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May 8, 2019

VIA U.S. MAIL AND E-MAIL: rherrick@spcsa.nv.gov

Ryan Herrick
General Counsel
State Public Charter School Authority
State of Nevada
1749 North Stewart Street, Suite 40
Carson City, NV 89706-2543

Re: Nevada Virtual Academy - Renewal Recommendation Proposal

Dear Mr. Herrick:

By way of introduction, this firm represents Nevada Virtual Academy ("NVVA") in connection with the draft Renewed Charter School Contract (the "Contract") you recently proposed to NVVA through our co-counsel, Kara Hendricks. While there are several draft provisions we are concerned about, our most immediate focus is to remove provisions of the Contract that clearly and unequivocally violate the statutes that govern the Nevada State Public Charter School Authority (the "SPCSA"), ignore NVVA's due process rights under those statutes, and operate in complete contravention of the Legislative intent underlying those statutes.

NVVA is gratified that its Charter was renewed, a decision which we believe is absolutely appropriate and consistent with Nevada law. However, the draft Contract presented to NVVA includes performance benchmarks with automatic closure triggers that are more restrictive than and totally at odds with performance benchmarks that are permissible under the Nevada Revised Statutes. Moreover, the method by which the SPCSA seeks to implement these benchmarks and impose the penalties associated with them completely eradicates the due process rights that NVVA must be permitted to exhaust before the proposed penalties are assessed. NVVA cannot accept those conditions, and seeks to remove them from the Contract. We are confident that any court would concur with our analysis and strike the illegal provisions from the draft Contract.

Nevada's Legislature has mapped out the entire lifecycle of charter schools, from how they come into being to how they can or should be closed. The Legislature fully occupies that field, with delegation to the SPCSA regarding matters of implementation. Although the SPCSA may include charter approval "requirements or restrictions" it deems "appropriate," such requirements and restrictions cannot contravene the express language of governing statutes, nor can they thwart the

public policy underlying those statutes. That is precisely what the SPCSA and staff are attempting to do here. Set forth below is our support for this contention.

A. The SPCSA is Required to Employ and Adhere to the Benchmarks Established in NRS 388A.300(1).

NRS 388A.300(1) mandates that charter schools must meet state standards—i.e., must not receive one star for **three** years in a period of **five** consecutive years. The SPCSA, in direct contravention of this statute, is attempting to impose a condition whereby NVVA faces mandatory revocation of its charter if ratings fall below three stars in any **two** consecutive years. While the face of the statute is compelling enough evidence of the Legislature's intent with respect to lawful benchmarks for charter schools, further proof of that intent is found within the law's Legislative history. As you are probably aware, the three of five year benchmark was established in 2015, modifying the previous benchmark that required termination after three consecutive years of ratings below the state standard.[1] In fact, the three-year consecutive benchmark was the law when NVVA's last contract was initiated. Consistent with that law, the Charter School Performance Framework accompanying that earlier contract applied the three-year consecutive standard. In other words, the Framework issued for the last contract complied with then-existing statutes related to NRS 388A.300.

For reasons unknown to us, the SPCSA has decided that the benchmarks in the proposed Contract for the present renewal must be different, and must deviate from what is permissible under existing law. As referenced above, during the pendency of NVVA's prior charter contract the law changed to the three of five year standard. Therefore, the new Framework and benchmarks in the Contract should conform to that. Clearly, if the Legislature had rejected a three-year consecutive standard and removed it from the statutory scheme, it would be equally hostile to the two-year consecutive standard that the SPCSA is attempting to impose on NVVA.

When the Legislature chose to change the applicable benchmarks for charter schools, it could have imposed any benchmarks that it wanted, including a two-year consecutive standard. The Legislature did not do that, and as a result neither can the SPCSA. During the Legislative session, multiple benchmarks were considered. For instance, the text for S.B. 460 on March 23, 2015 proposed a benchmark that would terminate a school for ratings below standards in three out of six years. Ultimately, the three in five year benchmark was codified into law. We respectfully submit that the SPCSA is bound to adhere to this benchmark in the NVVA's proposed Contract and Framework.

B. The SPCSA Knows that its Retroactive Application of the Illegal Two-Year Standard Will Result in Termination of NVVA's Charter Without Due Process.

The SPCSA's proposed Contract mandates that NVVA's middle school program and high school program ratings from the 2017-2018 and 2018-2019 school years will be considered in applying the improper two-year benchmark. It does this knowing that NVVA's middle school program ranking for 2017-2018 was two stars and that it is possible that its rating for 2018-2019 may be two stars, even though the middle school program point totals are extremely close to three-star status, and way above the requirement of NRS 388A.300 that the school must not receive a one-star rating

[1] See, Legislative Counsel Bureau Research Brief for S.B. 460, 2015 Session.

for three years. The SPCSA therefore knows full well that imposing the two-year consecutive benchmark sounds the death knell for the NVVA middle school program. It is therefore terminating the middle school program without uttering the words. Moreover, the SPCSA imposes conditions on the high school program that might require it to close when it would otherwise remain open if the benchmark set forth in NRS 388.300(1) was properly applied. In either case, this amounts to a premeditated and unlawful summary termination of NVVA's charter without due process.

In order to terminate an active charter that is a going concern, the SPCSA must comply with the terms of NRS 388A.330(3), pursuant to which the charter school is entitled to notice, a hearing, and an opportunity to cure. Of course, the provisions of NRS 388A.330 are not triggered in the context of our present dispute, because NVVA's charter has been renewed and is at its inception (term begins July 1, 2019). However, if the two-year consecutive benchmark remains in the proposed Contract, and is applied retroactively, then the SPCSA will effectively be executing an NRS 388A.300(3) termination without complying with that statute. This further illegality, that compounds the application of an impermissible two-year consecutive standard, is another reason why we believe a court would not let the proposed Contract and the accompanying Framework stand.

If the benchmarks and consequences set forth in the proposed Contract are implemented, the SPCSA will be completely side-stepping the statutory due process rights afforded to charter schools facing termination. Given that we know that NVVA's charter has been renewed, and that it is meeting all applicable standards under NRS 388.300(1), there is no legal or equitable basis to apply a different and illegal standard to NVVA.

C. <u>R089-16 and NRS 388A.330 Do Not Operate Independently or in Collaboration to Permit the SPCSA to Violate NRS 388A.300(1).</u>

It appears that the SPCSA takes the untenable position that regulation R089-16 is a catch-all provision imbuing the Authority with broad powers to act in regulating and terminating charter schools. You have also invoked NRS 330A.330 as a statute that authorizes "permissive" termination of a charter school. This latter argument is easily dispensed with. NRS 388A.330(1) states in pertinent part that "...the sponsor of a charter school may reconstitute the governing body of a charger school or terminate a charter contract ***before the expiration of the charter***[2] if the sponsor determines that..." certain conditions have occurred. The plain language of the statute clearly confines the authority to terminate to situations that arise ***during*** a charter school's term, when it is actively operating under an existing contract. Nothing in statute's language allows the SPCSA to impose more severe or even different benchmarks with automatic closure triggers than are allowed under NRS 330A.300(1), especially at the time of ***renewal***.

R089-16 may in fact indicate authority for SPCSA staff to impose provisions that it deems appropriate, but the Nevada Supreme Court has made it abundantly clear that an agency's regulatory power does not extend to circumventing or contracting the statutory scheme that enables the agency in the first place. In *State v. Rosenthal*, 93 Nev. 36 (1977), the Nevada Supreme Court invalidated a regulation that allowed for summary revocation of a work permit, where the statutory scheme governing work permits required administrative and judicial review before revocation.[3] The

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[2] Emphasis added.
[3] *Id.* at page 46.

Court cited the Constitution for the State of Nevada for the proposition that no person can be deprived of life, liberty, or property without due process of law.[4]

In *Clark County Social Service Dept. v. Newkirk,* 106 Nev. 177 (1990), the Nevada Supreme Court rebuked the Clark County Social Service Department when it enacted regulations that required poor individuals to be employed to receive benefits. There was no such employment condition in the state statute that required the county to supply the benefits. The Court held that "[t]he mere enacting of the mentioned administrative regulation obviously cannot countermand the statutory mandate. 'Administrative regulations cannot contradict or conflict with the statute they are intended to implement.'"[5] Because the regulation was contrary to the state statute and imposed conditions that the state statute did not require, the Court stuck the regulation.

In this matter, the SPCSA is committing the same error. It is arguing that its "permissive" powers of termination and its catch-all authority under R089-16 permit it to impose a benchmark that is more restrictive than that allowed by statute. Adopting such an interpretation would essentially render the entirety of NRS 388A.300 void and meaningless. The statutory scheme must be interpreted to give weight and deference to each of its provisions. An agency is not permitted to simply ignore or violate a statute that it doesn't like. The SPCSA's interpretation would empower it to take any action it deems fit, regardless of whether such actions violated the law. A court need not defer to an agency's interpretation of its governing statutes and regulations if the interpretation is not reasonable. *Public Employees' Retirement System of Nevada v. Nevada Policy Research Institute, Inc., 134 Nev. Adv. Opn. 81 (2018).*

Here, the SPCSA's interpretation of its statutes and regulations is not reasonable. It is unreasonable to impose benchmarks more restrictive than those allowed under NRS 388A.300, to retroactively apply those benchmarks, and to do so with full knowledge that the result will be a summary termination of a charter without due process. Moreover, it appears that the SPCSA's decision to declare its power and override existing statutes and the Constitution has been applied arbitrarily and capriciously ***only*** to NVVA. The motivation for this is not clear to us, but what is clear is that the conditions and benchmarks which SPCSA seeks to impose in the proposed Contract are illegal and unconstitutional. For that reason, we are demanding that you strike the benchmarks, and that the proposed Contract and Framework be amended to incorporate the appropriate benchmarks mandated by statute.

If we do not receive an affirmative reply by May 13, 2019, we intend to take steps to compel the SPCSA to conform to the statutes under which it operates, including but not limited to seeking judicial relief.

Sincerely,

John C. Lemmo

JAG:tw

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[4] *Nev. Const. art 1, s 8.*
[5] *Id. at page 179, citing Roberts v. State, 104 Nev. 33 (1988).*