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May 8, 2019

VIA U.S. MAIL AND E-MAIL: rherrick@spsca.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

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

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 charter 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

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 struck 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 RO89-16 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

⁴ Nev. Const. art 1, s 8.

⁵ *Id.* at page 179, citing *Roberts v. State*, 104 Nev. 33 (1988).

STEVE SISOLAK
Governor

STATE OF NEVADA

Rebecca Feiden
Executive Director



STATE PUBLIC CHARTER SCHOOL AUTHORITY

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May 20, 2019

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Re: Nevada Virtual Academy's Renewed Charter School Contract

John and Jeff,

Thank you very much for your correspondence dated May 8, 2019 regarding your concerns regarding Nevada Virtual Academy's ("NVA") renewed charter school contract, and the Nevada State Public Charter School Authority's ("SPCSA") decision in regard to NVA's renewed charter school contract. It has also been a pleasure discussing this matter with you.

It is my understanding that your immediate concern is the requirements and conditions that the SPCSA Board included in NVA's renewed contract.¹

While I address each of the concerns set forth in your May 8, 2019 correspondence below, I note initially that each and every concern raised in your May 8, 2018 correspondence has been previously raised by NVA and NVA's legal counsel and considered by the SPCSA prior to the Authority's decision in regard to NVA's renewed charter school contract.

I raise this issue here because – as we have discussed – NVA's current charter school contract expires on **June 29, 2019**. To be blunt, the absence of a fully-executed charter contract between the SPCSA and NVA as of June 29, 2019 will present a myriad of issues for NVA. The control of

¹ As you are aware, a previously agreed-to Stipulated Agreement between NVA and the SPCSA mandated that if NVA's elementary school did not meet or exceed certain benchmarks, NVA's elementary school would close at the end of the 2018-2019 school year. It is my understanding that neither the Stipulated Agreement or NVA's elementary school is at issue, and every indication available to the SPCSA clearly shows that NVA is closing its elementary school at the conclusion of the current (2018-2019) school year.

several of these issues reside wholly outside of the SPCSA. Again, while I address the issues raised in your correspondence to me dated May 8, 2019 below, it is concerning to me that these same arguments are being raised at this late date. Again, please note that it is imperative that NVA have a charter school contract in place as of June 30, 2019.

1. Background

For background purposes, it is my understanding that the primary focus of your correspondence dated May 8, 2019 are the “performance benchmarks” and “automatic closure triggers” that are contained in NVA’s renewed charter contract.² For reference, I have set out the language at issue below (Section 7.5.2 relates to NVA’s middle school; Section 7.5.3 relates to NVA’s high school:³

7.5.2 Notwithstanding the foregoing, the Authority and the Charter School agree the Charter School’s middle school shall cease operations at the end of the school year that the NSPF ratings are released if the Charter School’s middle school does not earn an index score of 50 index points or greater for two consecutive years. Given that the Charter School’s middle school earned an index score of less than 50 index points pursuant to the NSPF for the 2017-2018 school year, a rating of less than 50 index points for the Charter School’s middle school for the 2018-2019 school year shall result in the Charter School’s middle school ceasing operations at the end of the 2019-2020 school year.

7.5.3 Notwithstanding the foregoing, the Authority and the Charter School agree the Charter School’s high school shall cease operations at the end of the school year that the NSPF ratings are released if the Charter School’s high school does not earn an index score of 50 index points or greater for two consecutive years. Given that the Charter School’s high school earned an index score above 50 index points pursuant to the NSPF for the 2017-2018 school year, two consecutive years of ratings pursuant to the NSPF of less than 50 index points for the Charter School’s high school, beginning with the 2018-2019 school year, shall result in the Charter School’s high school ceasing operation no sooner than the end of the 2020-2021 school year.

Again, it is my understanding that these are the primary contract provisions at issue; please let me know immediately if I am mistaken.⁴

2. Arguments Raised in Your November 8, 2019 Correspondence

In my review of your May 8, 2019 correspondence, you raise three primary arguments related to the SPCSA’s determination regarding NVA’s renewed charter contract and the conditions and requirements set out in NVA’s renewed charter contract.

These arguments are as follows: (1) NVA’s due process rights were somehow denied or “violated” in regard to NVA’s charter school contract application and the SPCSA’s Board’s decision in regard to NVA’s renewed charter school contract, (2) the SPCSA’s Board’s decision in regard to NVA’s

² Please see your correspondence dated May 8, 2019, at page 1.

³ Note that Section 7.5.4 is a non-waiver provision requested by NVA in regard to NSPF data prior to the 2015-2016 school year)

⁴ Note that there are also several “reservation of rights” provisions included in NVA’s renewed charter school contract. See Sections 7.5.4, 12.14, and 12.15.

charter school contract somehow contravenes and violates NRS 388A.300 and NRS 388A.330 (Nevada's charter school contract termination statutes), and, finally, (3) that the SPCSA somehow "knows" that the conditions and requirements set forth in NVA's renewed charter contract are the "death knell" for NVA's middle school. In regard to this last point, you argue that the NVA's renewed charter contract is somehow a "premeditated and unlawful summary termination" of NVA's charter school contract (in regard to its middle school).

Although each and every one of these arguments has previously been raised by NVA – and rejected by the SPCSA – I address each of these concerns below.

a. Due Process

In regard to the arguments raised in your May 8, 2019 correspondence, my review of your correspondence shows that you argue in at least five places that due process was not provided to NVA in regard to its renewed charter school contract application and the SPCSA's determination in regard to NVA's renewed charter school contract.

Again, I note here that this very same argument was raised by Ms. Hendricks in correspondence to me dated November 16, 2018.

As I am sure that you are aware, due process in regard to an administrative agency's decision – such as the SPCSA's determination regarding NVA's renewal application – primarily involves (1) notice, (2) an opportunity to be heard, and (3) any decision of the administrative agency cannot be "arbitrary or capricious."

Without belaboring the point, NVA was provided with ample notice of the Authority Board meeting related to its application to renew its charter school contract (the SPCSA Board meeting was even moved at the request of NVA's Board's chair from November 2, 2018 to November 30, 2018). In fact, NVA's legal counsel can confirm that discussions were held between NVA's staff and Board representatives and legal counsel for NVA and the SPCSA regarding NVA's renewal request and the November 2, 2018 SPCSA Board meeting (again, later moved to November 30, 2018 at the request of NVA) dating to at least early September 2018. If there is any question in this regard, please see Ms. Hendricks' correspondence to me dated November 16, 2018 (thanking me for providing NVA with information regarding the SPCSA's staff's renewal recommendation in advance of the November 30, 2018 SPCSA Board meeting) and my correspondence to Ms. Hendricks dated November 21, 2018.

Likewise, NVA was provided with ample opportunity to be heard – in fact, representatives of NVA (including NVA's legal counsel and Board chair) appeared and participated in the November 30, 2018 SPCSA Board meeting related to NVA's application to renew its charter school contract. Please see the minutes and recording from the November 30, 2018 SPCSA Board meeting. Furthermore, several correspondences from NVA – raising the very same arguments that you are now raising – were provided to the SPCSA Board and discussed at the November 30, 2018 SPCSA Board meeting. Please see correspondence between myself and Ms. Hendricks dated November 16, 2018, November 21, 2018, November 28, 2018, and (again) November 28, 2018. Again, any argument that NVA was not provided with an opportunity to be heard in regard to its renewal application is misplaced.

Finally, any suggestion that NVA was denied due process in regard to its renewal application and the SPCSA Board's decision because that decision was arbitrary and capricious is clearly without merit. As discussed in the Briefing Recommendation provided to the SPCSA Board in connection with NVA's renewal request, the minutes and recording of the November 30, 2018 SPCSA Board meetings – including, most importantly, NVA's historical academic performance – the SPCSA Board's decision regarding NVA's renewal application was anything but arbitrary and capricious. Instead, the record in its totality clearly shows that the SPCSA's Board's decision regarding NVA's renewal application was well reasoned, based in fact, and appropriate.

I note here that as a general matter, I read your “due process” arguments as essentially arguing that because the SPCSA did not rely on NRS 388A.300 or NRS 388A.330 in regard to the imposition of the requirements and conditions set forth in NVA's renewed charter school contract, that NVA was somehow denied due process. As discussed in greater detail below, the SPCSA did not rely whatsoever on NRS 388A.300 or NRS 388A.330 in regard to NVA's renewed charter contract, and, as such, this argument misses the mark. In short, any claim that NVA was denied due process in regard to its renewal application and the SPCSA's Board's decision is misplaced.

b. Charter School Contract Termination: NRS 388A.300 and NRS 388A.330

My review of your May 8, 2019 correspondence reveals that this is your primary argument is that the SPCSA somehow “sidestepped” the charter school contract *termination* statutes set out in NRS 388A.300 and NRS 388A.330 in regard to NVA's renewed charter school contract.

Once again, this issue was raised by NVA both prior to and during the SPCSA's Board's November 30, 2018 meeting.

In regard to this point, you note that “Nevada's Legislature has mapped out the entire lifecycle of charter schools.” On this point, I wholeheartedly agree.

To be clear, Nevada's statutory scheme related to the lifecycle of a charter school contemplates the following:

1. An applicant applies for a charter school contract (NRS 388A.240 et seq.);
2. The applicant is approved to open a charter school contract (NRS 388A.270);
3. During the term of the charter school contract, the charter school may apply for an charter school contract amendment (NRS 388A.276-282);
4. During the term of the charter school contract, the charter school contract can be terminated under certain circumstances (NRS 388A.300 (mandatory charter school contract termination) and NRS 388A.300 (permissive termination)); and
5. *Potential renewal of the charter school contract at the expiration of the initial term of the charter school contract (NRS 388A.285)*

As is evident, *what your analysis is wholly missing is the final step in the “lifecycle” of a charter school – charter school contract renewal.* Nevada's Legislature clearly contemplated this final

step in NRS 388A.285 and NAC 388A.415.⁵ Your May 8, 2019 correspondence to me contains no reference whatsoever to NRS 388A.285. Instead, just as Ms. Hendricks did last November, you rely on NRS 388A.300 and NRS 388A.330 – *Nevada’s charter school contract termination statutes*.

To be blunt, starting in the summer of 2018 and culminating in the November 30, 2018 SPCSA Board meeting, NVA was seeking *renewal* of its charter school contract – NVA was not undergoing *termination* proceedings related to its charter school contract. As a result, *your reliance on NRS 388A.300 and 388A.330* (Nevada’s charter school contract termination statutes) *is wholly misplaced*.⁶ To be clear: Given NVA’s charter school contract expires on June 29, 2019, the SPCSA is not seeking to terminate NVA’s charter school contract. Instead, because NVA has applied to renew its charter school contract, the SPCSA and NVA are operating under NRS 388A.285 and NAC 388A.415.

In this regard, NRS 388A.285 – the charter school contract *renewal* statute – makes clear that renewal decisions are to be made based on the criteria of the SPCSA for renewal, and the performance of the charter school during the preceding term(s) of the charter school contract.

NAC 388A.415(6) – the charter school *renewal* administrative code provision – likewise makes clear that past performance of the charter school is the touchstone for any renewal recommendation. And NAC 388A.415(9) expressly states that any decision to grant or deny a renewal request is to consider the “totality of the evidence” and that the academic performance of the school is to be given the greatest weight in any renewal decision. See NAC 388A.415(10). Finally, and perhaps most importantly, NAC 388A.415(11) vests the SPCSA – at its “sole discretion” – with the ability to include in any renewed charter school contract “any additional provisions, requirements, or restrictions” that the SPCSA deems appropriate.

As is evident, none of these statutory or regulatory charter school contract *renewal* provisions implicate whatsoever the charter school termination statutes – NRS 388A.300 and NRS 388A.330 – cited and relied upon in your May 8, 2019 correspondence. As such, any reliance upon Nevada’s charter school contract termination statutes is wholly misplaced.

c. The SPCSA “Knows” That The Provisions and Requirement Contained in NVA’s Renewed Charter School Contract Will Result In the Closure of NVA’s Middle School

Finally, in your correspondence dated May 8, 2019, you state that “by including the provisions and requirements related to the academic benchmarks in NVA’s renewed charter school contract that the SPCSA somehow “knows full well that imposing the two-year consecutive benchmark[s] sounds the death knell for the [NVA] middle school program.”

Without belaboring the point, I am completely unclear what this means.

⁵ I note that in your May 8, 2019 correspondence you cite R089-16. This regulation has been incorporated into the Nevada Administrative Code as NAC 388A.415.

⁶ I note here that the reference in your May 8, 2019 correspondence to NRS 388A.330 as the SPCSA’s “permissive” (as opposed to mandatory charter school contract termination) (see NRS 388A.300) is correct.

NVA's middle school dropped almost 15 index points under the NSPF ratings last school year. However, the SPCSA historically has had charter schools that show a significant increase in index points from year to year. For the 2017-2018 school year, NVA's middle school received an index score of 40.5 (including a participation penalty of 9 index points). Therefore, it is completely feasible that NVA's middle school will receive an index score of 50 or greater index points for the 2018-2019 school year – particularly if NVA's middle school does not receive a participation penalty.⁷ As a result, I am completely unclear in regard to NVA's proposition regarding the SPCSA somehow "knowing" that NVA's middle school will not reach the benchmarks set forth in NVA's renewed charter school contract.

In closing, while you state in your May 8, 2018 correspondence that you are "confident that any court would concur with our analysis and strike any 'illegal' provisions from [NVA's renewed charter school contract]," the SPCSA is likewise confident that given NVA's historical academic performance and the provisions included in NRS 388A.285 and NAC 388A.415 that the requirements and conditions set forth in NVA's renewed charter school contract would be upheld.

As always, please do not hesitate to contact me with any questions or concerns.

Sincerely,

/s/

Ryan Herrick
General Counsel, State Public Charter School Authority

Cc: Rebecca Feiden, SPCSA Executive Director (via email)

⁷ NVA's April 30, 2019 Board minutes seem to demonstrate that NVA is confident that it will not receive a participation penalty for the 2018-2019 school year.



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May 30, 2019

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

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Carson City, NV 89706-2543

Re: Nevada State Public Charter School Authority's May 31, 2019 Agenda Item 9b re NVVA

Dear Mr. Herrick:

As you know, this firm represents Nevada Virtual Academy ("NVVA") concerning its charter renewal and draft Renewed Charter School Contract (the "Contract"). We reviewed the notice and agenda for tomorrow's SPCSA Board Meeting, and note that Agenda Item 9b states:

SPCSA staff and school leadership will provide the Authority Board with an update regarding Nevada Virtual Academy's renewed charter school contract related to its middle and high schools, and any potential litigation related to NVA's renewed charter school contract.

(Underlining added for emphasis.) If you would like to provide information to your own board, you are obviously free to do so. But to be clear, NVVA school leadership will not be communicating with or updating the Authority Board tomorrow about any potential litigation it may be considering against the SPCSA. For many reasons, that would be inappropriate. Our position is explained in our May 8, 2019 letter, which I believe you have provided the Authority Board. Rather, at your and Executive Director Rebecca Feiden's request, we accepted your invitation to meet and discuss our respective positions regarding the renewal and Contract, and potential resolution of any disputes. We have scheduled that meeting for next week.

I ask that you please provide a copy of this letter to the Authority Board members in advance of its meeting tomorrow. We look forward to meeting with you and Ms. Feiden next week.

Sincerely,

A handwritten signature in blue ink, appearing to read 'John C. Lemmo', with a long horizontal flourish extending to the right.

John C. Lemmo

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STEVE SISOLAK
Governor

STATE OF NEVADA

Rebecca Feiden
Executive Director



STATE PUBLIC CHARTER SCHOOL AUTHORITY

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June 14, 2019

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Re: Nevada Virtual Academy's Renewed Charter School Contract

John and Jeff,

At Nevada Virtual Academy's ("NVA") May 21, 2019 Board meeting, your law firm was purportedly authorized to commence legal proceedings against the State Public Charter School Authority ("SPCSA") in regard to NVA's renewed charter school contract.

However, in reviewing NVA's May 21, 2019 Board meeting, it has come to my attention that NVA's May 21, 2019 Board meeting was conducted in violation of Nevada's Open Meeting Law. As a result, any action taken by the NVA Board at its May 21, 2019 Board meeting – including the purported authorization of litigation against the SPCSA – is void.

Specifically, NRS 241.020(3)(b) specifies that the "minimum public notice" for a public meeting includes posting a copy of the public body's notice on the official notice website of the State of Nevada "no later than 9:00 am of the third working day before the meeting is to be held...." NVA's notice and agenda was posted to the official notice website of the State of Nevada (notice.nv.gov.) at 9:07 pm on Thursday, May 16, 2019. Because NVA's May 21, 2019 Board meeting was held on Tuesday, May 21, 2019, NVA missed the 9:00 am deadline by over twelve hours. If there was any question in this regard, Nevada's Attorney General's Offices' Nevada Open Meeting Law Manual expressly contemplates this exact situation: "For example, ... a Tuesday meeting must be noticed no later than 9 a.m. Thursday of the preceding week...."

I also do not believe that notice was posted on NVA's website in accordance with NRS 241.020(3) in a timely manner. Can you please confirm with NVA whether this is or is not the case?

Please note that the SPCSA is not raising these issues as merely “technical” violations (as NVA has posited in the past, please see below). Given NVA’s posture in this matter, the SPCSA has monitored Nevada’s official notice website in order to receive notice of any potential legal action or other actions. I note here that although you and I held several telephonic conferences and exchanged correspondence, no notice was provided to the SPCSA that NVA’s Board might be authorizing litigation against the SPCSA until we reviewed NVA’s delinquently-posted notice and agenda.

As you are aware, any “action” of a public body such as NVA taken in violation of Nevada’s Open Meeting Law is void; i.e., the action has no legal force or binding effect. See NRS 241.036. As you are also aware, the initiation of litigation is an “action” for which a public body such as NVA must authorize as part of a duly noticed and held public meeting.

I raise these concerns for a number of reasons.

First, this correspondence is meant to provide NVA with notice of an Open Meeting Law violation, and the fact that any action taken at NVA’s May 21, 2019 Board meeting is void. Of course, NVA can schedule a new Board meeting, provide appropriate notice, and re-authorize litigation against the SPCSA (please note that any attempt to schedule an “emergency” Board meeting under NRS 241.020(2) will in all likelihood face a similar Open Meeting Law challenge). However, any attempt to initiate litigation premised on the May 21, 2019 NVA Board meeting will result in an Open Meeting Law complaint being filed with Nevada’s Attorney General’s Open Meeting Law unit, and a request that the Attorney General’s Office declare any action taken at NVA’s May 21, 2019 Board meeting is void (including any action purporting to initiated litigation against the SPCSA). NVA’s Open Meeting Law violation will also be raised as part of any court action and as one of several defenses to any legal action taken in regard to the SPCSA.

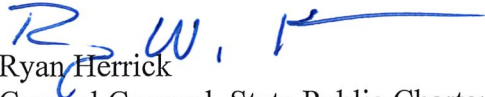
Second, and perhaps more importantly, and as we have discussed, it is unfortunate that NVA seems to be following the same path it followed in 2018 in regard to litigation that NVA commenced against the SPCSA. In that litigation, and just as it has here, NVA violated Nevada’s Open Meeting Law when it attempted to authorize litigation against the SPCSA. When notified of this violation, NVA notified the court of its error, vacated the hearing it had set without input of opposing counsel, voluntarily dismissed the pending action, and refiled the action. I have attached a copy of NVA’s request to vacate the hearing scheduled in that matter, and that cases was voluntarily dismissed pursuant to NRC 41(a)(1) days later. As an aside, but importantly, please note that NVA’s request for an injunction was denied in that second-filed case.

Unfortunately, it appears that NVA is on the same path now.

As we have previously discussed, NVA’s current charter school contract expires on June 29, 2019. NVA’s renewed charter school contract, as approved by the SPCSA Board, does not contain any conditions that are triggered until the release of the Nevada School Performance Framework (“NSPF”) ratings on September 15, 2019, and would not take effect until the end of the 2019-2020 school year. As a result, I am unsure why NVA is attempting to authorize litigation against the SPCSA and appears to be making the same mis-steps that NVA made in 2018.

Please let me know as soon as possible whether NVA will be rescheduling a new Board meeting in order to re-authorize your firm to commence legal proceedings against the SPCSA, your position in regard to the foregoing, and, as always, please feel free to contact me with any questions or concerns.

Sincerely,



Ryan Herrick
General Counsel, State Public Charter School Authority

Cc: Rebecca Feiden, SPCSA Executive Director (via email)
Rosalie Bordelove, Nevada's Attorney's General's Office (via email)

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Governor

STATE OF NEVADA

Rebecca Feiden
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VIA ELECTRONIC MAIL ONLY

June 17, 2019

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Re: Nevada Virtual Academy's Renewed Charter School Contract

John and Jeff,

As you know, on June 14, 2019, I wrote to both of you regarding Open Meeting Law compliance issues in regard to Nevada Virtual Academy's ("NVA") May 21, 2019 Board meeting. At that Board meeting, NVA's Board purportedly authorized your firm to commence litigation against the State Public Charter School Authority ("SPCSA") in regard to NVA's renewed charter school contract. Following my correspondence, and pursuant to my request made pursuant to NRS 241.020(3)(c), I received notification from Mr. Gerhardt from NVA that NVA had called a "special" meeting scheduled for June 20, 2019 at 1:00 pm to re-authorize your firm to potentially initiate litigation against the SPCSA.

It appears that you or NVA representatives have agreed with my analysis that the May 21, 2019 NVA Board meeting was conducted in violation of Nevada's Open Meeting Law and that any action taken at that meeting is void, including authorizing your firm to initiate litigation against the SPCSA. As a result, NVA has called a special meeting scheduled for June 20, 2019 to re-authorize litigation against the SPCSA.

This raises a number of concerns.

First and foremost, I see that NVA's agenda for its June 20, 2019 Board meeting does not contain any agenda item related to potentially approving NVA's renewed charter school contract. Instead,

the only agenda item related to NVA's renewed charter school contract deals with potential litigation against the SPCSA.¹

In this vein, I note here that although the potential approval of NVA's renewed charter school contract was agendized at NVA's April Board meeting (however, at that Board meeting that agenda item was "tabled" and no action was taken, nor was there any discussion related to that agenda item), no draft of NVA's renewed charter school contract was provided to NVA's Board as part of the supporting materials for that meeting. As such, unless a copy of NVA's renewed charter school contract has been provided to the NVA Board as part of an attorney-client conference (which would be unusual), the SPCSA is concerned that NVA's Board has *never even* reviewed a draft of NVA's renewed charter school contract. This is despite the fact that the SPCSA Board approved NVA's renewed application for its middle and high schools in late November 2018, Ms. Hendricks and I began drafting NVA's renewed charter school contract in early January 2019, the draft was finalized in April 2019, and I provided you with a copy of the contract in May 2019.² Notwithstanding the foregoing, I am again attaching a copy of NVA's renewed charter school contract to this correspondence.

I raise these concerns here because, as we have discussed on multiple occasion, NVA's current charter school contract *expires on June 30, 2019*.³ As a result, it appears as though the only option that will be presented to the NVA Board at its June 20, 2019 special Board meeting is the initiation of litigation against the SPCSA.

This is concerning since the earliest any litigation could possibly be filed by NVA against the SPCSA is the afternoon of June 20, 2019 – a mere *six court days* prior to the expiration of NVA's current charter school contract. As I have previously discussed with you, and I have stated in previous correspondence to you, in the event that NVA does not execute the renewed charter school contract that it has been presented with on or before June 30, 2019, or, alternatively (and an unlikely scenario), obtains a court order that somehow extends NVA's current charter school contract until any underlying litigation related to the conditions and requirements included in NVA's renewed charter school contract is resolved, NVA will face numerous issues. Simply put, a public charter school cannot operate – in any manner whatsoever – without a charter school contract.

Given that NVA has not placed on its agenda for the June 20, 2019 special meeting approval of its renewed charter school contract, but instead has only agendized the initiation of litigation against the SPCSA, I must assume that NVA is supremely confident that it can obtain a court order in the six court days following NVA's June 20, 2019 special Board meeting.

¹ I also note that the agenda for NVA's special Board meeting scheduled for June 20, 2019 appears to contain identical agenda items from several of NVA's recent Board meetings. This is concerning, since it appears that there also may be Open Meeting Law issues with several of NVA's Board meetings.

² My assumption is that although Ms. Hendrick's and I finalized the draft of NVA's renewed charter school contract in April 2019, it was never provided to the NVA at that time since your firm was retained as litigation counsel at NVA's March 2019 Board meeting.

³ Note that in reviewing the file related to this matter, I noticed that the date of June 29, 2019 has been used in regard to the expiration date of NVA's current charter school contract. Note that the correct date is June 30, 2019.

To be blunt, this seems to be an extremely risky strategy. In the event that there is another Open Meeting Law issue with NVA's June 20, 2019 Board meeting, or any procedural misstep in regard to any litigation seeking some sort of injunctive relief, NVA will have little or no time to call another Board meeting prior to the expiration of NVA's current charter school contract on June 29, 2019. I do note here that NVA currently has a Board meeting scheduled for June 25, 2019 – however, the agenda for the June 25, 2019 NVA Board meeting will need to be finalized and posted prior to NVA's June 20, 2019 Board meeting. By engaging in this strategy, NVA seems to be putting at risk the ability to serve over 1,700 students this coming Fall, forcing these students and their families to find new schools in less than eight weeks' time.

As stated above, presuming that NVA's Board authorizes litigation against the SPCSA at NVA's June 20, 2019 Board meeting, NVA will have a mere six court days to obtain some sort of emergency and extrajudicial relief from the court. My initial analysis shows that this will require NVA to (1) file litigation with the court, (2) serve the summons and complaint on both the SPCSA and Nevada's Attorney General's office, (3) obtain a hearing date from the court, (4) appear and prevail at any such hearing, and (5) post a bond with the court in order for any such injunction to be effective. Needless to say, even if NVA is confident that it will prevail in its request for some sort of injunction, it seems like there are a myriad of logistical and procedural issues that NVA must overcome in a mere six court days (not the least is the posting of a bond).⁴

In this regard, is NVA's Board aware of NRCP 65's bond requirement? In this vein, NVA has received between \$13 and \$16 million per school year each of the last three school years in Distributive School Account ("DSA") monies. As such, it seems that any injunction obtained by NVA would require a substantial bond (if, in fact, NVA does prevail on its request for an injunction), and as you know, under NRCP 65 any injunction obtained by NVA is not effective until the posting of any required bond. Is NVA prepared to post such a bond prior to June 30, 2019?

As I have repeatedly discussed with you, it appears NVA is following the same path it followed in 2018 when it initiated litigation against the SPCSA. In that case, NVA filed litigation, was made aware that the litigation could not proceed because of Open Meeting Law issues (just as has occurred here), and, most importantly, ultimately failed to obtain the requested injunctive relief in that case. While the context is a bit different now, the Open Meeting Law issue is almost identical, and the SPCSA believes that any request for injunctive relief will result in the very same outcome – NVA will not prevail. However, note that in this case, the SPCSA is, again, very concerned since if the SPCSA prevails again and NVA is denied any request for injunctive relief NVA will not be operating under a charter school contract.

Given all of this, I would strongly suggest that consideration of NVA's renewed charter school contract be placed on NVA's agenda for its June 25, 2019 Board meeting. While the NVA Board is, of course, free to approve or reject the renewed charter school contract (which, again, seems to be a very risky strategy), by placing the renewed charter school contract on its June 25, 2019 agenda the NVA Board is at least provided with the opportunity to consider the renewed charter school contract prior to the expiration of its current charter school contract.

⁴ I note here, again, that any attempt to schedule an "emergency" Board meeting pursuant to NRS 241.020(2) will result in an Open Meeting Law challenge, and any attempt to obtain injunctive relief against the SPCSA without notice and pursuant to NRCP 65(b)(1) will similarly be challenged.

Finally, I would like to reiterate the position of the SPCSA: It is my understanding that NVA's primary concern related to the renewed charter school contract that the SPCSA Board approved in November of 2018 and related to NVA's middle and high school is the mandate that a second year of sub-three-star performance under the Nevada School Performance Framework ("NSPF") will result in the closure of NVA's middle school at the end of the 2019-2020 school year. This provision (as it relates to NVA's middle school) reads as follows:

7.5.2 Notwithstanding the foregoing, the Authority and the Charter School agree the Charter School's middle school shall cease operations at the end of the school year that the NSPF ratings are released if the Charter School's middle school does not earn an index score of 50 index points or greater for two consecutive years. Given that the Charter School's middle school earned an index score of less than 50 index points pursuant to the NSPF for the 2017-2018 school year, a rating of less than 50 index points for the Charter School's middle school for the 2018-2019 school year shall result in the Charter School's middle school ceasing operations at the end of the 2019-2020 school year.

Again, it is my understanding that your position is that the use of the 2017-2018 school year NSPF data is impermissible, particularly as it relates to NVA's renewed charter school contract and NVA's middle school. As I stated in my email to you, you have at least intimated – and I am not attempting to bind you to anything – that the conditions and requirements included in NVA's renewed charter school contract are acceptable moving forward, but that the primary objection is to the use of the 2017-2018 school year NSPF data.

As we have discussed, Section 7.5.2 only comes into play if NVA's middle school does not earn an index score of 50 index points under the NSPF for the 2018-2019 school year. As we have also discussed, the 2018-2019 school year NSPF ratings and related index scores are released by Nevada's Department of Education on September 15, 2019.

As you are also aware, NVA's middle school earned an index score of 40.5 for the 2017-2018 school year, which included a participation penalty of 9 index points. NVA's school leaders have now stated at two separate NVA Board meetings that they are confident that NVA achieved a participation rate exceeding 95 percent for testing during the 2018-2019 school year. As a result, presuming that NVA's middle school's test results remain at the same level as during the 2017-2018 school year, NVA's middle school will be one-half of an index point from achieving an index score of 50. Any incremental improvement should push NVA's middle school to a 50 point index score and therefore to a three-star status or above.

Given all of this, and as we have discussed, I am unsure why litigation at this stage is appropriate or productive? If, in fact, NVA's middle school achieves an index score at or above 50 index points for the 2018-2019 school year – which results will be released on September 15, 2019 – none of the provisions contained in Section 7.5.2 are triggered at this time.

As such, and as I have discussed with you, I would propose that NVA execute the renewed charter school contract that the SPCSA Board approved and reserve all rights to litigate any and all issues or concerns related to the renewed charter school contract if and when NVA's middle school does not achieve an index score of 50 index points this Fall. To be clear, any litigation prior to the release of the NSPF ratings and related index scores for the 2018-2019 seems premature.

In the event that you agree that any action is premature prior to the release of the 2018-2019 NSPF ratings this Fall, and NVA is amenable to executing the renewed charter contract (while reserving any and all rights to litigate any issues related to the renewed charter school contract), it seems as though any litigation (if needed) can be initiated on or after September 16, 2019. In the event that NVA's middle school receives an index score exceeding 50 index points, no such litigation seems necessary. On the other hand, if NVA's middle school does not receive an index score at or above 50 index points under the NSPF for the 2018-2019 school year, it seems that any litigation would be concluded prior to the end of the 2019-2020 school year (the soonest any closure would occur under the provisions contained in the renewed charter school contract).

Again, as I stated in my previous emails to you, I see no reason whatsoever to litigate the use of the 2017-2018 school year NSPF data prior to the release of the 2018-2019 school year NSPF data in September of 2019, since it is that data triggers any potential closure of NVA's middle school.

In conclusion, the SPCSA is concerned since it appears that the NVA Board has never been provided with a draft of its renewed charter school contract and given the litigation posture that NVA is taken its renewed charter school contract the extremely tight timeline that NVA is operating under since its current charter school contract expires on June 30, 2019.

And most importantly, why is NVA pursuing a litigation path at this point in time when it appears NVA's middle school will potentially receive a three-star rating this Fall for the 2018-2019 school year? I'm sure that you can understand the SPCSA's concern if NVA does not believe that it will meet state standards for its middle school for the 2018-2019 school year and obtain a three-star rating, but all indications from NVA is that its middle school will, in fact, meet this benchmark.

I would ask that this correspondence be provided to you client, and I would also request that this correspondence be included as part of any supporting documentation to Agenda Item No. V.A in connection with NVA's June 20, 2019 Board meeting (I note that my previous correspondence dated May 20, 2019 is already a part of the supporting materials for NVA's upcoming Board meeting, and I also request that your previous correspondence to me also be included as supporting materials). Director Feiden and I are also available to participate in any discussion related to Agenda Item No. V.A at NVA's June 20, 2019 meeting at the request of the NVA Board.

As always, Director Feiden and I am more than willing to discuss any of these issues with you or any representatives from NVA.

Sincerely,



Ryan Herrick
General Counsel, State Public Charter School Authority

Cc: Rebecca Feiden, SPCSA Executive Director (via email)



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June 17, 2019

Ryan Herrick
General Counsel
STATE PUBLIC CHARTER SCHOOL AUTHORITY
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Carson City, NV 89706-2543

Re: Nevada Virtual Academy – Contract Renewal

Dear Mr. Herrick,

We are in receipt of your June 17, 2019, letter. You assert that the special meeting noticed for June 20, 2019, amounts to a concession that the May 21 meeting notice was invalid, and that the actions taken at that meeting are null and void. That conclusion is yours alone and we decline to adopt it. Given that you had full notice of the May 21 meeting, and in fact asked if you could attend well beforehand, any variation from the statutory notice requirements had no actual impact or prejudice to the SPCSA, and we view your objection as a strategic invocation of a technicality.

Your letter expresses concern for the risk that the Nevada Virtual Academy's ("NVVA's") students face. This risk is directly related to the SPCSA's insistence on imposing conditions on NVVA's contract renewal that are unlawful and violative of NVVA's due process rights. On multiple occasions our office has conferred with you regarding potential solutions to address this injustice. In each case you have stated that you would consult with your staff and respond to us, and in every case you have ultimately advised us that neither your staff nor board will support modification of any of the objectionable conditions.

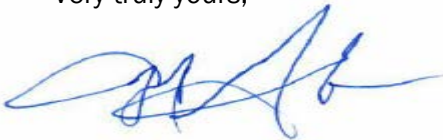
As your board chair made abundantly clear at the SPCSA's last meeting, there is hostility to the NVVA. NVVA is being pressured to sign the contract with unlawful conditions or lose its renewal, which the SPCSA knows will put nearly two thousand students' education in jeopardy. The responsibility for this rests with the SPCSA. We do not know what the NVVA's middle school scores will be for the 2018/2019 school year. All of the prognostications stated in your letter are wholly hypothetical. Moreover, given your apparent confidence that the middle school will earn the requisite 50 points, the refusal of the SPCSA to remove 2017/2018 scores from the performance metrics governing our renewed six-year term commencing with the 2019/2020 school year is all the more mystifying.

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The extensive dialogue we have conducted, which in every case resulted in a proposed solution being rejected by the SPCSA, combined with your late technical objections to open meeting law notice requirements are indeed running out the clock. This is most certainly exacerbating the exigent circumstances that already existed in this case, where the NVVA and its students are concerned.

If you make any progress with your employer in securing an agreement to compromise on the conditions we have objected to, we are committed to communicating same to our client for consideration. Our client is informed of your present stance but amenable to evaluating any solution that ameliorates the extreme prejudice that it is subjected to given the current situation. The door is open should the SPCSA's present position change.

Very truly yours,



Jeffery A. Garofalo
Senior Counsel, of
PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

JAG:tw
cc: Clients

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VIA ELECTRONIC MAIL ONLY

June 18, 2019

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Re: Nevada Virtual Academy's Renewed Charter School Contract

Jeff,

Thank you very much for your correspondence to me dated June 17, 2019. While I am loath to get into a letter writing battle with you, there are several points that require clarification.

First, any assertion that providing you with information related to a recent violation of Nevada's Open Meeting Law is somehow a "strategic invocation of a technicality" or a "technical objection" is wholly misplaced. Without belaboring the severity of NVA's most recent Open Meeting Law Violation, I note that NVA's non-compliance with Nevada's Open Meeting Law is nothing new. Not only did NVA fail to provide appropriate notice pursuant to NRS 241.020 in March of 2018 in regard to its public meeting purporting to authorize litigation against the SPCSA, a member of the public recently filed an Open Meeting Law Complaint against NVA (along with a number of other public charter schools). The alleged violation related to failing to provide appropriate notice under NRS 241.020. Of course, this is the same violation – mandated public notice – that I recently raised in regard to NVA's May 20, 2019 Board meeting. Given this pattern of Open Meeting Law non-compliance, I find it hard to understand how NVA's continued violation of the notice provisions contained in Nevada's Open Meeting Law is a mere "technicality."

Given that NVA believes that the SPCSA is simply raising Open Meeting Law "technicalities" in regard to its Board meetings, I will leave NVA's compliance in regard to Nevada's Open Meeting Law in connection with its upcoming Board meetings – currently scheduled for June 20 and June 25, 2019 – in your hands. However, note that while the SPCSA is eager to address the substantive merits of NVA's complaints and believes that it is in a strong position both legally and factually,

note that since it is presumed that NVA will be seeking equitable relief in the form of an injunction that these issues will all be raised in any court proceedings.

In regard to any injunction sought by NVA, I note that your concessions that NVA's elementary school's Nevada School Performance Framework index scores for the 2018-2019 school year are "hypothetical" and that "[w]e do not know what the NVVA's middle school's scores will be for the 2018-2019 school year" seem problematic. It is unclear how "hypothetical" index scores can be considered specific and definite harm that NVA will need to show in order to obtain any injunctive relief.

Second, as to any assertion that the SPCSA is "running out the clock," again, I am unclear what this means. NVA has been aware of the proposed conditions that would be included in its renewed charter school contract since late Summer of 2018. The SPCSA Board approved these conditions in November of 2018, and contract drafting with the input of NVA began in January of 2019. Any "clock" that is running is solely of NVA's own making. Certainly, NVA's failure to comply with Nevada's Open Meeting Law that required NVA to hold another public meeting to authorize litigation against the SPCSA cannot be considered the fault of the SPCSA and an attempt by the SPCSA to "run out the clock."

Finally, your various references to "extensive dialog" and "potential solutions" seems at odds with the fact that SPCSA, and not NVA, initiated every phone conference between NVA representatives and the SPCSA; the meeting between SPCSA staff and NVA representatives held on May 5, 2019 was initiated by the SPCSA; and the fact that although NVA representatives were invited to the SPCSA's May 31, 2019 Board meeting, but NVA declined this invitation. Additionally, the SPCSA informed you of potential Open Meeting Law violations prior to NVA initiating any litigation against the SPCSA. To claim that the SPCSA is "hostile" towards NVA simply because the SPCSA seeks to include conditions in NVA's renewed charter school contract that ensures NVA's students are meeting state standards is simply inaccurate. I note here that your comment related to the SPCSA Board Chair is likewise misplaced, since he voted in favor of renewing NVA's charter school contract (two SPCSA Board Members voted not to renew NVA's charter school contract at all).

As always, please feel free to contact me or Director Feiden with any questions or concerns.

Sincerely,

/s/

Ryan Herrick

General Counsel, State Public Charter School Authority

Cc: Rebecca Feiden, SPCSA Executive Director (via email)