



New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Compliance With the Reimbursable Cost Manual

**State Education Department
Rivendell School**



Executive Summary

Purpose

To determine whether the costs reported by Rivendell School (Rivendell) on its Consolidated Fiscal Reports (CFRs) were properly documented, program-related, and allowable pursuant to the State Education Department's (SED) Reimbursable Cost Manual (Manual). The audit included the expenses claimed on Rivendell's CFRs for the three fiscal years ended June 30, 2014.

Background

Rivendell is a Brooklyn, New York-based not-for-profit organization that is authorized by SED to operate, among other SED-approved programs, a Preschool Special Education Itinerant Teacher (SEIT) program to disabled children between the ages of three and five years. During the 2013-14 school year, Rivendell served 86 students. The New York City Department of Education (DoE) refers students to Rivendell based on clinical evaluations, and the municipality pays for the services Rivendell provides using rates established by SED. The rates are based on the financial information that Rivendell reports to SED on its annual CFRs. SED reimburses DoE for a portion of its payments to Rivendell based on statutory rates. For the three fiscal years ended June 30, 2014, Rivendell reported approximately \$7.5 million in reimbursable costs for the audited programs.

In addition to the SEIT Program subject to our audit, Rivendell operates a Montessori preschool, which is primarily privately funded, and a program for Related Services and Evaluations. These non-SEIT programs are not subject to SED's rate-setting function.

Key Findings

For the three fiscal years ended June 30, 2014, we identified \$536,449 in reported costs that did not comply with Manual requirements and recommend such costs be disallowed. These ineligible costs included \$70,644 in personal service costs and \$465,805 in other than personal service costs. Among the disallowances we identified were:

- \$389,012 in over-allocated expenses, including bond interest (\$202,162) and depreciation and amortization (\$128,506). These costs should have been allocated to other Rivendell programs.
- \$70,644 in undocumented extra pay expenses. The teachers in question did not work sufficient hours to earn extra pay, or the hours worked did not pertain to the SEIT Program.
- \$12,699 in unnecessary and ineligible travel costs.

Key Recommendations

To SED:

- Review the recommended disallowances resulting from our audit and make the appropriate adjustments to Rivendell's reimbursement rates.
- Work with Rivendell officials to help ensure their compliance with Manual provisions.

To Rivendell:

- Ensure that costs reported on future CFRs comply with all Manual requirements.

Other Related Audits/Reports of Interest

[Whitestone School for Child Development: Compliance With the Reimbursable Cost Manual \(2014-S-38\)](#)

[Institutes of Applied Human Dynamics: Compliance With the Reimbursable Cost Manual \(2014-S-39\)](#)

State of New York
Office of the State Comptroller

Division of State Government Accountability

December 28, 2015

Ms. MaryEllen Elia
Commissioner
State Education Department
State Education Building - Room 125
89 Washington Avenue
Albany, NY 12234

Ms. Katy Hill
Executive Director
Rivendell School
277 Third Avenue
Brooklyn, NY 11215

Dear Ms. Elia and Ms. Hill:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage government resources efficiently and effectively and, by so doing, providing accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities, and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is a report of our audit of the expenses submitted by Rivendell School to the State Education Department for the purposes of establishing the tuition reimbursement rates, entitled *Compliance With the Reimbursable Cost Manual*. The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution; Article II, Section 8 of the State Finance Law; and Section 4410-c of the State Education Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this draft report, please feel free to contact us.

Respectfully submitted,

Office of the State Comptroller
Division of State Government Accountability

Table of Contents

Background	5
Audit Findings and Recommendations	6
Personal Service Costs	6
Other Than Personal Service Costs	7
Recommendations	9
Audit Scope and Methodology	10
Authority	10
Reporting Requirements	11
Contributors to This Report	12
Exhibit	13
Notes to Exhibit	14
Agency Comments - State Education Department	15
Agency Comments – Rivendell School	17
State Comptroller’s Comments	32

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This report is also available on our website at: www.osc.state.ny.us

Background

Rivendell School (Rivendell) is a not-for-profit organization that is authorized by the State Education Department (SED) to provide, among other programs, a Preschool Special Education Itinerant Teacher (SEIT) program to disabled preschool children from three to five years of age. Based in Brooklyn, New York, Rivendell provides these SED Programs to children throughout the five boroughs of New York City. During the 2013-14 school year, Rivendell served 86 students.

The New York City Department of Education (DoE) refers students to Rivendell based on clinical evaluations and pays for Rivendell's services using rates established by SED. These rates are based on the financial information that Rivendell reports to SED on its annual Consolidated Fiscal Reports (CFRs). The State, in turn, reimburses municipalities 59.5 percent of the statutory rate paid to Rivendell. To qualify for reimbursement, Rivendell's expenses must comply with the criteria set forth in SED's Reimbursable Cost Manual (Manual), which provides guidance to special education providers on the eligibility of reimbursable costs, the documentation necessary to support these costs, and cost allocation requirements for expenses relating to multiple programs. Reimbursable costs must be reasonable, necessary, program-related, and properly documented.

Chapter 545 of the Laws of 2013 mandates the State Comptroller to audit the expenses reported to SED by special education service providers for preschool children with disabilities. For the three fiscal years ended June 30, 2014, Rivendell reported approximately \$7.5 million in reimbursable costs for its SED Programs.

In addition to the preschool special education programs subject to our audit, Rivendell operates a Montessori preschool. Rivendell charges private payers tuition for their children to attend the Montessori preschool. Rivendell also administers a program for Related Services and Evaluations. These non-SEIT programs are not subject to SED's rate-setting function.

Audit Findings and Recommendations

For the three fiscal years ended June 30, 2014, we identified \$536,449 in reported costs that did not comply with the Manual's requirements for reimbursement. The ineligible costs included \$70,644 in personal service costs and \$465,805 in other than personal service (OTPS) costs (see Exhibit at the end of the report).

Personal Service Costs

According to the Manual, personal service costs, which include all taxable and non-taxable salaries and fringe benefits paid or accrued to employees on the agency's payroll, must be reported on the provider's CFR as either direct care costs (e.g., teachers' salaries) or non-direct care costs (e.g., administrators' salaries). For the three fiscal years ended June 30, 2014, Rivendell reported about \$6.5 million in reimbursable personal service costs. We identified \$70,644 in personal service costs that did not comply with the Manual guidelines for reimbursement.

The Manual states that compensation costs must be based on approved, documented payrolls. Payroll must be supported by employee time records prepared during, not after, the time period for which the employee was paid. Also, Section 200.9 of the Regulations of the Commissioner of Education states that providers shall maintain adequate records to document direct and/or indirect service hours provided as well as time spent on all other activities related to each student served. Direct services are associated with the provision of instruction to students with disabilities. Indirect services include consultations provided by a certified special education teacher to assist the child's general education teacher.

During the three fiscal years ended June 30, 2014, Rivendell reported \$70,644 (\$52,798 in salaries and \$17,846 in related fringe benefits) in extra payments for five SEIT teachers. Rivendell officials advised us that these SEIT teachers were scheduled for 1,610 work hours in a school year (35 hours a week for 46 weeks). Of the 1,610 hours, 1,127 hours (70 percent) are considered to be direct hours. According to Rivendell officials, any SEIT teacher working in excess of 1,127 direct hours received extra payments for the additional SEIT sessions these staff members provided.

To determine whether the extra payments were adequately supported, we reviewed Rivendell's monthly Attendance Verification forms (in lieu of standard time and attendance records, which were not available). The Attendance Verification forms summarized the direct and indirect SEIT service hours provided per child. We determined that the total numbers of hours worked, per the Attendance Verification forms, were lower than the total work hours reported on the CFR. Specifically, for four of the five teachers who received extra payments, the Attendance Verification forms indicated that they worked fewer than 1,610 total hours. Consequently, these teachers were not eligible for extra compensation. Also, the remaining teacher worked in excess of the 1,127 direct hours; however, 462 of the hours were not related to the SEIT Program. Therefore, we recommend that SED disallow \$70,644 in extra payment compensation for five SEIT teachers.

Other Than Personal Service Costs

According to the Manual, OTPS costs must be reasonable, necessary, program-related, and supported by sufficient and appropriate documentation. During the three fiscal years ended June 30, 2014, Rivendell charged \$931,240 in OTPS expenses to the SED Programs. We identified \$465,805 of these expenses that did not comply with SED reimbursement requirements.

Over-Allocation of Expenses

The Consolidated Fiscal Reporting and Claiming Manual (CFR Manual) states when programs share the same geographic location or more than one State agency is served at the same geographic location, property and related costs must be allocated between the programs/State agencies benefiting from those resources. These costs include expenses such as utilities, repairs and maintenance, depreciation, and leases or mortgage interest. The CFR Manual also prescribes the procedures that providers must use to calculate cost allocations using the square footage method. We determined that Rivendell officials did not apply the square footage methodology to allocate facility costs among its programs. Instead, they used the ratio value method of allocation. However, this method of allocation was incorrect because it allocated facility costs based on overall program costs and not square footage, as required by the CFR Manual.

As noted previously, Rivendell operates two other SED-approved programs at its main location in addition to its SEIT Program. The other programs include Related Services and Evaluations and a Montessori preschool, primarily funded through private tuition revenues. To determine the allocation of building expense to the SEIT Program, the audit team measured the locations' square footage and discussed the program use of each space with Rivendell officials. Auditors and Rivendell officials generally agreed on the use of each space. However, Rivendell officials claimed that the library was used exclusively for SEIT services, and therefore, its costs should be allocated 100 percent to the SEIT Program.

According to SED officials, SEIT is an itinerant service to be provided in the student's natural environment, such as the home or an early childhood program in which parents have enrolled their child. In exceptional cases, with the consent of parents and the provider, a Committee on Preschool Special Education can indicate on students' Individualized Education Programs that SEIT sessions be rendered at the provider's site. According to SED officials, certain students received SEIT services at Rivendell's site. However, SED officials also advised Rivendell officials that out-of-classroom space (i.e., the library space) was not appropriate for rendering SEIT services. Further, SED did not approve the library space for SEIT administrative purposes. Therefore, charging all of Rivendell's library space exclusively to SEIT was not reasonable and necessary. Under these circumstances, we designated the library's square footage as common space and reduced the amount of space directly allocable to the SEIT Program.

Using updated square footage and space use calculations, we determined that \$389,012 in costs were over-allocated to the SEIT Program. Thus, we recommend SED disallow these costs as follows:

- \$202,162 in bond interest, bond amortization, and bond administration expenses;
- \$128,506 in depreciation and amortization expenses;
- \$22,210 in utility expenses;
- \$20,760 in maintenance expenses; and
- \$15,374 in other expenses.

We note that SED had previously disallowed some of these costs.

Unapproved Preschool Special Education Itinerant Teacher Facility

The Manual states that program and fiscal issues require prior written approval of the Commissioner's designees when costs for an education program expansion (including, e.g., additional staff, property, and classroom equipment) is expected to be reimbursed fully or partially through the tuition rate. Both program and fiscal designee written approval is required for new or renovated facility space, both instructional and non-instructional.

We found that Rivendell officials rented space at 272 Third Avenue, Brooklyn, in addition to its primary building. Rivendell officials advised us that the additional space was used for administrative purposes as well as to provide SEIT services. During our audit period, Rivendell reported \$99,228 in rent expenses (of which \$53,546 was charged to the SEIT Program). We asked Rivendell officials if they had SED's formal approval to acquire and use this building for SEIT services, as required by the Manual. Officials told us that they did not request SED's approval to use this building, and consequently, no such approval was granted. As such, we recommend that SED disallow \$53,546 in costs that were not in compliance with the Manual. We note that SED had previously disallowed some of these costs.

Travel Expenses

According to the Manual, conferences must be directly related to the education program or to the administration of the program. Programs shall be required upon audit to provide brochures, agendas, or other literature that verify attendance and document the purpose of the conference or meeting. For fiscal year 2013-14, the Manual states that out-of-country travel is not reimbursable. The Manual also states that costs must be reasonable, necessary, directly related to the special education program, and sufficiently documented.

During fiscal year 2011-12, Rivendell charged \$8,207 for a conference in Cape Town, South Africa. Rivendell's former Executive Director (who was employed by Rivendell at the time of our fieldwork) advised us that the primary purpose of the trip was to present Rivendell's preschool program internationally. Nevertheless, this expense was not necessary to administer Rivendell's SEIT Program. In addition, Rivendell charged \$4,492 for conferences in Edinburg, Scotland and in Vancouver, British Columbia, Canada in fiscal year 2013-14. The costs for both of these conferences were not eligible for reimbursement because they occurred in foreign countries.

Rivendell officials asserted that the conference costs should be allowed. They advised us that Rivendell is a member of an international not-for-profit organization that promotes the mental well-

being and healthy development of infants throughout the world and generates and disseminates scientific knowledge. We did not question this. Nonetheless, the travel costs of \$12,699 (\$8,207 + \$4,492) in question were either not necessary or not eligible for reimbursement, and therefore, we recommend that SED disallow them. Also, we note that SED had previously disallowed some of these costs.

Education Costs

According to the Manual, fringe benefits may include paid time off, such as vacation leave, sick leave, military leave, holidays, training, and educational costs, provided the benefit is established by written school policy. Rivendell has its own written school policy in its Employee Handbook for tuition reimbursement, which states an employee can be reimbursed for up to \$500 for a year.

During fiscal year 2011-12, we found that Rivendell made tuition reimbursement payments to one SEIT teacher totaling \$7,079. These payments exceeded the amount allowed by Rivendell's Employee Handbook. Consequently, we recommend SED disallow \$6,579 – the amount over the \$500 limit.

Other Unsupported/Ineligible Expenses

Generally, costs will be considered for reimbursement provided such costs are reasonable, necessary, directly related to the special education program, and sufficiently documented. Gifts of any kind are non-reimbursable.

During our audit period, we identified credit card expenses totaling \$3,969 that were not sufficiently documented nor ineligible for reimbursement based on the Manual, as follows:

- \$3,232 in ineligible gift purchases, including items from museum gift shops and jewelry; and
- \$737 in other purchases that were not supported by an invoice or receipt.

Rivendell officials advised us that they purchased staff appreciation gifts for their SEIT teachers, and acknowledged they were not reimbursable. In addition, we found that Rivendell did not maintain any invoices or receipts for any of these purchases. Consequently, we recommend that SED disallow these \$3,969 in reported expenses.

Recommendations

To SED:

1. Review the recommended disallowances resulting from our audit and make the appropriate adjustments to Rivendell's reimbursement rates.
2. Work with Rivendell officials to help ensure their compliance with Manual provisions.

To Rivendell:

3. Ensure that costs reported on future CFRs comply with all Manual requirements.

Audit Scope and Methodology

We audited the costs reported on Rivendell's CFRs to determine whether they were properly documented, program-related, and allowable pursuant to SED's Manual. The audit included all claimed expenses for the three fiscal years ended June 30, 2014.

To accomplish our objective, we reviewed the Manual and the CFR Manual, Rivendell's CFRs, and relevant financial records for the audit period. We also interviewed Rivendell officials, staff, and independent auditors to obtain an understanding of their financial and business practices. In addition, we assessed a sample of reported costs to determine whether they were supported, program-appropriate, and reimbursable. Our review of Rivendell's internal controls focused on the controls over Rivendell's CFR preparation process.

We conducted our audit in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained during our audit provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions, and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these management functions do not affect our ability to conduct independent audits of program performance.

Authority

The audit was performed pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution; Article II, Section 8 of the State Finance Law; and Section 4410-c of the State Education Law.

Reporting Requirements

We provided draft copies of this report to SED and Rivendell officials for their review and formal comment. We considered their comments in preparing this final report and attached them to it. In their response, SED officials agreed with our recommendations. However, in their response, Rivendell officials disagreed with most of our proposed disallowances. Further, our rejoinders to certain Rivendell comments are included in the report's State Comptroller's Comments.

Within 90 days of the final release of this report, as required by Section 170 of the Executive Law, the Commissioner of Education shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and if the recommendations were not implemented, the reasons why.

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Vision

A team of accountability experts respected for providing information that decision makers value.

Mission

To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Exhibit

Rivendell School
Schedule of Submitted and Disallowed Program Costs
for the 2011-12, 2012-13, and 2013-14 Fiscal Years

Program Costs	Amount per CFR	Amount Disallowed	Amount Remaining	Notes to Exhibit
Personal Services				
Direct Care	\$5,782,672	\$70,644	\$5,712,028	A,F,G
Agency Administration	735,184	0	735,184	
Total Personal Services	\$6,517,856	\$70,644	\$6,447,212	A,F,G
Other Than Personal Services				
Direct Care	\$192,439	\$4,344	\$188,095	A
Agency Administration	738,801	461,461	277,340	B-E,G
Total Other Than Personal Services	\$931,240	\$465,805	\$465,435	A-E,G
Total Program Costs	\$7,449,096	\$536,449	\$6,912,647	

Notes to Exhibit

The following Notes refer to specific sections of SED's Reimbursable Cost Manual used to develop our recommended disallowances. We summarized the applicable sections to explain the basis for each disallowance. We provided the details supporting our recommended disallowances to SED and Rivendell officials during the course of our audit.

- A. Section II - Costs will be considered for reimbursement provided such costs are reasonable, necessary, directly related to the education program, and are sufficiently documented.
- B. Section II.13.B.1- Fringe benefits may include paid time off, such as vacation leave, sick leave, military leave, holidays, training and educational costs, provided the benefit is established by written school policy.
- C. Section II.13.B.2.e - Employer-provided educational assistance costs are reimbursable as compensation only when the course or degree pursued is relevant to the field in which the employee is working.
- D. Section II.24 - Gifts of any kind are non-reimbursable.
- E. Section II.59.B - Out of country travel is not reimbursable.
- F. Section III.1.A - Compensation costs must be based on approved, documented payrolls. Payroll must be supported by employee time records prepared during, not after, the time period for which the employee was paid. Employee time sheets must be signed by the employee and a supervisor, and must be completed at least monthly.
- G. Section III.1.M.1 - Any expenditures that cannot be charged directly to a specific program must be allocated across all programs and/or entities benefited by the expenditure.

Agency Comments - State Education Department



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY
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December 2, 2015

Mr. Frank Patone
Audit Director
Office of the State Comptroller
Division of State Government Accountability
110 State Street – 11th Floor
Albany, NY 12236

Dear Mr. Patone:

The following is the New York State Education Department's (SED) response to the draft audit report, 2015-S-25, Compliance with the Reimbursable Cost Manual: Rivendell School.

In addition to the actions that will be taken in response to the specific recommendations described below, the Department will closely examine the circumstances that led to the findings described in the audit report. This examination will include an assessment of the programmatic oversight and fiscal management employed at Rivendell School, and will be a factor in the consideration of the continued approval of this provider and the corrective action or enforcement actions that may be warranted.

Recommendation 1:

Review the recommended disallowances resulting from our audit and make the appropriate adjustments to Rivendell's reimbursement rates as appropriate.

We agree with this recommendation. The Department will review the recommended disallowances as noted in the report and make adjustments to the reported costs to recover any overpayments, as appropriate, by recalculating tuition rates.

Recommendation 2:

Work with Rivendell officials to help ensure their compliance with Manual provisions.

We agree with this recommendation. SED will continue to provide technical assistance whenever requested and will strongly recommend Rivendell School officials take advantage of our availability to help them better understand the standards for reimbursement as presented in Regulation and the Reimbursable Cost Manual (RCM). Furthermore, Consolidated Fiscal Report (CFR) training is available both in person, at one of the six locations it is offered across

the State, and online on the Department's webpage. The Department recommends that all individuals signing the CFR certification statements, namely Executive Directors and Certified Public Accountants, complete this training. At the direction of the Board of Regents, the Department intends to require that this training be mandatory and will require individuals to verify that they have completed the training.

If you have any questions regarding this response, please contact Suzanne Bolling, Director of Special Education Fiscal Services at 518/474-3227.

Sincerely,



Sharon Cates-Williams

c: James P. DeLorenzo
Suzanne Bolling
bc: Commissioner

Agency Comments - Rivendell School

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November 20, 2015

**BY EMAIL (SLynch@osc.state.ny.us)
AND FEDERAL EXPRESS**

Steven Lynch, Audit Manager
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New York, NY 10038

Re: Rivendell School
Your Draft Audit Report # 2015-S-25

Dear Mr. Lynch :

This letter is in response to the draft audit report, issued on November 15, 2015, of the Office of the State Comptroller ("OSC") with respect to OSC's audit of Rivendell School ("Rivendell").

At the outset, we note that Rivendell does not agree that OSC has authority to conduct the audit at issue under the New York State Constitution, as interpreted by the New York Court of Appeals in *Blue Cross & Blue Shield of Cent. N.Y. v McCall*, 89 N.Y.2d 160 (1996), *New York Charter Schools v. DiNapoli*, 13 N.Y.3d 120 (2009) and *Handler v. DiNapoli*, 23 N.Y.3d 239 (2014). Rivendell's cooperation with the audit and this response to OSC's draft report do not waive any of its rights to challenge OSC's authority to conduct this audit or any decision to act upon it, and Rivendell expressly reserves all such rights.

*
Comment
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We further note at the outset that most of the disallowances OSC proposes in fact already were made by the New York State Education Department ("SED") in their thorough prior annual reviews of Rivendell's financial reports, and therefore those expenses already were excluded in the determination of Rivendell's tuition rates. Items that SED already has disallowed should be excluded from OSC's report, as it serves no purpose for OSC to "recommend" to SED that it

*See State Comptroller's Comments on Page 32.

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 2 of 15

disallow what SED already excluded when it set Rivendell's tuition rates. If OSC for some reason nevertheless includes these items in its report, it should clearly identify where SED already has disallowed the same item during its rate-setting process and how much SED disallowed. Otherwise, OSC's report is misleading, because it conveys the false impression that Rivendell has been paid for costs that OSC is recommending for disallowance, when in reality those amounts already were excluded from the tuition rate calculation, so that Rivendell has not been paid anything on account of them. In fact, by our calculation, of the \$536,449 of costs that OSC is recommending for disallowance in the draft report, \$445,850 were disallowed by SED previously, so that only \$90,599 really are new proposed disallowances not already reflected in Rivendell's tuition rate. The draft report as written presents a misleading picture in stating that OSC "recommends" disallowances of so much larger amounts. Specific instances of this are addressed in the discussion below.

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Comment
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I. Misleading Language

Before proceeding to a discussion of OSC's proposed disallowances, we will address certain misleading language in OSC's draft report that should be corrected in any final report.

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Comment
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First, both in the first bullet point of the "Key Findings Section" on page 1 and again in the heading on page 7, OSC uses the misleading wording "Over-Allocation" of Expenses. The report should say "Incorrect Allocation" of Expenses. OSC is not accusing Rivendell of deliberately allocating expenses to SEIT that should not have been, but the words "over-allocation" can be read to imply a connotation of deliberate intent.

Second, OSC's report should note right up front in the first bullet point that SED already disallowed \$376,373 of the expenses referred to in that bullet point, so that all but \$12,639 of OSC's proposed disallowances already were excluded in the calculation of Rivendell's tuition rate. OSC's draft report creates the misleading impression that Rivendell has received tuition payments based on \$389,012 of costs that should be disallowed when the reality is that, even if OSC's additional disallowances were correct (which they are not), Rivendell has received tuition payments based on only \$12,639 of costs that OSC is recommending for disallowance. OSC's draft report notes on page 8 "that SED had previously disallowed some of these costs," but this should be stated right up front with the "Key Findings", and it also should be made clear that SED previously disallowed almost all of what OSC now is recommending for disallowance, not just "some of these costs."

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Comment
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Third, in the second bullet point of "Key Findings" on page 1 the words "undocumented" extra pay expenses should be changed to "incorrectly determined". Again, the word "undocumented" can be read to carry a connotation that the claims for extra pay were fabricated, which is not what OSC is contending. As is explained below, we believe that this item should be removed from OSC's report altogether, as OSC is wrong on the merits of this issue, but in any

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Comment
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SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 3 of 15

event it should not be described by misleading language that could be read to connote impropriety by a reader who reads only this Executive Summary and not the discussion of this issue on page 6.

Fourth, the third bullet point in the “Key Findings” section on page 1, and the discussion of this item on pages 8-9, should be deleted from the report, because again SED already disallowed these items, so that the expenses were not included in Rivendell’s tuition rate. OSC did not discover anything, and there is no point to OSC’s recommending to SED that it disallow expenses that SED already has disallowed. If OSC nevertheless keeps this item in its report, the third bullet point should state that SED already excluded these expenses in its review, so that they were not included in the calculation of Rivendell’s tuition rate. Also, if this bullet point is included, for clarity the words “incurred in attending industry conferences” should be added at the end. For persons who read only this this Executive Summary page and do not read the discussion of this item on pages 8-9, the words “unnecessary and ineligible travel costs” could cause them to come away with the false impression that this was personal travel, rather than the business travel to industry conferences, as OSC recognizes that it was.

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Comment
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Those language changes are important because OSC’s reports can cause substantial reputational harm, whether or not they are accurate. We would expect OSC, as a responsible government agency, to exercise great care not to use language that carries unwarranted connotations that could be misunderstood by members of the public who read the report. Careless and misleading language could have a defamatory effect.

*
Comment
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II. The Proposed Disallowances

We will now proceed to discuss the disallowances proposed by OSC.

A. Personal Service Costs

Rivendell disagrees with OSC’s disallowance of extra salary and fringe benefits paid to five salaried SEIT teachers because they accepted extra assignments beyond the normal case load for a full-time salaried SEIT teacher. OSC claims that payment of these costs purportedly “did not comply with the Manual guidelines for reimbursement.” That contention is wrong. OSC does not cite any Manual guidelines relating to reimbursement that purportedly were not met, and there aren’t any. These payments fully complied with the requirements of the Reimbursable Cost Manual (“RCM”).

Rivendell’s Methodology for Determining What Constitutes Extra Work

OSC omits relevant context and does not accurately describe how Rivendell determined what constituted extra work beyond what was expected from a full-time salaried SEIT teacher.

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Comment
7

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 4 of 15

Rivendell determined that a normal work load for a full-time salaried SEIT teacher was 25 hours of direct service IEP mandates per week, or if all of the teacher's direct service was in one location so that he or she would not have to travel between assignments, 27 hours of IEP mandates per week. This would mean that the SEIT teacher would work a total of at least 35 hours per week, because to meet direct service IEP mandates, SEIT teachers also must provide indirect services and non-billable non-direct services as well. By regulation, non-billable service time must constitute at least 28% (and no more than 34%) of the SEIT teacher's total work time. That means that a SEIT teacher assigned to 25 hours of direct service time per week would work at least 35 total hours per week, which was stated in Rivendell's employee manual to be the work expectation for a full-time employee.

Based on this, Rivendell determined that its salaried SEIT teachers' salaries contemplated a full-time case load of 1,150 mandated direct service hours per year, which was 25 hours per week times 46 weeks. If the SEIT teacher did not travel between assignments, then a full case load would equate to up to 1,242 direct service hours per year (27 hours per week times 46 weeks). If a salaried SEIT teacher worked more than those amounts of mandated direct service hours over the course of the year, he or she was paid extra compensation for taking on more than a normal full-time case load.

A SEIT teacher who worked 1,150 mandated direct service hours in fact would work at least 1,610 total hours during the year because of the additional indirect and non-direct service time associated with that work. We note that although Rivendell did not require its SEIT teachers to prepare Attendance Verification Forms for non-billable time prior to the 2012-13 year, OSC does not and cannot contend that they did not in fact perform non-billable services during the 2011-12 as well. Rivendell provided the auditors with samples of work product reflecting non-billable work and worker statements from parents attesting to such work, and Rivendell offered to provide written statements from every family and every SEIT teacher attesting that such work was done during 2011-12 as well if requested (which OSC did not request). Rivendell's supervisors saw no evidence that the required level of non-billable hours of work was not getting done during 2011-12, and there were no parent complaints that non-billable services were not being provided. Moreover, the Attendance Verification Forms for non-billable work that were initiated in the 2012-13 year confirmed that Rivendell's SEIT teachers were spending 28% or more of the time on non-billable service. There is no reason to believe they did not do the same in prior years.

As stated above, Rivendell's determination of whether the teacher worked more than his or her contemplated full-time case load was based on mandated direct service hours. Rivendell did that because it was paid based on mandated time, not total time spent by the SEIT teacher. Moreover, all SEIT teachers at all agencies are paid based on direct service time, not their total time. In this regard, as OSC is aware, most SEIT teachers in the industry are hourly employees, not salaried employees as the five Rivendell SEIT teachers at issue were. Throughout the

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Comment
8

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 5 of 15

industry SEIT teachers who are paid on an hourly basis are paid only for direct service time. Their hourly rate (about \$65.00 per hour on average for Rivendell) is multiplied by the direct service hours to determine their compensation. While they are required to work indirect and non-direct service time as well – indeed, roughly a third of their total time must be spent on that as per regulation – how much of such time they work does not affect their compensation at all. The assumption that they will do that additional work is built into their hourly rate. Rivendell did the same thing with its salaried SEIT teachers. It assigned them a full work load of 1,150 mandated direct service hours (or up to 1,242 mandated direct service hours if they do not travel between cases). While it also required them to perform indirect and non-billable services, it calculated their compensation (extra time for extra work) based entirely on their direct service hours, just as is done for SEIT teachers paid by the hour. Thus, Rivendell's compensation practice of determining their extra time compensation based only on billable direct service hours is in accordance with industry norms.

We also note that from experience we understand that the New York City Department of Education ("NYCDOE") does the same thing. For example, if a therapist who works for NYCDOE is scheduled to work four direct service hours in a 6-1/2-hour work day, but then is asked to spend another hour on direct service during the day for some reason (say, to cover for an absent therapist), the therapist is paid extra for that extra hour of direct service, even if he or she worked the same 6-1/2 hours in total. Conversely, the therapists receive no extra pay for any additional time they spend on non-direct service work.

The Legal Standards

OSC appears to take the position that the RCM requires that payment for extra work must be determined by comparing the total time SEIT teachers worked to 1,610 hours, not by comparing their total mandated direct service hours to 1,150 hours, and that in making that comparison no credit can be given for non-billable service hours that were not documented by contemporaneous time sheets, even though the work indisputably was done. The RCM does not support OSC's positions at all.

The RCM does not provide any guidance as to how a provider agency must determine what is extra time for which extra compensation should be paid. It is silent on that point. Accordingly, the governing standard is that what the provider agency does must be reasonable. Rivendell's methodology for determining what constituted extra work, as explained above, not only was eminently reasonable, it was consistent with industry norms, as all agencies that provide SEIT services determine SEIT teachers' compensation based on direct service hours. If OSC believes this was not reasonable, it has not said that, much less stated any reason why it purportedly was not reasonable.

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Comment
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SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 6 of 15

For all the reasons described above, 1,150 mandated direct service hours constituted a full work load for a full-time teacher that, with the necessary indirect and non-direct services that the mandated services necessarily would require, would take at least 35 hours per week of total work time, or 1,610 hours over the course of the year, to complete. OSC in essence is saying that these hardworking teachers should not have been paid extra for taking on work beyond a normal full-time workload. We find it surprising, to say the least, that OSC would take the position that SEIT teachers should not be fully and fairly paid for their very important work and should not be compensated extra for taking on extra work beyond a normal full-time case load. We would submit that it is OSC's position, not Rivendell's practice, that is unreasonable.

Moreover, the State actually saved money as a result of these extra work assignments to Rivendell's full-time salaried SEIT teachers. At Rivendell, the hourly rate for SEITs paid by the hour averaged about \$65.00/hour; the rates paid for extra assignments to salaried SEITs averaged about \$45.00/hour. Thus, if that extra work had been assigned to hourly SEITs instead, which would be Rivendell's alternative, the amounts Rivendell would have paid as compensation for those services, and therefore the cost to the State, would have been higher. Accordingly, the State should be pleased that Rivendell met its needs for extra service time in this cost-efficient way.

OSC correctly states that the RCM requires that compensation costs "must be based on approved, documented payrolls." Rivendell did that and provided the auditors with the approved documented payrolls.

The only RCM provision discussing payroll documentation is RCM Section III.I.A, which states in relevant part:

"Compensation costs must be based on approved, documented payrolls. Payroll must be supported by employee time records prepared during, not after, the time period for which the employee was paid. Employee time sheets must be signed by the employee and a supervisor, and must be completed at least monthly."

This provision does not support OSC's contentions for several reasons.

First, the second two sentences of Section III.I.A, which is what OSC relies on, apply only to hourly employees, not to salaried employees. To require time records makes no sense in the context of an employee who is not paid based upon time. For salaried employees, all that is required are approved, documented payrolls, which Rivendell provided.

Second, even if those two sentences did apply, Rivendell had such time records. Section III.I.A does not state, or remotely imply, that for a SEIT teacher whose pay is determined based on direct hours of mandated service, the "time records" also must include a record of indirect and

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SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 7 of 15

non-direct service time as well. There is no logical reason why that should be required as documentation for payroll when, as in this case, only direct service time affected how much pay the SEIT teacher was entitled to receive. Nor does this section of the RCM state or imply in any way that the SEIT teachers' extra compensation must be computed based on both direct and indirect and non-direct service hours. As stated above, it is silent on that point. What Rivendell did – computing SEIT teachers' extra compensation based on direct service hours – not only was allowed by the RCM, it is the uniform practice in the industry.

While such records are not required to support payroll, Rivendell did have contemporaneous time sheets for direct service time its salaried SEIT teachers worked for all of the audited years. OSC does not dispute that. Rather, OSC compares the hours reported in those time sheets to 1,610 hours, rather than the 1,150 hours of direct service time that that constitutes a full work load for a salaried SEIT, in determining whether there was extra work that warranted extra pay beyond the SEIT teachers' set annual salary. Nothing in the RCM required or justified that, and in so doing OSC improperly substituted its judgment for Rivendell's as to how what constituted extra work should be determined. OSC also did not compare "apples to apples," as a SEIT teacher who worked 1,610 direct service hours in fact would be working more than 2,300 hours of total time, including indirect and non-direct service time.

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Comment
13

To the extent OSC is claiming that time sheets for indirect and non-direct time must be provided to establish a "documented" payroll with the meaning of RCM Section III.I.A, OSC not only is incorrect; it is internally inconsistent. OSC takes no issue with the fact that hourly SEIT teachers were paid based on direct service time, without time sheets reporting time spent on indirect and non-direct services. Similarly, it takes no issue with documentation of Rivendell's payroll for its salaried SEIT teachers supporting their base salaries, even though almost none of them had time sheets reporting as many as 1,610 hours in 2011-12 (because they had time sheets only for direct service hours). It is only payment for the extra assignments that OSC says cannot be paid without such documentation. Yet RCM Section III.A.1 does not distinguish between extra pay and set salary in requiring "documented" payrolls.

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Comment
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OSC's draft report notes that Section 200.9 (actually it is Section 200.9(f)(2)(ix)(c)) of the regulations requires documentation of time spent both on direct and non-direct activities. That is true but irrelevant. That is a programmatic requirement to assure compliance with the requirement that SEIT teachers must spend no less than 66% and no more than 72% of their total time on direct service activities. It has nothing to do with a SEIT teacher's right to compensation or what documents a provider agency must maintain to support compensation paid to a SEIT teacher in order to be entitled to reimbursement of the compensation paid. The RCM does not reference this section of the regulations at all; nor does anything in the RCM mention or impose that requirement as a condition for reimbursement. As explained above, Rivendell met all of the requirements that the RCM did impose for reimbursement.

*
Comment
15

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 8 of 15

Disallowance Is Not Appropriate In Any Event

While we believe that the RCM clearly allows reimbursement of this extra compensation, if OSC still believes otherwise, at best the RCM is ambiguous on this point. One of the major problems in this industry is that the RCM does not provide clear guidance in many instances; it is unclear, or silent altogether, on many points.

When OSC discovers such instances on audit, rather than recommending retroactive disallowances that will reduce tuition rates for years long past, so that the provider cannot do anything to adjust its practices to avoid the disallowances, OSC should recommend instead that SED amend the RCM to clarify it, so that service providers will know what standards they have to meet. The fact that OSC disagrees with Rivendell's interpretation of the RCM does not mean that Rivendell's interpretation was unreasonable. Rivendell, like all responsible SEIT service providers, takes great pains to follow the rules, but to follow the rules, the rules need to be clear, so that SEIT service providers know what costs are and are not reimbursable. Unfortunately, the RCM does not come close to providing that kind of clarity and certainty for SEIT service providers.

A retroactive tuition rate reduction based on an unclear RCM requirement would be patently unfair to Rivendell, because it would result in tuition rate reductions on account of a practice that Rivendell had been following for years, justifiably believing that it is correct based on the wording of the RCM, as well as the fact that SED never has questioned it during its extensive annual reviews of Rivendell's financial reports. Moreover, the financial effect of OSC's proposed disallowances would be greatly magnified, because the disallowances would be applied retroactively to audited years long since past, and under SED's rate setting methodology the reduced tuition rate resulting from the disallowances becomes a ceiling for future years. Thus, the proposed disallowances would adversely affect Rivendell's tuition rate not only for 2011-12, the year where most of OSC's proposed disallowances of extra compensation occurred, but also for every subsequent year. And Rivendell cannot now recoup the extra compensation paid to its SEIT teachers years ago, reasonably believing those payments were properly reimbursable; the money is spent.

We note that at a meeting between Rivendell and OSC on October 29, 2015, after the draft report was issued, after hearing Rivendell's contention that its practice of paying its SEIT teachers based on direct service hours not only complied with the RCM, but also is the normal industry practice, OSC stated that it would "take this up with SED." We hope and trust that SED will confirm what Rivendell said and that OSC will remove these disallowances from its final report as a result. However, as we stated at that meeting, even if SED agrees with OSC's interpretation of the RCM, that still would not justify retroactive disallowances. Service providers like Rivendell necessarily rely on the RCM as written in making judgments as to what expenses to pay and what will be reimbursable. In fairness OSC's determination must be based

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 9 of 15

on the RCM as written, not based on what SED four years later says was intended, but the RCM did not clearly say. Again, OSC's recommendation to SED in that circumstance should be to clarify the RCM, not to make retroactive disallowances.

Calculation Errors

OSC not only has misinterpreted the RCM; it also has made several errors in calculating the service hours of Rivendell's salaried SEITs.

First, OSC's draft report admits that one of Rivendell's SEIT teachers, V.H., worked more than 1,127 direct hours,¹ but says that "462 of the hours were not related to the SEIT program." That contention is incorrect. SEIT services were part of both Rivendell's SEIT (9135) program and its pendency program for older children. That SEIT teacher provided SEIT services for both programs in 2011-12. Specifically, she provided 1,648 direct service hours, 1,186 hours for SEIT program students and 462 hours for the pendency program students. She was paid for 498 hours of extra time, because her direct service case load was 498 hours over a normal full-time caseload.

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Her 462 hours for the pendency program were not part of her compensation allocated to SEIT on Rivendell's CFR and should not be excluded from reimbursement. The reason for this is that Rivendell's methodology in its CFR was to allocate compensation between SEIT and pendency globally, based on the proportion of total SEIT program direct service hours to total pendency program SEIT direct service hours. That proportion was 92.6:7.4, and accordingly, Rivendell allocated 92.6% of its SEIT teachers' total compensation and fringe benefits, which included both salary and compensation for extra work, to SEIT and 7.4% of its total SEIT teacher compensation and fringe benefits to pendency. This methodology already accounted for V.H.'s 462 hours of direct service time for pendency students, and allocated them to the pendency program by the global 92.6:7.4 allocation. By now reducing her allowable compensation by taking out these same 462 hours, OSC is double-dipping, because it is taking out these same 462 hours twice; once in the global 92.6:7.4 allocation made in the CFR and now again. There is no rational justification for that. If OSC now is going to deduct those 462 hours of SEIT, to avoid double-counting it would have to add back in the 7.4% of other SEIT teachers' compensation and fringe benefits that was allocated to pendency under the global allocation, even though those SEIT teachers worked only in the SEIT program. OSC improperly is mixing together two different methodologies, by allocating between SEIT and pendency individually for V.H. but using the global allocation for everybody else. That causes the double-dipping.

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¹ We are not sure why OSC thinks 1,127 is a relevant benchmark. That is not a number Rivendell used for any purpose. We also note that other Rivendell salaried SEIT teachers worked more than 1,127 hours, but OSC compared their hours to 1,610 hours, not 1,127 hours. We have no idea why OSC views 1,127 hours (or (1,150) as a relevant benchmark for this one teacher but not for the others.

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Comment
18

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 10 of 15

Second, even if it were appropriate to apply the SEIT/pendency allocation individually for V.H. but globally for everybody else, which it clearly is not, OSC's contention still would be incorrect. V.H. was entitled to extra compensation because she worked more than a normal caseload. Her right to extra pay did not depend on for which program or programs she worked. OSC cannot realistically assume that all of the disallowed "extra" hours were SEIT program work and that none were pendency program work. At worst, the total extra compensation cost should be allocated in proportion to the total hours she worked for the SEIT program and the pendency program: 71.97% to SEIT (1,186/1,648) and 28.03% to pendency (462/1,648). There is no reason to disallow it entirely simply because part of her work was for a pendency student.

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Third, OSC omitted 45 hours reflected on Attendance Verification Forms for another SEIT teacher, E.V., in April 2012. E.V. recorded 45 direct service hours for each of two students, for a total of 90 direct service hours in April 2012, but OSC credited her for only 45 hours. Copies of those Attendance Verification Forms will be submitted to OSC under separate cover.

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Fourth, there were discrepancies between OSC's determination of direct service hours and Rivendell's, which were provided to OSC during the audit and with Rivendell's response to OSC's preliminary reports. The reason for this is that Rivendell based its determination of each teacher's extra compensation on mandated hours assigned to the teacher. For example, if a SEIT teacher was assigned a student who was mandated to receive 5 hours per week for 40 weeks, Rivendell credited the teacher with 200 direct service hours. Sometimes, fewer hours were rendered because of vacations or absences, so that fewer hours were reported on the Attendance Verification Forms, but Rivendell credited the teacher for the entire 200 hours. This was appropriate because Rivendell was paid for the entire 200 hours, and the teacher held open 200 hours of his or her time for these services. Again, nothing in the RCM requires payment to SEIT teachers to be based on attendance, rather than enrollment, even though Rivendell is paid based upon enrollment.

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Finally, before leaving this point, we note that OSC states that the hours on the Attendance Verification Forms were less than the hours reported in the CFR for these teachers. There is nothing surprising or wrong about that. The hours reported in the CFR were based on the normal 35-hour work week (including 25 direct service hours) on which the salaries for all of Rivendell's full-time SEIT teachers were based, that is, 35 hours times 46 weeks for a total of 1,610 hours. For SEIT teachers who were assigned more than the normal full-time workload of 25 direct service hours per week, the extra mandated direct service hours were included in the CFR. Again, there is nothing in the RCM which requires the hours reported in the CFR to be based on Attendance Verification Forms, rather than on work assignments as Rivendell did.

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For all these reasons, OSC's proposed disallowances of compensation for extra time paid to Rivendell's salaried SEIT teachers are incorrect and should not be included in OSC's report.

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 11 of 15

B. Other Than Personal Service Costs**“Over Allocation” of Expenses**

As discussed above, OSC’s proposed disallowance for incorrect allocation of various expenses related to the real property used by Rivendell already has been addressed by SED in its rate-setting process, and SED disallowed almost the same amount as OSC. Given that SED already examined these expenses in detail as part of its own detailed review, its review should control over OSC’s numbers, which were determined based on a different calculation methodology from SED’s.

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On the substance, Rivendell also disagrees with several aspects of OSC’s determination. In response to OSC’s preliminary report, Rivendell and OSC jointly measured the dimensions of all rooms used by Rivendell, and Rivendell presented its allocation of space used in whole or in part by SEIT, which was 6.22% SEIT exclusive space and 14.53% of administration space at 277 Third Avenue. OSC’s draft report does not directly address those contentions, and Rivendell continues to believe they are correct. More specifically, Rivendell disagrees with two OSC deviations from the allocations made by Rivendell.

First, Rivendell disagrees with OSC’s conclusion that the basement “library” was common space, not SEIT exclusive space. There is no factual basis for OSC’s conclusion. While this space is a “library” today, it was not a library during the audited years. It was used exclusively for SEIT instruction and for preparation and meetings by SEIT teachers as described below. OSC claims that this was not exclusively SEIT program space because while SEIT services can be authorized at the provider’s site, SED advised that “that was not what usually occurred at Rivendell.” OSC’s contention is incorrect for several reasons.

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First, this space was not used only for direct SEIT instruction; it also was used by all of Rivendell’s SEIT teachers to prepare materials and to conduct conferences with parents, teachers and administrators. Thus, this space was used exclusively for SEIT program purposes, even if one were to assume (incorrectly) that no direct SEIT services in this space were authorized by the CPSE.

Second, to the extent this room was used for direct SEIT instruction, that was authorized by the CPSEs. As was explained to OSC in Rivendell’s prior response to the preliminary report, the students who received instruction in this space were special education students (mostly autistic students), who needed such services outside the classroom in the quieter, less distracting and more emotionally secure environment available on site as part of their pre-school program, to facilitate their successful adaptation to the inclusion classroom. The CPSEs understood that they would receive this on-site out-of-classroom SEIT instruction as part of their pre-school program at Rivendell, and that was part of their mandate for SEIT services.

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25

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 12 of 15

To the extent SED told OSC that the CPSEs “usually” do not authorize SEIT services at the site, we do not know which students SED was referring to or why SED believed that out-of-classroom SEIT instruction was not part of the mandated program, during the audited years, as Rivendell was not party to those discussions. This is another flaw in OSC’s process – that OSC discussed this issue with SED without Rivendell present. SED representatives participated in the exit conference by telephone, but they did not say anything about this, or any other issue, during the exit conference. Accordingly, Rivendell has no direct knowledge of what OSC and SED said to each other about this issue and, therefore, had no opportunity to address any misunderstanding that might have influenced whatever SED told OSC or any misunderstanding in what OSC concluded from what SED said.

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Third, whether or not OSC agrees that some direct SEIT instruction should have been given in this space during the audited years, this space still was used exclusively by the SEIT program at that time. The only use made of this space was the use by SEIT teachers, as described above, for SEIT instruction, preparation and conferences. No other use was made of this space; the other Rivendell programs did not need or use this space at all. OSC has no evidence of any use of this space by any other Rivendell program because there was no such use. Therefore, there is no factual basis to re-classify it as common space as OSC has done.

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The second improper deviation from Rivendell’s allocations in OSC’s calculation of space allocations is that OSC used dimensions that were different from the agreed dimensions jointly measured by OSC and Rivendell, with no explanation as to why it did so or where OSC’s numbers come from. While the differences were small, OSC should use the agreed measurements. That was the whole point of doing a joint measurement.

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Unapproved Facility

Rivendell disagrees with OSC’s contentions that the RCM does not allow reimbursement for costs associated with space at 272 Third Avenue used by the SEIT program because the space was not approved. As was explained by Rivendell in detail previously, the SEIT program used 193 square feet, which was 37.28% of the space at 272 Third Avenue, exclusively both for SEIT instruction and SEIT training, staff and supervisor meetings, as well as mandated team meetings and meetings with parents to discuss strategies for and progress of individual students.

The regulations do not set forth or mandate any particular formal approval process. While it is true that Rivendell did not obtain formal SED approval before commencing use of this space in September 2012, the space is appropriate space for the purposes for which it is used, and SED was well aware of this space and how Rivendell was using it during the audited years. In connection with rate-setting, SED was provided a space allocation analysis that included the space at 272 Third Avenue. Moreover, SED conducted a program audit of Rivendell during the

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29

SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 13 of 15

2012-13 year, during which SED conducted a site visit. SED did not make any comment in connection with the site visit or its review of the space usage plan during its rate-setting process that there was any issue regarding failure to obtain formal SED approval of the 272 Third Avenue space.² To disallow the costs associated with this space because the space was unapproved would elevate form over substance.

In any event, again SED made its own adjustments to the rent and other expenses related to use of space reported on the CFR as part of its own rate-setting process. For the reasons explained above, given that SED thoroughly examined the space allocations, its findings should take precedence over OSC's.

Travel Expenses

SED already disallowed the travel expenses OSC proposes to disallow in its draft report. Therefore, there is no reason for SED to address those expenses, and they should be excluded from the final report.

If those expenses are re-considered, Rivendell disagrees with OSC's contention that its attendance at the conference in Capetown, South Africa in 2011-12 was "not necessary." As of 2011-12, RCM Section II.31 allowed reimbursement for attendance at international conferences. This was a conference of the World Association of Infant Mental Health ("WAIMH"). Rivendell is a long-time member of WAIMH, an organization held in high esteem by scientists, educators and mental health professionals. This conference, and other WAIMH conferences, provided an opportunity to share and receive the latest information about state of the art intervention for children who are developing atypically. Information from this conference, and all WAIMH conferences attended by Rivendell staff, were routinely shared with SEITs at staff meetings, making the cost of attendance a sensible investment for the school and the SEIT program.

OSC has stated no reason why it believes that attendance by one SEIT teacher and one administrator at this conference was "not necessary", and there is no such reason. Indeed, OSC acknowledges on page 8 of its draft report that WAIMH conferences served the useful functions described above but nevertheless concludes, without stating any reason, that the costs "were not eligible for reimbursement." That is true of the 2013-14 costs for conferences in Edinburgh and Vancouver, because Section II.59.B of the 2013-14 RCM expressly provided that "out-of-country travel is not reimbursable." In contrast, Section II.59.B of the 2011-12 RCM did not contain that provision, and OSC cannot apply a subsequent amendment of the RCM retroactively to 2011-12 travel. Accordingly, there is no basis for OSC's statement that the costs of attending the 2011-12 conference "were not eligible for reimbursement."

² SED's Regional Associate did advise Rivendell in July 2015 in connection with the program audit that approval of this space was needed. She described the process for obtaining such approval and simple and routine.

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SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 14 of 15

Education Costs

Rivendell disagrees with OSC's proposed disallowance of \$6,579 paid to one SEIT teacher for tuition reimbursement. As was explained to the auditors, Rivendell's Executive Director approved this tuition reimbursement for an employee viewed as exceptional and whom Rivendell had identified as a leader. Rivendell wanted her to receive this additional training to help prepare her for a leadership position. This was consistent with how Rivendell always had interpreted its tuition reimbursement policy; it had done this previously for another employee.

Tuition reimbursement is expressly authorized by RCM Section II.14.B(2)(e), which provides in relevant part:

"Employer-provided educational assistance costs are reimbursable as compensation only when the course or degree pursued is relevant to the field in which the employee is working and the employer has exhausted all Federal and other grant funds available to cover the education costs. The employee must complete and receive a passing grade for the course(s) for which the employer/provider paid. Appropriate records of course completion must be maintained by the employer/provider. Such costs are limited to tuition charged by the educational institution, textbooks, fees and training materials. Reasonable costs of specialized programs specifically designed to enhance the effectiveness of executives or managers are reimbursable."

The amounts paid by Rivendell meet these requirements. OSC does not contend otherwise.

OSC's contention appears to be based on a provision in Rivendell's Employee Handbook, which states: "Each professional staff member can be reimbursed up to \$500 a year for continuing education appropriate to their field and approved by the Executive Director." OSC contends that this provision limits reimbursement to \$500 per year, so that anything Rivendell approved beyond that amount should be disallowed, notwithstanding the RCM provision quoted above. OSC is incorrect for two reasons.

First, the reimbursement provision in the RCM quoted above does not refer to the agency's policies. The RCM does not preclude reimbursement for tuition reimbursement that is more generous than what is stated in the agency's policies. Thus, by implication it allows such tuition reimbursement as a reimbursable expense.

Second, OSC is interpreting Rivendell's Employee Handbook incorrectly and differently from how Rivendell has interpreted it over the years. With all due respect, Rivendell knows better than the OSC what it intends by its own Employee Handbook. Specifically, Rivendell always has interpreted its Employee Handbook to mean that the Executive Director will

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Comment

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SHEBITZ BERMAN COHEN & DELFORTE, P.C.

ATTORNEYS-AT-LAW

Steven Lynch

November 20, 2015

Page 15 of 15

routinely approve only up to \$500 of professional development education expenses but in exceptional cases, where there is an employee of exceptional merit whom the educational program will help prepare to assume greater responsibility, the Executive Director may, in his or her discretion, approve larger amounts. As mentioned above, Rivendell always has interpreted and implemented its Employee Handbook this way. Moreover, Rivendell's interpretation of its own policy is consistent with other provisions of the Employee Handbook, which emphasize Rivendell's commitment to "select, place, train and promote the most qualified individuals based on relevant factors such as work quality, attitude and experience." The handbook also states that this commitment "applies to all the terms of employment including, but not limited to, hiring, placement, promotion, termination, layoff, recall, transfer, leave of absence, compensation and training. Advancement to positions of greater responsibility is based on an individual's abilities and demonstrated performance."

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Comment
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In short, Rivendell's interpretation of its own policies is entitled to deference and is correct; OSC cannot substitute its own self-serving and unduly narrow interpretation of Rivendell's handbook provision for Rivendell's own consistent interpretation and implementation of the handbook. Moreover, in any event the RCM does not preclude reimbursement of education benefits more generous than what the agency's Employee Handbook provides, so long as they otherwise meet the requirements of the RCM, as Rivendell's payments at issue indisputably did.

Other Expenses

Rivendell does not dispute the proposed disallowance of expenses for certain token gifts purchased for staff by the former Executive Director and \$737 of purchases not supported by an invoice or receipt. However, we note that the purchases for which there were no invoices or receipts were valid purchases of educational items. There were no invoices or receipts only because Rivendell could not locate the receipts for these relatively small purchases years after the fact.

III. Conclusion

We respectfully submit that OSC's draft report is incorrect, and in some cases misleading, for the reasons stated above. We trust that the final report will be modified to correct those errors and change the misleading wording.

Very truly yours,



Frederick J. Berman

FJB:jp

State Comptroller's Comments

1. The State Comptroller's legal authority to audit the costs submitted by the Rivendell School on the CFRs it submits to the State Education Department is expressly cited on pages 3 and 10 of the report.
2. We noted throughout the report any instances where SED had previously disallowed certain costs. Our audit is independent of any actions that SED may have previously taken on certain costs. We provide the details of our proposed disallowances to SED so that any adjustments to reported costs are not duplicated.
3. We use the term "over-allocation" to mean more than the proper amount. It does not indicate explicitly or implicitly whether or not any discrepancy was deliberate.
4. We use the term "undocumented" to mean that documentation to support charges to the audited programs was not available or provided to us. It does not indicate explicitly or implicitly whether or not any discrepancy was fabricated.
5. We have revised our report to state that SED had previously disallowed some of these travel expenses.
6. We use the term "unnecessary" to mean that the cost is of a type generally not recognized as ordinary and necessary for the operation of the approved special education program. We use the term "ineligible" to mean that the expense was not eligible for reimbursement, per the Manual. In either case, it does not indicate explicitly or implicitly whether or not the travel was for personal reasons.
7. We disagree. On page 6 of our report, we provide sufficient detail of and basis for our findings related to extra payments for five SEIT teachers. We did not omit any relevant context from the report.
8. Rivendell's "determination" of what constituted extra work was not documented in any of its policies and procedures. Moreover, Section 200.9 of the Regulations of the Commissioner of Education states that providers shall maintain adequate records to document both direct and/or indirect service hours provided as well as time spent. Rivendell officials did not comply with this requirement.
9. Our audit determined that Rivendell did not maintain documentation to support all the work hours reported on the CFR. The Manual requires that all compensation costs must be supported. Moreover, the Manual provides specific guidelines for SEIT providers to follow regarding billable time and documentation.
10. We disagree. As stated on page 6 of the report, the Manual is not silent on how compensation should be supported.
11. The Manual states that payroll must be supported by employee time records. The Manual does not exclude salaried employees from maintaining time records.
12. We disagree. The Manual refers to section 200.9 of the Regulations of the Commissioner of Education, which states that entities operating approved programs must retain all pertinent accounting and allocation records supporting related data directly or indirectly related to the establishment of tuition rates. In addition, costs will not be reimbursable on field audit without appropriate written documentation.
13. The "time sheets" that Rivendell refers to are the Attendance Verification Forms (AVFs). The AVFs only accounted for direct time. Further, we did not substitute our judgment for how

- “extra work” was determined. Section 200.9 requires that the total time be adequately supported including direct and indirect time. In addition, Rivendell’s own policy states that both billable and non-billable time must be documented. However, Rivendell officials could not support all of the costs (and corresponding hours) they reported on their CFRs.
14. Our report does not state that time sheets for indirect and non-direct time must be provided to establish a documented payroll. Furthermore, we were not inconsistent in our assessment. Given the absence of time and attendance sheets, we relied on the aforementioned AVFs to support charges for direct and non-direct costs. However, the AVFs did not support the “extra work” payments in question. This portion of our audit focused on the extra work payments (as opposed to direct and non-direct personal service charges). Also, see Comment no. 13.
 15. Rivendell’s assertion is incorrect regarding the Commissioner’s Regulations under Section 200.9. These regulations relate to the establishment of “Tuition rates for approved programs educating students with disabilities ages 3 to 21 years old who have been enrolled pursuant to articles 81 and 89 of the Education Law” rendering them fiscally not programmatically driven and support the requirement for Rivendell to keep the appropriate time records for reimbursement.
 16. Rivendell’s assertion is incorrect. In fact, Pendency SEIT was already funded by the DoE and, as such, should not have been included in the preschool SEIT’s cost. In addition, Rivendell provided records that supported only 1,534 hours of this employee’s time – including the 462 hours spent in Rivendell’s DoE-funded Pendency program.
 17. We did not double-count. We did not deduct the 462 hours; instead, we took note that of the 1,534 hours for which Rivendell officials provided supporting documentation, 462 of these hours actually belonged to its Pendency program. Nevertheless, Rivendell officials reported to the SEIT program both the employee’s base salary as well as the “extra work” payment.
 18. Rivendell had no written policies or guidelines for “extra work.” During the audit, Rivendell officials advised us that the expectation was 70 percent of 1,610 hours (1,127 is 70 percent of 1,610) will be direct hours.
 19. The “extra work” compensation costs should not be allocated. Also, see Comment no. 17.
 20. There was no calculation error related to the 45 additional hours. We will credit V.H. for 45 hours based on information provided to us after the issuance of the draft report.
 21. Section 200.9 of the Regulations of the Commissioner of Education states that providers shall maintain adequate records to document both direct and/or indirect service hours provided as well as time spent. Rivendell officials did not comply with this requirement.
 22. We agree that there is nothing in the Manual that requires the hours reported to be specifically based on Attendance Verification Forms. However, the reason we reviewed Attendance Verification Forms is because Rivendell did not maintain traditional time records. Regardless, Section 200.9 requires that providers maintain supporting documentation for both direct and indirect time worked by employees.
 23. We acknowledge SED’s annual review of the allocation expenses as part of its annual desk review of provider CFRs. Further, as part of their routine follow-up on our audit recommendations, SED officials reconcile our recommended disallowances to their previous disallowances, if any, and adjust them as appropriate.
 24. The Consolidated Fiscal Reporting and Claiming Manual defines three types of space for

allocation purposes: program exclusive; agency administration; and common space. It is unclear that the library was program exclusive. As noted in the report, Rivendell operated other programs, including a Montessori preschool, which was primarily privately funded. In addition, SED advised us that the library space was not an appropriate location for the provision of SEIT services. Further, because SED did not approve of the library space as SEIT administrative space, common space was the appropriate classification for the library.

25. We acknowledge that the library space could have been used to provide certain services to SEIT students. However, SED advised us that the space was not an appropriate location for the provision of SEIT services. Consequently, we maintain that “common space” is the appropriate space classification for the library.
26. Our report does not state that SED told OSC that the CPSEs usually do not authorize SEIT services at the provider’s site. In fact, we acknowledge that CPSEs can prescribe that SEIT sessions be rendered at such site. We will revise the report to clarify the reference that the provision of SEIT sessions was not what usually occurred at Rivendell. Moreover, SED advised us that the library space was not an appropriate location for the provision of SEIT services, nor was it approved for SEIT administrative purposes. In addition, Rivendell’s Compliance Assurance Plan Status Report (Final Report Issued August 8, 2014) stated that Rivendell must work with the CPSEs to identify appropriate locations, consistent with Education Law, for the provision of SEIT.
27. As previously noted, SED advised us that the library space was not an appropriate location for the provision of SEIT services and was not approved for administrative purposes.
28. The square footage calculations we used in the report are accurate. In fact, we discussed and confirmed our calculations with Rivendell officials during the audit. Further, we provided Rivendell officials with our final calculations prior to the issuance of the draft audit report.
29. As stated on page 8 of the report, the Manual states that program and fiscal issues require prior written approval of the Commissioner’s designees when costs for an education program expansion are expected to be reimbursed fully or partially through the tuition rate. Rivendell, however, did not receive the required SED approval.
30. We do not dispute that SED’s review was conducted using square footage measurements provided by Rivendell officials. However, we determined that the measurements officials communicated to SED were incorrect. Consequently, we performed our own measurements and used the correct amounts of square feet.
31. We disagree. Section II.31 of the Manual does not specifically allow reimbursement for attendance at international conferences; instead, it is silent. We also noted that SED disallowed international travel costs during its desk review of the reported expenses.
32. As stated on page 8 of the report, the primary reason for the trip was to present Rivendell’s preschool program internationally. Further, there was no documentation of the tangible benefit that students received as a result of the trip. As such, this cost was not necessary for the operation of the approved special education program. Also, as previously noted, SED disallowed these costs upon desk review.
33. We have revised our report to clarify that the travel expenses were either unnecessary or ineligible.
34. We disagree. As stated on page 9 of the report, Section II.14.B.1 of the Manual directs that training and educational costs are reimbursable provided the benefit is established

by written school policy. Rivendell's written policy provides for the reimbursement of education costs up to \$500 per person per year. Given the Manual's requirement, it is unreasonable to contend that Rivendell should be reimbursed for costs that are inconsistent with its own formal policy.

35. Rivendell's policy on staff development is clear. It states that an employee can be reimbursed up to \$500 in any year for continuing education appropriate to their field. Also, see Comment no. 34.