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Via Email: ***bjames@schertz.com***
Brian James
Assistant City Manager
City of Schertz
1400 Schertz Parkway, Bldg. 2
Schertz, Texas 78154

RE: Responsive Education Solutions' appeal of the City of Schertz's imposition of roadway impact fees

Dear Mr. James:

I represent Responsive Education Solutions ("Responsive Ed"), a Texas non-profit corporation based in Lewisville, Texas that operates open-enrollment charter school campuses throughout the state, including the Founders Classical Academy of Schertz located at 8453 FM 1518 N. in the City of Schertz ("the City"). As you know, Responsive Ed has submitted plans to construct an addition to its campus, which would allow it to expand the tuition-free public school services offered for the benefit of the local community.

On September 1, 2021, you issued an administrative decision on behalf of the City imposing a roadway impact fee of $9,310 on this proposed development. This letter explains Responsive Ed's legal position in support of its appeal of your decision, and I request that you distribute a copy of same to each of the City Council members that will consider Responsive Ed's appeal at the upcoming Council meeting.

Open-enrollment charter schools are governmental units and public schools.

As an open-enrollment charter school, Responsive Ed is a governmental unit and "is part of the public school system of this state." Tex. Educ. Code §§ 12.105, 12.1056(a). Generally speaking, an open-enrollment charter school is subject to federal and state laws and rules, and municipal ordinances, governing public schools. *See* Tex. Educ. Code § 12.103(a); *see also Neighborhood Centers Inc. v. Walker*, 544 S.W.3d 744, 753-54 (Tex. 2018).

On June 16, 2021, the Texas Attorney General held that Section 12.103(a) of the Education Code supersedes a municipality's authority to promulgate ordinances that treat charter schools differently from school districts. *See* Tex. Atty Gen. Op. KP-0373, at p. 4. This same analysis should be applied to the question before the City of Schertz in this appeal, as the Attorney General concluded that a court would likely conclude a municipality that treats open-enrollment charter schools differently from school districts violates state law. *Id.*

Responsive Ed is a "school district" that is exempt from paying impact fees under Section 395.022(b) of the Local Government Code.

Section 395.022(b) of the Local Government Code exempts a school district from the payment of mandatory impact fees to a political subdivision unless certain conditions are met, namely, the school board's agreement to do so as part of a contract with the political subdivision imposing the impact fee. This prohibition similarly applies to open-enrollment charter schools by virtue of Section 12.103 of the Education Code.

First and foremost, an open-enrollment charter school should be considered a "school district" within the meaning of Section 395.022(b) of the Local Government Code. The United States District Court for the Southern District of Texas recently considered the similar question of whether a junior college was a "school district" for the purposes of Section 395.022(b) in *Houston Community College System v. City of Houston*, 2020 WL 70842 (S.D. Tex. 2020). In that case, the court ultimately held that the city committed a constitutional taking by withholding a building permit from a junior college that refused to pay an impact fee. The court noted that Chapter 395 of the Local Government Code does not define the term "school district" but, citing a similar opinion from the Texas Attorney General, the court considered the whole statutory landscape to find several instances in which junior colleges were treated like school districts. *Id.* at *1.

The same can be said of charter schools. Most notably, charter schools are considered to be school districts for the purposes of several provisions of the Local Government Code and other statutes. *See, generally* Tex. Educ. Code, Chapter 12, Subchapter D. For instance, Section 12.135 of the Education Code allows the Commissioner of Education to designate an open-enrollment charter school that meets certain financial criteria as a "charter district," allowing its bonds to be guaranteed by the permanent school fund (PSF) under Chapter 45 of the Education Code. And Responsive Ed in particular has been so designated when it issued several separate bond series guaranteed by the PSF, thus making Responsive Ed a charter district under Section 12.135 of the Education Code.

Furthermore, the Texas Education Agency also considers charter schools a type of school district, and has promulgated a glossary of terms that includes and defines a "charter school district" as follows:

> Charter School Districts (180 districts). Charter school districts are open-enrollment school districts authorized by the commissioner of education with final approval for operation provided by the State Board of Education. Established by the Texas Legislature in 1995 to promote local initiative, charter school districts are subject to fewer regulations than other public school districts. Generally, charter school districts are subject to laws and rules that ensure fiscal and academic accountability but that do not unduly regulate instructional methods or pedagogical innovation. Like other public school districts, charter school districts are monitored and accredited under the statewide testing and accountability system.

See https://tea.texas.gov/reports-and-data/school-data/district-type-data-search/district-type-glossary-of-terms-2019-20

A charter school's funds may not be used to pay an impact fee without the express consent of the school's governing body.

Under Section 12.106 of the Education Code, a charter school is entitled to receive public funds from the state, as if it were a school district, in order to support its public school operations. A charter school's funds "may only be used for a purpose for which a school may use local funds under Section 45.105(c) [of the

Education Code]" and "may *not* be used to support an operation or activity not related to the educational activities of the charter holder." Tex. Educ. Code § 12.107(a)(3), (a)(5)(B).

Accordingly, a charter school's ability to consent to the payment of an impact fee is restricted by Section 45.105(c) of the Education Code, which expressly limits how a charter school's funds may be spent. Impact fees are not among the enumerated list of authorized expenditures. As the Dallas Court of Appeals and the Attorney General have recognized, a school may only agree to pay an impact fee when the school board determines that the expenditure is "*necessary* in the conduct of public schools." *See* Tex. Atty Gen. Op. No. GA-0850 (2011); *see also City of Garland v. Garland Indep. Sch. Dist.*, 468 S.W.2d 110, 111 (Tex. App.—Dallas 1971, writ ref'd n.r.e.) (holding that a city could not impose an impact fee on a public school without the consent of the school's governing body). Furthermore, a school board may only agree to pay an impact fee when it is being assessed in order to construct specific improvements that are necessary for health and safety reasons, as opposed to an assessment for improvements that the political subdivision is capable of constructing on its own. *Id.* And of course, whether or not the charter school's governing body agrees to do so is entirely up to its discretion. *See* 19 Tex. Admin. Code § 100.1101(a)-(b) (stating that the governing body of an open-enrollment charter school has primary authority to operate the school and only limited ability to delegate, assign, or transfer that authority).

Likewise, Article III, Section 52 of the Texas Constitution prohibits a public school from making gratuitous payments of public funds to others, including other governmental entities, unless it obtains a clear public benefit in return. *See* Tex. Const. art. III, § 52(a); *see also Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383-84 (Tex. 2002). Simply put, Responsive Ed operates with public funds, and these scant resources should not be diverted from their intended purpose to pay for roadway infrastructure that the City of Schertz is capable of providing on its own. Such a diversion would ultimately deprive the public school students that the Legislature has mandated to be the beneficiary of public funds held by charter schools.

In summary, the City of Schertz's impact fee cannot be imposed without the consent of Responsive Ed's governing body, and it is questionable whether Responsive Ed would even be permitted to consent to such a fee, given the constitutional and statutory limitations on its ability to expend public funds. At the same time, the law is clear that Responsive Ed should be considered a "school district" for purposes of Section 395.022(b) of the Local Government Code, and the City of Schertz's decision to condition receipt of a building permit on payment of an impact fee would be considered an actionable taking under Article I, Section 17 of the Texas Constitution. *See Houston Community College System*, 2020 WL 70842 at *2.

Responsive Ed genuinely desires a productive and mutually beneficial relationship with the City of Schertz. The proposed campus expansion will primarily benefit local residents by increasing capacity of a high performing charter school district located within the City. For these reasons, I respectfully request that the City Council grant this appeal and overturn the administrative decision imposing the roadway impact fee.

I thank you and each of the City Council members for your time and thoughtful consideration of this matter.

Cordially,

SCHULMAN, LOPEZ,
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By PDay

Bryan P. Dahlberg

cc: Lynn Tompkins
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