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**BEFORE THE STATE PUBLIC CHARTER SCHOOL AUTHORITY**  
**STATE OF NEVADA**

In Re:

Nevada Connections Academy Notice of  
Closure or Possible Board Reconstitution

Hearing Date: March 30, 2017  
Hearing Time: 8:00 AM

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**NEVADA CONNECTIONS ACADEMY'S  
PREHEARING BRIEF**

10 Pursuant to the Pre-Hearing and Hearing Order dated March 10, 2017, Nevada  
11 Connections Academy ("NCA"), by and through their undersigned counsel, Davis Graham &  
12 Stubbs LLP, hereby submits this prehearing brief for the March 30, 2017 hearing in this matter.

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**I. INTRODUCTION**

15 But for student "dumping" going on in other high schools, NCA would not be subject to  
16 the pending closure proceedings. Specifically, in the 2016 cohort, removing these students who  
17 came to NCA credit deficient, NCA's graduation rate would be 62.2%. NCA is committed to  
18 working with the Authority to resolve this matter on mutually agreeable terms, and has  
19 demonstrated that through months of work on and implementation of its graduation rate  
20 improvement plan and with its "cure" proposal<sup>1</sup> submitted to the Authority on December 2, 2016  
21 and recently revised based on new feedback from the Authority Staff ("Staff"). At the Authority  
22 Board's request, NCA prepared an exemplary graduation rate improvement plan that the school  
23 has been implementing with success – even with an increasing enrollment of credit deficient  
24 students (as a result of other high schools "dumping" students), according to the Authority  
25 Staff's calculations NCA's four year cohort graduation rate increased by 5 percentage points in  
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<sup>1</sup> Attached as **Exhibit A** (Letter from L. Granier dated Dec. 2, 2016).

1 2016.<sup>2</sup> In addition to NCA’s proposed cure and demonstrated improvement and that NCA would  
2 not be subject of these proceedings but for other Nevada high schools “dumping” credit deficient  
3 students, NCA requests that the Authority consider relevant concerns with the Authority Staff’s  
4 calculation of “graduation rate” – which is necessary to evaluating the adequacy of the cure –  
5 and also material to consideration of whether closure or board reconstitution is appropriate under  
6 Nevada law. The Legislature intended consideration of such material evidence when providing  
7 for potential (“may”) rather than mandatory (“shall”) closure of charter high schools triggered by  
8 a single data point – the high school graduation rate particularly where, as here, but for other  
9 schools “dumping” hundreds of credit-deficient students, NCA would not be subject to the  
10 pending proceedings. Moreover, NCA provides a comprehensive analysis of the school’s 2016  
11 graduation rate, which demonstrates that NCA’s graduation rate for last year exceeds the  
12 graduation rate benchmarks approved by the Authority, when calculated in accordance with  
13 Nevada law. *See Exhibit S* (2016 Graduation Rate Analysis).

## 16 II. BACKGROUND

17 NCA is an accredited, comprehensive, online public charter school serving more than  
18 3,200 Nevada students in grades K-12 under one charter granted in 2007 and renewed in 2013.  
19 *See NCA Charter, Exhibit B.* The Nevada Department of Education’s (“NDE”) last rating of  
20 NCA’s middle school was four-star (on a five-star scale) and the Authority Staff has confirmed  
21 that its only concerns with NCA are with the high school’s four-year cohort graduation rate.  
22 Unfortunately, Staff has refused to consider the student population or evidence demonstrating  
23 that the data point at issue does not reflect NCA’s performance but instead the fact that NCA has  
24 enrolled hundreds of credit deficient high school students counseled out of other high schools.

25 NCA serves some of Nevada’s most at-risk youth in need of flexible accommodations,  
26 many of whom enroll in NCA behind in credits and as a last resort before dropping out  
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28 <sup>2</sup> NCA believes that when properly calculated in accordance with Nevada law, the increase is

1 altogether. NCA provides highly individualized learning opportunities, which have  
2 demonstrated success in reengaging credit-deficient students and helping them graduate. Still,  
3 because many students are credit-deficient when they enroll in NCA as a result of falling behind  
4 in their previous school(s), they are unable to graduate within their four-year cohort—even if  
5 they accrue credits on track from the day they enter NCA, they often cannot make up for the time  
6 they lost at their prior school(s). **NCA has enrolled 633 high school students since October 1,**  
7 **2016, who are behind in credits and 408 of those students came to NCA from the Clark**  
8 **County School District.** NCA is seeing a trending increase in students being “counseled” by  
9 their zone schools to leave and enroll in online school when they get behind in credits. Yet, even  
10 with this increasing trend, NCA’s graduation improvement plan yielded a 5 percentage point  
11 increase in the graduation rate as calculated by the Authority staff. The plan is working and  
12 NCA deserves reasonable time to implement the plan prepared at the Authority’s directive and  
13 applauded by the Authority Board in May 2016.

14         Approximately 50% of the students that were part of the 2015 and 2016 NCA graduation  
15 cohorts were behind in credits when they initially enrolled at NCA. Therefore, even if every  
16 student accumulated credits at a normal rate from the time they enrolled in NCA, the school’s  
17 graduation rate would barely exceed 50%. This demonstrates one of the fundamental flaws in  
18 Staff’s calculation of the “graduation rate” for NCA’s high school – it punishes NCA for poor  
19 performance of a student’s prior school – rather than accounting for or even considering NCA’s  
20 performance with the students once they enroll at NCA. As a result, NCA’s four-year cohort  
21 high school graduation rate is below 60%, which Staff asserts justifies closure of NCA under  
22 NRS 388A.330 even though **NCA’s high school graduation rate for students who enrolled in**  
23 **NCA on cohort and stayed through the end of their senior year in 2015 was 73.3% and for**  
24 **2016 is 87.5%.** Exhibit S.

25         While the Authority is required to consider all compelling evidence and then, in its  
26 discretion, evaluate possible closure of a high school if its graduation rate falls below 60%, there  
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28 even greater than 5 percentage points as discussed below.

1 is no statutory authority for the agency to close an entire K-12 charter school based solely on this  
2 data point for the high school grades, and there is not a separate charter for NCA's high school.  
3 See NRS 388A.330(1)(e) (providing the sponsor *may* consider closure or board reconstitution if  
4 the "charter school is a **high school** that has a graduation rate for the immediately preceding  
5 school year that is less than 60 percent"). NCA is not just a high school – it is a K-12 school.  
6 Moreover, NCA's middle school is excelling: the NDE's most recent rating indicated that it is  
7 "among the higher performing schools in Nevada in student proficiency and/or student growth  
8 on the State assessments." See **Exhibit C**. NRS 388A.330 also provides the triggers for  
9 consideration of closure of an elementary school and a middle school and there is no evidence  
10 NCA's K-8 grades are subject to those provisions. These circumstances demonstrate why the  
11 Nevada Legislature did not allow closure of an entire K-12 school based solely on a single data  
12 point for the high school.<sup>3</sup>

13 **A. The Authority Considered Issuing a Notice of Closure to NCA in March and Instead**  
14 **Directed NCA to work with Staff to Prepare a Graduation Rate Improvement Plan**

15 On February 22, 2016, without any communication with NCA, the Staff placed NCA on  
16 the SPSCA agenda for its February 26, 2016 meeting for consideration of whether the Authority  
17 should issue NCA a "notice of closure." In doing so, the Authority violated its own State  
18 Performance Framework ("Performance Framework"), which requires the Authority to first issue  
19 a notice of concern, then a notice of breach, and then a notice of closure, under its adopted  
20 Intervention Ladder. See **Exhibit D**, page 6. The last notice NCA received from the Authority  
21 stated that NCA was in "good standing." See **Exhibit C**. The Authority took no action on the  
22 agenda item during the February 26, 2016 meeting.<sup>4</sup>

23 As soon as NCA received the publicly posted agenda for the February meeting, the

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25 <sup>3</sup> In an attempt to work with the Authority on this issue, through its proposed cure NCA has  
26 offered to address this issue through multiple steps that would include severance of the high  
27 school charter, if NCA's proposed cure is accepted by the Authority.

28 <sup>4</sup> Although NCA attended the February 2016 meeting and stayed until the end to publicly  
comment, the Authority chairman announced at 4:30 PM they had to clear the room they were in  
and adjourned the meeting before NCA representatives had the chance to complete their public  
comment.

1 school began reaching out to Staff to learn why it was included for possible closure without any  
2 prior communication. See *Email from S. Werlein to P. Gavin* (Feb. 22, 2016) and *Email from P.*  
3 *Gavin to S. Werlein* (Feb. 29, 2016), **Exhibit E**. Initially, Director Gavin was unresponsive to  
4 NCA's inquiries as to why NCA was included on the agenda – responding simply that  
5 “documentation is with counsel at this time.” Eventually, Director Gavin did speak with NCA  
6 representatives and stated that NCA had been placed on the agenda solely because its 2015 high  
7 school four-year cohort graduation rate fell below 60%.<sup>5</sup> Director Gavin told NCA that he had  
8 no performance concerns with grades K-8 at NCA, and that he had no concerns with NCA's high  
9 school aside from the graduation rate.<sup>6</sup> Director Gavin advised that he was required to treat all  
10 schools the same which was why NCA was included on the agenda based on the graduation  
11 rate.<sup>7</sup> NCA questions why Director Gavin recommended the Authority board members meet  
12 directly with the Quest Academy board members but has discouraged NCA from contacting any  
13 Authority board members on this issue. See **Exhibit T**, Minutes from August 24, 2015 Authority  
14 meeting.

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16 <sup>5</sup> NRS 388A.330 provides that the Authority “may” consider closing a **high school** if its  
17 graduation rate for the previous year is below 60%. This provision was revised from a  
18 mandatory (“shall”) provision in an earlier draft of the bill (SB 509) that would have required  
19 closure. Rather than mandate closure, the Legislature afforded the Authority discretion to  
20 consider the possibility of closure *if* compelling and substantial evidence supported such a  
21 decision. In response to legislators’ concerns about penalizing schools for serving Nevada’s at-  
22 risk youth, Director Gavin assured legislators that the Authority would consider all evidence  
23 necessary to truly evaluate the four-year cohort graduation rate. See **Exhibit 8** to **Exhibit A**  
24 (Excerpts from 5/27/2015 Minutes of Assembly Education Committee Meeting) and **Exhibit F**  
25 (Excerpts from 4/3/2015 Minutes of Senate Education Committee Meeting).

26 <sup>6</sup> Following the 2015 Nevada Legislative session, NCA immediately sought to meet with  
27 Director Gavin to discuss Senate Bill 509 (codified at NRS 388A.330). After several weeks of  
28 attempts, the school was able to meet with Director Gavin in September 2015 at which time he  
informed the NCA principal and Board President that seeking closure of NCA under SB 509 was  
not imminent because he “had bigger fish to fry” and indicated there would be time to work on  
the issue, which made sense given NCA having raised concerns about penalizing schools for  
serving credit deficient students. See **Exhibits G and H** (emails attempting to schedule meeting  
and declaration of J. Sanchez).

<sup>7</sup> Judge Russell also emphasized the importance of all schools being treated equally. See  
**Exhibit I**, Transcript of Nov. 30, 2016 Court hearing, page 50. Thus, NCA continues to question  
why another online school has been allowed to avoid closure based on high school graduation  
rate by simply refusing to accept credit deficient high school students – in violation of Nevada  
law. **Exhibit J**, Sept. 28, 2015 Authority Minutes; **Exhibit K**, Emails between NVVA and the  
Authority regarding unlawful enrollment practice.

1 Prior to the March 2016 Authority meeting, NCA provided the Authority board members  
2 and staff with detailed information about NCA's graduation rate. For example, NCA explained  
3 that, of the **non-graduates for 2015, 40.9% enrolled with NCA in the 12th grade; 6 enrolled**  
4 **with NCA for one month or less, 1 student was enrolled with NCA for only 14 days,** and  
5 another 14 of the students identified as "non-graduates" have enrolled in a post-secondary  
6 institution, calling into question their status as "non-graduates."<sup>8</sup> NCA also questions the  
7 Authority's calculation of the graduation rate in a manner that conflicts with NRS 385A.260  
8 which precludes the State from counting students who receive a GED or continue on to adult  
9 education as "drop outs." NCA explained that if you exclude that population from the  
10 calculation, without doing anything else, the 2015 graduation rate would increase substantially.  
11 The same is true for 2016 – the graduation rate excluding these students under NRS 385A.260 is  
12 50.7%. See Exhibit S. Unfortunately, the Authority Staff is unwilling to consider anything other  
13 than the single data point – the four year cohort graduation rate – without regard to the fact this  
14 holds the wrong school accountable for these students being credit deficient.

15 In March 2016, after allowing NCA an opportunity to present evidence, the Authority  
16 Board vote was not to proceed with closure, recognizing that the sole basis of concern was the  
17 high school's four-year cohort graduation rate, but instead to direct that NCA work with  
18 Authority staff to develop a graduation rate improvement plan. The evidence related to the high  
19 school's "graduation rate" demonstrated that the **2015 rate was 73.3% when calculated based**  
20 **upon students enrolled at NCA for all four years of high school**—a number that is on the rise:  
21 the same rate was 87.5% for 2016. Importantly, measuring graduation rate in this manner was  
22 something suggested by Board Member Mackedon at NCA's renewal hearing – to evaluate how  
23 NCA was serving students it had continuously enrolled. See Exhibit 7 to Exhibit A (Minutes of  
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25 <sup>8</sup> NCA also questioned the Authority's retroactive application of NRS 388A.330. "Substantive  
26 statutes are presumed to only operate prospectively, unless it is clear that the drafters intended  
27 the statute to be applied retroactively." *Sandpointe Apts. v. Eighth Judicial Dist. Court*, 129  
28 Nev., Adv. Op. 87, 313 P.3d 849, 853 (2013). As the United States Supreme Court has stated,  
"elementary considerations of fairness dictate that individuals should have an opportunity to  
know what the law is" and that settled expectations should not be lightly disrupted. *Landgraf v.*  
*USI Film Products*, 511 U.S. 244, 265 (1994).

1 March 22, 2013 SPCSA meeting.) Further, the Authority seemed to acknowledge that the lower  
2 rate was not an accurate reflection of NCA's ability to serve its students based upon evidence  
3 demonstrating that the rate was negatively impacted by students who were unable to graduate  
4 "on track" not because of NCA's performance but because they were credit-deficient at the time  
5 they enrolled in NCA's high school, and by highly mobile students, some of who are counted as  
6 "drop-outs" because their enrollment in another school went unreported.<sup>9</sup>

7 Heeding the Authority's direction during the March 2016 hearing, NCA spent weeks  
8 collaborating with Authority staff to prepare what the Authority praised as a commendable  
9 graduation rate improvement plan. *See* May 20, 2016 Transcript of SPCSA Meeting, pages 196,  
10 199, 203, 212.<sup>10</sup>

11 **Vice-Chair Mackedon:** ". . . this report is really well done." May Transcript  
12 at 196.

13 **Member McCord:** "I'd really like to congratulate you on that. . . . I congratulate  
14 the school for putting this in there. It speaks to the integrity of the data collection,  
15 but it does one other thing. **It actually defines the actionable data.**" *Id.* at 199,  
16 203.

17 **Member Johnson:** ". . . if you implement this **really stellar plan** that I think  
18 we've all been impressed by . . ." *Id.* at 212.

19 Nothing has changed since this May hearing to trigger the Authority reversing its March  
20 2016 decision. In the meantime, NCA has implemented the Graduation Rate Improvement Plan  
21 and spent time and money to address the issue as directed by the Authority in March. The  
22 evidence is that the plan is working but, unfortunately, Staff refuses to consider that evidence.

## 23 **B. NCA's Implementation of the Graduation Rate Improvement Plan**

24 NCA has begun implementing the improvement plan and has already seen success. NCA  
25 had contracted with AdvancED to validate NCA data relevant to the graduation rate issue as  
26 requested by the Authority. Just weeks ago, however, AdvancED suddenly terminated the

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27 <sup>9</sup> The current four-year cohort calculation of the graduation rate the Authority cites as the basis  
28 for closure is inconsistent with NRS 385A.260.

<sup>10</sup> Transcripts of the Authority meetings can be found on the Authority website at  
[http://charterschools.nv.gov/News/Public\\_Notices/](http://charterschools.nv.gov/News/Public_Notices/) ). NCA requests that these transcripts be  
included in the record for the Authority's consideration.

1 contract for this data validation expressing concern that the Authority Staff had a problem with  
2 AdvancED doing the very work the Authority requested NCA have them complete. NCA has  
3 engaged another third party validator to complete the validation who will provide a report for  
4 NCA's cure and testify at the scheduled hearing. NCA increased summer school classes which  
5 produced more high school graduates. Other intervention measures from NCA's improvement  
6 plan also are bearing fruit as will be explained at the hearing.<sup>11</sup>

7 Following its favorable reaction to NCA's Graduation Rate Improvement plan, the  
8 Authority requested "benchmarks" to measure improvement from implementation of the plan  
9 over a three-year period, noting that NCA would need at least six months to a year to implement  
10 the plan and see results before the Authority would again consider closure or whether the plan  
11 was working.<sup>12</sup> Accordingly, NCA worked with Authority staff to agree to benchmarks with the  
12 understanding that the four-year cohort graduation rate depends heavily on the students' previous  
13 schools, and in many cases does not reflect NCA's ability to successfully reengage students who  
14 have come to the school credit-deficient.

15 On July 29, 2016, Director Gavin recommended that the Authority approve NCA's  
16 proposed benchmarks, but ambushed NCA by proposing for the first time in the Staff's report  
17 released that morning to the public, that such approval be on the condition that NCA agree to  
18 enter into a 30 page charter contract (that NCA had never before seen), which required NCA to  
19 waive its right to judicial review on future Authority actions – including appointment of a  
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22 <sup>11</sup> NCA's changes started with a cohort analysis that detailed every student in the 2015-16 four-  
23 year cohort with regard to their credit status that guided assignment of credit deficient students to  
24 programs, support and interventions, depending on their credit status, tailored to their individual  
25 needs to help them earn a high school diploma. NCA has seen success in these improvements –  
26 increasing the graduation rate by 5 percentage points in 2016 and anticipates as much as a 10  
27 percentage point increase over 2016 performance. NCA provides its students a highly  
28 individualized approach to learning through targeted instruction, counseling and the  
implementation and monitoring of individualized graduation plans.

<sup>12</sup> Member Mackedon expressed this same view that "It's their responsibility to put forth the  
plan, which they did, and to get results on it. And it's our responsibility to make a decision when  
the results come out in a year or six months or whenever it is they come out." May 20, 2016  
Transcript of SPSCA Meeting, page 234. As acknowledged by Member Mackedon, the school  
needs time to implement the plan the Authority Board directed the school create.



1 receiver.<sup>13</sup>

2 The Authority Board voted to condition the approval of the benchmarks on NCA entering  
3 into a **mutually agreeable** charter contract with the Authority Staff. Unfortunately, when Staff  
4 negotiated with NCA, Director Gavin and his counsel insisted the school waive certain rights to  
5 judicial review, taking the position the Authority board had required that term. Because the  
6 Authority refused to remove the judicial waiver term, NCA did not sign the contract and Staff  
7 threatened closure if the school would not agree to waive these rights.

8 **C. The Notice of Closure, Mandatory Waiver of Court Review, and Proposed Cure**

9 On September 30, 2016, the Authority issued a notice of closure to NCA pursuant to  
10 NRS 388A.330(2),<sup>14</sup> citing NCA's 2015 high school graduation rate, even though just 3 months  
11 earlier the Authority acknowledged NCA would need time to implement its graduation  
12 improvement plan before the Authority reconsidered a notice of closure. *See Exhibit M* (Notice  
13 of Intent to Revoke Charter). Before moving to approve issuance of a notice of closure, the  
14 Board voted on Staff's recommendation to *require* that any contract between NCA and the  
15 SPSCA would include the waiver of NCA's rights to judicial review of future agency action.  
16 *See* Transcript of September 2016 SPSCA Meeting, pages 42-43, and **Exhibit N**, Staff Briefing  
17 Memo. Then, surprisingly, when Staff issued the notice of closure, that notice stated that in  
18 addition to considering possible closure, the Authority would consider at the December meeting  
19 whether to reconstitute NCA's school board, which could be effective immediately. However,

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21 <sup>13</sup> NCA objected to the condition on a number of bases including the lack of any notice from  
22 Staff and lack of statutory authority to force NCA to convert from its Charter to a contract. In  
23 response, one Authority Board member suggested that NCA had requested a "charter  
24 amendment," which would give the Authority the legal right to require NCA to convert to a  
25 contract. *See* Transcript of July 2016 SPCSA Meeting, pages 163-165. In fact, NCA had not  
26 requested such an amendment, nor has the Authority agenda since February 2016 reflected any  
27 public notice that the Authority would consider an amendment to NCA's charter, as required by  
28 NRS 388A and 233B. Moreover, the Authority did not even have regulations in place governing  
when a charter amendment is required by certain school actions. *See Exhibit L*, Excerpts from  
Proposed Regulation R089-16P.

<sup>14</sup> In issuing the notice of closure, the Authority violated its own policy regarding notice to  
schools under the State Performance Framework Intervention Ladder. Moreover, the notice  
represented a sudden and unexpected shift in the Authority's intention, which, up until  
September 30, had included working with NCA to implement a successful improvement plan,  
praising NCA's efforts, and recognizing the misleading nature of the high school graduation rate.

1 the Authority did not raise board reconstitution during its September hearing, and did not take a  
2 public vote regarding reconstitution; therefore, the Authority's threat to reconstitute the school  
3 board violates Nevada's open meeting law and appears to be a transparent attempt to retaliate  
4 against the board members who would not waive the school's constitutional rights.<sup>15</sup>

5 Without the benefit of guidance from the Authority staff, NCA prepared a proposed cure  
6 and submitted it to Mr. Ott on November 14, 2016. On November 29, 2016, Mr. Ott responded  
7 that Staff did not feel it was a cure because it required action by the Authority. On November  
8 30, 2016, NCA requested a meeting with Authority staff to obtain feedback from the Authority  
9 staff regarding NCA's proposed cure, but Director Gavin declined. Exhibit 3 to Exhibit A  
10 (Email from G. Ott to L. Granier).  
11

12 On December 2, NCA submitted a detailed letter to the Authority (and uploaded a  
13 number of documents to Epicenter) proposing a cure for the deficiency the Authority identified  
14 in its Notice of Closure—namely, the four-year high school graduation rate. *See* Exhibit A and  
15 **Exhibit O**. The proposed cure suggested (1) calculating NCA's four-year cohort graduation rate  
16 in accordance with Nevada law including NRS 385.3485 (now codified at NRS 385A.260),  
17 according to which NCA's 2015 four-year cohort graduation rate was 50.7% in 2016; (2)  
18 excluding students enrolled for 50% of the school year or less, based upon Federal regulations  
19 promulgated under the Every Student Succeeds Act, in which the federal government recognized  
20 that a school should not be penalized for students the school had inadequate time to impact  
21 relative to their academic progress toward graduation, under which NCA's graduation rate was  
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24 <sup>15</sup> Upon receiving the Notice of Closure, NCA reached out to Staff to collaborate on a potential  
25 cure. On October 5, 2016, NCA reached out to the Authority's counsel, Greg Ott, requesting the  
26 Authority's guidance with respect to what it would consider an acceptable cure, and received no  
27 response. *See* Exhibit 1 to Exhibit A (Email from L. Granier to G. Ott). NCA subsequently  
28 attempted to contact Mr. Ott several times, and Mr. Ott responded on October 25, 2016, stating  
that the Authority was not obligated to "tell the school how the deficiency may be cured."  
Exhibit 2 to Exhibit A (Email from G. Ott to L. Granier). Mr. Ott did, however, reference how  
Beacon Academy cured its deficiency, by entering into the contract we understand includes a  
waiver of rights to judicial review. NCA reiterates that the cure for Beacon Academy—a high

1 47.2% in 2016;<sup>16</sup> (3) continuing implementation of the graduation rate improvement plan; and  
2 (4) voluntarily reconstituting NCA’s board on a fixed rolling basis to effectuate a reasonable  
3 transition that will not disrupt school governance. *See* Exhibit A. This proposal also addresses  
4 the fact that the Authority has not adopted a policy for reappointing a new governing board of a  
5 charter school following reconstitution as required under NRS 388A.223(1)(h). Further, “[e]ach  
6 sponsor of a charter school shall develop policies and practices that are consistent with state laws  
7 and regulations governing charter schools” that must include, in relevant part, “[a] description of  
8 how the sponsor will maintain oversight of the charter schools it sponsors, which must include,  
9 without limitation . . . [a]n assessment of the needs of the charter schools that are sponsored by  
10 the sponsor that is prepared with the input of the governing bodies of such charter schools[,] and  
11 . . . [a] strategic plan for the oversight and provision of technical support to charter schools that  
12 are sponsored by the sponsor in the areas of academic, fiscal and organizational performance.”<sup>17</sup>  
13 NRS 388A.223(2)(f). To date, the Authority has not fulfilled any of these legal obligations –  
14 which also has resulted in these proceedings. Charter schools need to have their performance  
15 considered based on meaningful data – not a single metric that, in this instance, reflects student  
16 “dumping” by other high schools rather than NCA’s performance. But Staff refuses to review or  
17 consider anything other than the 4-year cohort graduation rate with NCA. The proposed cure  
18 also quantified the improvements NCA has made in the early stages of plan implementation,  
19 demonstrating that the 60% statutory goal for the high school is within striking distance. *See*

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20 school—is not applicable to NCA’s K-12 school.

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25 <sup>16</sup> NCA believes when combining the respective increases in the graduation rate yielded from  
26 this calculation with the additional increase from excluding students who Nevada law proscribes  
27 from being reported as dropouts, NCA’s graduation rate will be even higher and well within  
28 striking distance of the 60% minimum threshold at issue. For example, properly adjusting the  
graduation rate to accommodate ESSA and students who transferred to a GED or adult education  
program, yields a 2016 rate of 56.6%, with a reported 48 non-graduates from the 2016 cohort  
enrolled at NCA for a 5<sup>th</sup> year. *See* Exhibit S.

<sup>17</sup> In addition, the policies must include a description of the Authority’s evaluation process for

1 Exhibit A.

2 At its January 26, 2017 board meeting, NCA voted to approve the proposed measures  
3 presented in the December cure – given the Authority Staff’s concerns about those cures  
4 expressed in its December 2016 prehearing brief. In March 2017, Staff advised NCA that even  
5 with the NCA board approval, it did not find the proposed cure acceptable. NCA has proposed  
6 several additional suggestions for a proposed cure to address every concern the Authority Staff  
7 has raised but, to date, the Staff has rejected all such proposals and takes the position that Staff is  
8 not obligated to make suggestions about what would be an acceptable cure. NCA’s proposal  
9 included financial penalties for the school and accountability reporting on credit deficient  
10 students and their accrual of credits, and third party validation of all data. NCA’s proposal  
11 includes getting to the minimum 60% rate by 2018 and, even establishing an alternative  
12 performance school given the high number of students who are credit deficient when they enroll  
13 with NCA. Unfortunately, Staff has rejected every proposal and it appears, to date, the only  
14 acceptable “cure” is the proposed contract waiving NCA’s right to judicial review.  
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16  
17 Giving the school such a Hobson’s choice to be closed or waive its rights to judicial  
18 review may be unlawful. The Authority’s closure proceedings put thousands of Nevada  
19 students’ education at risk, and NCA has demonstrated its willingness to work with the Authority  
20 to prevent this result.  
21

### 22 III. ANALYSIS

#### 23 A. THE ENTIRE K12 SCHOOL CANNOT BE CLOSED BASED ON THE GRADUATION RATE

24 The notice of closure originally issued because NCA was unwilling to waive its right to  
25 judicial review regarding future Authority decisions that could put the entire K-12 school into  
26 receivership based solely on the four-year graduation rate for the high school. This is not within  
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28 the charter schools it sponsors. NRS 388A.223(2)(g).

1 the agency’s statutory authority, as the Nevada Legislature identifies separate, unrelated triggers  
2 for discretionary closure of high schools as opposed to middle and elementary schools, and  
3 NCA’s middle and elementary schools do not meet the statutory triggers. Still, in an effort to  
4 resolve this matter, NCA has included in its cure a resolution for this issue.

5 The Authority “may” consider charter termination if “[t]he charter school is a **high**  
6 **school** that has a graduation rate for the immediately preceding school year that is less than 60  
7 percent.” NRS 388A.330(1)(e) (emphasis added). As previously noted, the legislative history  
8 demonstrates that the Nevada Legislature did not intend to require the Authority to mindlessly  
9 close schools which fell below the 60 percent marker, but instead intended for the Authority to  
10 thoughtfully consider all factors involved, including a school’s mission to serve at-risk students,  
11 who, by definition, are less likely to graduate on track.<sup>18</sup>

12 By contrast, the Authority has discretion to consider closure if “[t]he charter school is an  
13 elementary or middle school or junior high school that is rated in the lowest 5 percent of  
14 elementary schools, middle schools or junior high schools in the State in pupil achievement and  
15 school performance.” NRS 388A.330(1)(f). NCA’s elementary and middle schools are not rated  
16 in the lowest 5 percent of schools in the State.

17 Nevada courts apply the plain-meaning rule in determining legislative intent, meaning  
18 that “[t]he starting point for determining legislative intent is the statute’s plain meaning; when a  
19 statute ‘is clear on its face, a court cannot go beyond the statute in determining legislative  
20 intent.’” *State v. Lucero*, 249 P.3d 1226, 1228 (2011) (citing *Robert E. v. Justice Court*, 99 Nev.  
21 443, 445 (1983)). Moreover, Nevada courts interpret “statutes within a statutory scheme

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23 <sup>18</sup> It was initially proposed before the Legislature in SB 509 that the Authority “shall” revoke a  
24 high school’s charter if a school’s graduation rate fell below 60%--a mandatory provision. The  
25 Legislature rejected this principle, eventually codifying NRS 388A.330 to state that the  
26 Authority “may” do the same—a discretionary provision. Rather than mandate closure, the  
27 Legislature afforded the Authority discretion to consider the possibility of closure *if* compelling  
28 and substantial evidence supported such a decision. In response to Nevada Legislators’ concerns  
about penalizing schools for serving Nevada’s at-risk youth, Director Gavin assured Nevada  
legislators that the Authority would consider all evidence necessary to truly evaluate the four-  
year cohort graduation rate. See Exhibit 8 to Exhibit A (Excerpts from 5/27/2015 Minutes of  
Assembly Education Committee Meeting) and Exhibit F (Excerpts from 4/3/2015 Minutes of  
Senate Education Committee Meeting).

1 harmoniously with one another to avoid an unreasonable or absurd result.” *Nev. Attorney for*  
2 *Injured Workers v. Nev. Self-Insurers Ass’n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010).

3 Therefore, while NRS 388A.330(1) provides that the Authority may consider closing a  
4 **high school** based on a graduation rate below 60%, the statute does not afford the Authority the  
5 power to close **an entire K-12 school** based solely on that single data point. Reading the  
6 subsections (1)(e) and (1)(f) in harmony demonstrates that the Authority does not have statutory  
7 authority to close NCA’s middle and elementary schools unless those separate schools meet the  
8 discretionary triggers outlined in NRS 388A.330(1)(f), which they do not. NCA’s middle and  
9 elementary schools are excelling in student achievement and school performance, and the  
10 Authority has not raised any performance concerns with these programs which therefore do not  
11 meet the criteria for the Authority to consider closure, as outlined in NRS 388A.330(1)(f).  
12 Therefore, the Authority is exceeding its statutory power to consider closure of NCA – a K-12  
13 school – based solely on the high school’s four-year cohort graduation rate, where NCA’s K-12  
14 program operates under a single charter. The same is true for any proposal to reconstitute the  
15 NCA governing board which oversees the K-12 school.  
16  
17

18 **B. THE AUTHORITY IS NOT USING THE APPROPRIATE CALCULATION OF GRADUATION**  
19 **RATE REQUIRED BY NEVADA LAW**

20 ***1. The Authority’s Graduation Rate Calculation Violates NRS 385A.260***

21 NCA’s four-year graduation rate must be calculated consistent with Nevada law,  
22 including NRS 385A.260(3), which prohibits the State from reporting as drop-outs, students who  
23 provide proof of successful completion of the high school equivalency assessment selected by  
24 the State Board (a “GED”), are enrolled in courses approved by the Nevada Department of  
25 Education for an adult standard diploma (“Adult Ed”), and students who withdraw from school  
26 to attend another school. NAC 389.699(3) further mandates that a “pupil who qualifies for a  
27 certificate of attendance must not be counted as a dropout.” NCA’s 2016 four-year graduation  
28

1 rate as calculated excluding students who received a GED or went on to Adult Education is  
2 50.7%, and, as of January 24, 2017, 48 non-graduates from the 2016 cohort were enrolled at  
3 NCA for a fifth year. *See* Exhibit S. The Legislature encourages in NRS 385.3485(3) the  
4 determination of at-risk students who strive to graduate from high school against various odds,  
5 while Authority Staff effectively ignores the same in its graduation rate calculation.  
6

7 Accordingly, the Authority Staff has failed to provide evidence that closure or board  
8 reconstitution for a high school has been triggered given this threshold question of the Authority  
9 Staff's calculation of graduation rate.

10 **2. *The Authority must consider compelling evidence about the graduation rate***

11 The promise Director Gavin made to the Nevada Legislature when it raised concerns of  
12 penalizing schools for accepting credit-deficient students was that the Authority would not use  
13 the discretionary closure provision triggered by the 60% graduation rate without looking at all  
14 compelling evidence on the matter. *See* Exhibit 8 to Exhibit A. The proceedings leading us to  
15 the December 16<sup>th</sup> and March 30<sup>th</sup> hearing have been based solely on NCA's refusal to waive its  
16 rights to judicial review and a single data point – the four-year cohort graduation rate for NCA's  
17 high school with no consideration of the population of students who enrolled with NCA credit  
18 deficient, the evidence of student “dumping” that is leading to this issue, or even the proper  
19 graduation rate to be considered.  
20

21 NRS 388A.330 does not define “graduation rate” for purposes of the potential closure of  
22 a high school. Accordingly, it is appropriate to look to Nevada law as discussed above. In  
23 addition, the Federal Department of Education's (“DOE”) definition of “graduation rate” being  
24 applied by the Authority is not mandatory for states to use; rather, reporting of that rate to the  
25 DOE is required for states to access Title I funding.<sup>19</sup> Therefore, it is not appropriate to apply  
26  
27

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28 <sup>19</sup> *See, e.g.*, Title I, Part A, Section 1005 of the Every Student Succeeds Act (reauthorizing the

1 this “graduation rate” when the Nevada legislature could have but did not provide for such use  
2 under NRS 388A.330.<sup>20</sup> Even if that definition is applied, however, given the Federal  
3 regulations promulgated under the Every Student Succeeds Act, students enrolled for 50% of the  
4 school year or less would be excluded from calculation of NCA’s graduation rate. This adopted  
5 federal policy recognizes that a school should not be penalized for students the school had  
6 inadequate time to impact relative to their academic progress toward graduation.  
7

8 Applying the Every Student Succeeds Act formula, NCA estimates its 2016 graduation  
9 rate would be **47.2%**. NCA believes when combining this increase with the increase from  
10 excluding students who Nevada law prescribes from being reported as dropouts, NCA’s  
11 graduation rate will be even higher and well within striking distance of the 60% minimum  
12 threshold at issue. For example, properly adjusting the graduation rate to accommodate ESSA  
13 and students who transferred to a GED or adult education program, yields a 2016 rate of 56.6%,  
14 with a reported 48 non-graduates from the 2016 cohort enrolled at NCA for a 5<sup>th</sup> year. *See*  
15 Exhibit S. These numbers have materialized as NCA has started to implement its graduation  
16 rate improvement plan approved by the Authority, and NCA expects to see further improvement  
17 implementation of the plan initiative matures. This highlights an important point – the DOE has  
18 recognized it is improper to hold a high school accountable for students enrolled in a high school  
19 for 50% or less of the current school year. This is compelling evidence for the Authority Board  
20 to consider relative to the issue at hand given that the Nevada Legislature did not mandate  
21 closure of a high school based on the 60% graduation rate but instead allowed the Authority the  
22 discretion to consider closure, in light of all compelling evidence (such as this).  
23  
24  
25

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26 Elementary and Secondary Education Act of 1965) which provides that failure to file a plan  
27 including an accountability system makes a state ineligible for Title I funds.

28 <sup>20</sup> It is solely the prerogative of the Legislature, not this Agency, to change or rewrite a statute.  
*See Holiday Ret. Corp. v. State, DIR, 274 P.3d 759, 761 (Nev. 2012).*



1       **C.     FORCING NCA TO WAIVE ITS RIGHTS TO JUDICIAL REVIEW IS UNCONSTITUTIONAL**

2             Under Article 5, Section 7 of the Nevada Constitution, the Authority is an executive  
3 branch agency charged with carrying out and enforcing the laws enacted by the Legislature. The  
4 powers of the judicial branch are set forth in Article 6 of the Nevada Constitution. Nevada’s  
5 Constitution expressly prohibits any one branch of government impinging on the functions of  
6 another. *Hardy v. Commission on Ethics*, 125 Nev. 285, 292, 212 P.3d 1098, 1103-1104 (2009).  
7 “The separation of powers doctrine is the most important foundation for preserving and  
8 protecting liberty by preventing the accumulation of power in any one branch of government.”  
9 *Berkson v. LePome*, 245 P.3d 560, 564, 126 Nev. 492, 498 (Nev. 2010) (citing *Secretary of State*  
10 *v. Nevada State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004)).

11             The Authority impinges on the function of the judicial branch by requiring NCA to waive  
12 its rights to judicial review as a term of the proposed charter contract. Moreover, the Authority  
13 previously advised the school that to “cure” the alleged deficiency and avoid closure  
14 proceedings, NCA must agree to the waiver. There is no evidence or explanation as to why such  
15 a waiver is the only possible cure for the alleged deficiency nor is there any explanation as to  
16 why the Authority would seek to avoid accountability to a Court for its decision-making  
17 especially as it relates to such a serious issue. In a hearing before the Honorable Judge Russell  
18 of the First Judicial District on November 30, 2016, the Court raised pointed questions about the  
19 legality of the agency attempting to force the school to waive its rights to judicial review under  
20 threat of closure. *See* Exhibit I, November 30, 2016 Transcript, pages 70-71. Attorney Greg Ott  
21 responded that he had done “a little legal research on this” but did not provide any legal support  
22 to the Court that such action was in fact lawful. Exhibit I, page 70.

23       **D.     THE AUTHORITY’S DECISION MUST BE LAWFUL & BASED ON SUBSTANTIAL EVIDENCE**

24             As a party identified of record by the Agency’s decision and aggrieved by the Agency’s  
25 decision, NCA is entitled to judicial review of the decision. *See* NRS 233B.130. The district  
26 court’s “function” when presented with such a petition is “to determine, based on the  
27 administrative record, whether substantial evidence supports the administrative decision.” *Kay v.*  
28

1 *Nunez*, 122 Nev. 1100, 1105 (2006). No evidence supports the Agency’s July 2016 vote to force  
2 NCA to convert its charter to a contract or its September 2016 vote to mandate NCA enter into a  
3 contract that waives its rights to judicial review or face closure. *See Exhibit P* (Excerpt from  
4 Minutes of July 29, 2016 SPCSA Meeting), *see also Exhibit Q* (Excerpt from Minutes of Sept.  
5 23, 2016 SPCSA Meeting) and Exhibit N (Sept. 23, 2016 Staff Briefing Memo). Similarly, no  
6 evidence supports closure of the school or reconstitution of the NCA governing board given that  
7 NCA would not be subject to these proceedings but for student “dumping” by other high schools.

8 NCA put on evidence in March 2016 that persuaded the Authority that issuance of a  
9 notice of closure was not appropriate and, instead, a plan for improvement should be prepared  
10 and implemented. *See Transcript of March 2016 SPCSA Meeting, Exhibit R.* Authority  
11 members acknowledged that the school must be given an opportunity to implement that plan and  
12 then the Authority could review the results. Therefore, the Authority’s attempt to compel  
13 conversion of NCA’s charter to a contract and decision to issue the Notice of Closure to NCA  
14 exceeded the Authority’s jurisdiction and cannot withstand judicial review in light of the  
15 substantial evidence.

16 *1. The Agency’s Prior Actions Violated the Open Meeting Law*

17 Nevada’s Open Meeting Law requires that all meetings of a public body such as the  
18 Authority be open and public and “written notice of all meetings,” including an agenda listing all  
19 items on which action may be taken, “must be given at least 3 working days before the meeting.”  
20 NRS 241.020(1)-(2). Action of any public body, such as the SPCSA, “taken in violation of any  
21 provision” of the Nevada Open Meeting Law “is void.” NRS 241.036.

22 The Authority violated Nevada’s Open Meeting Law with respect to its threat to  
23 reconstitute the NCA school board. The Authority Staff’s September 30, 2016 notice of closure  
24 threatened to reconstitute the board, notes that the Authority will make a determination regarding  
25 reconstitution during the December 16, 2016 meeting, and states that reconstitution could be  
26 effective immediately. *See Exhibit M.* Despite this immediate threat, the Authority did not raise  
27 board reconstitution during the September 23 hearing or since then, did not include any notice on  
28 a public agenda for such action – issuance of a notice for board reconstitution – and did not take

1 a public vote regarding reconstitution during any open meeting. See Transcript of September  
2 2016 SPCSA Meeting at 42-43. The Authority's actions undermine the Open Meeting Law's  
3 purpose, which includes compelling governing bodies to publish and follow an agenda and allow  
4 for public discussion and participation in its decisions. The same is true with respect to the most  
5 recent Notice of Closure issued that resulted in the March 30, 2017 hearing. Therefore, the  
6 Authority's threat to reconstitute the board is void and the notice of closure defective.

7 **2. The Agency is Equitably Estopped from Proceeding with Closure**

8 Equitable estoppel consists of four elements: (1) the party to be estopped must be  
9 apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act  
10 that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting  
11 the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on  
12 the conduct of the party to be estopped. *Chequer, Inc. v. Painters & Decorators*, 98 Nev. 609,  
13 655 P.2d 996 (1982). Equitable estoppel may be invoked against an agency of the state. See  
14 *Nevada Public Employees Retirement Board v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1980).  
15 Additionally, "where a public official, acting within his authority and with knowledge of the  
16 pertinent facts, has made a commitment and the party to whom it was made has acted to his  
17 detriment in reliance on that commitment, the official should not be permitted to revoke that  
18 commitment." *S. Nevada Mem'l Hosp. v. State, Dep't of Human Res.*, 705 P.2d 139, 141-42  
19 (Nev. 1985). The Nevada Supreme Court has recognized that estoppel may lie against the  
20 government "when justice dictates that it apply." *Manning v. Nevada State Board of*  
21 *Accountancy*, 673 P.2d 494 (1983). The Court has adhered to the overriding goal of equity to  
22 achieve justice and "prevent the unconscientious and inequitable assertion or enforcement of  
23 claims or rights." *Id.* (internal quotations and citations omitted).

24 Based on the Agency's direction, NCA spent several weeks working with Authority staff  
25 to prepare a graduation rate improvement plan. Then, based on the Authority Board's praise of  
26 that plan, NCA expended significant resources to immediately implement the plan – including  
27 expenditure on additional summer school classes and at the suggestion of Director Gavin and the  
28 Authority Board, hiring a third party company to validate data related to the graduation rate

1 calculation. *See* Exhibit 6 to Exhibit A. After NCA undertook these actions at the Authority’s  
2 direction, the Authority then sought to materially modify its acceptance of the plan and decision  
3 to allow NCA time to implement that plan without NCA’s knowledge, and later entirely  
4 disregarded the plan with no consideration of NCA’s investment – insisting that the only way for  
5 NCA to avoid closure was to enter a contract waiving the school’s rights to judicial review of the  
6 Authority’s actions. The Authority should be estopped from denying NCA the ability to  
7 implement its plan to meet certain graduation benchmarks.

8 **3. *The Agency’s Forced Waiver of Judicial Review Breaches the Covenant of***  
9 ***Good Faith and Fair Dealing & the Existing Charter and is Void Ab Initio***

10 Where the terms of a contract may have been literally complied with, but one party to the  
11 contract deliberately contravenes the intention and spirit of the contract, that party can incur  
12 liability for breach of the implied covenant of good faith and fair dealing. *Hilton Hotels Corp. v.*  
13 *Butch Lewis Prods., Inc.*, 107 Nev. 226, 808 P.2d 919, 923 (1991). NCA’s existing charter  
14 granted by the State in 2007 and renewed in 2013 constitutes a valid, enforceable contract  
15 between NCA and the Authority, and therefore includes the implied covenant of good faith and  
16 fair dealing. The Authority has wrongfully insisted that in order to continue operating under its  
17 existing charter, NCA must enter into an entirely new charter contract that includes waiver of  
18 rights to judicial review for future Authority actions including appointment of the receiver – a  
19 very costly sanction to the school. The Authority’s action violates the express terms of the NCA  
20 Charter currently in place and also the implied covenant of good faith and fair dealing in  
21 violation of Nevada law.

22  
23 **IV. CONCLUSION**

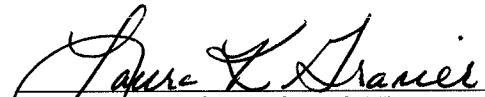
24 NCA’s entire K-12 school serving more than 3,000 students across our great state is  
25 being subjected to closure or reconstitution of its board solely because of student “dumping” by  
26 other high schools. NCA seeks to collaborate with the Authority to reach a mutually agreeable  
27 cure to prevent NCA’s closure or reconstitution of NCA’s board. NCA’s cure addresses the  
28

1 Authority's concerns while, at the same time, allowing the school to continue serving its students  
2 in an effective and transparent manner and under the Authority's continuing jurisdiction. NCA  
3 is currently participating in discussions with the Authority regarding a new agreement for NCA's  
4 charter, and plans to continue good faith efforts to cooperate with the Authority in this regard  
5 hoping to find an acceptable cure prior to the March 30 hearing.

6 Respectfully submitted this 23<sup>rd</sup> day of March, 2017.

7 DAVIS GRAHAM & STUBBS LLP

8  
9 By:



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**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Davis Graham & Stubbs LLP and not a party to, nor interested in, the within action; that on March 23, 2017, a true and correct copy of the foregoing document was served as listed below:

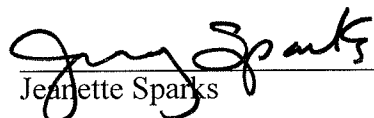
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