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VIA ELECTRONIC MAIL ONLY

May 20, 2019

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Re: Nevada Virtual Academy's Renewed Charter School Contract

John and Jeff,

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

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

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

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

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

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

1. Background

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

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

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

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

2. Arguments Raised in Your November 8, 2019 Correspondence

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

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

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

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

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

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

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

a. Due Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

/s/

Ryan Herrick
General Counsel, State Public Charter School Authority

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

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