



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
Birch Family Services, Inc.**



Executive Summary

Purpose

To determine whether the costs reported by Birch Family Services, Inc. (Birch) on its Consolidated Fiscal Reports (CFRs) were reasonable, necessary, directly related to the special education program, and sufficiently documented pursuant to the State Education Department's (SED) Reimbursable Cost Manual (RCM) and the Consolidated Fiscal Reporting and Claiming Manual (CFR Manual). The audit focused primarily on expenses claimed on Birch's CFR for the fiscal year ended June 30, 2013, and included certain expenses claimed on its CFR for the fiscal year ended June 30, 2012.

Background

Birch is a New York City-based not-for-profit organization authorized by SED to provide preschool special education services to children with disabilities who are between the ages of three and five years. During the 2012-13 school year, Birch served about 1,103 students. The New York City Department of Education (DoE) refers students to Birch and pays for its services using rates established by SED. The DoE is reimbursed by SED for a portion of its payments to Birch. For the two fiscal years ended June 30, 2013, Birch reported approximately \$52.1 million in reimbursable costs for the SED preschool cost-based programs (full-day and half-day Special Classes and a Special Class in an Integrated Setting). In addition to the preschool cost-based programs, Birch operates two other SED-approved preschool programs: Evaluations and 1:1 Aides. However, payments for services under these other programs are based on fixed fees. Birch also operates an SED school-age special education program; Headstart, Day Care, and Universal Pre-Kindergarten (UPK) programs; a Training Institute; Day Rehabilitation and Residential programs; Family Support Services; a job coaching program; and the Herbert G. Birch Fund (Fund) - a related fundraising entity.

Key Findings

For the two fiscal years ended June 30, 2013, we identified \$1,376,319 in reported costs that did not comply with the RCM's requirements, as follows:

- \$605,667 in compensation paid to employees who did not work for Birch's SED preschool cost-based programs. These individuals provided services to Birch's SED fixed-fee 1:1 Aides program, and to the Day Care, Headstart, UPK, and other Birch programs;
- \$310,778 in incorrectly allocated other than personal service costs, including \$208,506 in property-related costs and \$102,272 in Day Care costs that were incorrectly allocated to the SED preschool cost-based programs;
- \$227,831 in compensation costs that should have been charged to the Fund, Birch's Training Institute, Evaluations, and other Birch programs rather than to the SED preschool cost-based programs. Moreover, to the extent that the compensation costs were reimbursable, fees collected from services provided by the Training Institute should have been used to offset some of these costs;
- \$92,862 in incorrectly allocated personal service costs, including \$54,281 in Day Care costs, \$14,637 in agency administrative costs, \$14,602 in fringe benefits, and \$9,342 in fundraising costs;

- \$88,266 in insufficiently documented costs, including \$53,384 in related services costs, \$16,796 in rent expenses, \$9,599 in staff reimbursements, \$5,487 in legal expenses, and \$3,000 in utility expenses;
- \$38,096 in excessive executive compensation for three executives that did not comply with the RCM's requirements. The compensation for the three executives exceeded SED's reimbursement limits for the preschool cost-based programs; and
- \$12,819 in bonuses. Payment of these bonuses did not comply with the requirements in the RCM.

Key Recommendations

To SED:

- Review the recommended disallowances resulting from our audit and make the appropriate adjustments to Birch's CFRs and reimbursement rates, as warranted.
- Work with Birch officials to help ensure their compliance with SED's reimbursement requirements.
- Investigate the \$284,063 in compensation costs in the Other Matters section of this report and determine if a disallowance is warranted.

To Birch:

- Ensure that costs reported on future CFRs comply with the RCM's requirements.

Other Related Audits/Reports of Interest

[New York Center for Child Development, Inc.: Compliance With the Reimbursable Cost Manual \(2015-S-101\)](#)

[Brookville Center for Children's Services, Inc.: Compliance With the Reimbursable Cost Manual \(2016-S-75\)](#)

State of New York
Office of the State Comptroller

Division of State Government Accountability

December 20, 2017

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

Mr. Matthew Sturiale
President and CEO
Birch Family Services, Inc.
104 West 29th Street, Third Floor
New York, NY 10001

Dear Ms. Elia and Mr. Sturiale:

The Office of the State Comptroller is committed to helping State agencies, public authorities, and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for the 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, entitled *Compliance With the Reimbursable Cost Manual*, of our audit of the costs submitted by Birch Family Services, Inc. to the State Education Department for the purposes of establishing preschool special education tuition reimbursement rates. This 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

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Background

Birch Family Services, Inc. (Birch) is a New York City-based not-for-profit organization authorized by the State Education Department (SED) to provide preschool special education services to children with disabilities who are between the ages of three and five years. During our audit period, Birch operated three SED rate-based preschool special education programs: full-day and half-day Special Classes (SC) and Special Class in an Integrated Setting (SCIS). For purposes of this report, these programs are referred to as the SED preschool cost-based programs.

During the 2012-13 school year, Birch served about 1,103 students. In addition to the SED preschool cost-based programs, Birch operated two other SED-approved preschool programs: Evaluations and 1:1 Aides. However, payments for services under these other programs are based on fixed fees, as opposed to the cost-based rates established through financial information reported on the annual Consolidated Fiscal Reports (CFRs) Birch files with SED. Birch also operates an SED-authorized program that serves school-age special education students; Headstart, Day Care, and Universal Pre-Kindergarten (UPK) programs; a Training Institute; Day Rehabilitation and Residential programs; Family Support Services; a job coaching program; and the Herbert G. Birch Fund (Fund) - a related fundraising entity.

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

Section 4410-c of the Education Law authorizes the State Comptroller to audit the expenses reported to SED by special education service providers for preschool children with disabilities. For the two fiscal years ended June 30, 2013, Birch reported approximately \$52.1 million in reimbursable costs for the SED preschool cost-based programs. This audit focused primarily on expenses claimed on Birch's CFR for the fiscal year ended June 30, 2013, and included certain expenses claimed on its CFR for the fiscal year ended June 30, 2012.

Audit Findings and Recommendations

According to the RCM, costs will be considered for reimbursement provided such costs are reasonable, necessary, directly related to the special education program, and sufficiently documented pursuant to the guidelines in the RCM. For the two fiscal years ended June 30, 2013, we identified \$1,376,319 in reported costs that did not comply with SED's requirements for reimbursement. These ineligible costs included \$977,275 in personal service costs and \$399,044 in other than personal service (OTPS) costs (see Exhibit at end of this report). SED, pursuant to a desk review, previously disallowed some of these costs.

Personal Service Costs

According to the RCM, personal service costs, which include all salaries and fringe benefits (compensation) paid or accrued to employees on the provider's payroll, must be reported on the CFR as either direct care costs (e.g., teachers' salaries) or non-direct care costs (e.g., administrators' salaries). The RCM also states that final costs are determined on field audit. Moreover, compensation costs must be based on approved and documented payrolls, which must be supported by employee time records prepared during, not after, the time period for which the employee was paid. For the two fiscal years ended June 30, 2013, Birch reported approximately \$40.5 million in personal service costs for its SED preschool cost-based programs. We identified \$977,275 in personal service costs that did not comply with SED's requirements for reimbursement.

1:1 Aides

According to the RCM and the CFR Manual, all costs (compensation and allocated direct and indirect costs) for 1:1 aides should be reported on the provider's CFRs under the fixed-fee 1:1 Aides program. Moreover, compensation of employees who perform tasks for more than one program must be allocated among all programs for which they work; and entities must maintain appropriate documentation reflecting the hours used in this allocation. In addition, direct care student-to-staff ratios shall not exceed the staffing levels in SED's program approval letter. Any net excess of staff will not be included as part of reimbursable costs.

On its CFRs for the two fiscal years ended June 30, 2013, Birch reported \$3,387,332 (\$2,785,781 in salaries and \$601,551 in fringe benefits) in compensation costs for 472 full-time and part-time employees and allocated \$1,182,667 of those costs, for 144 of the employees, to the SED preschool cost-based programs. Birch officials asserted that the 144 employees provided services as 1:1 aides, teaching aides, and teaching assistants to Birch's programs. However, Birch officials did not provide time studies to support this assertion. We reviewed personnel files, payroll records, class rosters, available Personnel Action Forms, and Class Assignment records and determined that just 45 of the 144 employees, who received a total of \$577,000 (\$474,732 in salaries and \$102,268 in fringe benefits) in compensation, provided services to the preschool special education programs. Consequently, we recommend that SED disallow \$605,667 (\$1,182,667-\$577,000) in compensation costs because they were insufficiently documented and/or should not have been charged to the SED preschool cost-based programs.

Non-Program Costs

The RCM states that final costs are determined upon field audit and will be considered for reimbursement provided such costs have adequate substantiating documentation. Moreover, compensation of employees who perform tasks for more than one program must be allocated among all programs for which they work; and entities must maintain appropriate documentation reflecting the hours used in this allocation. According to the Regulations of the Commissioner of Education (Regulations), any cash receipts that reduce the cost of an item will be applied against the item, except for gifts, donations, and earned interest from other public funds. In addition, the costs of evaluations and related statistical data must be reported in a separate cost center. On its CFRs for the two fiscal years ended June 30, 2013:

- Birch reported \$629,221 in compensation costs for six Training Institute (training and development) employees and allocated \$148,422 of the \$629,221 to the SED preschool cost-based programs. According to Birch officials, the six employees provided training to Birch employees and to external groups. However, Birch officials did not provide allocation records or other documentation to support the \$148,422 that was allocated to the SED preschool cost-based programs. Moreover, Birch collected \$226,739 in fees for the training provided by the Training Institute during the two-year period and did not offset the fees against the costs incurred for the six employees.
- Birch reported \$357,974 in compensation costs for three Evaluations and Intake employees and allocated \$79,409 of those costs to the SED preschool cost-based programs. Birch officials acknowledge that compensation costs for two of the three employees should not have been allocated to the SED preschool cost-based programs. They assert that the third employee provided services to both the SED preschool cost-based and the Evaluations programs. However, Birch officials did not provide documentation to support their assertion.

Consequently, we recommend that SED disallow a total of \$227,831 (\$148,422+\$79,409) in compensation costs because they were insufficiently documented, not applicable to the SED preschool cost-based programs, and/or were not offset by related revenues.

Allocation of Compensation Costs

In addition to the SED-approved preschool cost-based programs, Birch operates two SED fixed-fee preschool programs, as well as Day Care, Headstart, UPK, and other programs. According to the RCM, compensation of employees who perform tasks for more than one program must be allocated among all programs for which they work; and entities must maintain appropriate documentation reflecting the hours used in this allocation. In addition, allocation methods, as well as the statistical basis used to calculate allocation percentages, must be documented and retained for each fiscal year. Moreover, allocation of expenses should reasonably reflect the level of services provided to each program (cost center). According to the CFR Manual (Appendix H), providers should report all costs of their Day Care programs that are in excess of the approved duration of their SED SCIS program under the Day Care Costs in Excess of Integrated Program (Code 9164). For example, if the Day Care program operates from 7 a.m. to 5 p.m. (10 hours), and

the SCIS program operates from 9 a.m. to 2 p.m. (five hours), providers are instructed to report the costs of the five hours of Day Care operation under Code 9164. Further, if the provider is funded by the New York City Agency for Child Development, the provider is directed to report all costs, revenues, and related statistical data for that program under Program Code 9164. The RCM also requires that expenses related to fundraising and special events be reported separately. For the two fiscal years ended June 30, 2013, Birch incorrectly allocated \$92,862 in expenses to the SED preschool cost-based programs, as follows:

- \$54,281 in Day Care costs. These costs should have been allocated to the Day Care Costs in Excess of Integrated Program.
- Birch, on its CFRs for the fiscal year ended June 30, 2013, reported \$1,156,829 in compensation costs for six non-direct care employees. These costs were reported under various direct care position titles even though the six employees provided support services to the entire agency. Therefore, the costs should have been reported in the agency administration section of the CFR and allocated across the programs that benefited from the services. Birch incorrectly allocated \$14,637 of these costs to the SED preschool cost-based programs.
- Birch, on its CFRs for the fiscal year ended June 30, 2012, reported \$6,390,320 in fringe benefit costs and incorrectly allocated \$14,602 of those costs to the SED preschool cost-based programs. Birch asserts that a modified ratio value method was used to allocate the fringe benefit costs. However, Birch officials did not provide sufficient documentation to support the basis for the allocation.
- Birch, on its CFRs for the two-year period, reported \$4,716,330 in compensation costs for certain administrative staff who provided management services, such as human resources, budgeting, cash receipts, cash disbursements, and payroll, to both Birch and the Fund. Birch incorrectly allocated \$9,342 of the compensation costs to the SED preschool cost-based programs. These costs should have been allocated to the Fund.

Consequently, we recommend that SED disallow a total of \$92,862 (\$54,281+\$14,637+\$14,602+\$9,342) in compensation costs that were incorrectly allocated to the SED preschool cost-based programs and/or were insufficiently documented.

Executive Compensation

According to the RCM, compensation for an entity's staff whose function is that of Executive Director and Assistant Executive Director will be directly compared with the regional median compensation for comparable administration job titles of public school districts. Reimbursement shall not exceed the median compensation paid to comparable personnel in public schools for similar work and hours of employment in the region in which the entity is located. For the two fiscal years ended June 30, 2013, Birch reported \$1,385,110 in compensation costs for its Executive Director and two Assistant Executive Directors, as follows:

- For the two years, Birch reported a total of \$509,721 (\$266,160 for fiscal year ended June 30, 2012 and \$243,561 in fiscal year ended June 30, 2013) in compensation for its Executive Director. The Executive Director was a 0.884 Full-time Equivalent (FTE) employee during

the fiscal year ended June 30, 2012 and a 0.803 FTE during the fiscal year ended June 30, 2013. The total modified regional median reimbursement limit for the two years was \$456,911. As a result, the Executive Director's compensation exceeds the regional median reimbursement limit by \$52,810 (\$509,721-\$456,911).

- For the fiscal year ended June 30, 2012, Birch reported a total of \$448,377 in compensation for its two Assistant Executive Directors (AEDs). The total regional median reimbursement limit for the two AEDs was \$425,655. As a result, the AEDs' compensation exceeds the regional median reimbursement limit by \$22,722. In total, compensation for the three executives exceeded the regional median limit by \$75,532 (\$52,810+\$22,722). Consequently, we recommend that SED disallow \$38,096; the portion of the excessive compensation allocated to the SED preschool cost-based programs. SED, pursuant to a desk review, previously disallowed some of these costs.

Bonuses

According to the RCM, a bonus is a non-recurring and non-accumulating (i.e., not included in base salary of subsequent years) lump sum payment in excess of regularly scheduled salary which is not directly related to hours worked. A bonus may be reimbursed if it is based on merit as measured and supported by employee performance evaluations. Moreover, bonuses are restricted to direct care employees.

For the two fiscal years ended June 30, 2013, Birch reported \$25,500 in bonuses for three non-direct care employees. We recommend that SED disallow \$12,819 in bonuses – the amount allocated to the SED preschool cost-based program – because the payment of the bonuses did not comply with the requirements in the RCM.

Other Than Personal Service Costs

During the two fiscal years ended June 30, 2013, Birch reported approximately \$11.6 million in OTPS costs for the SED preschool cost-based programs. We identified \$399,044 of those costs that did not comply with SED's reimbursement requirements.

Allocation of Property and Related Costs

According to the CFR Manual, when programs share the same geographical location or more than one agency/program is served at the same location, property-related costs, such as utilities, repairs and maintenance, depreciation, and leases or mortgage interest must be allocated among the agencies/programs benefitting from those costs. In addition, square footage is the recommended method for allocating property and property-related costs. Further, the RCM states that an expenditure that cannot be charged to a specific program must be allocated across all programs that benefited from the expenditure. Moreover, entities must use allocation methods that are fair and reasonable, and allocation percentages should be reviewed and adjusted on an annual basis. The RCM also states that allocation methods, as well as the statistical basis used to calculate allocation percentages, must be documented and retained for each fiscal year.

During the two fiscal years ended June 30, 2013, the SED preschool cost-based programs shared space with other Birch programs. However, Birch did not maintain sufficient documentation to support the allocation of property-related costs among the programs. In total, Birch incorrectly allocated \$310,778 in property-related costs to the SED cost-based programs, as follows:

- \$203,067 in rent, utilities, repairs, and maintenance costs. These costs should have been allocated to the other Birch programs that shared the same location.
- \$102,272 in property-related expenses. Birch operated SED preschool cost-based programs and Day Care programs at four instructional sites. However, Birch did not provide documentation to support the \$102,272 in costs allocated to the SED preschool cost-based programs.
- \$5,439 for supplies and administrative costs. These costs should have been allocated to the Fund.

Consequently, we recommend that SED disallow \$310,778 in incorrectly allocated costs that were charged to SED's preschool cost-based programs.

Insufficiently Documented Expenses

According to the RCM, payments to consultants must be supported by itemized invoices which indicate the specific services actually provided; and for each service, the date(s), number of hours provided, and the fee per hour; and the total amount charged. In addition, when direct care services are provided, the documentation must indicate the names of students served, the actual dates of service, and the number of hours of service provided to each child on each date. Further, rental costs of buildings and facilities are reimbursable provided occupancy costs are based on actual documented rental charges, supported by bills or vouchers. The RCM also states that vehicle logs must be maintained indicating the dates of travel, destination, purpose, mileage, and related costs such as tolls, fuel charges, and repair costs for all program-owned vehicles. Generally, costs associated with retainers for legal services are not reimbursable unless the fee represents payment for actual documented reimbursable services rendered. Costs resulting from violations of, or failure by, the entity to comply with federal, State, and/or local laws and regulations, are not reimbursable.

For the two fiscal years ended June 30, 2013, Birch could not provide sufficient documentation to support:

- \$53,384 in direct care consultant costs. Birch officials did not provide sufficient documentation detailing the actual services provided, as required.
- \$19,796 in rent and utility costs for its Mill Basin instructional site. Birch did not provide documentation to support these costs.
- \$8,827 in staff travel. Birch officials did not maintain vehicle logs or other documentation to support these costs.
- \$5,487 in legal costs, including \$4,988 for a legal settlement and \$499 in retainer fees. Birch officials told us that the settlement cost resulted from a dispute between Birch and a former program employee. However, insufficient documentation was provided to

support this cost. In addition, Birch did not provide documentation to show that the \$499 in retainer fees were for actual services.

- \$772 in cell phone costs. Birch reimbursed an employee for the use of her personal cell phone. However, officials did not provide sufficient documentation to show that the cell phone costs were necessary or directly related to the operation of the SED preschool cost-based programs.

Consequently, we recommend that SED disallow \$88,266 (\$53,384+\$19,796+\$8,827+\$5,487+\$772) in insufficiently documented OTPS costs.

Other Matters

The financial data a provider submits to SED is reviewed and the tuition rate setting methodology is applied in accordance with Section 200.9(f)(2) of the Regulations and the Tuition Rate-Setting Methodology Memo. The tuition rate-setting methodology limits reimbursable non-direct care costs to 42.86 percent of the provider's reimbursable direct care costs. Moreover, the RCM states that allocation of non-direct care compensation among direct care job titles on the CFR is not allowable.

For the two fiscal years ended June 30, 2013, Birch allocated \$284,063 in compensation costs for seven administrative (program non-direct care) employees who were classified on the CFRs under various direct care positions. We determined on audit that these employees should be classified as non-direct care employees. Consequently, we recommend that SED investigate the allocation of these expenses and determine if a disallowance under the methodology is warranted.

Recommendations

To SED:

1. Review the recommended disallowances resulting from our audit and make the appropriate adjustments to Birch's CFRs and reimbursement rates, as warranted.
2. Work with Birch officials to help ensure their compliance with SED's reimbursement requirements.
3. Investigate the \$284,063 in compensation costs in the Other Matters section of this report and determine if a disallowance is warranted.

To Birch:

4. Ensure that costs reported on future CFRs comply with the RCM's requirements.

Audit Scope, Objective, and Methodology

We audited the costs reported on Birch's CFRs to determine whether they were reasonable, necessary, directly related to the special education program, and sufficiently documented, pursuant to SED guidelines. The audit focused primarily on expenses claimed on Birch's CFR for the fiscal year ended June 30, 2013, and included certain expenses claimed on its CFR for the fiscal year ended June 30, 2012.

To accomplish our objective, we reviewed the Education Law, the Regulations, the RCM, the CFR Manual, Birch's CFRs, and relevant financial and program records for the audit period. We also interviewed Birch officials, staff, and its independent auditors to obtain an understanding of their financial and business practices. In addition, we selected and reviewed a judgmental sample of reported costs to determine whether these costs were supported, program-related and reimbursable. Specifically, we reviewed costs that were considered high risk and reimbursable in limited circumstances, based on prior audit report findings, such as salary and consultant costs. Our samples were based on the relative materiality of the various categories of costs reported and their associated levels of risk. Our samples were not designed to be projected to the entire population of reported costs. Also, our review of Birch's internal controls focused on the controls over the CFR preparation process.

We conducted our performance 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 objective. We believe that the evidence obtained during our audit provides a reasonable basis for our findings and conclusions based on our audit objective.

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 Birch officials for their review and formal comment. Their comments were considered in preparing this final report and are included at the end of it. In their response, SED officials agreed with our recommendations and indicated they will take steps to address them. However, in their response, Birch officials disagreed with most of our proposed disallowances. Our rejoinders to certain Birch comments are included in the report's State Comptroller 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.

Contributors to This Report

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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

Birch Family Services, Inc.
Schedule of Submitted and Disallowed Program Costs
for the 2011-12 and 2012-13 Fiscal Years

Program Costs	Amount per CFR	Amount Disallowed	Amount Remaining	Notes to Exhibit
Personal Services				
Direct Care	\$37,572,823	\$898,719	\$36,674,104	A-E, H,
Agency Administration	2,941,934	*78,556	2,863,378	K-O, R-W
Total Personal Services	\$40,514,757	*\$977,275	\$39,537,482	
Other Than Personal Services				
Direct Care	\$9,054,638	\$175,452	\$8,879,186	A, F-M,
Agency Administration	2,498,269	223,592	2,274,677	P-Q, S, V-X
Total Other Than Personal Services	\$11,552,907	\$399,044	\$11,153,863	
Total Program Costs	\$52,067,664	*\$1,376,319	\$50,691,345	

*SED, pursuant to a desk review, previously disallowed some of these costs.

Notes to Exhibit

The following Notes refer to specific sections of SED's 2012-13 (unless otherwise stated) RCM and CFR 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 Birch officials during the course of our audit.

- A. RCM Section II - Generally, costs will be considered for reimbursement provided such costs are reasonable, necessary, directly related to the special education program and are sufficiently documented.
- B. RCM Section II(13)(A)(4)(a) - Compensation (i.e., salaries plus fringe benefits) for an entity's staff whose function is that of Executive Director, Assistant Executive Director or Chief Financial Officer will be directly compared to the regional median compensation for comparable administration job titles of public school districts, as determined and published annually by the Department's Basic Educational Data Systems (BEDS). Reimbursement of employee compensation for these job titles shall not exceed the median compensation paid to comparable personnel in public schools for similar work and hours of employment in the region in which the entity is located. Compensation for an "Executive Director" providing services to an Article 81 and/or Article 89 funded program will be compared to the median "Superintendent-Independent" compensation for the region in which the entity is located and compensation for an Assistant Executive Director and Chief Financial Officer will be compared to the median compensation for "Assistant Superintendent."
- C. RCM Section II(13)(A)(4)(e) - Direct care student to staff ratios shall not exceed the approved staffing levels supported by the Department's program approval letter. Any net excess of staff will not be included as part of reimbursable costs in the program's reconciliation tuition rate.
- D. RCM Section II(13)(A)(10) - A merit award (or bonus compensation) shall mean a non-recurring and non-accumulating (i.e., not included in base salary of subsequent years) lump sum payment in excess of regularly scheduled salary, which is not directly related to hours worked. A merit award may be reimbursed if it is based on merit, as measured and supported by employee performance evaluations and does not exceed three and a half percent of the base salary of the direct care employee who is receiving the merit award. In addition, merit awards: (a). Are restricted to direct care titles/employees as defined by the Reimbursable Cost Manual's Appendix A-1 and those in the 100 job code series as defined by the Consolidated Fiscal Reporting and Claiming Manual's Appendix R.
- E. RCM Section II(14)(A)(4)(b)(July 2011 Edition) - Allocation of non-direct care compensation among various direct care job titles is not allowable. Staff should be reported in the job code title for which they were hired and supported by salary agreements and job descriptions. For example, an individual who fills the position and holds the responsibility and authority of Executive Director should be reported 100% as Executive Director.
- F. RCM Section II(14)(B) - Costs of legal, accounting or consulting services and related costs incurred in connection with reorganization of the agency, including mergers and acquisitions, unless mandated by the State Education Department, are not reimbursable. Costs associated with retainers for legal, accounting or consulting services are not

reimbursable unless the fee represents payment for actual documented reimbursable services rendered, provided the services are not for lobbying efforts. Lobbying activities include, but are not limited to, advocating for legislation and activities associated with obtaining grants, contracts, cooperative agreements or loans.

- G. RCM Section II(21) - Costs resulting from violations of or failure by, the entity to comply with Federal, State and/or local laws and regulations, are not reimbursable.
- H. RCM Section II(23) - Costs of organized fund raising (i.e., financial campaigns, endowment drives or solicitation of gifts and bequests) to raise capital, or to obtain contributions are not reimbursable.
- I. RCM Section II(41)(B)(4) - The share of rental expense allocated to programs funded pursuant to Article 81 and/or Article 89 is based on documented and reasonable criteria, such as square footage utilization, when more than one program is operated in a rented facility.
- J. RCM Section II(41)(B)(1) - Occupancy costs are based on actual documented rental charges, supported by bills, vouchers, etc. Donated rent is not reimbursable.
- K. RCM Section II(44)(A)(1) - Any cash receipts that reduce the cost of an item will be applied against the item, except gifts, donations and earned interest from other than public funds.
- L. RCM Section II(44)(A)(3) - Any income earned from investment of public funds (e.g., tuition) resulting from the operations of approved programs will be considered applied income to reduce the costs of the program(s).
- M. RCM Section III(1) - Costs will not be reimbursable on field audit without appropriate written documentation of costs.
- N. RCM 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.
- O. RCM Section III(1)(B) - Actual hours of service are the preferred statistical basis upon which to allocate salaries and fringe benefits for shared staff who work on multiple programs. Entities must maintain appropriate documentation reflecting the hours used in this allocation for seven years.
- P. RCM Section III(1)(C)(2) - Adequate documentation includes, but is not limited to, the consultant's resume, a written contract which includes the nature of the services to be provided, the charge per day and service dates. All payments must be supported by itemized invoices which indicate the specific services actually provided; and for each service, the date(s), number of hours provided, the fee per hour; and the total amount charged. In addition, when direct care services are provided, the documentation must indicate the names of students served, the actual dates of service and the number of hours of service to each child on each date.
- Q. RCM Section III(1)(D) - All purchases must be supported with invoices listing items purchased and indicating date of purchase and date of payment, as well as canceled checks. Costs must be charged directly to specific programs whenever possible. The particular program(s) must be identified on invoices or associated documents.
- R. RCM Section III(1)(M)(1)(i) - Salaries of employees who perform tasks for more than one program and/or entity must be allocated among all programs and/or entities for which they work.

- S. RCM Section III(1)(M)(2) - Entities operating programs must use allocation methods that are fair and reasonable, as determined by the Commissioner's fiscal representatives. Such allocation methods, as well as the statistical basis used to calculate allocation percentages, must be documented and retained for each fiscal year for review upon audit for a minimum of seven (7) years. Allocation percentages should be reviewed on an annual basis and adjusted as necessary.
- T. RCM Section IV(2)(F) - All 1:1 aide costs (salaries, fringe benefits of the aide and allocated direct and indirect costs) should be reported in one separate cost center on the providers' financial reports.
- U. CFR Manual Page 8.6 - Expenses and revenues and FTE enrollment for approved 1:1 teacher aides (preschool and school age) must be reported as a separate column (Program Code 9230).
- V. CFR Manual Page 8.13 - Expenses related to fundraising are reported on Schedule CFR-2 in Column 7, "Other Programs." Expenses related to fundraising must not be reported as an agency administration expense on Schedule CFR-3 (lines 1 through 42).
- W. CFR Manual Page 41.3 - Report all costs of day care program in excess of the approved duration of the Integrated program in Program Code 9164. For example, if their Day Care program operates from 7 a.m. to 5 p.m. (10 hours) and the Integrated program operates from 9 a.m. to 2 p.m. (5 hours), providers must report the costs of the 5 hours of Day Care operation in Program Code 9164. In addition, if the provider is funded by the Agency for Child Development, such providers are directed to report all costs, revenues and related statistical data in Program Code 9164.
- X. CFR Manual Page 42.2 - If agency administrative offices and program offices are located in the same building, property related costs must be allocated using square footage as the statistical basis. These costs include expenses such as utilities, repairs and maintenance, depreciation, leases or mortgage interest.

Agency Comments - State Education Department



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY
12234

DEPUTY COMMISSIONER
Office of Performance Improvement and Management Services
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November 3, 2017

Mr. Kenrick Sifontes
Audit Director
Division of State Government Accountability
NYS Office of the State Comptroller
59 Maiden Lane, 21st Floor
New York, NY 10038

Dear Mr. Sifontes:

The following is the New York State Education Department's (SED) response to the draft audit report, 2016-S-74, Compliance with the Reimbursable Cost Manual: Birch Family Services, Inc. (Birch).

In addition to the actions that will be taken in response to the specific recommendations described below, SED 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 Birch 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 Birch's CFRs and reimbursement rates, as warranted.

We agree with this recommendation. SED 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 Birch officials to help ensure their compliance with SED's reimbursement requirements.

We agree with this recommendation. SED will continue to provide technical assistance whenever requested and will strongly recommend the Birch officials take advantage of our availability to help them better understand the standards for reimbursement as presented in Regulation and the RCM. Furthermore, Consolidated Fiscal Report (CFR) training is available online on SED's webpage. SED recommends that all individuals signing the CFR certification

statements, namely Executive Directors and Certified Public Accountants, complete this training. This training is a requirement for preschool special education providers upon approval and reapproval.

Recommendation 3: Investigate the \$284,063 in compensation costs in the Other Matters section of this report and determine if a disallowance is warranted.

We agree with this recommendation. When establishing the tuition rate based on audit, SED will reclassify the expenses associated with the seven administrative positions as non-direct care expenses and calculate whether this reclassification results in a non-direct care cost screen of all or a portion of these expenses.

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

Yours truly,



Sharon Cates-Williams
Deputy Commissioner

cc: Christopher Suriano
Belinda Johnson
Suzanne Bolling

Agency Comments - Birch Family Services, Inc.



Pamela A. Madeiros
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November 13, 2017

VIA ELECTRONIC EMAIL

Kenrick Sifontes
Audit Director
Office of the State Comptroller
Division of State Government Accountability
59 Maiden Lane, 21st Floor
New York, New York 10038

**RE: State Education Department
Compliance with Reimbursable Cost Manual
Birch Family Services, Inc.
Draft Report//Report #2016-S-74**

Dear Mr. Sifontes:

We have reviewed the above captioned Draft Report concerning the expenses claimed by Birch Family Services, Inc. (Birch) on its Consolidated Fiscal Reports (CFRs) for the fiscal year ending June 30, 2013, and including certain expenses claimed for the fiscal year ending June 30, 2012, and provide the following comments and challenges to specific findings presented. As the auditors are aware, the Birch management team very recently experienced significant changes in personnel which present certain challenges when attempting to give context to the processes and reporting of the former management team. Current management remains committed, however, to providing as complete a response to the auditors' findings as possible given our current understanding of the audited years.

We note, however, as reflected in the Draft Report narrative, that a portion of the costs identified by the auditors have already been "(disallowed by) SED, pursuant to a desk review" and appreciate that acknowledgement.

Personal Service Costs

1:1 Aides

Birch acknowledges that all costs associated with services provided by 1:1 aides in the capacity of a 1:1 aide should be reported on the CFR under the fixed-fee 1:1 aides program cost center. As the auditors are aware, and as NYSED acknowledges, the activities in which a 1:1 aide may be engaged may extend beyond that portion of the school day when students are present, as well as require the redeployment of individual 1:1 aides in the event of the absence of the student to whom the 1:1 aide is assigned. Accordingly, 1:1 aides often perform tasks beyond the 1:1 aide program and costs associated with the performance of those tasks are appropriately allocated to the cost center which derived the benefit of those tasks.

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Birch engaged in an exhaustive analysis of each of the 144 employees' time records and assignments in response to the auditors' request for supporting documentation and appreciates the auditors' acknowledgement that a significant portion of the auditors' initial determination has been revised in recognition of the necessary and cost-effective redeployment of certain 1:1 aides.

However, Birch reasserts its challenge that the remaining costs associated with 1:1 aides who performed functions beyond their 1:1 aides function were not properly charged to the SED cost-based program as the auditors allege.

As the auditors are aware, the first preliminary draft of audit findings dated March 10, 2017, raised concerns around the allocation of certain percentages of 1:1 aides' salaries to the cost-based SED program. A number of examples indicated that 11% of 1:1 aides' salaries had been allocated to the cost-based programs rather than the 9230 cost center. After extensive research, Birch provided the auditors with our understanding of the rationale for the allocation of 11% to the cost-based programs.

During the 2 year audit period ending 6/30/2013, BFS' 1:1 aides worked 6.5 hours per day. It is important to note that NYSED has confirmed that the 1:1 aide rate is "based on 5 hours of reported 1:1 salary and fringe costs" as per email from Suzanne Bolling on April 6, 2017 to Pamela Madeiros (See: Attachment: RSU). In summary:

1. Staff (1:1 aides) worked 5.75 hours each day with students. This included the instructional day in the classroom (direct costs) and then safely placing the children on and off the bus (indirect costs).
2. The same staff then participated in activities such as those outlined below in point 4 for an additional .75 hour each school day beyond their assigned 1:1 aide responsibilities. These hours could not be charged to the 9230 cost center because students were not present.
3. **Based on a 6.5 hour work day, 5.75 hours equals 89% of total time and .75 hours equals the remaining 11% of total time. This allocation methodology was applied for each of the audited years.**
4. The following are a sample of activities in which 1:1 aides participated during the period charged to the cost-based programs:
 - Participate in team meetings for assigned 1:1 student. This would include annual reviews, behavior plan modifications, medical issues or protocols. Many of the children we support are complex and it is often critical to have the 1:1 aide present at meetings to provide their input. It is also an opportunity to provide support and guidance to the entire team.
 - Meetings with the related service providers to discuss strategies to be used during classroom activities. For example, the Speech provider would advise the 1:1 aide on how to utilize an augmentative communication system or a Physical Therapist may provide training on how to navigate steps for someone with gross motor difficulties.

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*See State Comptroller's Comments, page 30.

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- Participate in lesson planning meetings and group instruction activities. It is critical that the 1:1 aides meet with the classroom teacher in order to review and plan the next day’s lesson and help prepare the activities for that lesson as it pertains to their 1:1 student, specifically.
- Prepare learning materials for the 1:1 student including creating tasks for independent workstation activities, setting up or revising communication systems and modifying visual supports, if appropriate.
- Review data collection related to tasks completed and skills demonstrated by the 1:1 student with the teacher; review and report on IEP goals and progress in preparation for quarterly reviews.
- Participate in required trainings and learning sessions including, but not limited to, compliance, health and safety, curriculum and instruction and individual specific conditions and protocols.
- Participate in staff meetings during which the site administrator shares new/revised policies/procedures/requirements, discuss upcoming events, family meetings, etc.
- Assist the classroom team in cleaning up and preparing the environment for the next day. In addition to focusing on 1:1 specific preparation, the aide may also assist with the appropriate sanitation of the materials in the classroom.

Birch developed an allocation methodology for 1:1 aides which appropriately designated 1:1 costs to the separate cost center as required (89%) with the remaining time (11%) appropriately allocated to the cost-based programs. Birch believes it employed an appropriate allocation methodology: the proportionate allocation was well reasoned and not arbitrary as the auditors might suggest. Birch has provided the auditors substantial documentation in support of the validity of this 89%/11% allocation methodology which has been demonstrated to be reasonable, necessary and cost-effective, as required by the RCM. Application of this allocation methodology, then, compels restoration of the proposed disallowance.

Birch also reasserts its challenge of an additional \$147,039 salary and \$31,937 fringe for a sum total of \$178,976 recommended disallowances asserted in the 1:1 aide report. This amount reflects 55 identified 1:1 aides who were attributed to the SED cost-based program for 11%. Of the 55 aides, only 15 aides continue to be employed by Birch. Identification of the 1:1 aides and a breakout of the contested disallowances are again herein provided. (See: Attachment: 1:1 Aides)

Birch also challenges the auditors’ subtle suggestion that the direct care student-to-staff ratio ever exceeded the staffing levels in SED’s program approval letter. Point of fact, any redeployment of 1:1 aide personnel fell well within the ratios set out in each of Birch’s approval letters and was analyzed and accepted by SED through the rate setting process as reflected in applicable tradj sheets.

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Non-Program Costs

Training Institute Employees

Birch reasserts its challenge of the auditors' assertion that allocation records and other documentation provided to the auditors did not support \$148,422 of the reported compensation costs allocated to the SED preschool cost-based programs associated with certain Training Institute (training and development) employees. As shared with the auditors, these employees provided training to Birch employees and to external groups.

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Comment 8

Birch reasserts its position that the salaries in question were appropriately reported as direct care programmatic staff development/training expenses on schedule CFR-1 and CFR-4 and 4A (staff training). The activities in which those individuals engaged were clearly "Program related" - staff training and development. The CFR Manual authorizes the allocation of these costs through either hours of service calculation or time study, or such alternative method that is "equitable and conform(s) to generally accepted accounting principles". Birch believes "units of service" is just such an equitable method, both fair and reasonable.

Under this analysis, all training costs may be allocated under position title code 347 based upon revenues billed for services provided during both audited school years in each program cost center.

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Comment 9

During school year 2012-13, program revenues were reported as follows:

- Program 9103 - \$15,113,880
- Program 9104 - \$5,968,167
- Program 9117 - \$766,360
- Program 9161 - \$3,612,384
- Training Revenue - \$114,629

Accordingly, the percentage of revenue per source is:

59.73%
23.52%
3.03%
14.28%
.45% , respectively

All remaining staff training costs were appropriately reported as expenses against the Federal IDEA 611/619 Grants.

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Similarly, during school year 2011-12, program revenues were reported as follows:

- Program 9103 - \$14,564,074
- Program 9104 - \$5,682,705
- Program 9117 - \$831,972
- Program 9161 - \$2,958,893
- Training Revenue - \$112,110

Accordingly, the percentage of revenue per source is:

60.31%
23.53%
3.45%
12.25%
.46%

Again, all remaining staff training costs were appropriately reported as expenses against the Federal IDEA 611/619 Grants.

Accordingly, the auditors' proposed disallowance should be "redistributed" according to the units of service allocation set out above based upon the identified percentages associated with each program cost center.

These costs then, are, in fact, directly related to Program and must be reimbursed accordingly.

In addition, Birch challenges the auditors' assertion that Birch had not provided documentation sufficiently reflective of the SED cost-based program design of the training. Clearly, the Job Posting, the Employee Certification & Professional Experience and the Staff Training Sign-In Roster documentation provided to the auditors complies with the RCM requirements relating to "Meetings and Conferences" in support of the allocation to the SED preschool cost-based programs. (See: Attachment: Sign-In)

As clearly, the direct service providers employed by Birch in its OPWDD program are not teachers, teacher assistants, nor para-professionals and therefore could not/would not benefit from training sessions around the TEACCH system which ONLY relates to SED cost-based programs. The costs are exclusively SED program related.

Birch does not challenge the auditors' assertion that certain training fees should have offset the costs incurred for the training staff, proportionate, however, to the costs associated with the SED cost-based program. As the attached material reflects, the appropriate offset is a function of the number of training staff hours attributable to the SED cost center. (See: Attachment: Revenue Offset) Thus, the offset attributable to the SED cost center for 2011-12 is \$22,140; and the appropriate offset for 2012-13 is \$35,039. We request modification of the auditors' finding accordingly.

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Evaluation and Intake Employees

Birch also reasserts its position that the individual staff member (Abby S.) who the auditors claim performed evaluation functions exclusively, in fact acted as the Related Services Coordinator, supervising the clinical staff who provided both classroom therapies as well as evaluation services substantiated by the documentation provided to the audit team and attached here again (See: Attachment: Job Description). Birch also directs the auditors' attention to the previously provided sample calendar week for each of the audit years which reflect AS's engagement in Related Services Coordinator activities (See: Attachment: Calendar). Importantly, Birch reported 206,045 related service sessions on the SED1, compared with 3,224 evaluation units - a clear reflection of the substantial related service coordination efforts and activities required to be performed by AS, contrasted with evaluation related activities. In fact, as the attached documentation reflects, the SED-4 attests to the related service demands which required coordination. (See: Attachment: SED-4)

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Comment 11

The related service data totaled the following:

2011-12

- 113,627.5 clinical mandates in program 9103
- 62,511 clinical mandates in program 9104
- 12,165.5 clinical mandates in program 9117
- 9,852.5 clinical mandates in program 9161
- 1,261 units in program 9190 (Evaluations)

2012-13

- 154,547 clinical mandates in program 9103
- 53,172 clinical mandates in program 9104
- 6,541 clinical mandates in program 9117
- 28,199 clinical mandates in program 9161
- 1,596 units in program 9190

The data reported on the CFR's in both audited school years clearly support allocation of the coordinators' costs to all SED cost centers.

In addition, we are attaching materials which include data reported for the total direct care staff FTE's on schedule CFR-4 for the cost-based and evaluation program during both school years. (See: Attachment: CFR-4)

Taken together, the documentation supports restoration of the proposed disallowance in its entirety.

Allocation of Compensation Costs

Birch does not challenge the auditors' determination that certain Day Care program costs, non-direct care employee compensation costs, fringe benefit costs and administrative staff compensation costs were erroneously allocated to the SED preschool cost-based program.

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We reaffirm our position, however, that as relates to the fringe benefit costs, Birch did apply a reasonable allocation method to calculate the appropriate percentage of costs to be reported to the SED cost centers; more specifically, a modified ratio value methodology.

Executive Compensation

Birch does not challenge the auditors' determination that certain compensation expenses exceeded NYSED's approved levels. Birch appreciates the auditors' acknowledgement that "SED, pursuant to a desk review, previously disallowed" these costs. Birch has assured alignment of compensation with NYSED levels in subsequent years.

Bonuses

Birch does not challenge the auditors' finding that certain compensation amounts were awarded to select non-direct care personnel. Birch's intention was merely to recognize these individuals' outstanding efforts since a permanent salary enhancement was not sustainable given the uncertainty of reimbursement levels year to year. Birch has strengthened its internal controls to assure compliance with the RCM relating to the award of bonuses.

Other Than Personal Service Costs

Allocation of Property and Related Costs

Birch challenges the auditors' determination that certain property related costs were inappropriately allocated to the SED cost-based programs rather than to other Birch complementary programs such as Head Start and day care which shared space with the SED programs.

Birch appreciates the opportunity to provide the proper context to its operations, especially as relates to its integrated special education programming. As the auditors may be aware, NYSED has recently renewed its commitment to providing integrated special education programming to the full extent possible and appropriate. Birch had pioneered the integrated special education model, providing programming to students with IEPs alongside their general education peers in partnership with Universal Pre-K, Early Learning and even private-pay daycare programming in full recognition that some, if not all, of these general education/typical peer settings' programming would exceed the 5½-hour special education program. This expectation is shared by NYSED, as well.

Accordingly, ever mindful of the clear distinction between special education ("Program") and non-special education costs, we challenge the auditors' assessment that Birch could not adequately support the basis used in the allocation of costs amongst and between these related cost centers. As the auditors acknowledge, Birch has provided the audit team with its cost allocation methodology, each component of which is wholly consistent with the directives of the Reimbursable Cost and CFR manuals; more specifically, directly charging programs (cost centers) which enjoy the benefit of the incurred cost wherever possible; allocating facility costs by square footage; and allocating non-facility costs using student FTE's.

In sum, Birch appropriately identified costs which were exclusively special education costs and allocated those costs to Program. Birch does not challenge the auditors' assessment that some shared

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costs may have been inadvertently included within the calculation of special education programming costs (including the identified repairs and maintenance costs, as well as certain facility-related costs).

However, we believe that the auditors' calculations fail to properly recognize certain common areas, as well as certain administrative space specifically as relates to the proposed disallowance of \$203,067 in rent, utilities, repairs and maintenance costs. We challenge the auditors' exclusion of square footage associated with the training room from the calculation of administrative space. We believe this calculation error is based on the auditors' previous misperception that the training area was associated with some separate entity – a training Institute – which we have subsequently clarified with the auditors is not the case. Accordingly, the training room must be considered shared agency administrative space and the costs associated must be allocated using ratio value. As indicated above, Birch concurs with the auditors' assessment that training revenue must offset training costs, including related facility costs. Therefore, the related reimbursable property costs for the training room and BTI Training staff should be included in that calculation to adequately cover all of the costs incurred for those services.

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Comment 13

We have attached a summary chart of square footage by program (See: Attachment: Square Footage) which accounts for all areas of actual space utilized by Birch. Based on the square footage analysis, the disallowance resulting from the rental expenses should be reduced from \$65,121 to \$1,529 in school year 2011-12 and from \$73,110 to \$8,282 in school year 2012-13.

Birch respectfully requests that all of the property related costs totaling \$203,067 at the Birch administration building in rent, utilities, leasehold improvements and repairs and maintenance be adjusted based on the revised square footage schedule. This includes a reduction of the rent in sum total of \$138,231 and an additional adjustment for utilities, repairs, leasehold improvements, maintenance and other facility related matters.

Insufficiently Documented Expenses

While Birch does not challenge certain of the auditors' findings, we reassert our challenge of the proposed disallowance of \$19,796 in rent and utility costs associated with the Mill Basin instructional site.

Birch management has, at all times, attempted to be as responsive as possible to the auditors' frequent requests for amplification, explanation or clarification of documents or materials, as reflected in the numerous email exchanges and notations made during the audit process. We are pleased to provide the auditors with information, for example, around the NY Metropolitan Area's Consumer Price Index (CPI), as relates to the base rent escalation, which was easily accessible to all on a government website and upon which the Birch rent analysis was based, as the CFO shared with the auditors during the audit process. The CPI data provided in the preliminary report, and seemingly, upon which the auditors' based the proposed disallowance, was illustrative (Department of Labor Statistics) and does not reflect the NY Metro CPI as does the data chart attached to this response which the CFO has shared with the auditors was the appropriate measure. (See: Attachment: Rental)

We more specifically challenge the auditors' analysis used to support the proposed finding of non-reimbursable rent. In the first instance, as the attached chart reflects, each rental payment was appropriately calculated consistent with the terms of the amended rental agreement: Base + CPI percentage with appropriate enhancement of \$3,000 (1/1/2003; 7/1/2012). (See: Attachment: Rental) The auditors' analysis also failed to account for a deferred rental payment/entry made June 30, 2013.

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Taken together, our analysis supports the methodology by which rental expenses were calculated and the proposed disallowance should be adjusted accordingly.

We also reassert our challenge of the auditors' proposed disallowance of \$5,489 in legal costs associated with a legal settlement for want of supporting documentation. As shared with the auditors, Birch had offered a settlement to resolve an employee dispute, on advice of counsel. As the attached confidential document reflects, the claimed legal expenses were supported by detailed documentation by the law firm handling the matter. (See: Attachment: Legal Services)

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We appreciate the opportunity to provide comment to the Draft Report and welcome the opportunity to work with SED in assessing the applicability of the auditors' recommendations.

Very truly yours,

GREENBERG TRAURIG, LLP


Pamela A. Madeiros

PAM/hac
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CC: Suzanne Bolling, NYSED
Thalia Melendez, NYSED
James Kampf, NYSED
Matthew Sturiale, Birch
Josh Scher, Birch

State Comptroller's Comments

1. We disagree. Birch officials could not provide sufficient documentation to show that the 1:1 aides should have been charged to the SED cost-based programs.
2. Birch officials did not provide sufficient documentation to show that 11 percent of the compensation for the 1:1 aides should have been charged to the SED cost-based programs. Instead, they provided a listing of sample activities that some 1:1 aides might perform. However, they could not provide any support that the 1:1 aides actually performed these services.
3. In their response to our draft report, Birch officials referred to an April 2017 SED email. This email stated that there are limited circumstances where a 1:1 aide is justified to work in a SED cost-based program, providers often do not have adequate records, or the use of 1:1 aides is not justified. This is exactly the case with Birch. Birch officials merely provided a list of 14 aides and their total compensation. Birch officials did not provide adequate documentation to support that the additional time worked was related to the SED cost-based programs. Therefore, the costs for the 1:1 aides should not have been charged to SED cost-based programs.
4. While we agree with Birch's calculations, they could not provide adequate documentation to show that 11 percent of the 1:1 aides' time should have been charged to the SED cost-based programs.
5. These costs are for services provided by 1:1 aides. Therefore, they should be charged to the fixed-fee 1:1 Aides Cost Center and not to the cost-based programs.
6. Our audit report does not suggest that Birch's allocation methodology was arbitrary.
7. The language in our report does not suggest that the direct care student-to-staff ratio exceeded the staffing levels in SED's program approval letter. Instead, the purpose of our comment was to point out that Birch officials did not provide sufficient documentation to show that these compensation costs were necessary to support the SED cost-based programs.
8. We disagree. Birch officials did not provide sufficient documentation to support the allocation of these costs to the SED cost-based programs.
9. We maintain that Birch officials did not provide sufficient documentation to show that these costs should be allocated to the SED cost-based programs. Birch's analysis considers State and local government revenue received for the provision of special education services; however, it does not adequately explain how such revenue equated to revenue generated for the rental of space and the provision of training. Units of service, as defined by the CFR Manual, are the workload measure by which programs are evaluated. Birch officials did not show how they determined that program revenues are an equitable workload measurement for its training services and the cost-based programs.
10. Our report does not comment on the content of the training. Instead, we stated that Birch officials did not provide sufficient documentation to show how costs were allocated. Although Birch officials provided some training session sign-in sheets, these documents did not adequately support the \$148,422 charged to the SED cost-based programs.
11. Our report does not indicate that an individual employee exclusively performed evaluation services. Instead, we concluded that the compensation for two employees and part

of the compensation for a third employee should not have been allocated to the SED cost-based programs. In its response, Birch provided a job description, some personnel records, a calendar, and some CFR schedules, to show that the third employee also acted as the Related Services Coordinator and supervised classroom clinical staff. However, these documents were insufficient to support the \$79,409 charged to the SED cost-based programs.

12. We do not agree that Birch allocated property-related costs as required by the RCM and the CFR Manual.
13. We did not exclude square footage for Birch's training room in our calculation of administrative space. Using the guidance in the CFR Manual, we recognized the training room area as shared agency administrative space.
14. Our analysis allowed the \$3,000 enhancements in the lease agreement for 2003 and 2012. In addition, we recognized payments made in lieu of utility expenses pursuant to the modifications in the lease agreements.
15. As stated in the report, the \$5,487 in allocated legal costs consisted of a \$4,988 settlement and a \$499 retainer. According to the RCM, costs associated with retainers for legal services are not reimbursable unless the fee represents payment for actual documented reimbursable services rendered. In addition, costs resulting from violations or failure by an entity to comply with federal, State, and/or local laws and regulations, are not reimbursable. Birch officials did not provide the settlement details or supporting documentation for the services associated with the retainer. Birch officials, in their response to the draft audit report, provided a November 2017 letter from the legal firm that handled this case. We reviewed the document and determined that it does not show the \$5,487 was related to the SED cost-based programs.