

November 4, 2016

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 regulation R089-16P (the "Draft Amendment Regulation"). We appreciate that certain changes have been made to the Draft Regulation as it was previously proposed in December 2015 and respectfully request you consider further modifications.

The Draft Regulation exceeds the SPSCA's statutory authority and violates the statutory requirements for the mandated regulations. Under NRS 388A.169 the SPSCA is required to adopt regulations that prescribe "the process" for submission of an amendment to a written charter or charter contract "and the contents of such an application." N.R.S. 388A.168 (3). The statute does not authorize the SPSCA to expand the circumstances under which an amendment is required – especially in the manner proposed under the Draft Regulation. As an administrative agency, the SPSCA is limited to those powers specifically set forth in statute, here, NRS Chapter 388A. *See Andrews v. Nevada State Board of Cosmetology*, 467 P.2d 96 (1970). The grant of authority to an agency must be clear in the statute, otherwise, the agency lacks the power. *Id.* Several of the proposed provisions in the Draft Amendment Regulation exceed the agency's statutory authority and, therefore, are ultra vires:

- Section 10, subsection (1)(b) requires the director's approval for a charter school to submit external evaluations of academic data relevant to a renewal application. This is in direct conflict with the provisions of NRS 388A on renewal applications.
- Section 10, subsection (4) prohibits an application for renewal from containing "a material change from the existing charter contract." This too violates NRS 388A on renewal applications and makes no sense given that the renewal process is contemplated (as provided in statute) as involving a collaborative dialogue between the sponsor and the charter school which may identify concerns and need for changes in operations or academics or otherwise that the agency would consider "material." In addition, the SPSCA's recent proposed draft charter contract states the authority shall decide what is "material" for purposes of the charter contract which places absolute power in the agency and potentially the director to attempt to prohibit a school from presenting critical information for its renewal application. This violates express provisions of NRS 388A and also deprives the school of its autonomy and ability to implement or even propose innovation.

- Section 10 also unlawfully interferes with the school's ability to present information the school believes is important and relevant to its renewal application – until the director decides he will recommend denial of the application.
- Section 11 states that renewal of a charter will be in the Authority's "sole discretion" – this is beyond the statutory authority and ultra vires.

In addition, Section 7, subsection (3)(f) and (3)(g) of the Draft Amendment Regulation suggest that a charter amendment is necessary to change the membership of the governing body of the charter school. There is no statutory authority to require an amendment of a charter for such a day-to-day operational situation and, indeed, suggesting such membership must be approved by the Authority or its Director is an improper assertion of control over the charter school. NRS 388A.320 sets forth the clear requirements for membership and qualifications for governing board members and provides for removal of members convicted of certain crimes. Aside from these requirements, no further regulatory approval of governing board members of a charter school is lawful or appropriate. An agency only has the power to promulgate regulations within the express authority granted by the Legislature. Accordingly, this provision is unlawful and exceeds the Authority's jurisdiction. In addition, proposing the regulation violates the Executive Director's duties under NRS 388A.196 to "[e]nsure the autonomy provided to charter schools in this State pursuant to state law and regulation is preserved." N.R.S. 388A.196(4).

Section 7, subsection (e) purports to require a charter amendment for any change to the academic program of the school. This is unreasonably and unnecessarily broad and unlawfully encroaches upon the school's autonomy. No school could possibly operate under such a requirement nor could the Authority keep up with the number of amendments this could generate. This unreasonably interferes with a school's operations and is beyond the SPSCA's statutory authority. NRS 388A.279 provides the charter amendments that require approval by the SPSCA and, while it is not an exhaustive list, it is emblematic of the materiality required before an amendment is necessary: expanding the school to offer instruction to new grade levels; increasing the enrollment in a particular grade level to more than 120%; seeking to acquire an additional facility; or consolidating operations of multiple charter schools. Requiring a charter amendment for the most minor of instructional changes which could be considered within a "change to the academic program of the school" goes beyond the statutory authority and intent. The existing regulations governing amendment track those in the statute and then provide for a determination as to materiality of an amendment and that a nonmaterial amendment does not require the sponsor's approval. NAC 386.3269. This is a lawful and reasonable regulation compliant with the statutory authority.¹ Revising or replacing the existing regulation with one that requires amendments for changes in a governing board and in any academic program is unlawful and interferes with autonomy and innovation. The Nevada Legislature's intention in creating the SPSCA was to increase school choice and encourage innovation – preserve charter school autonomy – and "foster a climate in this State in which all charter schools, regardless of sponsor, can flourish." N.R.S. 388A.150. Not only does the Draft Amendment Regulation exceed the agency's statutory authority, it violates the very purpose of the SPSCA as expressly stated by the Nevada Legislature.

¹ These existing regulations also demonstrate compliance with NRS 388A.168 to identify the procedure for investigation to consider an amendment application and the criteria for approval of such an application – the Draft Amendment Regulation omits these statutorily required details.

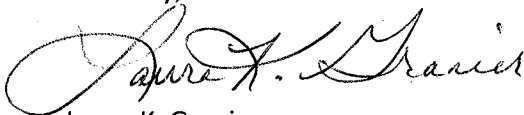
These overly broad requirements for amendments to a charter are combined with the arbitrary attempt to limit evidence and testimony a charter school may submit in support of such an amendment, according to Section 9 of the Draft Amendment Regulation. There is no statutory basis to limit the evidence an applicant can provide an agency for such a regulatory hearing and review process and, in fact, such an arbitrary and unreasonable attempt to limit such evidence to be offered to the agency is ultra vires and violates fundamental principles of due process and the Nevada Administrative Procedures Act, NRS Chapter 233B. One must also question why an agency would seek to prohibit a charter school from presenting information and evidence it believes is important for the SPSCA to hear relative to an amendment.

The Draft Amendment Regulation also fails to provide statutorily mandated details – “the procedure for the investigation” of an application for an amendment and the “criteria” that the SPSCA “will use to evaluate such applications.” N.R.S. 388A.168(4). The SPSCA is statutorily required to adopt regulations that include these details. The Draft Amendment Regulation is legally defective as it is silent on these critical elements the Legislature deemed necessary. These statutory provisions also limit the authority of the SPSCA to adopt regulations and the Draft Regulation exceeds that lawful authority.

The SPSCA also is required to develop policies and practices that describe how the sponsor will maintain oversight of its charter schools including an assessment of the needs of the charter schools sponsored by the sponsor that is prepared with input of the governing bodies of such charter schools and a description of the process of evaluation for charter schools. NRS 388A.223. We respectfully request that the SPSCA commence proceedings to gather input from the governing bodies to develop these policies.

Again, we appreciate the opportunity to work with you on these important matters and, we request an additional workshop with meaningful opportunity for stakeholder input similar to the workshops previously conducted by former SPSCA Director Canavero. We also incorporate by reference our letter submitted January 22, 2016 as certain of the concerns previously identified have not been addressed.

Sincerely,

A handwritten signature in cursive script, appearing to read "Laura K. Granier".

Laura K. Granier
Partner
for
DAVIS GRAHAM & STUBBS LLP

LKG:js