

1
2 **BEFORE THE STATE PUBLIC CHARTER SCHOOL AUTHORITY**
3 **STATE OF NEVADA**

4 In Re:

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

Hearing Date: December 16, 2016
Hearing Time: 9:00 AM

7
8 **NEVADA CONNECTIONS ACADEMY'S**
9 **PREHEARING BRIEF**

10 Nevada Connections Academy ("NCA"), by and through their undersigned counsel,
11 Davis Graham & Stubbs LLP, hereby submits this prehearing brief as requested by the State
12 Public Charter School Authority ("SPSCA" or "Authority") Chair on December 9, 2016.

13 **I. INTRODUCTION**

14 NCA is committed to working with the Authority to resolve this matter on mutually
15 agreeable terms, and has demonstrated its commitment through months of work on and
16 implementation of its graduation rate improvement plan and against most recently with its recent
17 "cure" proposal¹ submitted to the Authority on December 2, 2016. NCA would like the
18 Authority's input on the proposed cure and was disappointed that Staff refused to speak with
19 NCA regarding the cure. In addition to NCA's proposed cure, NCA requests that the Authority
20 consider relevant concerns with the Authority Staff's calculation of "graduation rate" – which is
21 necessary to evaluating the adequacy of the cure – and also material to consideration of whether
22 closure or board reconstitution is appropriate under Nevada law as the Legislature intended when
23 providing for potential rather than mandatory closure of charter high schools triggered by a
24 single data point – the high school graduation rate.
25

26
27
28 ¹ Attached as **Exhibit A** (Letter from L. Granier dated Dec. 2, 2016).

II. BACKGROUND

NCA is an accredited, comprehensive, online public charter school serving more than 3,200 Nevada students in grades K-12 under one charter granted in 2007 and renewed in 2013. See NCA Charter, **Exhibit B**. The Nevada Department of Education's ("NDE") last rating of NCA's middle school was four-star and the Authority Staff has confirmed that its only concerns with NCA are with the high school's four-year cohort graduation rate.

NCA's high school serves some of Nevada's most at-risk youth in need of flexible accommodations, many of whom enroll in NCA behind in credits and as a last resort before dropping out altogether. NCA provides highly individualized learning opportunities, which have demonstrated success in reengaging credit-deficient students and helping them graduate. Still, because many students are credit-deficient when they enroll in NCA as a result of falling behind in their previous school(s), they are unable to graduate within their four-year cohort—even if they accrue credits on track from the day they enter NCA, they often cannot make up for the time they lost at their prior school(s). For example, NCA has enrolled 633 high school students since October 1, 2016, who are behind in credits and 408 of those students came to NCA from the Clark County School District. NCA is seeing a trending increase in students being "counseled" by their zone schools to leave and enroll in online school when they get behind in credits.

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

1 While the Authority is required to consider all compelling evidence and then, in its
2 discretion, evaluate possible closure of a high school if its graduation rate falls below 60%, there
3 is no statutory authority for the agency to close an entire K-12 charter school based solely on this
4 data point for the high school grades, and there is not a separate charter for NCA's high school.
5 See NRS 388A.330(1)(e) (providing the sponsor *may* consider closure or board reconstitution if
6 the "charter school **is a high school** that has a graduation rate for the immediately preceding
7 school year that is less than 60 percent"). NCA is not just a high school – it is a K-12 school.
8 Moreover, NCA's middle school is excelling: the NDE's most recent rating indicated that it is
9 "among the higher performing schools in Nevada in student proficiency and/or student growth
10 on the State assessments." See **Exhibit C**. Thus, 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.²

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**. Although NCA attended the February
22 2016 meeting and stayed until the end to publicly comment, the Authority chairman announced
23 at 4:30 PM they had to clear the room they were in and adjourned the meeting before NCA
24 representatives had the chance to complete their public comment. The Authority took no action
25 on the agenda item during the February 26, 2016 meeting.

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

27
28 ² In an attempt to work with the Authority on this issue, through its proposed cure NCA has
offered to address this issue through multiple steps that would include severance of the high

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%.³ 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.⁴ Director Gavin advised that he was required to treat all
10 schools the same which was why NCA was included based on the graduation rate.⁵

11 Prior to the March 2016 Authority meeting, NCA provided the Authority board members
12 and staff with detailed information about NCA's graduation rate. For example, NCA explained
13 that, of the **non-graduates for 2015, 40.9% enrolled with NCA in the 12th grade; 6 enrolled**
14 **with NCA for one month or less, 1 student was enrolled with NCA for only 14 days, and**
15

16 school charter, if NCA's proposed cure is accepted by the Authority.

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

27 ⁴ Following the 2015 Nevada Legislative session, NCA immediately sought to meet with
28 Director Gavin to discuss Senate Bill 509 (codified at NRS 388A.330). After several weeks of
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).

⁵ 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

1 another 14 of the students identified as “non-graduates” have enrolled in a post-secondary
2 institution, calling into question their status as “non-graduates.” NCA also questioned the
3 Authority’s retroactive application of NRS 388A.330.⁶ NCA also questions the Authority’s
4 calculation of the graduation rate in a manner that conflicts with NRS 385A.260 which
5 precludes the State from counting students who receive a GED or continue on to adult education
6 as “drop outs.” NCA explained that if you exclude that population from the calculation, without
7 doing anything else, the 2015 graduation rate would increase substantially. Unfortunately, the
8 Authority Staff has never addressed or even discussed these issues with NCA.

9 In March 2016, after allowing NCA an opportunity to present witnesses and evidence, the
10 Authority Board vote was not to proceed with closure, recognizing that the sole basis of concern
11 was the high school’s four-year cohort graduation rate, but instead to direct that NCA work with
12 Authority staff to develop a graduation rate improvement plan. The Authority’s vote reflected
13 that the evidence related to the high school’s “graduation rate” demonstrated that the **rate was**
14 **73.3% when calculated based upon students enrolled at NCA for all four years of high**
15 **school.**⁷ Further, the Authority seemed to acknowledge that the lower rate was not an accurate
16 reflection of NCA’s ability to serve its students based upon evidence demonstrating that the rate
17 was negatively impacted by students who were unable to graduate “on track” because they
18 enrolled in NCA’s high school credit-deficient, and by highly mobile students, some of who are
19 counted as “drop-outs” because their enrollment in another school went unreported.⁸

20 Heeding the Authority’s direction during the March 2016 hearing, NCA spent weeks

21
22 Authority regarding unlawful enrollment practice.

23 ⁶ “Substantive statutes are presumed to only operate prospectively, unless it is clear that the
24 drafters intended the statute to be applied retroactively.” *Sandpointe Apts. v. Eighth Judicial*
25 *Dist. Court*, 129 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).

26 ⁷ Measuring graduation rate in this manner was something suggested by Board Member
Mackedon at NCA’s renewal hearing – to evaluate how NCA was serving students it had
continuously enrolled. See Exhibit 7 to Exhibit A (Minutes of March 22, 2013 SPCSA meeting.)

27 ⁸ 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.

1 collaborating with Authority staff to prepare what the Authority praised as a commendable
2 graduation rate improvement plan. *See* May 20, 2016 Transcript of SPCSA Meeting, pages 196,
3 199, 203, 212.⁹

4 **Vice-Chair Mackedon:** “. . . this report is really well done.” May Transcript
5 at 196.

6 **Member McCord:** “I’d really like to congratulate you on that. . . . I congratulate
7 the school for putting this in there. It speaks to the integrity of the data collection,
8 but it does one other thing. **It actually defines the actionable data.**” *Id.* at 199,
9 203.

10 **Member Johnson:** “. . . if you implement this **really stellar plan** that I think
11 we’ve all been impressed by . . .” *Id.* at 212.

12 Nothing has changed since this May hearing to trigger the Authority reversing its March
13 decision. In the meantime, NCA has implemented the Graduation Rate Improvement Plan and
14 spent time and money to address the issue as directed by the Authority in March.

15 **B. NCA’s Implementation of the Graduation Rate Improvement Plan**

16 NCA has begun implementing the improvement plan and has already seen success. NCA
17 has contracted with AdvancED to validate NCA data relevant to the graduation rate issue as
18 requested by the Authority. NCA increased summer school classes which produced more high
19 school graduates. Other intervention measures from NCA’s improvement plan also are bearing
20 fruit as will be explained at the hearing.¹⁰

21 Following its favorable reaction to NCA’s Graduation Rate Improvement plan, the
22 Authority requested “benchmarks” to measure improvement from implementation of the plan
23 over a three-year period, noting that NCA would need at least six months to a year to implement
24 the plan and see results before the Authority would again consider closure or whether the plan

25 ⁹ Transcripts of the Authority meetings can be found on the Authority website at
26 http://charterschools.nv.gov/News/Public_Notices/)

27 ¹⁰ NCA’s changes started with a cohort analysis that detailed every student in the 2015-16 four-
28 year cohort with regard to their credit status that guided assignment of credit deficient students to
programs, support and interventions, depending on their credit status, tailored to their individual
needs to help them earn a high school diploma. NCA has seen success in these improvements
and anticipates as much as a 10 percentage point increase over 2015 performance. NCA
provides its students a highly individualized approach to learning through targeted instruction,
counseling and the implementation and monitoring of individualized graduation plans.

1 was working.¹¹ Accordingly, NCA worked with Authority staff to agree to benchmarks with the
2 understanding that the four-year cohort graduation rate depends heavily on the students' previous
3 schools, and in many cases does not reflect NCA's ability to successfully reengage students who
4 have come to the school credit-deficient.

5 On July 29, 2016, Director Gavin recommended that the Authority approve NCA's
6 proposed benchmarks, but ambushed NCA by proposing for the first time in the Staff's report
7 released that morning to the public, that such approval be on the condition that NCA agree to
8 enter into a 30 page charter contract (that NCA had never before seen), which required NCA to
9 waive its right to judicial review on future Authority actions – including appointment of a
10 receiver. NCA objected to the condition on a number of bases including the lack of any notice
11 from Staff and lack of statutory authority to force NCA to convert from its Charter to a contract.
12 In response, one Authority Board member suggested that NCA had requested a "charter
13 amendment," which would give the Authority the legal right to require NCA to convert to a
14 contract. See Transcript of July 2016 SPCSA Meeting, pages 163-165. In fact, NCA had not
15 requested such an amendment, nor has the Authority agenda since February 2016 reflected any
16 public notice that the Authority would consider an amendment to NCA's charter, as required by
17 NRS 388A and 233B. Moreover, the Authority did not even have regulations in place (nor does
18 it today, although in November it voted to approve such regulations) governing when a charter
19 amendment is required by certain school actions. See **Exhibit L**, Excerpts from Proposed
20 Regulation R089-16P.

21 The Authority Board voted to condition the approval of the benchmarks on NCA entering
22 into a **mutually agreeable** charter contract with the Authority Staff. Unfortunately, when Staff
23 negotiated with NCA, Director Gavin and his counsel insisted the school waive certain rights to
24 judicial review, taking the position the Authority board had required that term. Because the
25 Authority refused to remove the judicial waiver term, NCA did not sign the contract and Staff

26
27 ¹¹ Member Mackedon expressed this same view that "It's their responsibility to put forth the
28 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 SPCSA Meeting, page 234.

1 threatened closure if the school would not agree to waive these rights.

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

3 On September 30, 2016, the Authority issued a notice of closure to NCA pursuant to
4 NRS 388A.330(2),¹² citing NCA's 2015 high school graduation rate, even though just 3 months
5 earlier the Authority acknowledged NCA would need time to implement its graduation
6 improvement plan before the Authority reconsidered a notice of closure. *See Exhibit M* (Notice
7 of Intent to Revoke Charter). Before moving to approve issuance of a notice of closure, the
8 Board voted on Staff's recommendation to **require** that any contract between NCA and the
9 SPSCA would include the waiver of NCA's rights to judicial review of future agency action.
10 *See* Transcript of September 2016 SPSCA Meeting, pages 42-43, and **Exhibit N**, Staff Briefing
11 Memo. Then, surprisingly, when Staff issued the notice of closure, that notice stated that in
12 addition to considering possible closure, the Authority would consider at the December meeting
13 whether to reconstitute NCA's school board, which could be effective immediately. However,
14 the Authority did not raise board reconstitution during its September hearing, and did not take a
15 public vote regarding reconstitution; therefore, the Authority's threat to reconstitute the school
16 board violates Nevada's open meeting law and appears to be a transparent attempt to retaliate
17 against the board members who would not waive the school's constitutional rights.

18 Upon receiving the Notice of Closure, NCA reached out to Staff to collaborate on a
19 potential cure. On October 5, 2016, NCA reached out to the Authority's counsel, Greg Ott,
20 requesting the Authority's guidance with respect to what it would consider an acceptable cure,
21 and received no response. *See* Exhibit 1 to Exhibit A (Email from L. Granier to G. Ott). NCA
22 subsequently attempted to contact Mr. Ott several times, and Mr. Ott responded on October 25,
23 2016, stating that the Authority was not obligated to "tell the school how the deficiency may be
24

25
26 ¹² In issuing the notice of closure, the Authority violated its own policy regarding notice to
27 schools under the State Performance Framework Intervention Ladder. Moreover, the notice
28 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 cured.” Exhibit 2 to Exhibit A (Email from G. Ott to L. Granier).¹³

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

9 On December 2, NCA submitted a detailed letter to the Authority (and uploaded a
10 number of documents to Epicenter) proposing a cure for the deficiency the Authority identified
11 in its Notice of Closure—namely, the four-year high school graduation rate. *See* Exhibit A and
12 **Exhibit O**. The proposed cure suggested (1) calculating NCA’s four-year cohort graduation rate
13 in accordance with Nevada law including NRS 385.3485, according to which NCA’s 2015 four-
14 year cohort graduation rate is 63%; (2) excluding students enrolled for 50% of the school year or
15 less, based upon Federal regulations promulgated under the Every Student Succeeds Act, in
16 which the federal government recognized that a school should not be penalized for students the
17 school had inadequate time to impact relative to their academic progress toward graduation;¹⁴
18 (3) continuing implementation of the graduation rate improvement plan; and (4) voluntarily
19 reconstituting NCA’s board on a fixed rolling basis to effectuate a reasonable transition that will
20 not disrupt school governance.¹⁵ *See* Exhibit A. The proposed cure also quantified the
21
22

23
24 ¹³ Mr. Ott did, however, reference how Beacon Academy cured its deficiency, by entering into
25 the contract we understand includes a waiver of rights to judicial review. NCA reiterates that the
26 cure for Beacon Academy—a high school—is not applicable to NCA’s K-12 school.

27 ¹⁴ NCA believes when combining the 8.28% increase in the graduation rate yielded from this
28 calculation with the increase from excluding students who Nevada law prescribes from being
reported as dropouts, NCA’s graduation rate will be even higher and potentially within striking
distance of the 60% minimum threshold at issue.

¹⁵ This proposal also addresses the fact that the Authority has not adopted a policy for
reappointing a new governing board of a charter school following reconstitution as required

1 improvements NCA has made in the early stages of plan implementation, demonstrating that the
2 60% statutory goal for the high school is within striking distance. *See* Exhibit A.

3 Although NCA believes there are legal concerns with the Authority's notice of closure
4 and how it was issued, NCA continues to seek a mutually agreeable resolution with the
5 Authority. The Authority's closure proceedings put thousands of Nevada students' education at
6 risk, and NCA has demonstrated its willingness to work with the Authority to prevent this result.
7

8 III. ANALYSIS

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

10 The notice of closure issued because NCA was unwilling to waive its right to judicial
11 review regarding future Authority decisions that could put the entire K-12 school into
12 receivership based solely on the four-year graduation rate for the high school. This is not within
13 the agency's statutory authority; however, NCA has included in its cure a resolution for this
14 issue. The Authority has discretion to consider charter termination if "[t]he charter school is a
15 **high school** that has a graduation rate for the immediately preceding school year that is less than
16 60 percent." NRS 388A.330(1)(e) (emphasis added). By contrast, the Authority has discretion
17 to consider closure if "[t]he charter school is an elementary or middle school or junior high
18 school that is rated in the lowest 5 percent of elementary schools, middle schools or junior high
19 schools in the State in pupil achievement and school performance." NRS 388A.330(1)(f).
20 Nevada courts apply the plain-meaning rule in determining legislative intent, meaning that "[t]he
21 starting point for determining legislative intent is the statute's plain meaning; when a statute 'is
22 clear on its face, a court cannot go beyond the statute in determining legislative intent.'" *State v.*
23

24 under NRS 388A.223(1)(h). Further, "[e]ach sponsor of a charter school shall develop policies
25 and practices that are consistent with state laws and regulations governing charter schools."
26 These policies must include, in relevant part, "[a] description of how the sponsor will maintain
27 oversight of the charter schools it sponsors, which must include, without limitation . . . [a]n
28 assessment of the needs of the charter schools that are sponsored by the sponsor that is prepared
with the input of the governing bodies of such charter schools[,] and . . . [a] strategic plan for the
oversight and provision of technical support to charter schools that are sponsored by the sponsor
in the areas of academic, fiscal and organizational performance." NRS 388A.223(2)(f). In
addition, the policies must include a description of the Authority's evaluation process for the

1 *Lucero*, 249 P.3d 1226, 1228 (2011) (citing *Robert E. v. Justice Court*, 99 Nev. 443, 445 (1983)).

2 Therefore, while NRS 388A.330(1) affords the Authority discretion to close high schools
3 based on a graduation rate below 60%, the statute does not afford the Authority the power to
4 close an entire K-12 school based solely on that rate. The Authority is exceeding its statutory
5 power to consider closure of NCA – a K-12 school – based solely on the high school’s four-year
6 cohort graduation rate, where NCA’s K-12 program operates under a single charter. NCA’s
7 middle and elementary schools are excelling in student achievement and school performance,
8 and the Authority has not raised any performance concerns with these programs which therefore
9 do not meet the criteria for the Authority to consider closure, as outlined in NRS 388A.330(1)(f).
10

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

13 ***1. The Authority’s Graduation Rate Calculation Violates NRS 385.3485***

14 NCA’s four-year graduation rate must be calculated consistent with Nevada law,
15 including NRS 385.3485, which prohibits the State from reporting as drop-outs, students who
16 provide proof of successful completion of the high school equivalency assessment selected by
17 the State Board (a “GED”), are enrolled in courses approved by the Nevada Department of
18 Education for an adult standard diploma (“Adult Ed”), and students who withdraw from school
19 to attend another school. NAC 389.699(3) further mandates that a “pupil who qualifies for a
20 certificate of attendance must not be counted as a dropout.” NCA’s 2015 four-year graduation
21 rate as calculated in compliance with Nevada law, excluding those students who received a GED,
22 went on to Adult Education, or enrolled in a 5th year is 63%. This calculation has been validated
23 by AdvanceED. See Exhibit 6 to Exhibit A. Accordingly, the Authority Staff has failed to
24 provide evidence that closure or board reconstitution for a high school has been triggered given
25 this threshold question of the Authority Staff’s calculation of graduation rate.
26
27

28

charter schools it sponsors. NRS 388A.223(2)(g).

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

2 The promise Director Gavin made to the Nevada Legislature when it raised concerns of
3 penalizing schools for accepting credit-deficient students was that the Authority would not use
4 the discretionary closure provision triggered by the 60% graduation rate without looking at all
5 compelling evidence on the matter. *See* Exhibit 8 to Exhibit A. The proceedings leading us to
6 the December 16th hearing have been based solely on NCA's refusal to waive its rights to
7 judicial review and a single data point – the four-year cohort graduation rate for NCA's high
8 school with no consideration given to the population of students who enrolled with NCA credit
9 deficient– without consideration (at least since the March and May 2016 Board decisions) of
10 compelling evidence or even the proper graduation rate to be considered.
11

12 NRS 388A.330 does not define “graduation rate” for purposes of the potential closure of
13 a high school. Accordingly, it is appropriate to look to Nevada law as discussed above. In
14 addition, the Federal Department of Education's (“DOE”) definition of “graduation rate” being
15 applied by the Authority is not mandatory for states to use; rather, reporting of that rate to the
16 DOE is required for states to access Title I funding.¹⁶ Therefore, it is not appropriate to apply
17 this “graduation rate” when the Nevada legislature could have but did not provide for such use
18 under NRS 388A.330.¹⁷ Even if that definition is applied, however, given the Federal
19 regulations promulgated under the Every Student Succeeds Act, students enrolled for 50% of the
20 school year or less would be excluded from calculation of NCA's graduation rate. This adopted
21 federal policy recognizes that a school should not be penalized for students the school had
22 inadequate time to impact relative to their academic progress toward graduation.
23
24

25 _____
26 ¹⁶ *See, e.g.*, Title I, Part A, Section 1005 of the Every Student Succeeds Act (reauthorizing the
27 Elementary and Secondary Education Act of 1965) which provides that failure to file a plan
28 including an accountability system makes a state ineligible for Title I funds.

¹⁷ 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 Applying the Every Student Succeeds Act formula, NCA estimates its 2015 graduation
2 rate would be **43.91%** – **an improvement of 8.28%** from the rate reported by the Authority in
3 the Notice of Closure. NCA believes when combining this increase with the increase from
4 excluding students who Nevada law prescribes from being reported as dropouts, NCA's
5 graduation rate will be even higher and potentially within striking distance of the 60% minimum
6 threshold at issue. This is before NCA has even had an opportunity to implement the graduation
7 rate improvement plan. NCA is working to validate its numbers, as required under the NCA
8 graduation rate improvement plan, and hopes to provide that updated information soon.

10 This highlights an important point – the DOE has recognized it is improper to hold a high
11 school accountable for students enrolled in a high school for 50% or less of the current school
12 year. This is compelling evidence for the Authority Board to consider relative to the issue at
13 hand given that the Nevada Legislature did not mandate closure of a high school based on the
14 60% graduation rate but instead allowed the Authority the discretion to consider closure, in light
15 of all compelling evidence (such as this).

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

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

27 The Authority impinges on the function of the judicial branch by requiring NCA to waive
28

1 its rights to judicial review as a term of the proposed charter contract. Moreover, Authority
2 board members have advised the school that to “cure” the alleged deficiency and avoid closure
3 proceedings, NCA must agree to the waiver. There is no evidence or explanation as to why such
4 a waiver is the only possible cure for the alleged deficiency nor is there any explanation as to
5 why the Authority would seek to avoid accountability to a Court for its decision-making
6 especially as it relates to such a serious issue. In a hearing before the Honorable Judge Russell
7 of the First Judicial District on November 30, 2016, the Court raised pointed questions about the
8 legality of the agency attempting to force the school to waive its rights to judicial review under
9 threat of closure. *See* Exhibit I, November 30, 2016 Transcript, pages 70-71. Attorney Greg Ott
10 responded that he had done “a little legal research on this” but did not provide any legal support
11 to the Court that such action was in fact lawful. Exhibit I, page 70.

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

13 As a party identified of record by the Agency’s decision and aggrieved by the Agency’s
14 decision, NCA is entitled to judicial review of the decision. *See* NRS 233B.130. The district
15 court’s “function” when presented with such a petition is “to determine, based on the
16 administrative record, whether substantial evidence supports the administrative decision.” *Kay v.*
17 *Nunez*, 122 Nev. 1100, 1105 (2006). No evidence supports the Agency’s July 2016 vote to force
18 NCA to convert its charter to a contract or its September 2016 vote to mandate NCA enter into a
19 contract that waives its rights to judicial review or face closure. *See Exhibit P* (Excerpt from
20 Minutes of July 29, 2016 SPCSA Meeting), *see also Exhibit Q* (Excerpt from Minutes of Sept.
21 23, 2016 SPCSA Meeting) and Exhibit N (Sept. 23, 2016 Staff Briefing Memo).

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

1 substantial evidence.

2 ***1. The Agency's Prior Actions Violated the Open Meeting Law***

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

8 The Authority violated Nevada's Open Meeting Law with respect to its threat to
9 reconstitute the NCA school board. The Authority Staff's September 30, 2016 notice of closure
10 threatened to reconstitute the board, notes that the Authority will make a determination regarding
11 reconstitution during the December 16, 2016 meeting, and states that reconstitution could be
12 effective immediately. *See* Exhibit M. Despite this immediate threat, the Authority did not raise
13 board reconstitution during the September 23 hearing or since then, did not include any notice on
14 a public agenda for such action – issuance of a notice for board reconstitution -- and did not take
15 a public vote regarding reconstitution during any open meeting. *See* Transcript of September
16 2016 SPCSA Meeting at 42-43. The Authority's actions undermine the Open Meeting Law's
17 purpose, which includes compelling governing bodies to publish and follow an agenda and allow
18 for public discussion and participation in its decisions. Therefore, the Authority's threat to
19 reconstitute the board is void and the notice of closure defective.

20 ***2. The Agency is Equitably Estopped from Proceeding with Closure in December***

21 Equitable estoppel consists of four elements: (1) the party to be estopped must be
22 apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act
23 that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting
24 the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on
25 the conduct of the party to be estopped. *Chequer, Inc. v. Painters & Decorators*, 98 Nev. 609,
26 655 P.2d 996 (1982). Equitable estoppel may be invoked against an agency of the state. *See*
27 *Nevada Public Employees Retirement Board v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1980).
28 Additionally, "where a public official, acting within his authority and with knowledge of the

1 pertinent facts, has made a commitment and the party to whom it was made has acted to his
2 detriment in reliance on that commitment, the official should not be permitted to revoke that
3 commitment.” *S. Nevada Mem'l Hosp. v. State, Dep't of Human Res.*, 705 P.2d 139, 141–42
4 (Nev. 1985). The Nevada Supreme Court has recognized that estoppel may lie against the
5 government “when justice dictates that it apply.” *Manning v. Nevada State Board of*
6 *Accountancy*, 673 P.2d 494 (1983). The Court has adhered to the overriding goal of equity to
7 achieve justice and “prevent the unconscientious and inequitable assertion or enforcement of
8 claims or rights.” *Id.* (internal quotations and citations omitted).

9 Based on the Agency’s direction, NCA spent several weeks working with Authority staff
10 to prepare a graduation rate improvement plan. Then, based on the Authority’s praise of that
11 plan, NCA expended significant resources to immediately implement the plan – including
12 expenditure on additional summer school classes and at the suggestion of Director Gavin and the
13 Authority Board, hiring a third party company to validate data related to the graduation rate
14 calculation. *See* Exhibit 6 to Exhibit A. After NCA undertook these actions at the Authority’s
15 direction, the Authority then sought to materially modify its acceptance of the plan and decision
16 to allow NCA time to implement that plan without NCA’s knowledge, and later entirely
17 disregarded the plan with no consideration of NCA’s investment – insisting that the only way for
18 NCA to avoid closure was to enter a contract waiving the school’s rights to judicial review of the
19 Authority’s actions. The Authority should be estopped from denying NCA the ability to
20 implement its plan to meet certain graduation benchmarks.

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

23 Where the terms of a contract may have been literally complied with, but one party to the
24 contract deliberately contravenes the intention and spirit of the contract, that party can incur
25 liability for breach of the implied covenant of good faith and fair dealing. *Hilton Hotels Corp. v.*
26 *Butch Lewis Prods., Inc.*, 107 Nev. 226, 808 P.2d 919, 923 (1991). NCA’s existing charter
27 granted by the State in 2007 and renewed in 2013 constitutes a valid, enforceable contract
28

1 between NCA and the Authority, and therefore includes the implied covenant of good faith and
2 fair dealing. The Authority has wrongfully insisted that in order to continue operating under its
3 existing charter, NCA must enter into an entirely new charter contract that includes waiver of
4 rights to judicial review for future Authority actions including appointment of the receiver – a
5 very costly sanction to the school. The Authority's action violates of the express terms of the
6 NCA Charter currently in place and also the implied covenant of good faith and fair dealing in
7 violation of Nevada law.
8

9 IV. CONCLUSION

10 NCA seeks to collaborate with the Authority to reach a mutually agreeable cure to
11 prevent NCA's closure or reconstitution of NCA's board. NCA's cure addresses the Authority's
12 concerns while, at the same time, allowing the school to continue serving its students in an
13 effective and transparent manner and under the Authority's continuing jurisdiction.

14 Respectfully submitted this 13th day of December, 2016.

15 DAVIS GRAHAM & STUBBS LLP

16
17 By: 

18 Laura K. Granier (NSB 7357)
19 Erica K. Nannini (NSB 13922)
20 50 W. Liberty Street, Suite 950
21 Reno, Nevada 89501
22 (775) 229-4219 (Telephone)
23 (775) 403-2187 (Fax)

24 *Attorneys for Nevada Connections Academy*
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Davis Graham & Stubbs
3 LLP and not a party to, nor interested in, the within action; that on December 13, 2016, a true
4 and correct copy of the foregoing document was enclosed in a sealed envelope, and served as
5 listed below:
6

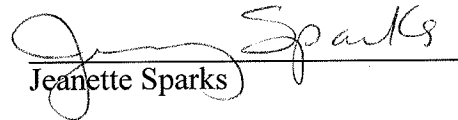
7 Gregory D. Ott, Esq.
8 Deputy Attorney General
9 100 N. Carson Street
10 Carson City, NV 89701

VIA EMAIL

11 Robert A. Whitney, Esq.
12 Deputy Attorney General
13 100 N. Carson Street
14 Carson City, NV 89701

VIA EMAIL

15 *Attorneys for State Public Charter School Authority*

16
17
18
19
20
21
22
23
24
25
26
27
28

Jeanette Sparks