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11
12 **BEFORE THE NEVADA STATE PUBLIC SCHOOL CHARTER AUTHORITY**

13 * * * * *

14 **RESPONSE TO STATE PUBLIC CHARTER SCHOOL AUTHORITY'S HEARING**
15 **STATEMENT**

16 Nevada Virtual Academy ("NVVA" or the "School"), by and through its undersigned
17 counsel, Kara Hendricks of Greenberg Traurig LLP and William Magrath and Sarah
18 Ferguson of McDonald Carano LLP, and present this response to State of Nevada Public
19 Charter School Authority's (the "Authority") Hearing Statement of June 11, 2018.

20 **I. INTRODUCTION**

21 NVVA serves a unique population of students - from those who are chronically ill, to
22 children of military families, to economically disadvantaged students and students who are targets
23 of bullying, to those who are high-performing and are on an accelerated path to a profession or an
24 advanced degree. To meet the needs of this diverse student body, NVVA has had to be
25 innovative and has developed a highly specialized online method of education.

26 Not surprisingly, as pioneers in this area, NVVA has encountered some challenges.
27 This is especially true in the elementary school program where students face a steep learning
28 curve when they start their education at NVVA. NVVA is well aware of these challenges and

1 continues to work with students, families, and staff to improve the performance of the elementary
2 school program. Despite NVVA's progress in the performance of its elementary school program,
3 its comprehensive plan for continued success, and the strong performance of the rest of the
4 school, the Authority appears to be hell-bent on using this unlawful termination process to close
5 the School.

6 As set forth more fully in NVVA's Opening Brief, the Authority's attempt to close
7 NVVA clearly violates its statutory authority. In addition, throughout this process the Authority
8 has made multiple procedural errors that effectively render the continued proceedings moot.
9 Finally, NVVA has submitted a comprehensive turnaround plan that should more than address the
10 alleged deficiencies highlighted by the Authority, but which the Authority fails to acknowledge in
11 its Hearing Statement.

12 The Authority's Hearing Statement provides no further information on the legal
13 justification for the Authority's Notice of Intent to Terminate and the subsequent termination
14 proceedings. Nowhere in its cursory eight-page statement does the Authority address the central
15 issue in this dispute – that it is prohibited by law from initiating these termination proceedings.
16 This issue has been at the core of this dispute since the Authority voted to issue the Notice of
17 Intent to Terminate, and the Authority has been repeatedly put on notice of the issue through
18 numerous letters and legal proceedings. Yet, instead of addressing this fatal flaw, the Authority
19 attempts to go forward with the termination based upon an irrelevant regulation, whose standard
20 the Authority cannot meet, new statutory provisions and performance issues not part of the
21 original Notice of Intent to Terminate, and utilizing stale and prohibited data. Absent a lawful
22 basis on which to proceed with the termination, the Authority should immediately cease these
23 termination proceedings.

24 **II. THE AUTHORITY DOES NOT HAVE THE LEGAL AUTHORITY TO**
25 **PROCEED WITH THIS TERMINATION**

26 The Authority's limited power to terminate a charter school contract is strictly prescribed
27 by two sections of state law - NRS 388A.300 and NRS 388A.330 - and NVVA's Charter School
28 Contract (the "Contract"). (See NVVA Opening Br. at 11-16) Here, the Authority has identified

1 NRS 388A.330 as the basis for the Notice of Intent to Terminate the Charter Contract. NRS
2 388A.330 and the Contract set forth certain requirements that the Authority must meet to ensure
3 that there is sufficient basis for closing the school. The Authority's crusade to close down an
4 entire school on the basis of the performance of *two grades* is in violation of both the law and the
5 Contract. (See NVVA Opening Br. at 21-22) The Authority is further precluded from undertaking
6 a termination due to insufficient data to demonstrate "persistent underperformance" as defined by
7 the Contract, *i.e.*, three consecutive years of data from both the Authority Charter School
8 Performance Framework ("Authority Framework") *and* the Nevada School Performance
9 Framework ("NSPF"). (*Id.* at 23-24) Indeed, the Authority is *precluded by law* from using all of
10 the years on which it relies as support for its position. (*Id.* at 24-25)

11 Perhaps recognizing its lack of legal support, the Authority attempts to subvert its
12 statutory and contractual obligations by relying on the definition of "persistent
13 underperformance" contained in NAC 386.332, a regulation that is cited *nowhere* in the founding
14 documents or in NRS 386A.330(1)(4), the legal justification provided in the Notice of Intent to
15 Terminate. That February 21, 2018 Notice indicated that because the elementary school has
16 allegedly been scored below a three-star rating for three consecutive ratings, the Authority was
17 considering acting under NAC 386.332, an unrelated regulation which reads:

18 "Persistently underperformed" interpreted. As used in NRS 386.535, a charter
19 school has "persistently underperformed" if:

20 1. The charter school was not rated in the first, second or third highest
21 tier during the last three ratings of the charter school pursuant to the statewide
22 system of accountability for public schools; or

23 2. If the charter school is operating under a charter contract, the charter
24 school has not complied consistently with the performance indicators, measures
25 and metrics set forth in the performance framework of the charter school, as
26 determined by the sponsor.

27 Even if it were properly relying on this regulation (it is not), the Authority *still*
28 fails to meet the requirements of that definition. NAC 386.332(1) states that a charter school has
"persistently underperformed" if the school was not rated in the first, second, or third highest tiers
of the star system during the last three ratings. As has already been set forth repeatedly, NVVA,
as the charter school, has never received a star rating for its K-12 school, so it could not and has

1 not *ever* been rated in the first, second, third, fourth, or fifth tiers. The Authority fails to even
2 meet the standard that it has said it is using to justify this unlawful termination.

3 NAC 388.332(2) is specifically addressed to charter schools operating under a charter
4 school contract. It states that the Authority must look to the performance framework *of the*
5 *Contract* to determine what it means to have “persistently underperformed,” a provision which
6 nearly mirrors what is in NRS 388A.330(1)(a)(4). The Authority has repeatedly failed to follow
7 the Contract in these termination proceedings and has failed to even address this challenge by
8 NVVA.

9 Moreover, the Contract provides that termination may occur when there are three
10 consecutive years of data under both frameworks to demonstrate persistent underperformance.
11 The Authority concedes that it cannot produce three consecutive years of data from the NPSF
12 because “[i]n 2015 and 2016, the Department of Education did not release ratings due to testing
13 irregularities and changes to federal law.” (SPCSA Hr’g Statement at 5) Nevertheless, the
14 Authority admits it is relying on 2017 data as a basis for these termination proceedings, but
15 without 2015 or 2016 data, it cannot possibly have three years of consecutive data under the
16 NPSF ratings (never mind the Authority Framework). Thus, the statutorily and contractually
17 required data required to initiate termination proceedings simply does not exist. As a result, these
18 proceedings are unlawful and must cease.

19 **III. THE AUTHORITY IS ATTEMPTING TO INTRODUCE NEW REASONS FOR** 20 **TERMINATING NVVA’S CHARTER CONTRACT**

21 In its Hearing Statement, the Authority introduces two new sections of law and several
22 new deficiencies, none of which were identified in the Notice of Intent to Terminate. NRS
23 388A.330(2) requires that before the sponsor may terminate a charter contract, it must “provide
24 written notice of its intention,” notice which must include “a statement of the deficiencies or
25 reasons upon which the action of the sponsor is based.” The reasons provided in the February 21,
26 2018 Notice of Intent to Terminate in their entirety read:

27 This Notice is based on NRS 388A.330(1)(a)(4), which states that the sponsor of a
28 charter school may revoke or terminate a charter contract if the charter school has
persistently underperformed. Nevada Virtual Academy’s elementary school was

1 rated as a 1-star school in the 2017 Nevada School Performance framework, and
2 has persistently underperformed as defined in NAC 386.332 as it was rated below
the three-star level during the last three ratings.

3 That statutorily required process states that the school must be given an opportunity to correct
4 those deficiencies before the public body may move forward on the proposed termination action.
5 NVVA provided its proposed cure to the Authority on April 2, 2018, which encompassed all of
6 the deficiencies noticed to the school on February 21, 2018. In its Hearing Statement, the
7 Authority is now citing NRS 388A.330(1)(g) and NRS 388A.330(7), neither of which were cited
8 in the original Notice of Intent to Terminate as a basis for action and are thus prohibited from
9 being used in these proceedings.

10 Moreover, in its Hearing Statement, the Authority notes for the first time since these
11 termination proceedings began that NVVA's financial performance as well as "a number of issues
12 [] related to its governing body" will be considered as additional bases for termination. (SPCSA
13 Hr'g Statement at 8) However, the Authority fails to provide specifics, noting only that "these
14 issues will be detailed at the June 25, 2018 hearing." (*Id.*)¹ As was previously noted above, the
15 Authority was required to include all areas of deficiency and bases for termination in the Notice
16 of Intent to Terminate, and these issues were not included in that Notice. The Authority's
17 Hearing Brief was also expected to set forth all arguments in support of termination with citations
18 to exhibits and evidence supporting the arguments. Basic fairness and due process require that
19 the Authority be barred from attempting to ambush NVVA with purported "issues" at the Hearing
20 which the Authority has not fully disclosed in its Hearing Statement *nor included in the original*
21 *Notice of Intent to Terminate.*

22 Without waiving our objection to the Authority's inclusion of alleged financial
23 performance deficiencies or alleged governance issues at this 11th hour and failing to include
24 them in the original Notice of Intent to Terminate, NVVA provides the following. NVVA has
25 addressed the financial framework issues previously raised outside the context of these

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28 ¹ The Authority provides no exhibits to support its assertion. NVVA reserves the right to object to
any exhibits not introduced with this exchange of briefs.

1 termination proceedings, issues which relate to enrollment forecasting and funds in excess of the
2 budget being held in reserves. Indeed, the School has repeatedly informed the Authority that the
3 School has never operated in the red or been in a position where it was required to take out a loan
4 or go into debt and in fact, has generated a surplus in recent years. (See NVVA letter to P. Gavin,
5 Sept. 1, 2017, Ex. 1) Additional steps that NVVA has taken to ensure its finances are properly
6 managed include hiring an accountant to sit on the Board, monthly budget reviews, and budgetary
7 adjustments if enrollment targets are not met. (*Id.*) Additionally, NVVA's enrollment forecasts
8 for recent years have been on point.

9 With respect to the Authority's vague allegations regarding "a number of issues []
10 related to [NVVA's] governing body," NVVA also objects to the inclusion of these "issues,"
11 which were not identified in the Notice of Intent to Terminate, but notes that the School is in full
12 compliance with the requirements for its governing body as set forth in 388A.320.² Further, to the
13 extent the Authority has now vaguely referenced supposed violations of the Open Meetings Law,
14 NVVA has never received a notice of correction regarding any alleged Open Meetings Law
15 violations and to its knowledge is in compliance with Nevada's Open Meetings Law. So while
16 NVVA forcefully objects to the use of these alleged deficiencies in these termination proceedings
17 as they were not raised in the Notice of Intent to Terminate, they are also irrelevant because they
18 are without merit.

19 Frankly, it should give the Authority board members pause why Authority staff has
20 opted not to rely on the issues and statutory citations originally noticed in the Notice of Intent to
21 Terminate and has now decided that additional issues and citations of law must be raised in order
22 to justify the termination action being proposed. NVVA has repeatedly raised concerns regarding
23 the legality of this process and the new arguments raised in the Hearing Statement further
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26 ² NVVA's Board is comprised of five members: 1) Samantha Morris – Board President
27 *Parent, Background in Business and Finance*; 2) Mark Makley – Treasurer *Parent, Accountant*;
28 3) Shannon Dangl – Board Member, *Licensed Educator*; 4) Elizabeth McFadden – Board
Member, *Licensed Educator*; and 5) Anne Mendenhall – Board Member, *Background in Online
Education.*

1 suggests insufficient grounds exist to justify the process being utilized pursuant to the issued
2 Notice of Intent. Moreover, any attempt to change the facts and/or law in the middle of the
3 proceedings is prohibited. We believe that a court would find the Authority acting in bad faith if
4 such actions were allowed to proceed at this juncture on new grounds.

5 **IV. NVVA's PERFORMANCE CONTINUES TO IMPROVE**

6 NVVA understands that the success of the elementary school program is critical for the
7 success of the rest of the school. All indicators show that the earlier students start with NVVA
8 and the longer they remain at the school, the higher achieving they are. This is borne out by
9 NVVA's graduation rate which has exceeded the State's average graduation rate as students who
10 have been in the school for their entire academic careers begin to successfully complete their
11 education. Indeed, as the Authority notes, "NV[V]A's high school graduation rate has steadily
12 increase from 36% in 2012 to 84% for the 2016-2017 school year." (SPCSA Hr'g Statement at 7)

13 Despite these remarkable advancements and the progress that the school is making in its
14 elementary school program, the Authority remains steadfast in its decision to proceed with these
15 termination proceedings. Oddly, the Authority does not reference the school's current plan for
16 improvement and measures already taken to improve the elementary school in its Hearing
17 Statement. Instead it focuses only on the school's past.

18 Presumably as a basis for terminating the school's charter, the Authority sets forth the
19 history of the school's alleged performance and various high-stakes reviews, none of which
20 actually took place. As noted in the February 16, 2018 Staff Memorandum from Patrick Gavin to
21 the Authority, no high stakes reviews ever took place, despite what the Authority's legal counsel
22 continues to proffer in his memoranda and presentations to the Authority board members. (*See*
23 Feb. 16, 2018 Briefing Memo at 5, NVVA Opening Br. Ex. 8) The Authority also notes a
24 decrease in overall enrollment of the school. It is important to note that the enrollment cap was
25 ***mandated by the Authority*** during its renewal of the school's charter in 2013. (*See* 2013 Contract
26 Section 2.3.2) The enrollment cap was again reset during the 2016 Contract amendment. (*See*
27 2016 Contract Section 2.3.1.3)

28 The Authority's assertion that the school's revised plans have had "little impact" on the

1 middle school is a gross mischaracterization. In the 2013-2014 school year, the middle school's
2 star rating went from a 2-star to a 3-star, where it has held steady ever since.³ The Authority's
3 comparison of the elementary school program's performance across years where it was held
4 subject to different standards does not provide a true measure of the program's improvement.
5 The August 17, 2017 letter from the Nevada Association of School Superintendents to
6 Superintendent Canavero set forth their collective concerns with comparing data from those
7 different years as the accountability system had changed. Notwithstanding, NVVA has every
8 reason to believe that now that it is fully aware of the newly implemented criteria in the most
9 recent framework, the elementary school program's performance will go up at least one full star
10 in the state's ratings.⁴

11 **V. CONCLUSION**

12 The Authority fails to provide any legal basis that authorizes it to initiate these
13 termination proceedings in contravention to the contract it entered with NVVA and the applicable
14 law set forth herein and in NVVA's Hearing Statement. Nor does the Authority appear to
15 consider the steps already taken to improve NVVA's elementary school program and the School's
16 in-depth proposal to cure the supposed deficiencies in its elementary school program. Instead, the
17 Authority erroneously relies on an irrelevant regulation, whose standard the Authority cannot
18 meet, unreliable and prohibited data, and new alleged deficiencies and statutory provisions, which
19 were not part of the original Notice of Intent to Terminate and demonstrate doubt on the part of

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25 ³ NVVA's Middle School Program received a 3-star rating on the new and stricter state
26 performance rating standards that were issued for the first time this year.

27 ⁴ While the elementary school's star rating is expected to increase, NVVA cannot speak to the star
28 rating for its charter school because no star rating has ever been issued. Moreover, the framework
is still partially suspended in that high school ratings have not been issued. Thus, the Authority
has no legal basis to declare the entire school as persistently underperforming as the data required
under the performance framework is not available.

1 the Authority staff as to whether there was clear legal justification to bring this action in the first
2 instance. Accordingly, the Authority must immediately cease these termination proceedings.

3 Respectfully submitted this 19th day of June, 2018.

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INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	NO. OF PAGES
1.	Sept. 1, 2017 NVVA Letter to Patrick Gavin re Notice of Concern	2

Exhibit 1

Exhibit 1



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K12.com/NVVA

September 1, 2017

VIA FIRST-CLASS MAIL & EMAIL

Mr. Patrick Gavin
Director, Nevada State Public Charter School Authority
1749 North Stewart Street, Suite 40
Carson City, NV 89706-2543
pgavin@spsca.nv.gov

Re: Nevada Virtual Academy (“NVVA”) Notice of Concern

Dear Mr. Gavin:

I am in receipt of the Notice of Concern sent to NVVA on July 14, 2017 “due to financial under performance as tracked in the 2015-2016 Authority Performance Framework” and write to address several issues raised therein and to apprise you of the efforts of NVVA’s Board to ensure the school’s financial health and sustainability.

As a preliminary matter, we believe there was a clerical error in the projected enrollment numbers utilized by the Authority in evaluating forecast accuracy. Indeed, it is our understanding that the Authority’s calculations in this regard were based on projected enrollment for the 2015-2016 school year of 2,792 students. However, as evidenced on the budgets NVVA submitted, the projected enrollment was actually 2,729. This 63 student differences alters the percentage calculation by more than 2%.

NVVA is cognizant of the fact that even with the revised calculations, there is a need for further improvement in enrollment forecast accuracy and is working to improve the same.

The Letter of Concern also identified an issue with the Total Margin and Cash Flow measures of the school. However, it is important to note that NVVA is currently operating with cash on hand and has never been in a position where it was required to take a loan or go into debt. Notably, NVVA had generated surplus funds from prior periods to negate and cover such deficits. Moreover, the NVVA Board has taken steps to create an action plan and budget that has a trajectory of a surplus and positive cash flow. Indeed, NVVA expects that it will have a surplus balance of over \$700,000 by June of 2018. NVVA also is expecting to generate a surplus and positive cash flow for FY 19.

NVVA has taken steps to address the Authority’s concerns. Notably, a certified public accountant with prior experience with school boards was recently added as a NVVA Board member and now leads the school’s Audit Committee. Additionally, NVVA’s Board looks at its



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budget on a monthly basis and makes adjustments as needed. Importantly, because of the nature of the online and blended learning opportunities offered by NVVA, the Board is able to react quickly to address budgeting issues. Moreover, a number of budgeted items including but not limited to the amount NVVA pays its management company for administrative, management and technology services, instructional materials costs, on-line curriculum costs, and computer costs, incurred by the school are tied specifically to the number of students enrolled in the school as well as revenue generated from the attendance of such students. As such, if enrollment targets are not met, there are corresponding reductions in monthly expenses.

NVVA's Board is committed to the financial sustainability of the school. We believe the data points identified by the Authority cannot be considered in a vacuum and there is a bigger story to tell that demonstrates the school is not trending towards financial difficulty and rather is positioned in a way that should give the Authority confidence in the school's financial viability. I would welcome the opportunity to meet with you and/or Brian Scroggins to further discuss these issues and/or any concerns that the Authority may have. Please let us know of your availability for such a meeting.

Very truly yours,

Anne Mendenhall
NVVA Board President

cc: Brian Scroggins
Yolanda Hamilton