

1 **BEFORE THE STATE PUBLIC CHARTER SCHOOL AUTHORITY**

2 **STATE OF NEVADA**

3 In Re:

4 Nevada Connections Academy Notice of  
5 Closure or Possible Board Reconstitution

**HEARING:**

**Date: October 23-25, 2017**

**Time: 8:30 AM**

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8 **NEVADA CONNECTIONS ACADEMY'S EXPEDITED**  
9 **MOTION FOR RECUSAL**

10 Nevada Connections Academy ("NCA"), by and through their undersigned counsel,  
11 Holland & Hart LLP, hereby moves for an order recusing State Public Charter School Authority  
12 ("SPCSA" or "Authority") Chair Jason Guinasso from the closure and reconstitution hearing  
13 regarding NCA, and any additional proceedings regarding NCA.

14 **I. INTRODUCTION**

15 Due process requires that NCA receive a fair hearing before an impartial factfinder prior  
16 to deprivation of its charter. Though disqualification of a decision-maker is not taken lightly, the  
17 circumstances here require it. SPCSA Chair Guinasso's actions throughout these closure  
18 proceedings have demonstrated a constitutionally intolerable bias which infringes upon NCA's  
19 procedural due process rights. Chair Guinasso demonstrated that his decision to rule against  
20 NCA in Phase I of the proceedings was a forgone conclusion when, prior to the final substantive  
21 hearing in Phase I of these proceedings, he drafted a personal statement regarding his conclusion  
22 based on his personal, unrelated childhood experience. He then made himself a rebuttal witness  
23 in the case on behalf of Director Gavin and Staff by delivering his statement without oath or  
24 affirmation and without any opportunity for NCA to examine him on the details of his own  
25 experience that he so impassionedly made to his colleagues on the tribunal and where, after  
26 completing his auto-biographical narrative in which he bench marked himself as the measure of  
27 success for all credit-deficient students in Nevada and the schools that serve them, Chair  
28

1 Guinasso issued a call to arms of his colleagues stating “So if we're going to provide quality  
2 education to students as we have said we're going to do on our strategic plan, fellow board  
3 members, we must be willing to uphold the third party -- sorry -- the third pillar for charter  
4 school success and hold NCA accountable for failing to graduate students entrusted to their  
5 care.” *See Expedited Transcript of August 23 hearing, at 88-89.* In making these statements he  
6 not only demonstrated his own bias against NCA, but became an advocate for his position to the  
7 other decision makers on the tribunal, lobbying them to side with him in his inappropriate call to  
8 arms. Following his call to arms Chair Guinasso then made the motion to find NCA’s  
9 graduation rate for academic years ending 2015 and 2016 was below 60% and then tested the  
10 loyalty of his colleagues by requesting another member of the Board support him in his call to  
11 arms by seconding his motion.

12 Two days after that hearing, prior to final findings of fact and conclusions of law even  
13 being adopted and prior to the opening of Phase II of the proceedings, Chair Guinasso, still  
14 cloaked in the authority of the NCA closure proceedings adjudicator, extended his call to arms  
15 by publishing the same speech as an opinion piece in the Nevada Independent writing that  
16 NCA’s graduation rate is “unacceptable,” and he would hold NCA accountable—all while  
17 NCA’s closure proceedings are still pending before him. *See Exhibit 1, Aug. 25, 2017 opinion*  
18 *piece by J. Guinasso.* The prejudicial nature of Chair Guinasso publishing his call to arms in the  
19 Nevada Independent can be seen from the final comments he made in the Phase I proceedings:  
20 Following the conclusion of Phase I, Chair Guinasso stated “what we need to do under Agenda  
21 Item No. 4 is set a date for the continuation of the hearing to hear evidence and argument  
22 regarding whether to reconstitute the governing body, revoke the written charter, or take no  
23 action.” *Expedited Transcript of August 23 hearing, at 125-26.* While the characterization of the  
24 options available to the Authority during Phase II remains subject to dispute, when Chair  
25 Guinasso stated in his opinion piece that NCA’s graduation rate is “unacceptable,” and he would  
26 hold NCA accountable, he unilaterally let it be known that he was taking the option of “take no  
27 action” off the table - - if he has his way, NCA will be closed or the NCA board will be  
28 reconstituted.



1 are presumed to be capable of judging a particular controversy fairly on the basis of its own  
2 circumstances, disqualification is proper where a party demonstrates that "he is not capable of  
3 judging a particular controversy fairly on the basis of its own circumstances." *Hortonville Joint*  
4 *Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976). Chair Guinasso's actions  
5 during the Phase I proceedings repeatedly demonstrated that "he is not capable of judging a  
6 particular controversy fairly on the basis of its own circumstances." *Id.*

7 "Administrative decisionmakers do not bear all the badges of independence that  
8 characterize an Article III judge, but they are held to the same standard of impartial  
9 decisionmaking." *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987). The U.S. Supreme  
10 Court decision in the case *Quercia v. U.S.*, 289 U.S. 466 (1933), is particularly illuminating with  
11 respect to the extreme prejudicial nature of Chair Guinasso's conduct in these proceedings. In  
12 *Quercia*, the United States Supreme Court stated:

13 This privilege of the judge to comment on the facts has its inherent  
14 limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be  
15 exercised in conformity with the standards governing the judicial office. In  
16 commenting upon testimony he may not assume the role of a witness. He  
17 may analyze and dissect the evidence, but he may not either distort it or add  
18 to it. His privilege of comment in order to give appropriate assistance to the  
19 jury is too important to be left without safeguards against abuses. The  
influence of the trial judge on the jury "is necessarily and properly of great  
weight" and "his lightest word or intimation is received with deference, and  
may prove controlling." This Court has accordingly emphasized the duty of  
the trial judge to use great care that an expression of opinion upon the  
evidence "should be so given as not to mislead, and especially that it should  
not be one-sided.

20 *Id.* at 470. The court then continued with respect to the facts of the case before it: "[i]n the  
21 instant case, the trial judge did not analyze the evidence; he added to it, and he based his  
22 instruction upon his own addition. . . . He did not review the evidence to assist the jury in  
23 reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said  
24 in his own behalf which conflicted with the statements of the Government's witnesses. This was  
25 error and we cannot doubt that it was highly prejudicial." *Id.* at 471. In finding reversible error,  
26 the Supreme Court continued: "His definite and concrete assertion of fact, which he had made  
27 with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not  
28 withdrawn. His characterization of the manner and testimony of the accused was of a sort most

1 likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would  
2 preclude a fair and dispassionate consideration of the evidence.” *Id.* at 472.

3         The circumstances presented here are analogous to those before the U.S. Supreme Court  
4 in *Quercia*, and the prejudice to NCA is the same here as that which warranted reversible error.  
5 There is no dispute that NCA is entitled to due process under the law with respect to the closure  
6 proceedings initiated by the Authority (*see, e.g.*, NRS 233B.121; 388A.330) and there is equally  
7 no dispute that an essential aspect of due process is a meaningful opportunity to be heard and an  
8 impartial tribunal. *Mathews v. Eldridge*, 424 U.S. 319 (1976). “[A] fair trial is a basic  
9 requirement of due process.” *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). “Not only is a biased  
10 decisionmaker constitutionally unacceptable but our system of law has always endeavored to  
11 prevent even the probability of unfairness.” *Id.* at 47 (emphasis added). “[D]ue process  
12 demands impartiality on the part of those who function in judicial or quasi-judicial capacities,”  
13 such as hearing officers and administrative law judges. *Schweiker v. McClure*, 456 U.S. 188,  
14 195 (1982).

15         The nature of the comments made by the trial judge in the *Quercia* case pale in  
16 comparison to Chair Guinasso’s autobiographical soliloquy read into the record at the end of  
17 closing argument and prior to the start of deliberations. The full extent of his address to his  
18 colleagues is set forth here for complete context:

19         So we've heard a lot of personal stories, and if you'll indulge me, I'll just share  
20 mine, you know, because I know from personal experience just how important  
21 graduating high school is to success. I, myself, was the first member of my family  
22 on my single mother's side to have graduated high school, and this achievement  
23 did not come easily.

24         I was the oldest of my mother's five children. I was a homeless teenager. I was  
25 what you all called here today an at-risk youth. I was gang affiliated. I was a  
26 troublemaker. I was angry. I was alone. I was afraid like many of the students that  
27 perhaps NCA serves.

28         I dropped out of high school at the end of my sophomore year, and when I was  
rescued from the streets and reentered high school, I was credit deficient.  
Nevertheless, a group of educators did not look at my circumstances, throw up  
their hands and say, "We can't help this kid. He's at risk. He's a troublemaker. He's  
credit deficient." No.

1  
2 Instead, they marshalled their resources, they rallied, and they provided me with  
3 every opportunity to graduate on time. They delivered that quality of education  
4 that set me up for success and I graduated, barely, but I graduated.

5  
6 So I guess my point in bringing up that anecdote is that making sure that a student  
7 graduates is the most important objective of a school educating high school  
8 students in my view, and so when a school fails to graduate students, they close  
9 the door of opportunity on the student.

10  
11 So a graduation rate of 35, 36, or 40 percent to me is more than mere data points.  
12 It represents a lost cohort of students. It says to me that six out of every ten  
13 students entrusted to the care of that school have been lost. These are young  
14 people who will not likely have the opportunities to succeed in higher education  
15 or to find high paying jobs to support them and their families.

16  
17 So in sum, I categorically reject the arguments that have been made to this body  
18 that the graduation rate is merely one data point, and quite frankly, I'm appalled at  
19 the arrogance of such an argument. Really, it represents a tone deaf disregard for  
20 what we are collectively trying to accomplish for our students in the State of  
21 Nevada.

22 Expedited Transcript of August 23 hearing, at 85-89.

23  
24 As the Chair of these proceedings, Chair Guinasso has directed the proceedings, rules on  
25 objections, led all motions, and assisted his fellow board members in arriving at conclusions in  
26 much the same fashion as the trial judge in *Quercia*, making the Court's conclusion in *Quercia*  
27 all the more applicable. *See* 289 U.S. at 469. Chair Guinasso's soliloquy amounts to testimony  
28 which was apparently offered to convince his fellow adjudicators that all students should  
graduate in four years based on his experience—testimony which substantially prejudiced NCA  
because NCA did not have the opportunity to cross-examine him as a means of comparing and  
contrasting his personal experience with the experiences of the hundreds of students who enroll  
at NCA in a credit-deficient condition rendering them unable to graduate in four years or to  
obtain additional details about the quality of his education at an entirely different high school,  
how far behind he was, or what resources actually led to his graduation in four years. Further  
adding to the prejudice, Chair Guinasso was never sworn in as a witness, and was never required  
to swear or affirm that the details to which he was testifying were the truth. The manner in  
which he injected himself into these proceedings as a witness for Director Gavin precluded NCA

1 from being afforded the opportunity to test Chair Guinasso's veracity, probe the completeness of  
2 his story, or challenge the conclusions he was drawing from his own unique circumstances. As  
3 such, in addition to the other prejudicial injuries directed against NCA, the school was also  
4 deprived of its Sixth Amendment right to cross examination what turns out to be a key witness  
5 under penalty of perjury. Guinasso's violation of Nevada law and the Nevada Constitution in  
6 this regard was not harmless error, as Chair Guinasso's improper testimony provided the basis of  
7 the motions which concluded Phase I of closure proceedings—both of which were adverse to  
8 NCA.

9 Chair Guinasso was not satisfied with becoming the star witness in support of Director  
10 Gavin's single-minded pursuit to close NCA, regardless of the good work NCA is doing in the  
11 service of the students enrolled with NCA, including the large credit-deficient population  
12 enrolling in NCA during their junior and senior year. After concluding his impassioned tale,  
13 Chair Guinasso promptly switched roles to take the mantle of chief advocate for Director Gavin,  
14 issuing the call to arms to the jury (his colleagues on the tribunal) that "if we're going to provide  
15 quality education to students as we have said we're going to do on our strategic plan, fellow  
16 board members, we must be willing to uphold the third party -- sorry -- the third pillar for charter  
17 school success and hold NCA accountable for failing to graduate students entrusted to their  
18 care." *See Expedited Transcript of August 23 hearing, at 88-89.* He then reverted back to the  
19 role of an administrative decisionmaker – cloaking himself in the robes of justice and fair play –  
20 and essentially a jury foreman based on his efforts to assist his fellow decisionmakers in arriving  
21 at a conclusion – when he then made the motion to, in essence, find that NCA had not cured its  
22 deficiencies pursuant to the central question in Phase I.

23 Applying law to facts, it is clear that Chair Guinasso's conduct violates the established  
24 tenants of due process fairness on so many levels that his continued involvement in these  
25 proceedings will render Phase II of the proceedings a sham. NCA has already been denied a fair  
26 and impartial hearing during Phase I. The prejudice to NCA should not be compounded by  
27 permitting Chair Guinasso to continue as the presiding adjudicator of Phase II. Accordingly,  
28 NCA requests his immediate recusal from the remainder of these proceedings.

1           **2. Chair Guinasso’s disqualification is required because he became a witness and**  
2           **prosecutor by testifying as to factual issues based on his personal experience**

3           “A trial judge is not a competent witness to . . . factual issues.” *See United States v.*  
4           *Lewis*, 833 F.2d 1380, 1385 (9th Cir.1987) (citing Fed. R. Evid. 605). “Nor can the judge take  
5           judicial notice of such issues.” *United States v. Berber-Tinoco*, 510 F.3d 1083, 1091 (9th Cir.  
6           2007). “A trial judge is prohibited from relying on his personal experience to support the taking  
7           of judicial notice. It is therefore plainly accepted that the judge is not to use from the bench,  
8           under the guise of judicial knowledge, that which he knows *only as an individual* observer  
9           outside of court.” *United States v. Berber-Tinoco*, 510 F.3d 1083, 1091 (9th Cir. 2007). For  
10          example, in *Berber-Tinoco*, the Ninth Circuit held that the decisionmaker violated Federal Rule  
11          of Evidence 605 when he interjected his own observations regarding the location of stop signs  
12          along a road based on his personal experience, even though those facts were not in the record nor  
13          were they reasonable inferences from the record. *Id.* Mirroring Federal Rule of Evidence 605,  
14          NRS 50.055 prohibits a presiding judge from testifying in that trial as a witness.  
15

16                 Similarly, under NRS 233B governing administrative procedure, “[n]o agency member  
17          who acts as an investigator or prosecutor in any contested case may take any part in the  
18          adjudication of such case.” NRS 233B.122(1).  
19

20                 Chair Guinasso’s soliloquy rendered him a witness in the hearing over which he is  
21          presiding, as he interjected his own opinion as to facts that are neither in the record nor can be  
22          considered reasonable inferences from the record, violating NRS 50.055. Chair Guinasso’s  
23          soliloquy amounts to testimony which was apparently offered to explain why all students should  
24          graduate in four years based on his experience—testimony which substantially prejudiced NCA  
25          because NCA did not have the opportunity to cross-examine him as a means of comparing and  
26          contrasting his personal experience with the experiences of other students who are unable to  
27  
28



1 graduate in four years<sup>1</sup> or to obtain additional details about the quality of his education at an  
2 entirely different high school, nor was Chair Guinasso sworn in as a witness despite testimony  
3 which sought to influence his fellow decisionmakers. As such, NCA was deprived of its Sixth  
4 Amendment right to cross examination. Guinasso's violation of Nevada law and the Nevada  
5 Constitution in this regard was not harmless error, as Chair Guinasso's improper observations  
6 provided the basis of the motions which concluded Phase I of closure proceedings—both of  
7 which were adverse to NCA—motions which would otherwise have no basis in evidence. While  
8 the rules of evidence are generally relaxed in an administrative setting, this Board has repeatedly  
9 entertained objections based on the federal rules of evidence. *See, e.g.*, May Transcript, Vol II,  
10 at 46. Therefore, it should similarly consider this egregious statutory violation arising from  
11 Chair Guinasso's improper personal soliloquy in rendering a decision regarding Chair  
12 Guinasso's necessary recusal.

13 In addition, it is reasonable to conclude that the nature of Chair Guinasso's call to arms  
14 (along with his request that Director Gavin provide him documents outside the record, as  
15 discussed below) caused him to act as a prosecutor seeking to hold NCA accountable in  
16 conjunction with Director Gavin, requiring his disqualification from the proceedings under NRS  
17 233B. Either way—whether his personal speech and plea to his fellow board members caused  
18 him to act as a witness or a prosecutor—neither role is appropriate for the Chair of an agency  
19 charged with deciding a contested case, and Chair Guinasso's recusal is required on either basis.

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23 <sup>1</sup> Chair Guinasso's personal experience may be distinguishable from that of other students based  
24 on any number of factors. For example, Chair Guinasso has been depicted in the media stating  
25 that he was taken in by a supportive foster family during high school, whereas a student who  
26 attends NCA may have significantly less support from home—which may be a pivotal factor  
27 toward on-cohort graduation for many students. NCA was deprived of its constitutional right to  
28 point out these potential differences and demonstrate that Chair Guinasso's unrelated personal  
experience cannot be projected onto every high school student. *See* <http://www.ktvn.com/story/35267979/three-wcsd-high-schools-rank-among-nevadas-top-ten>.

1           **3. Chair Guinasso’s decision to take his call to arms to the media immediately**  
2           **following the close of Phase I proceedings, but before the commencement of Phase**  
3           **II, further exposed his bias against NCA and is a separate and independent cause**  
4           **of prejudice to NCA’s ability to receive a fair and unbiased hearing**

5           Set forth in Exhibit 1 is the opinion piece published by Chair Guinasso two days after the  
6           close of the Phase I proceedings in the Nevada Independent entitled “Charter schools must be  
7           held accountable.” A review of the piece demonstrates that it is almost identical to the soliloquy  
8           made by Chair Guinasso during Phase I and set forth above. *See* Exhibit 1. Not content to  
9           prejudice NCA in the minds of his fellow adjudicator’s with respect to Phase I, Chair Guinasso  
10          immediately set out to do so before the commencement of Phase II. By publishing his opinion  
11          piece, Chair Guinasso again abandoned his adjudicator role, taking on the mantle of chief  
12          witness and prosecutor, this time presenting his closing argument in the court of public opinion.

13          In a case similar to this one, the D.C. Circuit concluded that the probability of bias on the  
14          part of the Chairman of the Federal Trade Commission violated the plaintiff’s due process right  
15          to an impartial tribunal where the chairman made a public speech hinting at the likely outcome of  
16          plaintiff’s case while the plaintiff’s case was pending before the examiner. *Texaco, Inc. v.*  
17          *F.T.C.*, 336 F.2d 754, 760 (D.C. Cir. 1964), *cert. granted, judgment vacated on other grounds*  
18          *sub nom. F T C v. Texaco, Inc.*, 381 U.S. 739 (1965). The speech listed problematic practices the  
19          Commission oversaw, and named several companies which were involved with those practices—  
20          pointing to plaintiff as one of them. *Id.* The Chairman then noted that some of the cases were  
21          still pending before the Commission, and that the Commission would continue to promote fair  
22          competition in the industry. *Id.* In light of his statements in the speech, the Court concluded that  
23          the Chairman’s participation in the hearing violated the party’s due process because “a  
24          disinterested reader of [the] Chairman[’s] speech could hardly fail to conclude that he had in  
25          some measure decided in advance that Texaco had violated the Act.” *Id.* at 760.

26          Chair Guinasso’s pre-written soliloquy delivered right before his motion and then  
27          published in the Nevada Independent<sup>2</sup> publicly censuring NCA is analogous to the Chairman’s

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28          <sup>2</sup> As the leading administrative decisionmaker in this matter, it is entirely inappropriate for Chair  
        Guinasso to put out a media statement about a matter pending before him as the Chair of the

1 public speech in *Texaco*, and the Authority should be highly persuaded by the court’s conclusion  
2 in that case that the party’s due process right to an impartial tribunal was violated by the  
3 Chairman’s continued participation. Similar to the speech in *Texaco*, Chair Guinasso’s opinion  
4 “testimony” outlines problems that exist in Nevada’s education system, identifies NCA by name  
5 as one cause of the problems—even going so far as to state that “Nevada Connections is one of  
6 the worst-performing schools relative to graduation rate in the entire country” and calling NCA’s  
7 graduation rate “unacceptable”—while NCA’s closure proceedings are still pending before him.  
8 *See* Exhibit 1. Also like the speech in *Texaco* in which the Chairman stated that it would  
9 continue to promote fair competition in the industry, Chair Guinasso made a prospective  
10 statement that would cause a disinterested reader to conclude that he had made his mind up about  
11 NCA’s closure proceedings—stating the following: “[i]f we are going to endeavor to provide  
12 quality education to Nevada students, it is vital that the SPCSA demonstrate a commitment to the  
13 third pillar for charter school success by holding NCA accountable for failing to graduate  
14 students entrusted to its care.” *See* Exhibit 1. Finally, the opinion piece at issue is even more  
15 “public” than the Chairman’s speech in *Texaco* because not only does the Nevada Independent  
16 have a substantial statewide readership, but it has the infinitely broad reach of an online  
17 publication—such that Chair Guinasso proclaimed his partiality in the public domain. Therefore,  
18 the highly analogous factual circumstance in *Texaco* demonstrates that Chair Guinasso’s  
19 continued participation in NCA’s closure proceedings violates NCA’s right to due process  
20 because a disinterested reader can reasonably conclude that he has adjudged NCA’s case prior to  
21 hearing Phase II – vowing to hold NCA “accountable” – while at the same time purporting to  
22 hold a hearing where one possible outcome is to “do nothing”. Chair Guinasso’s bias is further  
23 demonstrated by his recent refusal to allow evidence that an option other than just these three

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24  
25 Authority Board. *See* Nevada Code of Judicial Conduct Rule 2.10(A) (“A judge shall not make  
26 any public statement that might reasonably be expected to affect the outcome or impair the  
27 fairness of a matter pending or impending in any court, or make any nonpublic statement that  
28 might substantially interfere with a fair trial or hearing.”). While NCA will not expand further  
on this argument given the Authority Board’s previous conclusion that Authority Board members  
are not subject to the Nevada Code of Judicial Conduct, NCA preserves the right to make this  
argument in the future.

1 would be possible even though no statutory authority supports his position – out of an apparent  
2 concern that other Authority Board members might select an option other than closure.

3 **4. Chair Guinasso’s Ex Parte communications with Director Gavin as well as his**  
4 **seeking access to evidence outside the record violates the ethics of his office,**  
5 **undermining the public confidence in contested proceedings**

6 Under NRS 233B.126, agency members rendering a decision or making findings of fact  
7 and conclusions of law are limited in terms of communication.

8 Unless required for the disposition of ex parte matters authorized by law,  
9 members or employees of an agency assigned to render a decision or to make  
10 findings of fact and conclusions of law in a contested case *shall not*  
11 *communicate, directly or indirectly, in connection with any issue of fact, with*  
12 *any person or party*, nor, in connection with any issue of law, with any party or  
13 the party’s representative, *except upon notice and opportunity to all parties to*  
14 *participate*.

15 NRS 233B.126. In a limited exception, the statute allows agency members to “[c]ommunicate  
16 with *other members* of the agency” and “[h]ave the aid and advice of one or more personal  
17 assistants.” NRS 233B.126. The statute makes a clear distinction between employees/parties  
18 (such as Staff) and members of the Agency – meaning board members. Likewise, under NRS  
19 622A.340,

20 [a] party shall not communicate either directly or indirectly with any member of  
21 the regulatory body, any member of the hearing panel or the hearing officer about  
22 any issue of fact or law related to the case unless the communication:

23 1. Is part of a pleading, motion or other document that is properly filed and  
24 served on all parties; or

25 2. Occurs while all parties are present or occurs during a meeting or  
26 hearing for which all parties have been given proper notice, whether or not all  
27 parties are present at that meeting or hearing.

28 Under NRS 233B.121(7)(b), “[t]he record in a contested case must include . . .  
“[e]vidence received or considered.” Further, under NRS 233B.123(5), the Authority may take  
notice of judicially cognizable facts and technical or scientific facts within the specialized  
knowledge of the agency, provided that the parties must be notified before or during the hearing  
and they must be afforded an opportunity to contest the material so noticed.

Nevada law mandates that an agency will not consider materials outside of the record, as  
a reviewing court is confined to the record before the agency under NRS 233B.135, and without

1 an accurate record of what the agency considered, parties can never receive an accurate review of  
2 the whole record on appeal. By operating off of the record and requesting, receiving, and  
3 considering information outside of the record, Chair Guinasso violated NRS 233B.121(7),  
4 further prejudicing NCA's ability to receive a fair and unbiased opportunity to be heard with  
5 respect to the alleged graduation rate deficiency and proposed cure. In response to an August 10,  
6 2017, public records request, the Authority produced an email from Director Gavin to Chair  
7 Guinasso dated August 9, 2017, where the subject line read "per your request" and which  
8 contained links to a google drive containing documents with information regarding NCA that is  
9 not contained in the extensive record the parties have put before him. *See Exhibit 2*, Declaration  
10 of Jenny Sparks (comparing documents included in evidence with those provided in response to  
11 Public Records Requests and index reflecting same). In addition, in response to an August 29,  
12 2017, public records request, the Authority produced additional documents, some of which are  
13 not contained in the record. *See Exhibit 2 and Exhibit 3* (relevant Public Records Requests and  
14 responsive documents). More troubling is that Chair Guinasso recently denied<sup>3</sup> NCA's request  
15 for discovery to prepare for Phase II of this proceeding to determine what he reviewed and  
16 asserted in that order, apparently as witness rather than decisionmaker (though he is serving as  
17 both), that those documents consisted only of what is in the record – which is inconsistent with  
18 evidence Staff provided in response to a public records request. *See SPCSA Discovery Order*,  
19 issued September 25, 2017. Chair Guinasso did not provide NCA any notice that he was making  
20 requests for such information outside the record or otherwise disclose his ex parte  
21 communications with Staff, another party in this proceeding – to request such extra-record  
22 information. Nor did he disclose to NCA or anyone else that he had taken judicial notice of  
23 these documents through the proper channels under NRS 233B.123(5).

24 In addition, Chair Guinasso's practice of reviewing evidence outside of the record as  
25 submitted by Director Gavin is evidence of disparate treatment of the parties appearing before  
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27 <sup>3</sup> While the Authority Board's order stated that it granted this request, the Board only granted the  
28 same insofar as Guinasso provided an incomplete and cursory statement of what he reviewed  
relative to NCA, and allowed NCA's counsel to review Chair Guinasso's notes from the hearing.

1 him in these proceedings and violation of Nevada law prohibiting such ex parte communications.  
2 See NRS 233B.126. The prejudice of this to NCA is exacerbated by the fact that Chair Guinasso  
3 denied NCA any ability to request judicial notice in the closing arguments submitted prior to the  
4 August 23 decision by the SPSCA. During a call between Mr. Ott, Chair Guinasso, and NCA's  
5 counsel on August 11, 2017, NCA's counsel mentioned that NCA might request that the  
6 Authority take judicial notice of a document which NCA hoped to mention in its written closing  
7 argument. In response, Chair Guinasso stated that the parties could not request judicial notice of  
8 documents in written closing arguments, as the record had been closed for several weeks. Yet,  
9 as Exhibits 2 and 3 demonstrates, at the time Chair Guinasso made this statement to NCA's and  
10 the Staff's counsel on August 11, he had requested and reviewed documents relative to NCA  
11 outside of the record on August 9. Therefore, not only does Chair Guinasso's action violate  
12 Nevada law, the hypocrisy in this position and subsequent inaccurate statement in response to  
13 NCA's request for discovery – about the documents he requested being part of the record already  
14 -- erodes the “high standards of ethical conduct in government” that NRS 281A seeks to  
15 promote.

16 Finally, NCA's counsel's review of Chair Guinasso's notes (attached as **Exhibit 4**)  
17 pursuant to the Authority Board's discovery order revealed additional evidence that Guinasso has  
18 reviewed documents outside of the record in casting his vote regarding NCA's deficiency and  
19 cure, or in some cases intended to consult outside sources rather than believe NCA's evidence.  
20 (Chair Guinasso made a note to “compare and contrast” NCA's cure proposal with that of  
21 Beacon Academy—revealing an intention to consult factors not in evidence even though Chair  
22 Guinasso refused NCA's request to allow Beacon's contract into the record during the May  
23 hearing in relation to NCA's argument regarding what would constitute an acceptable cure<sup>4</sup>);  
24 pages 29-33 (briefing memos from Director Gavin to the SPSCA Board regarding Discovery  
25 Charter School were included with Chair Guinasso's notes regarding NCA, but not included in  
26 the record); page 8 (in reference to NCA's counsel's statement during opening argument that  
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28 <sup>4</sup> May Transcript, Vol II, at 203-204.

1 NCA’s middle school is rated four-star, Chair Guinasso writes “Really?”—a possible indication  
2 that he disbelieves NCA’s counsel for no apparent reason and intends to verify this statement  
3 through outside research); page 14 (Chair Guinasso wonders in reference to our closing  
4 argument the following: “Could we allow for an innovative solution by contract? We have  
5 [illegible] authority to contract w. charters”—an insight into Chair Guinasso’s possible intention  
6 to consult outside sources to answer his question and disregard NCA’s arguments that it does  
7 have this authority); page 11 (In a handwritten note on NCA’s closing argument, Guinasso  
8 writes: “Does this meet the definition of credit-deficiency?”—evidence that he ignored evidence  
9 NCA presented on this topic and the varying degrees of credit deficiency and that he may intend  
10 to look to extrinsic sources to make his own determination on this key issue).

11 **5. The Authority’s Order denying NCA’s earlier motion to recuse Chair Guinasso**  
12 **establishes the law of the case with respect to deciding the present Motion, under**  
13 **which Chair Guinasso’s recusal is required**

14 The doctrine of law of the case has long been accepted in Nevada law. As early as 1895,  
15 in *Wright v. Carson Water Co.*, 22 Nev. 304, 39 P. 872, the Nevada Supreme Court stated  
16 “where an issue has once been adjudicated by a first appeal, that adjudication is the law of that  
17 case in subsequent proceedings.” The Court went on to state that “[r]egarding a determination  
18 made in an earlier appeal which this Court found went to the essence of the case, . . . The decision  
19 is the law of the case, not only binding on the parties and their privies, but on the court below  
20 and on this court itself.” *Andolino v. State*, 662 P.2d 631 (1983) (internal quotations omitted).

21 In a prior motion brought by NCA to recuse Chair Guinasso, because of comments he  
22 was overheard to have made with respect to the pending death of counsel for NCA’s mother, this  
23 Board denied NCA’s motion and in support of that decision stated:

24 NRS Chapter 281A governs recusal standards for Board members.  
25 However, even if the standards of RNCJC were applied to Board  
26 members, I find that extrajudicial bias against NCA’s counsel, bias arising  
27 from something other than information/facts learned from participating in  
28 a case, is required for recusal of a Board member. *Ainsworth v. Combined*  
*Ins. Co.*, 105 Nev. 237, 259, 774 P. 2d 1003, 1019 (1989); *See*  
*Commonwealth v. Eddington*, 71 Mas. App. Ct., 138, 144 (2008).

SPCSA Order, May 22, 2017, at 4. Based on *Ainsworth*, Chair Johnson concluded that

1 “the allegations against Member Guinasso are insufficient to establish bias arising from some  
2 other source than participation in the case” and that “these comments alleged to have been made  
3 by Member Guinasso do not demonstrate extrajudicial bias because they do not allege facts  
4 learned outside of NCA’s case.”<sup>5</sup> *Id.* at 4-5. This is the law of the case for the present motion—  
5 i.e., recusal is appropriate upon a showing that recusal is required under NRS 281A or a showing  
6 that Guinasso has exhibited a bias arising from some other source than participation in the case.

7 Applying the standard set by this Authority to Guinasso’s prejudicial conduct addressed  
8 in this motion, it is clear recusal is the only available and appropriate remedy. Chair Guinasso’s  
9 recusal is required based on his clear violation of the policy rationales the legislature adopted for  
10 public officers in NRS 281A.020. NRS 281A.020(1) (“A public office is a public trust and shall  
11 be held for the sole benefit of the people” and “[a] public officer or employee must commit  
12 himself or herself to avoid conflicts between the private interests of the public officer or  
13 employee and those of the general public whom the public officer or employee serves.”). Chair  
14 Guinasso’s soliloquy and published opinion piece clearly outlined his private interest and bias—  
15 his childhood experience at a different school, which is completely unrelated to NCA’s  
16 proceedings and the matter before him. In announcing his private bias and relying on that to  
17 render his decision in Phase I, it is apparent that Chair Guinasso has failed to avoid conflicts  
18 between his private life and his duty to the general public. Further, his recusal is required under  
19 *Ainsworth*, as Chair Guinasso clearly established that his bias against NCA has its roots in his  
20 own high school experience and his ability to graduate on cohort—a bias which arose from  
21 something other than his participation in this proceeding. Further, the numerous accounts from  
22 Chair Guinasso’s notes demonstrate a repeated pattern of reaching out in ex parte  
23 communications with Director Gavin and his staff to obtain access to documents outside the  
24 official record and outside the proceedings. Yet, Chair Guinasso, in deciding NCA’s motion  
25 requesting discovery for the evidence on these issues, denied NCA such opportunity – keeping  
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27 <sup>5</sup> This finding was surprising given that Member Guinasso’s comment at issue was that if Ms.  
28 Granier’s mother did die during the NCA closing hearing, we could all take a break to allow  
her to deal with that – facts that do not seem within the NCA school case.



1 potential communications between himself and Gavin out of the record or NCA's hands.

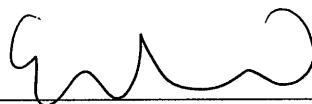
2 Accordingly, whether this Authority applies established U.S and Nevada case law,  
3 Nevada statutory law, Nevada rules of ethics or Nevada rules of evidence, or the established law  
4 of the case for this proceeding, the result is the same. Chair Guinasso's actions during Phase I of  
5 the proceedings have materially prejudiced NCA's ability to receive the due process that is  
6 afforded it under the law. The prejudice cannot be cured with respect to Phase I. However,  
7 NCA does have an opportunity to limit the prejudice with respect to Phase II. To that end, it  
8 moves for the immediate recusal of Chair Guinasso.

9 **III. CONCLUSION**

10 For the foregoing reasons, NCA request that Chair Guinasso be disqualified from further  
11 participation in closure proceedings regarding NCA before the Authority Board.

12 DATED this 16th day of October, 2017.

13  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Holland & Hart LLP and not  
3 a party to, nor interested in, the within action; that on October 16, 2017, a true and correct copy  
4 of the foregoing document was served as listed below:  
5

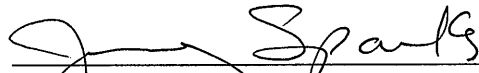
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