is actually demonstrative of
12 NCA’s ability to serve its students. Vol. IV, at 150. According to NCA’s other respected and
13 unrefuted expert, Dr. Richard Vineyard, who has extensive experience with the Nevada
14 Department of Education, a graduation rate of 80 percent is “among the top 10 or 20 percent of
15 all the schools in the state.” Vol. IV, at 55. The graduation rate increases in varying degrees
16 under each disaggregated calculation to which Mr. Wicks testified. *See* Vol. IV, at 148-150.
17 While NCA does not maintain that the Authority must adopt one of these calculations in order to
18 deem that the school has cured, these calculations are compelling evidence to demonstrate the
19 significant impact that enrolling roughly half of its students credit-deficient has on a school’s
20 graduation rate—which the Authority should consider as part of its discretionary determination
21 because, as Mr. Wicks explained, “the more credit-deficient [students] are, the more challenging
22 it’s going to be to make up the credits for an on-time graduation.” Vol. IV, at 153.

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26 supplemented with an understanding of the humans behind that number, so as not to render it a
27 meaningless statistic. *See* **Supp. Ex. D**, Declaration of Gina Hames, at 2-3 (explaining that, as director of
28 NCA’s Grad Point Recovery Program, she sees students who face mental illness, severe and debilitating
physical illness, become parents during high school, homelessness, must maintain full-time jobs, and
more—all to the detriment of the students’ abilities to accumulate credits at the typical rates).

1 Two things stand out in reviewing the data for NCA’s 2015 and 2016 cohorts (which
2 Staff still has never done): (1) “the percentage of students that arrived at the school credit-
3 deficient”—“just under half [of students] for the 2016 cohort” and “just over half for the 2015
4 cohort, and (2) “the average length of enrollment of all the students in the cohort . . . just under
5 one and a half years.” Vol. IV at 142-43. Expert witness Wicks explained that where a student
6 arrives “very late in their high school career and is highly credit-deficient,” it is “highly unlikely”
7 they will graduate in their four year cohort. Vol. IV, at 153-154. For NCA, of the 49 percent, or
8 163 students, that enrolled in NCA credit-deficient as part of the 2016 cohort, 84 percent of
9 credit-deficient students were credit-deficient by at least one year or more upon enrollment, and
10 came to the school in either 11th of 12th grade—falling within “highly unlikely,” and near
11 impossible, category for graduation on-cohort. Vol. IV, at 154. This is compelling information
12 for the Authority to consider in using its discretion to analyze whether closure is a reasonable
13 outcome under NRS 388A.330 – and also whether NCA has provided an adequate cure or at
14 least deserves the opportunity to work with its authorizer to address the issue.
15

16
17 Moreover, NCA presented evidence that a nearly five percentage point increase in its
18 federally-calculated graduation rate is significant and rare when compared with other Nevada
19 schools—evidence that NCA’s March cure proposal and the associated implementation of the
20 graduation rate improvement plan is working.²⁷ See Vol. IV, at 56; *id.* at 55-56 (Dr. Vineyard
21 testifies that a more dramatic increase of 10 percent would be improbable for a school that
22 enrolls a number of credit-deficient students). Dr. Vineyard also confirms that a close look at the
23 data and nature of the student population behind a school’s “graduation rate” is necessary to fully
24 judge and understand the school’s progress. See *id.* at 56-58 (stating, for example, that “you’d
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26 ²⁷ Along with the data and as part of the graduation rate improvement plan, NCA submitted declarations
27 from school teachers and personnel to demonstrate that implementation of the Grad Point Recovery Plan
28 has been effective from a ground floor perspective—though the school’s graduation rate would benefit
from additional time to continue implementing the same. See, e.g., **Supp. Ex. B**, Declaration of Joe
Thomas.

1 want to look and see what the graduation rate would be if they just used those students that were
2 enrolled at the beginning of that school year and not included the ones enrolled during the year”).
3 Notably, Member Mackedon made a strikingly similar comment in the 2013 renewal hearing for
4 NCA, in which she suggested “segregating out students who had been continuously enrolled at
5 the school in order to determine how the school is educating those children.” *See Ex. B-7.* Yet
6 Staff admits to having done none of this analysis when making the decision to seek a notice of
7 closure – instead choosing to and to relying solely on the 4 year cohort graduation rate number
8 with zero meaningful analysis as to what that number comprises. Moreover, Staff argues that
9 data that is not available statewide, such as that related to credit deficiency, should not be
10 considered in this proceeding or given much weight; yet, Director Gavin told the school to hire a
11 third party validator to review and validate the data the school was submitting relative to the
12 number of credit deficient students NCA serves. Vol. II, at 121-22. NCA is left wondering why
13 Director Gavin would put the school to that expense if he was simply going to ignore the data or
14 recommend that Authority not give it much weight.

15 Consistent with Dr. Vineyard’s statements, the Department of Education has recently
16 approved a plan that requires it to look beyond adjusted cohort graduation rate and do further
17 analysis of the school's performance when identifying schools for inclusion in the
18 Comprehensive Support program—evidencing in part an intent for accountability measures to
19 reflect a school’s performance with regard to those pupils who actually spend an adequate
20 amount of time with the school. *See The New Nevada ESSA Plan For Initial Public Comment,*
21 *at 52, available at [http://www.doe.nv.gov/News_Media/Press_Releases/2017/](http://www.doe.nv.gov/News_Media/Press_Releases/2017/Nevada_Submits_State_Education_Plan_Under_Every_Student_Succeeds_Act_to_U_S_Department_of_Education/)*
22 *Nevada_Submits_State_Education_Plan_Under_Every_Student_Succeeds_Act_to_U_S_Depar*
23 *tment_of_Education/* (stating that “calculation of 4-year Adjusted Cohort Graduation Rate
24 (ACGR) should also include ESSA’s Section 1111(c)(4)(F) “Partial Attendance” requirement”
25 and “Identify ‘Comprehensive Intervention’ high schools based on more than just the 4-year
26 ACGR graduation rates.”) The reason for doing so is to confirm that the school is actually in
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28

1 academic distress, and that its low measured adjusted cohort graduation rate is not simply a by-
2 product of the fact that the school enrolls a high percentage of students who are already behind in
3 credit when they enroll in the school. The Authority should do the same. The 60% ACGR
4 threshold should be the starting point, not the end of the Authority's analysis of a school. For the
5 Authority to refuse to consider academic performance beyond adjusted cohort graduation rate,
6 and to intentionally ignore the data on the percentage of students in NCA who were behind in
7 credits when the enrolled in the school as Director Gavin has testified, is contrary to the state's
8 own policy as codified in the recently approved ESSA plan.

10 Pursuant to this approach, NCA presented evidence that it is performing on-par with
11 other schools or outperforming other schools in terms of statewide assessments. Vol. IV, at 160
12 (NCA's performance in the English language arts has historically been "significantly better than
13 the state average on . . . two end-of-course assessments" and, for 2015-2016, NCA showed "one
14 of the strongest performances" on the same); *id.* at 161 ("in math, this year, [NCA] performed at
15 about the same level as the state," which is consistent with its performance in the last five or six
16 years); *id.* (in science, NCA's high school "performed quite a bit above the state average" this
17 year, and, historically, there have been a few years where NCA performed below the average but
18 has "generally . . . performed either above or about at the state average"). NCA's performance
19 on statewide assessments, both historically and in the past year, demonstrates that NCA is
20 serving its students well. Staff failed to refute the statewide assessment data or consider it as both
21 Nevada law and the CSPF require for high stakes decisions such as this.

22 As Dr. Vineyard testified, it is important to the Nevada legislature to consider a students'
23 growth *during the time they were at a particular school* when determining the school's
24 performance. Vol. IV, at 30-31. The Nevada legislature's goal, Dr. Vineyard confirms, was to
25 be sure that the school was being measured based on the services it provided and how the child
26 grew academically at the school, as opposed to how a student arrived at the school. Vol. IV, at
27 33. Director Gavin also testified that what is significant is what the school has done while the
28

1 student is there. Vol. III, at 110-11. Moreover, Dr. Vineyard provided his expert opinion that it
2 would be part of the Authority’s responsibility in considering a high stakes decision such as
3 closure to examine the information behind the data so as to understand “more than just the final
4 results on a page.” Vol. IV, at 90. This opinion is consistent with the Legislature’s concerns
5 with the passage of legislation regarding the Authority’s discretion to close schools and avoiding
6 policy that penalizes schools that serve a high population of at-risk students – and also with
7 Director Gavin’s own acknowledgments. This demonstrates a statewide effort to recognize that
8 credit-deficient students enrolling impacts a schools graduation rate, which is what NCA asks of
9 the Authority here—to judge its performance based on all of the relevant evidence and with
10 several metrics as the CSPF and Nevada law require.

11 Moreover, NCA submitted further evidence that can assist the Authority in understanding
12 how to exercise its discretion under NRS 388A.330 -- that other states consider the impact that
13 enrolling credit-deficient students has on a school’s four-year cohort graduation rates. Dr.
14 Vineyard explains that roughly half of states have attempted to account for this, so as not to
15 penalize schools – adopting “a measure of growth . . . in terms of more data for evaluating how
16 schools are doing in terms of educating students.” Vol. IV, at 55. Wicks explains that certain
17 states apportion the graduation rate calculation for the four-year adjusted cohort rate based on the
18 percent of the time a student was enrolled at the school. *See* Vol. IV at 173.

19 Finally, NCA has updated and supplemented its data analysis in response to Authority
20 board member questions during the May hearing. In response to Member Gardner’s May 27th
21 request regarding where students who depart from NCA are going, NCA submitted on June 12,
22 2017, a 2016 Cohort Analysis by Matt Wicks on the reasons why students dropped out or
23 transferred schools, and Matt Wicks offered a full explanation of the same in his declaration
24 submitted the same day. *See Supp. Ex. U*; *see also Supp. Ex. E*, Declaration of Matthew
25 Wicks, at 5-7. In response to requests made by Authority Board Members Gardner and Johnson
26 during the hearing on May 27th for how NCA compares to other charter schools in the state,
27 NCA submitted, inter alia, a Charter School Directory on June 12, 2017. *See Supp. Ex. V*. In
28 response to Authority Board Member Gardner’s request made during the hearing on May 27,

1 2017, to see, for each data point presented for NCA, the same measure for all other charter
2 schools in the state, NCA submitted a number of supplemental exhibits on June 12, 2017, and
3 additional exhibits on June 16, 2017. *See* Cohort Graduation Rate Report from the State
4 Accountability Website, www.nevadareportcard.com, containing data for all charter schools in
5 the state (**Supp. Ex. W**); Demographic Profile Report from the State Accountability Website,
6 www.nevadareportcard.com, containing data for all charter schools in the state (**Supp. Ex. X**); End
7 of Course Results Report for 15-16 from the State Accountability Website,
8 www.nevadareportcard.com, containing data for all charter schools in the state (**Supp. Ex. Y**);
9 Grade 10 Science Results Report for 15-16 from the State Accountability Website,
10 www.nevadareportcard.com, containing data for all charter schools in the state (**Supp. Ex. Z**);
11 Grade 11 Historical Performance Report on HSPE's from the State Accountability Website,
12 www.nevadareportcard.com, containing data for all charter schools in the state (**Supp. Ex. AA**);
13 Grades 3-8 CRT Results Report for 15-16 from the State Accountability Website,
14 www.nevadareportcard.com, containing data for all charter schools in the state (**Supp. Ex. BB**);
15 Student Report showing Credit Deficiency Per Year and Transiency for all high school charters
16 in Nevada from the State Accountability Website, www.nevadareportcard.com, containing data
17 for all charter schools in the state (**Supp. Ex. CC**); and High School Band Report of State
18 Assessment Data (**Supp. Ex. DD**);²⁸ Elementary School and Middle School Band Report of
19 State Assessment Data (**Supp. Ex. GG**), and Charts of High School Band Data for State
20 Assessment Results and Transiency Rates (**Supp. Ex. HH**).

21 NCA's "Charts of High School Band Data for State Assessment Results and Transiency
22 Rates," which NCA prepared in response to board member requests for a clean comparison of
23 NCA's statewide assessment performance to other Nevada charter schools demonstrate the
24 following: NCA is outperforming all but 1 other charter school in English Language Arts, is
25 performing on par with other charter schools—about the average to high range—in Math I & II,
26 and is outperforming all but two other charter schools on Science statewide assessments for

27
28 ²⁸ This was later corrected and submitted with the correction on June 16, 2016, in accordance with NCA's
motion for extension of time to supplement the record, which the Authority granted. *See* **Supp. Ex. EE**.

1 Grade 10. *See Supp. Ex. HH*, at 3-5 (submitted to the Authority on June 16, 2017). Moreover,
2 the same demonstrates that NCA ranks among the highest in terms of transiency rate in 2015-
3 2016. *See id.*, at 1.

4 Matt Wicks's declaration addresses additional board member questions from the
5 hearing—namely, explaining in response to Member Snow's request for a concise and focused
6 discussion about NCA's impressive test scores compared and contrasted to the disparity of
7 graduation rate and why that is, he explains that how high mobility and the flawed federal
8 calculation of the 4-year adjusted cohort rate contribute to the disparity. *See Supp. Ex. E*,
9 Declaration of Matt Wicks, at 2-3. Further, Matt Wicks explains, in response to Member
10 Guinasso's question regarding whether NCA has the capacity to serve high school students, that,
11 in his professional opinion, NCA is well-qualified to serve high school students because *inter*
12 *alia* NCA's 2016 graduation rate for the students enrolled in NCA for all four years is 87.5
13 percent. *Id.* at 3-4. In response to Member Mackedon's suggestion regarding a self-imposed
14 cap, Mr. Wicks explains that, because NCA has demonstrated that it is serving the students for
15 which it has the opportunity, the Authority should instead resort to a holistic method for viewing
16 the school based on the unique population it serves, and not through the numbers focused lense
17 of a self-imposed cap. *See id.* at 4-5.

18 Additionally, NCA takes this opportunity to explain that, pursuant to Member Guinasso's
19 request to see a tangible difference between NCA's 2013 and 2016 Graduation Rate
20 Improvement Plans, NCA's the 2016 Plan contains new and additional programmatic changes
21 that better position NCA to attain a higher graduation rate based on additional data analysis of
22 what is working and what is not, along with significant detail describing each of NCA's
23 approaches, how they will assist in increasing the 4-year graduation rate, and how NCA has
24 incorporated limited feedback from the Authority—all of which constitutes an improvement
25 from the 2013 Plan. *Compare* 2013 plan (**Ex. Z**) *with* 2016 plan (**Ex. B-4**). Namely, the
26 changes include both internal and external data validation; additional steps to locate students
27 who withdraw to potentially negatively impact NCA's graduation rate; early outreach initiatives;
28 the Every Student Succeeds Academy program and plan; substantive curricular changes;

1 professional development plan enhancement; NCA Board governance training; and a provision
2 for future development and potential modifications during strategic planning sessions to discern
3 where NCA needs to improve—as a further departure from the 2013 plan, this demonstrates a
4 focus on long-term goals and adjustments and long-term planning.

5 The purpose of these proceedings and consideration of adequacy of a cure is to evaluate
6 the school’s performance in accordance with Nevada law and the CSPF. NCA has presented
7 abundant evidence to demonstrate good performance which Staff has failed to refute. NCA has
8 demonstrated its commitment to its students as individuals, and a desire to help its at-risk
9 students get back on track academically and in other areas of life that may be affecting
10 academics. *See Supp. Ex. D*, Declaration of Gina Hames, at 2 (as part of the Grad Point
11 recovery program, she speaks with each of her students every other week in a mandatory call, in
12 which “I help them resolve challenges, both with school work and with time management and
13 organization, and keep them engaged in school”). NCA students have demonstrated to the
14 Authority in these proceedings that they continue to thrive—academically and personally—at
15 NCA, often in a way that students have not encountered at other schools. *See, e.g., Supp. Ex. N*,
16 Declaration of J. Berry, at 2 (stating that “teachers and staff at NCA have always treated me like
17 a real person instead of a number . . . they really care about my success” and that he would not be
18 graduating if it weren’t for the NCA teachers). Engaged parents of NCA students demonstrated
19 that NCA is the school of choice for their family—so much so that they are willing to sacrifice
20 significant time and resource to save NCA from closure. *See Supp. Ex. S*, Declaration of David
21 Held (stating that when his child was diagnosed with a severe brain condition that required
22 surgery, “[t]he school bent over backwards and did everything to make sure that he was able to
23 get his work done” and to ensure that he did not fall behind in credits). This further evidences
24 that NCA serves its students well, and, in the words of many students and parents—outperforms
25 other Nevada schools.

26 **D. NCA should be provided meaningful Authority feedback on the proposed cure**

27 The Authority's purpose includes to “[s]erve as a model of the best practices in
28 sponsoring charter schools and foster a climate in this State in which all charter schools,

1 regardless of sponsor, can flourish.” NRS 388A.150(3). The Authority must take certain
2 enumerated measures to “assist charter schools in achieving their academic, fiscal and
3 organizational goals” under NRS 388A.171(1), and base decisions on the "needs of the charter
4 schools" it sponsors. *See, e.g.*, NRS 388A.199(3). The sponsor of a charter school must develop
5 policies and practices that are consistent with state laws and regulations governing charter
6 schools that must include, in relevant part, “[a] description of how the sponsor will maintain
7 oversight of the charter schools it sponsors, which must include, without limitation . . . [a]n
8 assessment of the needs of the charter schools that are sponsored by the sponsor that is prepared
9 with the input of the governing bodies of such charter schools[,] and . . . [a] strategic plan for the
10 oversight and provision of technical support to charter schools that are sponsored by the sponsor
11 in the areas of academic, fiscal and organizational performance.” NRS 388A.223(2).²⁹
12 Additionally, the sponsor of a charter school is required to “[p]rovide reasonable assistance to . .
13 . a charter school in carrying out the provisions of this chapter,” “[p]rovide technical and other
14 reasonable assistance to a charter school for the operation of the charter school,” and “provide
15 appropriate information . . . to a charter school and the governing body of a charter school
16 concerning the applicable provisions of this title”³⁰ NRS 388A.226(1)(a)-(b), (e).

17 By failing to engage in meaningful collaboration with NCA on an acceptable cure despite
18 NCA’s repeated attempts, the Authority has violated its statutory obligations. NCA persisted in
19 its attempts to collaborate, and incorporated into its cure proposals the little feedback Authority
20 Staff provided, only to again be met with Staff’s position that its cure proposals are inadequate.
21 In fact, it took Chair Guinasso’s repeated questioning of Director Gavin to identify – for the first
22

23 ²⁹ As NCA noted in its Prehearing Brief filed March 20, 2017, and again in its Supplement to its
24 Prehearing Brief as filed May 18, 2017, the Authority Staff has failed to fulfill its obligations under this
25 subsection. *See* NCA Prehearing Brief, at 9 n.15. This failure could be cured with appropriate direction
from the Authority Board that Staff comply with the statute.

26 ³⁰ Director Gavin explains that the Authority has not complied with this provision because his requests for
27 additional funding to carry out this provision have not been fulfilled. Vol. III, at 170. Director Gavin
28 argues, it would be a “violation of statutes and actually a crime for me to furnish resources for which
there . . . were no moneys appropriated.” *Id.* Director Gavin fails to cite the basis in law that would
prevent the Authority from complying with NRS 388A.226, let alone criminalize statutory compliance, or
provide that compliance is contingent on the appropriate of additional funds.

1 time -- factors material to Director Gavin's decision that the cure was inadequate. Prior to that,
2 Director Gavin either asserted he had no legal obligation to identify such factors, no funding to
3 do so, or would not provide NCA such information absent a confidentiality agreement.

4 If the Authority deems NCA's cure proposal inadequate, the Authority should not issue a
5 blanket rejection, but should instead provide constructive feedback so that NCA may revise its
6 cure to meet the Authority's standards – or, at a minimum, allow NCA the opportunity to rebut
7 any argument by Staff that the cure is inadequate. Otherwise, the Authority will be in violation
8 of its statutory duties, including to (1) provide NCA with a chance to flourish pursuant to NRS
9 388A.150(3), (2) ensure that NCA's autonomy is preserved pursuant to NRS 388A.196(4),
10 (3) take certain enumerated measures to "assist charter schools in achieving their academic,
11 fiscal and organizational goals" pursuant to NRS 388A.171(1), (4) "provide technical and other
12 reasonable assistance" to NCA for its continued operation pursuant to NRS 388A.226(b), and
13 (5) "provide appropriate information, education and training to a charter school and the
14 governing body of a charter school concerning the applicable provisions of this title" pursuant to
15 NRS 388A.226(1)(e).
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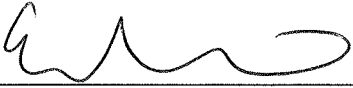
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IV. Conclusion

For the foregoing reasons, NCA requests that the Authority conclude that Staff failed to demonstrate by a preponderance of the evidence that NCA has failed to cure the single alleged deficiency.

Respectfully submitted this 14th day of August, 2017.

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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 August 14, 2017, a true and correct copy of the foregoing document was served as listed below:

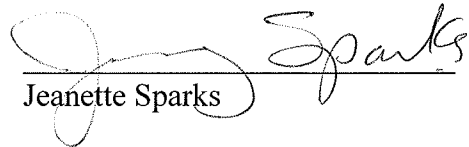
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