

January 22, 2016

Via Email and U.S. Mail

Patrick Gavin
Executive Director
State Public Charter School Authority
1749 N. Stewart Street
Carson City, Nevada 89706

Members of the Board of the State Public
Charter School Authority
1749 N. Stewart Street
Carson City, Nevada 89706

Re: Nevada Connections Academy (“NCA”) Comments on Proposed Regulations

Dear Director Gavin and Members of the Board,

Thank you for the opportunity to comment on the draft Charter School Proposed Regulations (the “Regulations”) being considered. The workshop meeting commenced a good dialogue on important issues affecting charter schools in Nevada. We respectfully request you consider the suggestions provided below with respect to the Regulations.

Applications, Amendments, and Renewal Proposed Regulations

- [Charter Application and Procedures for Granting Charters \(2\): Review Process](#) - “The role of any reviewer is solely advisory.”

NCA requests that all recommendations, supporting and review documents prepared by or relied upon by reviewers and SPSCA staff are posted on the SPSCA’s website at least 7 days prior to any publicly scheduled meeting to provide transparency to all stakeholders and a reasonable opportunity for the applicant to evaluate the basis for the recommendation.

- [Amendments of Written Charter or Charter Contracts \(first paragraph\)](#) - we propose the following amendment: “The ~~Executive Director, may, at his discretion,~~ [SPSCA shall](#) establish ~~annual, semi-annual, or~~ quarterly filings windows and deadlines for the filing of specific categories of amendment requests. Such windows and deadlines may be waived by the ~~Executive Director, at his discretion~~ [SPSCA Executive Director in extenuating circumstances on a case-by-case basis.](#)”

Currently, there are no deadlines for filing amendments for a written charter or charter contract. There is a concern that these windows for filing might cause unnecessary delays for schools. The school's circumstances might change outside of those filing windows and the school should be able to address those concerns in an expedited manner.

- Amendments of Written Charter or Charter Contracts (4): Consideration of Amendment Requests - we propose deleting the following: "The Executive Director shall propose business rules for the consideration of charter amendment requests for adoption. As such guidelines are related to changes to a contract, they are not considered rules of general applicability."

The terms of the charter contract cannot legally be unilaterally changed after execution. Business rules, described in the Regulations as "guidelines" are rules of general applicability which require compliance with the rulemaking procedures established under Nevada Administrative Procedure Act ("APA"), NRS Chapter 233B.¹ The APA establishes the minimum procedural requirement, such as notice and hearing, with which state agencies must comply when creating rules for carrying out their regulatory powers. *Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 39 (2007). "During this time, the agency must give interested persons a reasonable opportunity to present views on the proposal, and thereafter hold a public hearing before adopting the proposal." *Id.* In *Labor Com'r of State of Nevada*, the Court found that "when the Commissioner generally applies these interpretations...he establishes a directive of general applicability, which constitutes rulemaking² under the APA." *Id.* The APA requires that all affected parties are provided with a chance to challenge the regulations *before* they become effective, and the notice and hearing requirements allow for greater participation by the public and oversight. *Id.* at 42. (emphasis added).

¹ Under Nevada Revised Statute 233B.038 a regulation means an (a) an agency rule standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency; (b) A proposed regulation; (c) The amendment or repeal of a prior regulation; and (d) The general application by an agency of a written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest.

² "An agency engages in rulemaking when it promulgates, amends, or repeals "[a]n agency rules, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." *Labor Com'r of State of Nevada v. Littlefield*, 123 Nev. 35, 39-40 (2007). The Court found that the Labor Commissioner's decision to delete soils tester and equipment greaser classifications from his annual prevailing wage publication constituted ad hoc rulemaking, in violation of the APA.

- Amendments of Written charter or charter contracts (8) - we propose deleting the following: “A charter school which submits an amendment request pursuant to Section 2 which will come into effect within 18 months of the expiration of the written charter or charter contract explicitly waives any right to submit anecdotal evidence or testimony related to data not reflected in the NSPF or the SPCSA PF in its appeal of a non-renewal recommendation to the SPCSA Board.”

Each school should have the full and fair opportunity to convey information it deems relevant during the amendment process. This provision specifically precludes a school from providing such relevant information by imposing an explicit waiver of any right to “submit anecdotal evidence or testimony related to data...” This limitation interferes with the school’s ability to provide all information in support of an amendment and such information is directly relevant to the process and should be considered. This requisite waiver to exercise a statutory right to seek renewal exceeds authority under and conflicts with the statute.

- The sections which include the statement “...are subject to Authority review and approval...and any additional requirements in Authority guidelines” which is located in Charter Applications and Procedures for Granting Charters (3) (last paragraph) and Amendments of Written Charter or Charter Contracts (8) (sic) (last paragraph) should be reconciled with the statements “the decision of the [State Public Charter School Authority] with respect to whether to _____ shall be final” - which is located in Charter Applications and Procedures for Granting Charters (3); Amendments of Written Charter or Charter contracts (8) (sic) (last paragraph), Renewal (d) (1) (iv); Renewal (last paragraph).

The draft provisions require clarification as to when the Executive Director’s decisions are subject to the SPCSA’s review. Generally, administrative agencies often offer this administrative review prior to an affected party seeking judicial review. Any “guidelines” will require rulemaking under the Nevada Administrative Procedure Act, NRS Chapter 233B.

- Renewal (a): Applicability - we propose deleting the bolded language as follows: “As the renewal of charter contracts is subject to the provisions of contract law, the provisions of the contract and any internal policies developed by the Authority which are applicable to charter contracts govern **and these regulations shall be considered advisory guidelines instead of rules of general applicability in such situations.**”

As currently proposed, the regulation appears to provide unfettered discretion not currently included in existing charter law in Nevada. Under the current charter model, the agency has already complied with the requirements under the law including statutes and regulations with

regard to what the agency requires under the agreement which preserves autonomy and limits overreach. Any “guidelines” that will govern the renewal of the charter must be adopted through regulation in compliance with the Nevada Administrative Procedure Act, NRS Chapter 233B.

- Renewal – we propose adding a section (b) (v) “any and all additional material or information the school deems will be relevant or helpful when rendering a renewal decision.”

This provision will establish a more balanced approach as the current language provides for such information to be included at the Executive Director’s determination. Each school should have the full and fair opportunity to convey any information it deems relevant for renewal as each school is different and faced with its own set of challenges. The numbers and rigid limitations on what information can be provided for consideration could unfairly deprive a school of the opportunity to explain its model, how it is serving its students, and provide context for other information provided as required under regulation or at the Executive Director’s request. A denial of a renewal application is tantamount to closing a school and the opportunity to provide all the information necessary in advance of rendering a renewal decision is good policy and in accordance with due process.

- Renewal (b) (2) - “In considering whether a charter school merits renewal, the board will consider past performance in the areas of academics, finance, and organization. Future plans are not relevant to the renewal decision.”

This section should be amended as follows: “In considering whether a charter school merits renewal, the board will consider past performance in the areas of academics, finance, and organization and future plans relevant to the renewal decision.”

A school’s future plans are relevant to the renewal process and should be considered, i.e. proposals to change missions, implementation of new programs, etc. This information is pertinent to the issue of renewal because these future plans could assist in demonstrating the school’s individual goals and objectives and ideas and visions for change to improve delivery to students. As indicated above, the denial of a renewal application is tantamount to a school closure and to allow schools the opportunity to provide all information relevant to the renewal prior to a decision being rendered is good policy. Further, the schools are already required to attach this same information in response to a recommendation for a denial,³ it would make sense that the school be equally allowed to include the same information in its renewal

³ Renewal (c) (3) (i) (1) (ii) Notification of Recommendation “Any such written response may include supporting affidavits, exhibits, and other documentary evidence and may also include a written legal argument.”

application. This does not mean the separate process for any necessary charter amendment will be avoided; it simply allows for consideration of such future plans relative to the renewal.

- Renewal (b)(2) - we propose deleting the following: “The application for renewal submitted by the governing body of the charter school which is seeking renewal of a written charter or charter contract shall not contain any material changes which are considered amendments pursuant to the amendment section. Any such proposed material changes shall be evaluated separately following charter renewal through the amendment process.”

In order to create flexibility for charter schools and reduce paperwork burdens, we propose that charter schools be allowed to combine both the renewal and amendment processes together. It makes sense that revisions to a five year plan be made during the renewal process which may include changes such as deviations to a school’s mission statement, revisions to an educational programs, and changes to school schedules. Requiring two separate processes is time-consuming and detracts school leaders from focusing on student performance, and also places an unnecessary and redundant burden on the limited staff and resources of the SPCSA. The amendment could be considered in a separate hearing in the same proceeding but should not be required to be brought in a subsequent application to the renewal.

- Renewals (c) (3) (1) (ii) - “Within seven calendar days of the issuance of the recommendation to the Board, the school may furnish a written response to such recommendation.”

This section should be amended as follows: “Within thirty calendar days of the issuance of the recommendation to the Board, the school may furnish a written response to such recommendation.”

The proposed regulation only allows seven calendar days to respond to the renewal recommendation which is an insufficient amount of time to formulate a response which includes supporting affidavits, exhibits, other documentary evidence, and a written legal argument. Given the significance of nonrenewal to a school, the governing body and school staff should be given plenty of time to gather materials it believes are relevant to defend the renewal recommendation. This is fair and good policy for the school and the students it serves.

- Renewals (d) (2) (i) (b) - we propose deleting the following: “renew the charter for a term of six year with provision for a high stakes review under the charter contract- the criteria and criteria and format for which shall be solely at the discretion of the authority.”

A high stakes review is unnecessary in a renewal decision due to the SCPCA's authority to revoke a charter for non-compliance through the revocation process.

- Renewal (d) (2) (i) (c) – we propose deleting the bolded language as follows: “renew the charter for a term of six years **with any additional provisions, requirements, or restrictions which the Board, in its discretion, may deem appropriate, including but not limited to the termination of a management agreement or the renegotiation of management agreement terms to the satisfaction of the Board or the Executive Director, pursuant to delegated authority.**”

Such broad discretion with respect to conditions to require a change to a school's model or other significant modifications outside the scope of the renewal application would exceed statutory authority. Conditions should be within the scope of the school's mission and data presented in the renewal application and provided for the applicant's consideration prior to any recommendation. In addition, this proposed regulation undermines the charter school's autonomy by imposing a condition of renewal on contract terms to the “satisfaction of the Board or Executive Director.” The Nevada Legislature conveyed the importance of balancing State involvement in the contract process expressly providing for what terms would be prohibited in such an agreement recognizing that aside from such prohibited provisions, the freedom of contract is an integral part of the charter school's model.

- Renewal (d) (2) (i) (f) - we propose deleting the following: “The State Public Charter Authority, may, at the request of the Executive Director, reclassify a denial decision pursuant to d, e, or f as a reconstitution, restart, or closure the event it determines, at its discretion, that a different denial outcome is more practical or is more beneficial to the interest of the State and the public, including but not limited to students enrolled at the school.”

The conversion of a charter school renewal process into a closure proceeding does not provide a legal, full and fair opportunity for the school to participate in such proceedings. Nevada law requires certain notice and other requirements for proposed closure of a school which may be eliminated through such a conversion. As such, the regulation as drafted would exceed the agency's statutory authority and deprive a school of its due process and other legal rights. These two sets of processes have distinct sets of requirements, implications, and outcomes. As such, these two processes require two different sets of regulations which should be addressed separately.

- Renewal (d) (2) (ii) (3) - we propose to either replace or delete “...Regents”

The word “Regents” does not appear to conform to the context of this section.

Accountability Proposed Regulations

- Facility – “Any updates to the SPCSA PFs, including changes in state assessments, performance indicators, floors, targets, and formulas will be automatically updated and accepted by the school without requiring a charter amendment. The Board has the Authority to adopt and mandate parallel assessments for schools at its sole discretion.”

This section should be amended to the following: “Any updates to the SPCSA PFs, including changes in state assessments, performance indicators, floors, targets, and formulas will be ~~automatically~~ updated and accepted by the school in a manner consistent with Nevada law. The school will not be required to make those changes in state assessments, performance indicators, floors, targets, and formulas until the charter school renews its contract at which time such conditions will be considered as possible term and conditions to the extent permissible under Nevada law and consistent with the school’s mission and data submitted in the application.”~~without requiring a charter amendment. The Board has the Authority to adopt and mandate parallel assessments for schools at its sole discretion.”~~

The draft regulations as proposed could interfere with the five year plan a charter school is held accountable to by changing material requirements midstream with no opportunity for the school to have notice and comment on such changes. This would violate both contract law and fundamental principles under NRS 233B. A charter school enters into a contract and charter with the Authority based upon factors that outline accountability metrics that are school specific. The school will set up a five year plan to meet the goals and is consistently working hard to improve school performance based upon its data. When metrics and goals are changed yearly and unilaterally, it is hard for schools to focus on a long term vision and know what goals are in place. Further, requiring “parallel assessments” will confuse parents, require teachers and staff to focus on test administration which can become very costly and be overly burdensome on the school and impose a new requirement on charters different from other public schools.

- Facility - we propose deleting the following language: “Membership in such task forces will be limited to charter schools which have been in good standing under the current SPCSA PMFs for at least two consecutive years.”

The purpose for the advisory task force under this section is to vet updates to the SPCSA PFs including state assessments, performance indicators, floors, targets, and formulas. As such, the advisory task force should be comprised of all charter school from various demographics and circumstances so that every school’s voice is heard and given proper consideration. It makes

little sense to specifically exclude a segment of the charter school population based upon whether it meets a “good standing” measure because their input in areas especially concerning state assessments and performance indicators are of critical importance and should be heard and included in such a discussion.

- Facility - “To ensure alignment with SB509 schools which currently fail to meet any academic performance threshold set forth in statute or regulation are subject to a Notice of Closure under the Authority intervention process....”
- Facility (last paragraph) - “For the purposes of auto-closure at a single campus status school, the Authority will consider 1 star ratings at any grade level or a combination of grade levels as grounds for automatic closure.”

The intent of the charter law and evaluation of school performance is to ensure that a global approach, a multi-prong data analysis, and a multiple year performance are measured. This proposed regulation replaces this balanced and comprehensive approach with an automatic closure trigger not provided for in Nevada law -- that one data metric in a one year period can unilaterally close a school based upon a performance measure. It is important that multiple measures of performance are examined over multiple years to determine if egregious harm to students necessitates school closure. Further, the proposed regulation implies that a closure can occur if one grade level does not meet a particular standard even if the remaining grade levels are demonstrating academic excellence. In the case of a multi-campus school, one grade level can also be grounds for automatic closure even if the multi-campus operator has demonstrated performance in other locations and grade levels around the state. Schools are complex systems and unfortunately, circumstances such as extended staff medical leave, inability to find suitable staff replacements, and other factors beyond the schools ability could cause a grade level to not meet performance measures in a particular year. It would be unlawful and create policy that undermines charter schools to provide that a single grade level’s performance in one year would warrant automatic closure and displace hundreds of students which are otherwise finding success at that school.

- Definitions: Charter Schools: “A charter school is an political subdivision that holds a charter contract or written charter with a sponsor.”

This provision is beyond the scope of the Authority as declaring a school a political subdivision requires legislative action.

- Definitions: Educational and Charter School Terminology and Authorizer Actions_ we propose providing a definition for Distance Education in conformance with NRS 388.820 which is the following: “means instruction which is delivered by means of video, computer, television, or the Internet or other electronic means

of communication, or any combination thereof, in such a manner that the person supervising or providing the instruction and the pupil receiving the instruction are separated geographically for a majority of the time during which the instruction is delivered.”

We believe that a definition for distance education will provide clarity for the charter school community, especially with regards to schools which operate under the distance education model.

- Definitions: Educational and Charter School Terminology and Authorizer Actions: SPCSA: “[SPCSA] took over authority for some regulations and duties previously held by the SBOE and it can adopt parallel regulations which differ in varying degrees from those of the SBOE and NDE in key areas, including applicant approval, oversight, and school accountability.”

While NCA appreciates the authority of the SPCSA to conduct oversight and school accountability, we respectfully submit that the SPCSA should be mindful of the multiple paperwork responsibilities that schools already undergo. We request that the SPCSA work collaboratively with the Nevada Department of Education and its member schools to use data that is both readily accessible and can be objectively validated and not require additional reports. Flexibility is an integral facet of charter schools, and any tools we can employ to reduce time consuming paperwork while still providing the necessary information for accountability purposes would be greatly appreciated and consistent with Nevada law and policy governing charter schools.

- Contractual Provisions: Policy Providing for Notice of Closure to Trigger Reconstitution RFP Process - we propose deleting the following: “*e.g.* in the event that the Board votes to revoke or terminate as a result of a high stakes review identified in a charter contract.”

As indicated above, a high stakes review is unnecessary given the agency’s revocation authority.

Director Gavin
SPCSA Board Members
January 22, 2016
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Again, we appreciate the opportunity to work with you on these important issues. Should you have any questions, or require any additional information, please do not hesitate to contact me at (775) 473-4513 or Laura.Granier@dgsllaw.com.

Sincerely,

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

Laura K. Granier
Partner

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for
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LKG:js

cc: Ms. Jafeth Sanchez
Steve Werlein, Principal