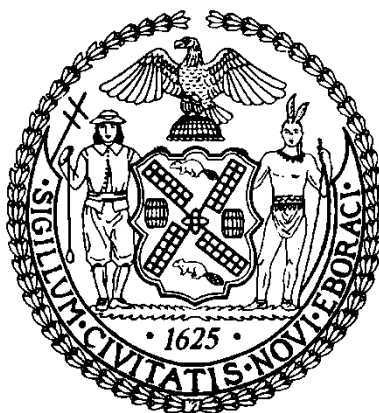


CITY OF NEW YORK OFFICE OF THE COMPTROLLER

**John C. Liu
Comptroller**

FINANCIAL AUDIT

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Audit Report on the Procurement of Direct Student Services by the Department of Education

FK10-147A

January 24, 2012



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
1 CENTRE STREET
NEW YORK, N.Y. 10007-2341

John C. Liu
COMPTROLLER

January 24, 2012

To the Residents of the City of New York:

My office has audited the Department of Education's (DOE) procurement of Direct Student Services. We audit City agencies such as DOE as a means of ensuring that they are accountable for the use of public funds, comply with applicable rules and regulations, and fulfill their responsibilities.

To serve students, DOE employs pedagogic staff and procures consultant services from companies and individuals. During Fiscal Year 2010, DOE expended \$836.2 million on Direct Student Services. A large part of the Direct Student Services that DOE provides are made up of Related Services. Related Services are defined as "developmental, corrective and other support services required to assist a student with a disability to benefit from instruction" and include services such as occupational, physical, and speech therapy. Under federal and State laws, DOE is mandated to provide students Related Services of the type, frequency, duration, and manner specified in their Individualized Educational Programs and within prescribed timeframes.

The audit revealed that DOE may not have made maximum reasonable efforts to contract with Related Service providers. Consequently, DOE does not have a sufficient pool of contracted resources to provide mandated Related Services. As a result, DOE is authorizing the use of independent consultants through RSA Forms, which may result in higher rates paid under lesser performance standards, monitoring constraints, and insurance requirements. More important, according to DOE's Division of Instructional and Information Technology Related Service Status Reports for June 2010, DOE failed to provide Related Services to 72,302 of 285,736 students referred for such services—more than 25 percent.

Additionally, DOE did not ensure that available DOE internal or contracted resources were utilized prior to authorizing the use of independent consultants; review consultants' past performance prior to retaining services; or maintain and register independent consultant agreements. Consequently, DOE may have unnecessarily engaged independent consultants and may have employed consultants incapable of satisfactorily providing services to students. Additionally, DOE cannot effectively monitor independent consultants and hold them sufficiently accountable for their performance.

The results of our audit have been discussed with DOE officials and their comments have been considered in preparing this report. Their complete written response is attached to this report.

If you have any questions concerning this report, please e-mail my audit bureau at audit@comptroller.nyc.gov.

Sincerely,



John C. Liu

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*The City of New York
Office of the Comptroller
Financial Audit*

**Audit Report on the Procurement of Direct Student Services
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AUDIT REPORT IN BRIEF

The Department of Education (DOE) serves approximately one million students in more than 1,600 schools as well as non-public (i.e., charter, parochial, private, and out-of-City) school students. To serve students, DOE employs pedagogic staff and procures consultant services from companies and individuals. During Fiscal Year 2010, DOE expended \$836.2 million¹ on Professional Services for Direct Educational Services to Students (Direct Student Services).

When procuring Direct Student Services, DOE must comply with New York State Education Law Article 52-A, § 2590 (h), DOE's Procurement Policy and Procedures (PPPs), Other Than Administrative Individual Consultants Standard Operating Procedures (SOPs), and other relevant laws and rulings. DOE's PPPs and SOPs set forth policies and procedures for procuring goods and services and assign individuals and units with specific responsibilities in the procurement process. These rules and regulations are intended in part to: ensure the wise, prudent, and economical use of public money; make as consistent as possible the uniform application of these policies; foster broad-based competition; and meet the needs of DOE students, staff, and offices.

A large part of the Direct Student Services DOE provides are made up of Related Services. Related Services are defined as "developmental, corrective and other support services required to assist a student with a disability to benefit from instruction" and include: counseling, occupational therapy, physical therapy, speech therapy, health education services, vision services, and hearing education services. Under federal and State laws, DOE is mandated to provide students Related Services of the type, frequency, duration, and manner specified in their Individualized Educational Programs (IEPs) and within prescribed timeframes.

Audit Findings and Conclusions

It is not clear whether DOE made maximum reasonable efforts to contract with Related Service providers because it: did not utilize open-ended solicitations or re-solicit for Related Service providers more frequently to directly engage needed providers; imposed overly

¹ Of the \$836.2 million, DOE reported a total of \$699.4 million as Direct Student Services expenses incurred and paid and \$136.8 million in related adjusting entries for expenses incurred in Fiscal Year 2010.

restrictive staffing requirements on prospective contractors; discouraged prospective contractors because it allowed contracted consultant companies to also act as independent consultants; and did not assign and award contracts based on a systematic needs analysis. Consequently, DOE does not have a sufficient pool of contracted resources to provide mandated Related Services. As a result, DOE is authorizing the use of independent consultants through Related Service Authorization (RSA) Forms to provide these services, which may result in higher rates paid under lesser performance standards, monitoring constraints, and insurance requirements. More important, according to DOE's Division of Instructional and Information Technology (DIIT) Related Service Status Reports for June 2010, DOE failed to provide Related Services to 72,302 of 285,736² students referred for such services—more than 25 percent (see Appendix I).

Additionally, DOE did not ensure that available DOE internal or contracted resources were utilized prior to authorizing the use of independent consultants; review consultants' past performance prior to retaining services; or maintain and register independent consultant agreements. Consequently, DOE may have unnecessarily engaged independent consultants; may have employed consultants incapable of satisfactorily providing services to students; and cannot effectively monitor independent consultants and hold them sufficiently accountable for their performance.

Audit Recommendations

To address these issues, we recommend that DOE should:

- Utilize open-ended solicitations or solicit more frequently for Related Service providers in order to retain sufficient contracted consultants to provide Related Services which cannot be fulfilled through DOE staff.
- Ensure that minimum staffing capacity requirements for future solicitations are not overly restrictive.
- Reconsider its practice of allowing contractors to also act as independent consultants while paying them at their highest contract rate for the service provided and not holding them to the associated contract terms.
- Assign and award future contracts based on a systematic needs analysis that considers all factors affecting the need for services including, but not limited to, the length, frequency, and duration of services.
- Ensure that it provides all students Related Services of the type, frequency, duration, and manner specified by their IEPs and within prescribed timeframes.

² DOE advised us that DIIT Related Service Status Report data reflects students who may be included in more than one service category because a single student may be recommended for more than one service. Therefore, the above numbers may be inflated.

- Institute controls to ensure that available DOE personnel and contracted consultant companies are utilized prior to authorizing the use of independent consultants. These controls should include but not be limited to making written determinations that DOE personnel and contracted consultant companies are not available to perform services and employing computer system edits to ensure that DOE personnel and contracted consultant companies are successively exhausted prior to engaging independent consultants.
- Complete Performance Evaluations and enter cautionary information in VENDEX.
- Review consultants' past performance prior to retaining services.
- Maintain RSA Forms used to engage independent consultants.
- Register all contracts and agreements as required by New York State Education Law Article 52-A, § 2590 (h) and DOE procurement rules.

Agency Response

In its response, DOE primarily objected to the report's "shameful commentary...that the Department failed to provide related services to more than 25 percent of the students recommended for the services in School Year 2010" on the basis that reported DIIT Related Service Status Report data was "untested" and that service provision was not within our scope. However, DOE's objections are unfounded because DOE itself compiled, reported, and used DIIT Related Service Status Report data to make procurement decisions as well as to track, monitor, and report on service provision. Further, since DOE used this data as the sole basis for determining the level of Related Services that must be provided through contracted companies, it is well within the scope of our audit.

DOE also stated it was concerned and took issue with the report's "unsupported findings, leaps of logic and largely stale and unviable recommendations." Nevertheless, DOE acknowledged the report's findings by agreeing to implement or partially implement many of our recommendations. In particular, DOE indicated that its new Request for Proposals (RFP) would address the report's recommendations and improve its contracting efforts. However, during the course of the audit, DOE did not inform the audit team that the RFP was completed or share this critical document with them. As a result, we cannot determine whether the new RFP will, in fact, address the recommendations and improve DOE's contracting process.

INTRODUCTION

Background

DOE serves approximately one million students in more than 1,600 schools as well as non-public (i.e., charter, parochial, private, and out-of-City) school students. To serve students, DOE employs pedagogic staff and procures consultant services from companies and individuals. During Fiscal Year 2010, DOE expended \$836.2 million on Direct Student Services.

When procuring Direct Student Services, DOE must comply with New York State Education Law Article 52-A, § 2590 (h), DOE's PPPs and SOPs, and other relevant laws and rulings. DOE's PPPs and SOPs set forth policies and procedures for procuring goods and services and assign individuals and units with specific responsibilities in the procurement process. These rules and regulations are intended in part to ensure the wise, prudent, and economical use of public money; make as consistent as possible the uniform application of these policies; foster broad-based competition; and meet the needs of DOE students, staff, and offices.

Direct Student Services include charges for educational services used to support direct instructional services to students which are performed by consultants. Although these services also include assessments, curriculum and staff development, art and music instruction, and Community Based Organization educational programs, a large part of the Direct Student Services DOE provides are made up of Related Services.

Related Services are defined as "developmental, corrective and other support services required to assist a student with a disability to benefit from instruction" and include counseling, occupational therapy, physical therapy, speech therapy, health education services, vision services, and hearing education services. Under federal and State laws, DOE is mandated to provide students Related Services of the type, frequency, duration, and manner specified in their IEPs and within prescribed timeframes.

DOE employs a successive three-tier system when procuring Related Services providers. Under this three-tier system, each tier must be exhausted before proceeding to the next as follows: (1) DOE personnel provide services; (2) if DOE personnel are not available, contracted consultant companies provide services; and (3) if contracted consultant companies are not available, DOE engages independent consultants.

The process of engaging independent consultants involves DOE notifying the child's parents/guardians that DOE is unable to provide Related Services and allowing them to choose an independent consultant from DOE's Registry of Providers or to choose a provider of their own. For these independent consultants, DOE issues a RSA Form in lieu of entering formal contracts.

Objective

The objective of this audit was to determine whether DOE complied with relevant procurement and other rules and regulations when procuring Direct Student Services.

Scope and Methodology Statement

We conducted this performance audit in accordance with generally accepted government auditing standards. Those 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 provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The scope of this audit was Fiscal Year 2010. Please refer to the Detailed Scope and Methodology at the end of this report for the specific procedures and tests that were conducted.

Discussion of Audit Results

The matters covered in this report were discussed with DOE officials during and at the conclusion of this audit. A preliminary draft report was sent to DOE officials and discussed at an exit conference held on October 14, 2011. On December 12, 2011, we submitted a draft report to DOE officials with a request for comments. We received a written response from DOE officials on December 27, 2011.

In its response, DOE primarily objected to the report's "shameful commentary...that the Department failed to provide related services to more than 25 percent of the students recommended for the services in School Year 2010" on the basis that:

"the stated audit objective simply was 'to determine whether the DOE complied with relevant procurement and other rules and regulations when procuring Direct Student Services.' Nothing within that scope supports disjointed sidebars about service provision....the Comptroller has not performed an audit of the Department's monitoring and provision of related services and, therefore, has no legitimate basis to include in its Report such reckless misrepresentations about untested service provision data....without regard to its veracity."

Specifically, DOE objected to our reporting of DOE's DIIT Related Service Status Report data for June 2010, which indicated that DOE failed to provide Related Services to 72,302 of 285,736 students. DOE, which repeatedly calls itself a data-driven agency, compiled, reported, and used DIIT Related Service Status Report data to make procurement decisions as well as to track, monitor, and report on service provision. DOE now repudiates its DIIT Related Service Status

Report data as “untested” and questions its veracity—which only reinforces that DOE needs to improve its contracting efforts. DOE used this data as the sole basis for determining the level of Related Services that must be provided. But if the data is incomplete, “untested,” and/or flawed, it should not be used in making decisions on behalf of New York City schoolchildren. Clearly, if there are problems with the data, it cannot be used effectively.

Additionally, contrary to DOE’s assertion, our reporting of DOE’s failure to provide mandated Related Services to students with disabilities is not a disjointed sidebar. Rather, it is the result of DOE’s failure to make maximum reasonable efforts to procure Related Services providers, in part, because DOE performed only a simplistic needs analysis. DOE did not consider a number of relevant factors affecting the need for services. As a result, DOE did not have a sufficient pool of contracted resources to provide services.

DOE also stated it was concerned and took issue with the report’s “unsupported findings, leaps of logic and largely stale and unviable recommendations.” Nevertheless, DOE acknowledged the report’s findings by agreeing to implement or partially implement many of our recommendations as follows:

“With particularity to the audit at hand, we affirm that the Department recognizes that it is accountable to the public for meeting students’ educational needs while maintaining vigilance over costs. Although we strive vigorously to meet these responsibilities, it is not our intention to suggest in this response either that the Department’s efforts to address related service mandates have been so successful that we may rest upon the job done to date or that we can reject viable recommendations about achieving cost efficiencies. And, we can go so far as to say that we agree with certain of the recommendations offered by the Comptroller at least to the extent that they embody general principals [sic] of service delivery and fiscal prudence and are within the public’s and Department’s interests.”

It makes little sense that DOE simultaneously criticizes the report’s recommendations as “unviable,” yet also agrees to implement or partially implement many of them. If the recommendations are indeed untenable, we don’t understand why the agency has decided to implement them. DOE cannot have it both ways.

In particular, DOE indicated that its new Request for Proposals (RFP) would address the report’s recommendations and improve its contracting efforts as follows:

“The Department’s new RFP, about which the auditors knew, but asked relatively little, is designed to maximize access to contract agency providers and adds a role for smaller firms that are not capable of serving an entire district.”

We are pleased that DOE maintains it will improve its contracting efforts. However, contrary to DOE’s assertion, the audit team did, in fact, ask DOE about the prospective solicitation process. During the course of the year-long audit, DOE did not inform the audit team that the RFP was completed or share this critical document with them. It appears that DOE withheld information and documentation relevant to the audit. This, coupled with the fact that DOE provided us

“untested” data, makes us question whether DOE has been forthright throughout the course of the audit. As a result, we cannot determine whether the new RFP will, in fact, maximize access to contracted Related Service providers.

FINDINGS AND RECOMMENDATIONS

It is not clear whether DOE made maximum reasonable efforts to contract with Related Service providers because it did not utilize open-ended solicitations as it does for other shortage areas or re-solicit for Related Service providers more frequently to directly engage needed providers; imposed overly restrictive staffing requirements on prospective contractors; discouraged prospective contractors because it allowed contracted consultant companies to also act as independent consultants; and did not assign and award contracts based on a systematic needs analysis which considered significant factors affecting the need for services including the length, frequency, and duration of services. Consequently, DOE does not have a sufficient pool of contracted resources to provide mandated Related Services. As a result, DOE is authorizing the use of independent consultants through RSA Forms which, as noted, may result in higher rates paid under lesser performance standards, monitoring constraints, and insurance requirements. More important, according to DOE's DIIT Related Service Status Reports for June 2010, DOE failed to provide Related Services to 72,302 of 285,736 students referred for such services—more than 25 percent (see Appendix I).

Additionally, DOE did not ensure that available DOE internal or contracted resources were utilized prior to authorizing the use of independent consultants; review consultants' past performance prior to retaining services; or maintain and register independent consultant agreements. Consequently, DOE may have unnecessarily engaged independent consultants; may have employed consultants that were not capable of satisfactorily providing services to students; and cannot effectively monitor independent consultants and hold them sufficiently accountable for their performance.

These findings are discussed in detail in the following sections of this report.

DOE Needs to Improve Its Efforts to Contract with Related Service Providers

DOE needs to improve its efforts to contract with Related Service providers. As noted, federal and State laws require DOE to provide students Related Services of the type, frequency, duration, and manner specified by their IEPs and within prescribed timeframes. To fulfill this mandate, DOE employs a successive three-tier system. Each tier must be exhausted before proceeding to the next, as follows: (1) DOE personnel provide services; (2) if DOE personnel are not available, contracted consultant companies provide services; and (3) if DOE cannot provide services through its internal or contracted resources, DOE engages independent consultants through RSA Forms. However, based on the following, DOE may not have made maximum reasonable efforts to contract with Related Service providers:

- *Although DOE had an ongoing shortage of Related Service providers, DOE did not utilize open-ended solicitations as it does for other shortage areas or resolicit more frequently for Related Service providers. DOE has acknowledged that historically there has been a shortage of Related Services providers. However, DOE only solicits*

Related Service providers every five years. DOE has not issued a solicitation for Related Services since January 3, 2007. This solicitation resulted in the award of three-year contracts expiring on August 31, 2010, and allowed for two consecutive one-year extensions.

- *DOE imposed overly restrictive staffing requirements on prospective contractors.* Although DOE acknowledges that there is a shortage of Related Service providers and DOE itself cannot recruit and retain sufficient Related Services personnel, DOE required prospective contractors to meet and maintain restrictive minimum staffing capacity requirements. For example, while DOE acknowledges that there is a major shortage of Occupational Therapists, DOE required prospective contractors to have up to 20 discrete therapists per district. Consequently, DOE may have limited the pool of prospective contractors, competition, and opportunities for small businesses.
- *DOE discouraged prospective contractors because it allowed contracted consultant companies to also act as independent consultants.* While acting as independent consultants, DOE paid providers at their highest contract rate for the discipline provided—which can vary by as much as \$12 per hour—and subjected them to lesser performance standards and monitoring as well as lesser insurance requirements than contracted companies.
- *DOE did not assign and award contracts based on a systematic needs analysis which considered significant factors affecting the need for services including: length, frequency, and duration of services.* Instead, DOE examined only the number of students mandated to receive Related Services.

Consequently, DOE does not have a sufficient pool of contracted resources to provide mandated Related Services. As a result, DOE is engaging independent consultants through RSA Forms which, as noted, may provide for higher rates and provide lesser performance standards and monitoring as well as and lesser insurance requirements. More important, according to DOE's DIIT Related Service Status Reports for June 2010, DOE failed to provide Related Services to 72,302 of 285,736 students—more than 25 percent (see Appendix I). Based on a review of the Status Reports, it appears that:

- DOE did not provide Related Services to 57,602 of 242,655 school age students—approximately 23.7 percent (See Appendix II). Of the 57,602 students, 33,847 did not receive any services and 23,755 did not receive services of the type, frequency, duration, or manner, specified in their IEPs. For example, students may not receive services, such as speech, counseling, and occupation therapy, in the language, frequency, or setting (i.e., individual or group) specified.
- DOE did not provide Related Services to 14,700 of 43,081 pre-school age students—more than 34 percent (See Appendix III). Of the 14,700 students, 13,775 did not receive any services and 925 did not receive services of the type, frequency, duration, or manner, specified in their IEPs.

DOE advised us that DIIT Related Service Status Report data reflects students who may be included in more than one service category because a single student may be recommended for more than one service. For example, if a student is recommended for occupational, physical, speech individual, and speech group therapy, that one student would be included in each of the four service categories in the reports. As a result, the above numbers may be inflated. Additionally, DOE advised us that students designated as not receiving services include: students awaiting services; students whose services were deferred; and students who were assigned a provider but were not given a service start date. Regarding students awaiting services, DOE stated “in looking at the numbers it must be understood that some of the children were only recently recommended for the service so there will always be some children showing on the report as awaiting even though they may only be awaiting for a short time.” Regarding deferred services, DOE stated that “while a service recommendation may have been made in June, the service delivery was not scheduled to start until the following school year i.e. September.”

Additionally, DOE advised us that DIIT Pre-School Age Related Service Status Report data may not always be updated in a timely manner as follows:

“The vast majority of the DOE’s preschool special education students are placed by the DOE in private NYSED approved special education programs pursuant to § 4410 of the NYS Education Law....Although the schools advise the DOE of the start dates for each related service and the dates should be entered into CAP, the entry does not always occur in a timely manner.”

Nevertheless, DOE DIIT Related Service Status Reports consistently show that a significant portion of students are not receiving mandated services. DOE should ensure report data accurately and fully represents service status. More important, DOE should ensure that it maintains a sufficient pool of internal and contracted resources to provide mandated Related Services.

DOE Response: “It is curious, and worth pointing out in addition, that the Comptroller chose to issue a report of findings knowing that the related service contracts that are the subject of the procurement with which this audit deals were at the end of their five-year life span. They will expire on August 31, 2012. Furthermore, during the course of the fieldwork it was known to the audit team that the Department had already embarked on a new procurement process and that Requests for Proposal were in development. Nonetheless, no effort was made to determine how the Department's new procurement would differ from the old....the Department has already re-designed the Request for Proposal so as to maximize the potential for attracting more contracted related service providers. The Report's recommendations, which flow from an out-dated process, are offered too late to be of substantial value to this agency for the new process.”

Auditor Comment: By auditing a contract in the year it terminates, we can best identify prior procurement weaknesses. This also allows us to make recommendations to improve the process. Contrary to DOE’s assertion, the audit team did review both the prior and

prospective solicitation processes including the solicitation method, solicitation frequency, needs analysis, and assignment of contracts. During the course of audit fieldwork, DOE did not indicate that prior and prospective solicitation processes would differ. Also, as previously noted, DOE did not inform the audit team that the RFP was completed or share this critical document with them. As a result, we cannot determine whether the new RFP will, in fact, maximize access to contracted Related Service providers.

Regarding DOE's assertion that "Report's recommendations, which flow from an out-dated process, are offered too late to be of substantial value to this agency for the new process," we discussed both the prior and prospective solicitation processes during audit fieldwork, formally communicated our preliminary findings to DOE on September 20, 2011, and discussed them at an exit conference held on October 14, 2011. Since DOE just issued its RFP on January 9, 2012, we do not understand how DOE can maintain that the audit process, report, and recommendations are offered "too late to be of substantial value."

Recommendations:

DOE should:

1. Utilize open-ended solicitations or solicit more frequently for Related Service providers in order to retain sufficient contracted consultants to provide Related Services which cannot be fulfilled through DOE staff.

DOE Response: "The Department will not implement the recommendation.

"It is our position that there is no provision for open-ended procurements in the Department's procurement rules. Accordingly, we had sought from the Comptroller's Office clarification and further specifics around the recommendation. An answer was not forthcoming. Further, we note that the Comptroller has offered no evidence that any number of additional procurements or open ended procurements would remedy the acknowledged shortage of related service providers."

Auditor Comment: DOE's PPPs do allow for and DOE does employ open-ended procurements. For example, the Multiple Task Award Contract process allows for the open-ended procurement of services to ensure that demand is met in a timely manner as follows:

"The multiple task award contract (MTAC) process allows the DOE to establish requirements contracts with multiple vendors to provide categories of defined services at discrete unit prices in order to ensure that demand for such services is met, and to offer schools and offices a choice among vendors from which such services may be quickly procured. All vendors who meet the minimum requirements are awarded multiple task award contracts. In the MTAC process, the solicitation is open-

ended, thereby allowing new vendors the opportunity to qualify for MTACs after the initial solicitation.”

As DOE currently uses the MTAC process to solicit school-based mental health and behavioral services as well as supplemental instructional services including “guidance and counseling services,” we do not understand how DOE maintains it cannot similarly employ such open-ended solicitations for Related Services. Further, if DOE believes that “there is no provision for open-ended procurements in the Department’s procurement rules,” DOE’s PPPs allow DOE to “test and evaluate the feasibility and application of procurement methods not currently used by the DOE or provided for under these Procedures.”

Additionally, while we acknowledge that there is a shortage of Related Service providers, DOE’s continuous use of independent consultants evidence the availability of additional contracted resources. According to DOE’s Division of Financial Operations Fiscal Year 2011 tracking reports, there were 116 independent consultants that were paid more than \$100,000 to provide Related Services. In total, DOE paid these 116 consultants \$45.4 million and consultant payments ranged from approximately \$100,328 to \$2.4 million. Further, as DOE indicated, DOE previously identified and solicited “a wide range of firms capable of providing high volume services in required disciplines within specified timeframes.” In fact, DOE solicited 702 firms, of which only 41 responded and 36 were awarded contracts. Clearly, there are additional resources that are known and available to DOE. Therefore, we reiterate that DOE should utilize open-ended solicitations or solicit more frequently for Related Service providers in order to retain sufficient contracted consultants that cannot be fulfilled through DOE staff.

2. Ensure that minimum staffing capacity requirements for future solicitations are not overly restrictive.

DOE Response: “The Department will be implementing this recommendation in large part, though not as a result of the recommendation since decisions with respect to the new RFP process had been made before release of audit findings.

“The Department recognizes that timely service provision is critical. Therefore, the new RFP will continue minimum staffing requirements for primary vendors since that is the best way to assure that an agency has the bandwidth to serve the district’s requirements and identify a direct service provider within a reasonable timeframe. However, since it is not always the case that even large agencies will be able to meet every need, as a new feature, the RFP will eliminate the minimum staffing requirement for some back-up agency contractors and thus may lessen the need to engage the third tier of service provision - independent related service providers.”

Auditor Comment: We are pleased that DOE maintains its new RFP will address this recommendation. However, as noted, DOE did not provide us with this critical document. Therefore, we cannot determine whether the new RFP minimum staffing capacity requirements are overly restrictive.

3. Reconsider its practice of allowing contractors to also act as independent consultants while paying them at their highest contract rate for the service provided and not holding them to the associated contract terms.

DOE Response: “The Recommendation will be implemented in part as follows.

“It is the Department's policy first to try to assign students to Department employees. If unsuccessful at that level, we then transmit notification of the need for service to the agency under contract for the required related service within the specific district. If that agency is unable to provide the service, the assignment is then transmitted to other contract agencies (back-ups). If a back-up provides the service, the rate paid is back-up agency's highest awarded contract rate in that discipline throughout the city. This policy was established to encourage all agency contractors to serve as back-up for each other, thereby increasing the pool of available related service providers. It should be noted that the payment of the highest awarded contract rate is, with few exceptions, lower than the RSA rate.

“A contract agency, however, may receive an RSA, *i.e.*, be an independent related service provider, for a service for which they have not been awarded a contract. In that case, the contract agency is paid at the RSA rate. However, the current contract prohibits contract agencies from providing service under an RSA if they provide the same service under a contract in the same district. Further the new RFP may reduce the need for RSAs - which is already relatively low - in that it creates additional categories of back-up contract agencies when the ‘primary’ contract agency for a particular discipline and district cannot serve the student.”

Auditor Comment: We are pleased that DOE maintains its new RFP will partially address this recommendation. However, as noted, DOE did not provide us with this critical document. Therefore, we cannot determine whether the new RFP will employ back-up contract agencies and thus, may reduce the need for RSAs.

Additionally, when DOE does allow contracted companies to also act as independent consultants through RSAs, we reiterate that DOE should reconsider paying them at their highest contract rate for the service provided and not holding them to the associated contract terms. As noted, this practice discourages prospective contractors.

4. Assign and award future contracts based on a systematic needs analysis that considers all factors affecting the need for services including but not limited to the length, frequency, and duration of services.

DOE Response: “The Department has analyzed usage patterns and fill rates. That analysis has resulted in revisions to the RFP as well as the inclusion of more detailed information for bidders to consider in developing their proposals.

“We take umbrage at the insinuation - made without meaningful fieldwork or analysis - that we had done otherwise. Department managers had considered all meaningful criteria in the past and have done that again with respect to developing the new RFP.”

Auditor Comment: Contrary to DOE’s assertion, DOE did not conduct a systematic needs analysis that considered all meaningful criteria or analyze usage patterns and fill rates. Again, DOE performed only a simplistic needs analysis. DOE advised us that it used DOE’s DIIT Related Service Status Report data as the sole basis for determining the level of Related Services that must be provided through contracted companies. However, these reports detail only the number of students mandated to receive Related Services. DOE did not consider significant factors affecting the need for services. As a result, DOE did not have a sufficient pool of contracted resources to provide services. Therefore, we reiterate that DOE should assign and award future contracts based on a systematic needs analysis that considers all factors affecting the need for services including but not limited to the length, frequency, and duration of services.

5. Ensure that it provides all students Related Services of the type, frequency, duration, and manner specified by their IEPs, and within prescribed timeframes.

DOE Response: “The Department has devoted considerable resources to doing what has been recommended by the Comptroller. Any further statement about the Department's efforts with respect to provision of related services, beyond those that have already been made elsewhere in our response, would signal that the recommendation is meaningful, when in our view, the recommendation is, on its face, facile.”

Auditor Comment: It is irresponsible for DOE to dismiss this recommendation. Again, according to DOE’s DIIT Related Service Status Reports for June 2010, DOE failed to provide Related Services to 72,302 of 285,736 students—more than 25 percent. And while DOE disputed the reporting of these figures, DOE nevertheless “acknowledged that at any point in time there are students who are too long awaiting one or more related services or who are only partially receiving one or more related services.” Therefore, we reiterate that DOE should ensure that it provides all students Related Services of the type, frequency, duration, and manner specified by their IEPs, and within prescribed timeframes.

DOE Did Not Ensure that Internal and Contracted Resources Were Utilized Prior to Using Independent Consultant Services

DOE did not ensure that available DOE personnel or contracted consultant companies were utilized prior to authorizing the use of independent consultants through RSA Forms. DOE’s SOPs prohibit the use of individual consultants when DOE personnel are available to perform services. And DOE’s PPPs state that “[a]ll DOE schools and offices must procure goods and services through existing contracts when such contracts meet the requirements of the school or office” unless they obtain better terms or pricing. Accordingly, DOE employs a successive three-

tier system when procuring Related Services providers. As noted, each tier must be exhausted before proceeding to the next, as follows: (1) DOE personnel provide services; (2) if DOE personnel are not available, contracted consultant companies provide services; and (3) if DOE cannot provide services through its internal or contracted resources, DOE authorizes the use of independent consultants through RSA Forms. However, DOE does not document that DOE personnel or contracted consultant companies are not available to perform services and employ control measures to ensure that DOE personnel and contracted consultant companies are successively exhausted prior to engaging independent consultants. Most notably, the DOE Special Education Component System allows DOE staff to engage independent consultants when contracted consultant companies are available to provide services. Consequently, DOE may unnecessarily engage independent consultants.

DOE Response: “Although the Comptroller is comfortable insinuating that the Department is quick to attach students requiring related services to private related service providers rather than those directly employed by the Department, there is no analysis of actual usage within the three tiers...that the Department uses for meeting students' IEP related service mandates. Had that critical analysis been done, the auditors would have discovered - and certainly would have had to report - that the vast majority of services ... are provided by Department personnel.”

Auditor Comment: The report stated only that DOE lacked controls to ensure that internal and contracted resources were utilized prior to tapping independent consulting services. At issue is whether DOE ensured that tiers were successively exhausted—not the percentage of services fulfilled by each tier. By law and decree, the majority of services should be provided by DOE personnel. Contracted and independent resources are intended only to be used as a stopgap measure.

DOE Response: “We dispute the Report's conclusion that the Department does not document or apply controls to ensure that contracted resources are utilized before moving to the third tier of independent providers. Furthermore, and without conceding the point about the Department's current process, the Comptroller's concerns are misplaced. In much the same way as it facilitates assignment of Department staff, the Provider Assignment Module of the Department's new automated special education tracking system will electronically route transactions that require attention to user inboxes for contractor staff and perform in many cases, the same tracking and reporting functions.”

Auditor Comment: As reported, DOE does not document that DOE personnel or contracted consultant companies are unavailable to perform services nor employ control measures to ensure that DOE personnel and contracted consultant companies are successively exhausted prior to engaging independent consultants. Consequently, DOE may unnecessarily engage independent consultants. DOE Special Education Component System sample transaction history screens show that DOE did not assign services to either a primary or secondary contract agency prior to issuing an RSA.

Recommendation:

DOE should:

6. Institute controls to ensure that available DOE personnel and contracted consultant companies are utilized prior to authorizing the use of independent consultants. These controls should include, but not be limited to, making written determinations that DOE personnel and contracted consultant companies are not available to perform services and employing computer system edits to ensure that DOE personnel and contracted consultant companies are successively exhausted prior to engaging independent consultants.

DOE Response: “[T]he Department already has a process for first attempting to match students with Department related service providers and then with contract agencies before offering parents an authorization to seek an independent related service provider. That process will be enhanced through the use of the new special education student tracking system. We cannot commit to any recommendation, such as making a written determination of unavailability of providers, which is burdensome and unnecessary, and in the end could delay a time-sensitive process.”

Auditor Comment: We acknowledge that DOE has a procedure for successively exhausting its three tiers (i.e., internal, contracted, and independent) of providers. However, as noted, DOE did not employ control measures to ensure this process was followed or document that this process was followed. If DOE is unwilling to make written determinations that DOE personnel and contracted consultant companies are unavailable, DOE should ensure that its new tracking system employs edits. This, in turn would confirm that DOE personnel and contracted consultant companies are successively exhausted prior to engaging independent consultants.

**DOE Did Not Review Consultants’
Performance Prior to Retaining Services**

DOE did not review consultants’ past performance prior to retaining services. Consequently, DOE may have employed consultants who were incapable of satisfactorily providing services to students. One of the City’s overarching goals is only to do business with responsible vendors. Accordingly, DOE’s PPPs state that “[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.” Vendors’ past performance is a key factor affecting responsibility. Therefore, DOE’s PPPs direct personnel to use VENDEX³ and other records or evaluations of performance to support determinations of

³ The New York City Administrative Code requires that the City maintain a computerized database containing information for City contracts, vendors, and prospective vendors. The VENDEX database includes: VENDEX questionnaires which contain information about vendors’ principals, ownership, affiliations, and involvement in government investigations; cautionary information disclosed on VENDEX questionnaires and reported by sources such as City agencies and law enforcement organizations; contract performance evaluations; outstanding liens and warrants; and tax filing status.

responsibility. DOE's SOPs state that personnel should: establish a system for evaluating services; review consultants' experience to identify other schools or agencies that have used their services; and make inquiries regarding consultants' past performance. However, DOE did not complete performance evaluations and enter cautionary information in VENDEX, and it did not establish an internal evaluation system. According to DOE officials, the agency is in the process of building a system, but its completion has been delayed. On its 2008, 2009, and 2010 Comptroller's Directive #1 responses, DOE indicated that it would be implementing an online database system to track and evaluate vendor performance in accordance with its PPPs. DOE initially estimated that this system would be implemented by the end of 2010 and subsequently indicated that the system would be implemented in the spring of 2011. However, this system has still not been implemented. Consequently, DOE and other agencies cannot assess consultants' past performance. As a result, DOE and other agencies may be employing ineffective, unqualified, or underperforming consultants. As DOE is providing services that directly support instructional services to students, DOE should have conducted appropriate performance reviews.

Recommendations:

DOE should:

7. Complete Performance Evaluations and enter cautionary information in VENDEX.

DOE Response: With regard to independent Related Service providers, DOE stated, "The Department provides VENDEX cautionary information in certain circumstances. Independent related service providers will be a covered category when the internal vendor tracking system is completed.

"Independent providers of related services must present their New York State Education Department-issued professional certification to the Department. Further, they are required to be fingerprinted by the Department and receive security clearance in order to provide services. Security clearance includes not only a criminal history background check, but review of the individual's status if (s)he had been a Department employee. If, after the initial clearance an independent provider is arrested, the Department will be notified by the state and will take appropriate action. Further, action may be taken by the Department upon learning that the related service provider has become the subject of a school administrator's verified complaint or is the subject of an investigation by the Department's Divisions of Finance or Contracts and Purchasing or by the Special Commissioner of Investigation. If services have begun, the individual may be directed to cease providing services.

"A parent may have selected an independent service provider that is a Department contract agency. In that case, if the DOE becomes aware of relevant negative information regarding the agency, the information will be entered into the Department's Vendor, Compliance, Investigations and Performance database⁴ even if the 'misconduct' occurred

⁴ The database contains information about vendors regarding performance and contract compliance as well as investigations that have examined their conduct.

in the agency's capacity as an RSA provider. Additionally, the Department either forwards the information to the Mayor's Office of Contract Services ('MOCS') for its consideration of inclusion in its VENDEX Caution database or instructs the vendor to self-report the matter to MOCS in its VENDEX Questionnaire. In the latter case, the Department verifies that such action is taken."

Auditor Comment: Foremost, we recommend that DOE complete performance evaluations and enter cautionary information in VENDEX for *all* consultants—and not just "independent related service providers" as DOE indicated in its response.

While we are pleased that DOE conducts background checks and security clearances prior to employment and "provides VENDEX cautionary information in certain circumstances," DOE did not address whether it would complete performance evaluations. Therefore, we reiterate that DOE should complete performance evaluations for all consultants. By not doing so, DOE and other agencies cannot assess consultants' past performance, which may result in DOE and other agencies employing ineffective, unqualified, or underperforming consultants.

8. Review consultants' past performance prior to retaining services.

DOE Response: With regard to independent Related Service consultants, DOE stated, "The Department cannot agree to implement this recommendation beyond conducting the review described in Response to Recommendation 7, above.

"If we understand correctly, the Comptroller advises that, in addition to relying on the fact that the state licensing division has granted the provider a professional certification and that the provider has cleared the Department's security clearance process, the Department should further explore the provider's 'performance.' Lacking from the advisement is any analysis or explanation of what a performance review would entail and how it could be implemented in a time-sensitive fashion and in an environment where, as an outgrowth of the Jose P. consent decree, it is the parent who selects the provider. "No one benefits from simplistic recommendations."

Auditor Comment: Foremost, we recommend that DOE review *all* consultants' past performance prior to retaining services—not just "independent related service providers."

We do not understand how DOE can now dismiss this recommendation as "simplistic" and not "agree to implement this recommendation beyond conducting the review described in Response to Recommendation 7, above." On its 2008, 2009, and 2010 Comptroller's Directive #1 signed Internal Control Certification responses, DOE indicated that it would be implementing an online database system to track and evaluate vendor performance in accordance with its PPPs. DOE's PPPs require DOE to "establish an electronic process for evaluating and documenting the performance of its vendors" and to consider performance "when determining whether an existing contract should be extended, renewed, terminated or allowed to lapse." As noted, DOE's SOPs state that

personnel should establish a system for evaluating services, review consultants' experience to identify other schools or agencies that have used their services, and make inquiries regarding consultants' past performance.

DOE is disingenuous when it maintains it needs advisement as to "what a performance review would entail and how it could be implemented in a time-sensitive fashion." DOE's PPPs specify that a:

"Performance evaluation of contractors shall evaluate the degree to which the contractor's performance has conformed to the requirements of the contract, including, but not limited to quality and timeliness of performance and fiscal administration and accountability."

If DOE implements its online database system to track and evaluate vendor performance, as it maintained it would do "in the spring of 2011," DOE could, in fact, review past performance "in a time-sensitive fashion."

DOE Did Not Maintain or Register Independent Consultant Agreements

DOE maintained that it authorized the use of independent consultants through RSA Forms. Although we repeatedly requested RSA Forms for sampled vendors, DOE did not provide us these agreements during the course of the audit. In the absence of written agreements, DOE cannot effectively monitor independent consultants and hold them sufficiently accountable for their performance. Additionally, DOE did not register independent consultant RSA agreements with the Comptroller's Office as may be required by DOE procurement rules and § 2590 (h) of the New York State Education Law. Registration is a key control for ensuring that agencies comply with applicable rules and regulations, and do not contract with corrupt, debarred, or suspended individuals or firms. Additionally, registration ensures that monies are available to pay contractors upon satisfactory performance and tracks contract expenditures. By not registering these independent consultant agreements, DOE agreements and expenditures lack accountability and transparency.

Recommendations:

DOE should:

9. Maintain RSA Forms used to engage independent consultants.

DOE Response: "The Department uses an automated system to generate and maintain RSAs. If the recommendation is that we maintain the authorizations in hardcopy, we decline to do that."

Auditor Comment: If DOE did in fact maintain RSA Forms in an automated system, DOE could have readily provided them to us but it did not. We repeatedly requested these

forms during the course of the audit. We initially requested RSA Forms on February 15, 2011, and to date—nearly 11 months later—DOE still did not provide us these agreements. Therefore, we reiterate that DOE should maintain—in either electronic or hardcopy format—RSA Forms used to engage independent consultants.

10. Register all contracts and agreements as required by New York State Education Law Article 52-A, § 2590 (h) and DOE procurement rules.

DOE Response: “The Department already registers contracts in compliance with by New York State Education Law Article 52-A, § 2590 (h) and DOE procurement rules. As the Comptroller was advised at several junctures, the Department's position, which is supported by the New York City Law Department, is that RSAs are not procurements within the meaning of the cited law and rules....If the Department is not able to provide the services through its employees or agency contractors, the student is entitled, pursuant to the Jose P. consent decree, to obtain such services from private providers having appropriate qualifications at the Department's expense.... Since this is the case, the payment by the Department to the provider is a legally mandated payment and is not a procurement of services by the Department.”

Auditor Comment: While the engagement of independent consultant through RSA Forms may not technically constitute procurement, as DOE asserts, DOE performs numerous procurement functions when engaging independent consultants and makes significant expenditures through RSA Forms. Specifically, DOE solicits independent consultants for inclusion on its registry, and verifies credentials, conducts security clearances, sets service, payment, and other terms, and enters agreements with and pays all independent consultants. And according to DOE Division of Financial Operations Fiscal Year 2011 tracking reports, DOE paid approximately \$61.8 million to 464 independent consultants engaged through RSA Forms. Therefore, we reiterate that DOE should register all contracts and agreements, including RSA Forms. Again by not doing so, these agreements and significant associated expenditures lack accountability and transparency.

DETAILED SCOPE AND METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those 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 provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

The scope of our audit was Fiscal Year 2010. To gain an understanding of the policies, procedures, and rules that govern the procurement process, we reviewed New York State Education Law Article 52-A, § 2590 (h), DOE's PPPs, and SOPs. We interviewed DOE officials and conducted a walk-through of DOE's *Special Education Component* (SEC) system which is used to assign the provision of Related Services to either contracted consultant companies or independent consultants. We also requested a copy of the SEC system manual.

For Fiscal Year 2010, we requested a list of all transactions charged to Object Code 685—Professional Services – Direct Educational Services to Students. DOE provided us a Financial Accounting Management Information System (FAMIS) expenditure report totaling \$836.2 million. To verify the reported total, we compared it to the amount reported in the Fiscal Year 2010 Comptroller's Comprehensive Annual Financial Report, examined the source code used to generate the FAMIS report, and obtained a confirmation letter from DOE. We then calculated total payments made to consultants and segmented consultants based on DOE procurement thresholds. Of the \$836.2 million, transactions totaling \$699.4 million were incurred and paid in Fiscal Year 2010 and transactions totaling \$136.8 million were for adjusting and correcting entries. From the transactions totaling \$699.4 million that were incurred and paid in Fiscal Year 2010, we selected a sample of 39 consultants that were paid approximately \$150.4 million as follows:

- We judgmentally selected the top nine of 547 consultants who were each paid more than \$100,000 (representing approximately \$148.4 million of the \$623.2 million paid to the 547 consultants), and
- We randomly selected a sample of 30 of 402 consultants who were each paid between \$50,000 and \$100,000 (representing approximately \$2.0 million of \$27.9 million paid to the 402 consultants).

To determine whether DOE contracted for sampled vendor expenditures, we obtained FAMIS access to look up transactions and identify associated contracts.

For identified contracts, we requested that DOE provide us contract documents including needs analyses, cost/benefit analyses, solicitations, determinations, Requests for Authorizations, and contracts. We also reviewed Omnibus Automated Image Storage Information System contract documents.

To determine whether DOE retained sufficient contracted consultant companies to provide Related Services, we requested SEC reports which identify the number of students mandated to receive services, receiving services, partially receiving services, and not receiving services.

APPENDIX I

Related Service¹ Status Information for All Students² for June 2010

	Not Receiving ³	%	Partially Receiving	%	Not or Partially Receiving	%	Receiving	%	Total
Public Schools	18,151	8.8%	22,056	10.7%	40,207	19.4%	166,797	80.6%	207,004
Non-Public Schools⁴	15,696	44.0%	1,699	4.8%	17,395	48.8%	18,256	51.2%	35,651
Total School Age Students	33,847	13.9%	23,755	9.8%	57,602	23.7%	185,053	76.3%	242,655
Total Pre-K Students⁵	13,775	32.0%	925	2.1%	14,700	34.1%	28,381	65.9%	43,081
Grand Total	47,622	16.7%	24,680	8.6%	72,302	25.3%	213,434	74.7%	285,736

¹ Related Services are defined as "developmental, corrective, and other support services required to assist a student with a disability to benefit from instruction" and include: counseling, occupational therapy, physical therapy, speech therapy, health education services, educational vision services, and hearing education services. Under federal and State Laws, DOE is mandated to provide students Related Services of the type, frequency, duration, manner, and timeframe specified in their Individualized Education Program.

² DOE advised us that the numbers in DOE's DIIT Related Service Status/Data Reports reflect services and a single student may be recommended for more than one service. For example, if a single student is recommended for occupational therapy, physical therapy, speech (individual), and speech (group), that one student would be represented as four "services" in the reports. Therefore, the above numbers may be inflated.

³ DOE also advised us that students designated as not receiving services include: students awaiting services; students whose services were deferred; and students that were assigned a provider but were not given a service start date. With regards to students awaiting services, DOE stated "in looking at the numbers it must be understood that some of the children were only recently recommended for the service so there will always be some children showing on the report as awaiting even though they may only be awaiting for a short time." With respect to deferred services, DOE stated "while a service recommendation may have been made in June, the service delivery was not scheduled to start until the following school year, i.e. September."

⁴ Non-Public Schools include private, parochial, and charter schools or students transferring in from outside of New York City.

⁵ Additionally, DOE advised us that DIIT Pre-K Students Related Service Status Report data may not always be updated in a timely manner. "The vast majority of the DOE's preschool special education students are placed by the DOE in private NYSED approved special education programs pursuant to Section 4410 of the NYS Education Law. . . . Although the schools advise the DOE of the start dates of each related service and the dates should be entered into Child Assistance Program (CAP), the entry does not always occur in a timely manner."

APPENDIX II

Related Service¹ Status Information for School Age Students² for June 2010
Summary by Related Service Type

Related Service Type	Not Receiving ³	%	Partially Receiving	%	Not or Partially Receiving	%	Receiving	%	Total
Speech Therapy	10,593	10.7%	11,333	11.4%	21,926	22.1%	77,085	77.9%	99,011
Counseling	9,630	11.9%	8,045	10.0%	17,675	21.9%	63,079	78.1%	80,754
Occupational Therapy	10,274	24.5%	2,850	6.8%	13,124	31.3%	28,771	68.7%	41,895
Physical Therapy	2,581	16.0%	1,143	7.1%	3,724	23.2%	12,357	76.8%	16,081
Hearing Education Services	430	16.5%	260	10.0%	690	26.5%	1,915	73.5%	2,605
Counseling by Social Worker/Psychologist	204	14.5%	76	5.4%	280	19.9%	1,126	80.1%	1,406
Educational Vision Services	135	15.0%	48	5.3%	183	20.3%	720	79.7%	903
Total Number	33,847		23,755		57,602		185,053		242,655
Total Percentage	13.9%		9.8%		23.7%		76.3%		

¹ Related Services are defined as "developmental, corrective, and other support services required to assist a student with a disability to benefit from instruction" and include: counseling, occupational therapy, physical therapy, speech therapy, health education services, educational vision services, and hearing education services. Under federal and State Laws, DOE is mandated to provide students Related Services of the type, frequency, duration, manner, and timeframe specified in their Individualized Education Program.

² DOE advised us that the numbers in DOE's DIIT Related Service Status/Data Reports reflect services and a single student may be recommended for more than one service. For example, if a single student is recommended for occupational therapy, physical therapy, speech (individual), and speech (group), that one student would be represented as four "services" in the reports. Therefore, the above numbers may be inflated.

³ DOE also advised us that students designated as not receiving services include: students awaiting services; students whose services were deferred; and students that were assigned a provider but were not given a service start date. With regards to students awaiting services, DOE stated "in looking at the numbers it must be understood that some of the children were only recently recommended for the service so there will always be some children showing on the report as awaiting even though they may only be awaiting for a short time." With respect to deferred services, DOE stated "while a service recommendation may have been made in June, the service delivery was not scheduled to start until the following school year, i.e. September."

Related Service¹ Status Information for Pre-K Students² for June 2010
Summary by Related Service Type

Related Service Type	Not Receiving ³	%	Partially Receiving	%	Not or Partially Receiving	%	Receiving	%	Total
Speech Therapy	6,076	30.5%	525	2.6%	6,601	33.1%	13,319	66.9%	19,920
Occupational Therapy	4,091	32.5%	232	1.8%	4,323	34.3%	8,277	65.7%	12,600
Physical Therapy	2,333	31.8%	121	1.6%	2,454	33.4%	4,883	66.6%	7,337
Counseling	836	34.0%	34	1.4%	870	35.4%	1,590	64.6%	2,460
Crisis Paraprofessional	179	62.8%	1	0.4%	180	63.2%	105	36.8%	285
Health Paraprofessional	72	68.6%	5	4.8%	77	73.3%	28	26.7%	105
Related Service Coordinator for Committees on Preschool Special Education only	58	35.4%	3	1.8%	61	37.2%	103	62.8%	164
Orientation/Mobility Paraprofessional	49	79.0%	-	0.0%	49	79.0%	13	21.0%	62
Hearing Education Services	22	66.7%	1	3.0%	23	69.7%	10	30.3%	33
Educational Vision Services	21	41.2%	-	0.0%	21	41.2%	30	58.8%	51
Nurse	15	62.5%	1	4.2%	16	66.7%	8	33.3%	24
Transportation Nurse	10	40.0%	2	8.0%	12	48.0%	13	52.0%	25
Special Transportation Paraprofessional	6	85.7%	-	0.0%	6	85.7%	1	14.3%	7
Orientation/Mobility Teacher	5	83.3%	-	0.0%	5	83.3%	1	16.7%	6
Travel Trainer Paraprofessional	2	100.0%	-	0.0%	2	100.0%	-	0.0%	2
Total Number⁴	13,775		925		14,700		28,381		43,081
Total Percentage	32.0%		2.1%		34.1%		65.9%		

¹ Related Services are defined as "developmental, corrective, and other support services required to assist a student with a disability to benefit from instruction" and include: counseling, occupational therapy, physical therapy, speech therapy, health education services, educational vision services, and hearing education services. Under federal and State Laws, DOE is mandated to provide students Related Services of the type, frequency, duration, manner, and timeframe specified in their Individualized Education Program.

² DOE advised us that the numbers in DOE's DIIT Related Service Status/Data Reports reflect services and a single student may be recommended for more than one service. For example, if a single student is recommended for occupational therapy, physical therapy, speech (individual), and speech (group), that one student would be represented as four "services" in the reports. Therefore, the above numbers may be inflated.

³ DOE also advised us that students designated as not receiving services include: students awaiting services; students whose services were deferred; and students that were assigned a provider but were not given a service start date. With regards to students awaiting services, DOE stated "in looking at the numbers it must be understood that some of the children were only recently recommended for the service so there will always be some children showing on the report as awaiting even though they may only be awaiting for a short time." With respect to deferred services, DOE stated "while a service recommendation may have been made in June, the service delivery was not scheduled to start until the following school year, i.e. September."

⁴ Additionally, DOE advised us that DIIT Pre-K Students Related Service Status Report data may not always be updated in a timely manner. "The vast majority of the DOE's preschool special education students are placed by the DOE in private NYSED approved special education programs pursuant to Section 4410 of the NYS Education Law. . . . Although the schools advise the DOE of the start dates of each related service and the dates should be entered into Child Assistance Program (CAP), the entry does not always occur in a timely manner."



Dennis M. Walcott, Chancellor

Veronica Conforme
Chief Operating Officer
New York City Department of Education

December 27, 2011

H. Tina Kim
Deputy Comptroller for Audit
The City of New York
Office of the Comptroller
One Centre Street
New York, NY 10007-2341

**Re: Audit Report on the Procurement of Direct Student Support Services by the
Department of Education (FK10-147A)**

Dear Ms. Kim:

This letter submitted on behalf of the New York City Department of Education ("Department"), with the attached detailed response to relevant findings and recommendations ("Response"), constitutes this agency's formal response to the City of New York Office of the Comptroller's ("Comptroller") draft audit report titled *Audit Report on the Procurement of Direct Student Support Services by the Department of Education* ("Report").

Although it represents only a small portion of the Report, we must address at this early juncture the shameful commentary on Page 2, and repeated elsewhere in the Report, that the Department failed to provide related services to more than 25 percent of the students recommended for the services in School Year 2010. Although more will be said on this subject in the attached response to recommendations, we say now and unequivocally, that the line between fair auditing and irresponsible reportage, which is driven either by an invidious agenda or careless quality assurance, has been crossed. These are the reasons: First, the stated audit objective simply was "to determine whether the DOE complied with relevant procurement and other rules and regulations when procuring Direct Student Services." Nothing within that scope supports disjointed sidebars about service provision. Second, then, is that the Comptroller knew before penning the statement in issue that the numbers provided to that Office represented services, not individual students who may have been recommended for multiple services.¹ Moreover, there are legitimate reasons that students may appear in the data as awaiting service. We know that the Comptroller recognized that the numbers were inflated and did not account for all the reasons students may be on the awaiting services list because, within the Report, and footnoted in the Appendix, are statements affirming that the numbers are inflated and citing some of the reasons students may be awaiting service that have nothing to do with a lack of available service providers or lack of vigilance on the part of the Department. We make this point not to suggest that the Department is fully providing all students

¹ The Report states that there are 285,736 students with service recommendations; this number is more than 85,000 greater than the total number of students in New York City who have IEPs. And, among those students, not all have related service recommendations.

with all of their recommended related services. We know and have acknowledged that at any point in time there are students who are too long awaiting one or more related services or who are only partially receiving one or more related services, and the Department continues to work diligently to increase the number of available providers and enhance monitoring and timeliness in this important area. However, the Comptroller has not performed an audit of the Department's monitoring and provision of related services and, therefore, has no legitimate basis to include in its Report such reckless misrepresentations about untested service provision data. It is unconscionable that in an audit Report that, by its nature, must hew to the guidelines embodied in Generally Accepted Government Auditing Standards, we find what amounts to a press release sound bite without regard to its veracity.

The larger components of the Report are not without flaw either, though to be fair, they at least address matters within the stated scope of audit. However, the lack of context, misapplication of procurement rules and puzzling conclusions contribute to the Report's weaknesses, as does its failure to inform the public with respect to the considerable efforts the Department has made to increase the ranks of its own employees who are credentialed in the required related service areas.² This audit is not about how the Department purchases goods, but concerns itself, rather, with procurement of specialized services that support its educational objectives in a nuanced environment.³ It is critical, therefore, that the auditors obtain a substantive and contextual understanding that informs the audit work and builds a solid platform for the findings and recommendations that are presented to the public.

Continuing that thought, we take note that although the Comptroller is comfortable insinuating that the Department is quick to attach students requiring related services to private related service providers rather than those directly employed by the Department, there is no analysis of actual usage within the three tiers of the service cascade⁴ that the Department uses for meeting students' IEP related service mandates. Had that critical analysis been done, the auditors would have discovered - and certainly would have had to report - that the vast majority of services for school-age children⁵ attending public schools are provided by Department personnel. We can say that because, in School Year 2010, Department employees provided roughly 90 percent of all school-aged related services to public school students.⁶ By contrast, the percent of services provided to the same cohort by contractors and "independent service providers" were only 5.7 and 4.2, respectively.

² Between August 2008 through September 2011, the Department hired a total of 1523 shortage area staff (971 Speech Improvement/Bilingual Speech teachers; 405 Occupational Therapists; and, 147 Physical Therapists) and a total of 1586 related service providers overall.

³ While we do not expect the auditors to become experts in the field of their review, we are particularly concerned about an appropriate level of preparation where, as here, the undertaking involves special education, an area controlled by myriad operational and programmatic rules set by federal and state law, Regulations of the Commissioner of the New York State Education Department, stipulations of settlement and policies promulgated by multiple government agencies, including the Department.

⁴ What we refer to as the "service cascade" is this: the Department first seeks to match students with related service needs to appropriately credentialed Department employees (first tier); if Department personnel are not available, a match is sought among the Department's contractors who were competitively selected to supplement the available pool of providers (second tier); if unsuccessful at the second tier, the Department provides the students' parents with a related service authorization - essentially a voucher - to obtain service from an independent provider (third tier).

⁵ With few exceptions, the Department does not place preschool-age students requiring special programs in public schools. Rather, the children may be assigned to New York State Education Department approved special education programs which provide required related services as a program component.

⁶ With respect to school-aged public and private school students combined, the percentage of related services provided by Department employees remained relatively high at 83. The percentage of those services provided by second (contractors) and third tiers ("independent service providers") to the same population were only 8.6 and 7.6, respectively.

It is curious, and worth pointing out in addition, that the Comptroller chose to issue a report of findings knowing that the related service contracts that are the subject of the procurement with which this audit deals were at the end of their five-year life span. They will expire on August 31, 2012. Furthermore, during the course of the fieldwork it was known to the audit team that the Department had already embarked on a new procurement process and that Requests for Proposal were in development. Nonetheless, no effort was made to determine how the Department's new procurement would differ from the old. As will be explained in the attached Response to Findings and Recommendations, the Department has already re-designed the Request for Proposal so as to maximize the potential for attracting more contracted related service providers. The Report's recommendations, which flow from an out-dated process, are offered too late to be of substantial value to this agency for the new process.

Finally, we recognize that when the Department's response to an audit identifies weaknesses in audit preparation, fieldwork and analysis, there is a risk of appearing combative. It is necessary, then, to point out that, historically, the Department's response to audit reports that fairly represented the subject matter, provided appropriate context and based findings and recommendations on actual conditions and knowledge of the subject area, have been accepting and appreciative of the recommendations. With particularity to the audit at hand, we affirm that the Department recognizes that it is accountable to the public for meeting students' educational needs while maintaining vigilance over costs. Although we strive vigorously to meet these responsibilities, it is not our intention to suggest in this response either that the Department's efforts to address related service mandates have been so successful that we may rest upon the job done to date or that we can reject viable recommendations about achieving cost efficiencies. And, we can go so far as to say that we agree with certain of the recommendations offered by the Comptroller at least to the extent that they embody general principals of service delivery and fiscal prudence and are within the public's and Department's interests. It is the framework in which those recommendations are made, the unsupported findings, leaps of logic and largely stale and unviable recommendations that concern us and with which we have taken issue.

Very truly yours,



Veronica Conforme
Chief Operating Officer

NEW YORK CITY DEPARTMENT OF EDUCATION RESPONSE TO FINDINGS AND RECOMMENDATIONS IN THE AUDIT REPORT ON THE PROCUREMENT OF DIRECT STUDENT SUPPORT SERVICES BY THE DEPARTMENT OF EDUCATION (FK10-147A)

The following, with the attached cover letter of New York City Department of Education ("Department") Chief Operating Officer Veronica Conforme, comprises the response to the City of New York Office of the Comptroller's ("Comptroller") draft audit report titled *Audit Report on the Procurement of Direct Student Support Services by the Department of Education* ("Report").

In this Response we intend not only to address the recommendations, but to shed light on the nature of the special education services that may be mandated at any time during a school year, recommended in a language other than English, and provided by professionals in disciplines that are service shortage areas; elucidate how the Department meets service delivery requirements imposed by federal and state law and the terms of a settlement order; and explain why the vouchers allowing parents to identify service providers for their children are outside the rules governing procurement.

The Department's Obligations with Respect to Students with Disabilities

The Department is responsible for providing a free, appropriate public education in the least restrictive environment to New York City resident students with disabilities ages three through twenty-one regardless whether they attend a Department school.

Under the federal Individuals with Disabilities Education Act ("IDEA") and corresponding state law,¹ a student with a disability is a defined term that means a student with at least one of the statutorily-enumerated disabilities, who, "by reason thereof," requires special education and/or related services (collectively, "special education services") to enable the student to be involved in and progress in the general education curriculum.² Related services include counseling services, speech-language pathology, occupational therapy, and physical therapy, among others,³ which are recommended in a particular frequency (number of sessions/week), group size, and duration (length of service session), and can be recommended in a language other than English. During School Year 2010/2011, students were recommended to receive those services in 48 languages other than English.

The determination that a student is a "student with a disability" may be made at any time during the school year and entitles the student to a free and appropriate public education ("FAPE"), defined as education tailored to meet the student's individual needs in the least restrictive environment.⁴ The Department is responsible for providing FAPE to New York City resident students with special needs ages three through twenty-one regardless whether they attend a Department school.

¹ 20 U.S.C. § 1400, *et seq.* and N.Y. Education Law § 4401, *et seq.*

² 20 U.S.C. §§ 1401(3)(A), 1414(b)(2)(A) and (d)(1)(A)(i)(I); N.Y. Education Law § 4401(1).

³ 8 N.Y.C.R.R. § 200.1(qq)

⁴ 20 U.S.C. §§ 1401(9), 1412(a)(5), 1414(d); 8 NYCRR 200.6.

The plan for meeting this requirement is set forth in the student's Individualized Education Program ("IEP"), a written document that specifies the special education to which the student is entitled, the learning environment in which that education will be provided, and any other special education services that the student needs to meet the goals set forth on the student's IEP and, as appropriate, progress in the general education curriculum.⁵ To the extent feasible, a student with a disability should be educated with general education students, and provided special education services in the general education classroom.⁶

Two class actions, *Jose P. v. Ambach* and *Dyrcia S. v. Board of Education* (referred to herein as *Jose P.*) - now consolidated - have challenged the identification, evaluation and placement of students with disabilities educated by the Department and the New York State Education Department. Each agency is a named defendant. The *Jose P.* litigation covers a broad range of special education issues, including compliance benchmarks that pertain to the education of City resident students with disabilities. The most important issues concern the Department's (a) timely and proper evaluation of students suspected of having disabilities and for those students found to be students with disabilities, the timely development of IEPs for them by IEP teams composed of their parents and certain statutorily-enumerated education professionals; (b) timely and proper re-evaluation of students with disabilities and development of IEPs for them by proper IEP teams; (c) timely offer of FAPE to students with disabilities; and (d) timely and complete provision of FAPE to those students with disabilities educated by the Department.

The court-ordered obligations in the *Jose P.* litigation that are the subject of current focus include, but are not limited to, the timely development of IEPs and issuance of placement offers, timely provision of special education services, staffing requirements and personnel development to ensure timely evaluation, placement offers, and provision of FAPE, and the scope of remedies when these obligations are not met on a timely basis. Moreover, the Department is required to provide plaintiffs with detailed data on a monthly basis concerning these areas, as well as others.

Delivery of Related Services

The Department employs a three-tier cascade to provide students with their required related services. In the first tier are Department employees. If an employee is not available to serve, the Department places an order with the contract agency(ies) responsible for providing the service. If these agency(ies) are not able to fulfill the order within the specified timeframe, the Department authorizes the parent/guardian to locate an independent provider of the service for which the Department will pay. It is worth reiterating what we have reported in the cover letter, to wit, that in School Year 2010, Department employees delivered roughly 90 percent of all school-aged related services that were

⁵ 20 U.S.C. § 1414(d); N.Y. Education Law § 4402(1)(b).

⁶ 20 U.S.C. § 1412(a)(5); N.Y. Education Law § 4401-a(5).

provided to public school students.⁷ By contrast, the percent of services provided to the same cohort by contractors and “independent service providers” were only 5.7 and 4.2, respectively.

First Tier: Department Employees

Related services are provided by, among other professionals, monolingual and bilingual counselors and psychologists, monolingual and bilingual speech teachers, occupational therapists, and physical therapists. There are national shortages of certified bilingual pedagogues in academic subjects as well as related services. In addition, there are nation-wide shortage areas in the related services at issue here.⁸ Closer to home, the New York State Education Department (“NYSED”), in recognition of that situation, has posted on its website under the caption “Employment Opportunities in Shortage Areas” that “[e]mployment opportunities are available with the New York City Department of Education in the areas of monolingual and bilingual special education, monolingual and bilingual speech services, bilingual school psychology, occupational therapy and physical therapy.”⁹

Unwilling to rely solely on the state’s assistance with recruitment, the Department has employed additional strategies to achieve its goal of engaging staff that are qualified to provide related services. To that end, among other activities, the Department

- provides an online employment application that is open all year and continually monitored for new applicants in the shortage areas;
- actively recruits in area colleges and universities that offer degree programs in the related service shortage disciplines;
- has joined with NYSED, the United Federation of Teachers and Western Kentucky University to create a distance learning program that offers an alternative pathway to becoming a speech pathologist;
- sponsors a loan forgiveness program in which students are given funds to assist with loan repayment in consideration for their commitment to work for the Department;
- presents at Speech Language Pathology EXPO/Information Sessions and annual meetings within that discipline;
- places advertisements for positions in professional journals; and,
- sponsors scholarship programs in shortage areas.

Despite budget-driven hiring freezes in most other areas, the Department has continued its efforts to attract and retain appropriately licensed related service providers and has made significant progress in increasing headcount in these hard to fill titles. Between August 2008 and September 2011, the Department hired a total of 1,523 shortage area staff (971 Speech Improvement teachers (monolingual

⁷ With respect to school-aged public and private school students combined, the percentage of related services provided by Department employees remained relatively high at 83. The percentage of those services provided by second (contractors) and third tiers (“independent service providers”) to the same population were only 8.6 and 7.6, respectively.

⁸ See Center on Personnel Studies in Special Education at <http://copsse.education.ufl.edu/research-focus-areas/related-services.php>.

⁹ <http://www.p12.nysed.gov/specialed/employ.htm>

and bilingual); 405 Occupational Therapists; and, 147 Physical Therapists). To put the impact of the hiring effort in perspective, we note that the number of new hires in the area of Speech in 2008 represented a 75 percent increase over the year before; and, we have continued to maintain that level of new hires.

As for assigning students to Department employees with the credentials that are approved for provision of IEP-mandated related services, notwithstanding the Report's suggestion otherwise, the Department does have an established process. If a Department related service provider had been working with the student during the prior school year and is available to continue, that provider is re-assigned. In the other cases, the school, which ultimately is responsible for meeting the student's special education mandate, will enlist the assistance of its Children First Network ("Network")/in-discipline supervisors who will review Department provider availability. When the Provider Assignment Module of the Department's new automated special education tracking system is fully operational – and we expect that to occur in the short-term – the system will facilitate this process by electronically routing transactions that require attention to user inboxes for Department staff; prompting users in many cases when these transactions age; and automatically moving the transactions to the appropriate new user when deadlines pass. The system will also provide improved reporting, including a flexible ad hoc tool.

Second Tier: Contract Agencies

Contract Procurement. The Department currently is in the terminal year of contracts that were awarded in 2007 upon a formal request for proposal ("RFP") process; the contracts are due to expire on August 31, 2012 and, as will be explained more fully in the Response to Recommendations section, below, a new RFP will be issued early in the new year. The current contracts were competitively let through a formal RFP process that included public notification, posting on the Department's website, and direct solicitation from a wide range of firms capable of providing high volume services in required disciplines within specified timeframes. Of the 702 firms that were solicited, 41 proposed. Proposals were formally evaluated by a Selection Committee to determine which met the minimum requirements specified in the RFP. The proposals that met minimum requirements, had an adequate number of staff licensed in particular disciplines, were deemed financially viable, and cleared a background review, were then ranked by price within community school district and discipline. Based on the rankings, the Committee recommended awards with the goal of maximizing coverage at an advantageous cost. Ultimately, contracts were awarded to 36 agencies.

If a Department provider is not available to deliver some or all of the service as mandated, it is the school's responsibility to work with its Network/in-discipline supervisors to arrange for the services. Upon verifying the unavailability of a Department provider, the Network will create an automated transmittal to the contract agency that had been awarded the relevant service for the district in which the school is located. If the agency has a provider available, it will assign the provider in that system. If the contract agency fails to identify a provider within five business days, the Network will issue a transmittal to the secondary agency(ies) awarded the relevant service for its action within the ensuing five day period.

During the audit fieldwork phase, the Department's Citywide special education program managers met with the audit team and walked them through an active case of a student for whom contracted services had been sought. They were shown the automated request that had been sent to the primary contractor and the secondary transmittal when the primary was unable to serve. We dispute the Report's conclusion that the Department does not document or apply controls to ensure that contracted resources are utilized before moving to the third tier of independent providers. Furthermore, and without conceding the point about the Department's current process, the Comptroller's concerns are misplaced. In much the same way as it facilitates assignment of Department staff, the Provider Assignment Module of the Department's new automated special education tracking system will electronically route transactions that require attention to user inboxes for contractor staff and perform in many cases, the same tracking and reporting functions.

Third Tier: Independent Providers (Related Service Authorizations)

If it is determined through the above processes that neither a Department nor agency provider is available to fully cover the student's outstanding service requirement, the Network issues a Related Service Authorization ("RSA") to the student's parent authorizing the parent to secure services from a qualified independent provider selected by the parent.

The RSA procedure for school-age students was established in approximately 1984 as an outgrowth of a settlement decree in the *Jose P.* matter. At its core, the RSA is a voucher that allows the parent to choose a private provider to serve the student with the caveats that the provider must present credentials to the Department, obtain security clearance, accept the Department's session rate and sign a Related Service Agreement. Once the parent has identified a provider, the provider will return the signed Related Service Agreement to the Department representative, who will confirm that the provider meets minimum licensure and other qualifications and has appropriate security clearance. An RSA Package is transmitted to the parents/guardians to advise them that they may locate an independent related service provider. Materials sent along with that advisement, including a list of providers who have been pre-approved, will assist parents in locating and selecting a provider of their choice. If the selected provider meets these requirements, the Department representative will assign the student to the provider. In addition, the new special education student tracking system will generate a report of students who require an RSA and a profile page summarizing the students' related service recommendation(s). A caseload management tool for the user to assign the authorized provider to the student also will be provided.

Response to Recommendations

Recommendation 1. *Utilize open-ended solicitations or solicit more frequently for Related Service providers in order to retain sufficient contracted consultants to provide Related Services which cannot be fulfilled through DOE staff.*

Response to Recommendation. The Department will not implement the recommendation.

It is our position that there is no provision for open-ended procurements in the Department's procurement rules. Accordingly, we had sought from the Comptroller's Office clarification and further

specifics around the recommendation. An answer was not forthcoming. Further, we note that the Comptroller has offered no evidence that any number of additional procurements or open ended-procurements would remedy the acknowledged shortage of related service providers. The Department's new RFP, about which the auditors knew, but asked relatively little, is designed to maximize access to contract agency providers and adds a role for smaller firms that are not capable of serving an entire district. That said, we do not wish to see lost in any discussion about procurement of related services the fact that contract agencies are a second-tier service category and that the Department actively seeks to increase its own qualified staff as its primary source of service provision. We note, again, that the Department has made significant progress in that regard and intends to continue those efforts.

Recommendation 2. *Ensure that minimum staffing capacity requirements for future solicitations are not overly restrictive.*

Response to Recommendation. The Department will be implementing this recommendation in large part, though not as a result of the recommendation since decisions with respect to the new RFP process had been made before release of audit findings.

The Department recognizes that timely service provision is critical. Therefore, the new RFP will continue minimum staffing requirements for primary vendors since that is the best way to assure that an agency has the bandwidth to serve the district's requirements and identify a direct service provider within a reasonable timeframe. However, since it is not always the case that even large agencies will be able to meet every need, as a new feature, the RFP will eliminate the minimum staffing requirement for some back-up agency contractors and thus may lessen the need to engage the third tier of service provision - independent related service providers.

Recommendation 3. *Reconsider its practice of allowing contractors to also act as independent consultants while paying them at their highest contract rate for the service provided and not holding them to the associated contract terms.*

Response to Recommendation 3. The Recommendation will be implemented in part as follows.

It is the Department's policy first to try to assign students to Department employees. If unsuccessful at that level, we then transmit notification of the need for service to the agency under contract for the required related service within the specific district. If that agency is unable to provide the service, the assignment is then transmitted to other contract agencies (back-ups). If a back-up provides the service, the rate paid is back-up agency's highest awarded contract rate in that discipline throughout the city. This policy was established to encourage all agency contractors to serve as back-up for each other, thereby increasing the pool of available related service providers. It should be noted that the payment of the highest awarded contract rate is, with few exceptions, lower than the RSA rate.

A contract agency, however, may receive an RSA, *i.e.*, be an independent related service provider, for a service for which they have not been awarded a contract. In that case, the contract agency is paid at the RSA rate. However, the current contract prohibits contract agencies from providing service under an RSA if they provide the same service under a contract in the same district. Further the new RFP may reduce the need for RSAs - which is already relatively low - in that it creates additional categories of back-up contract agencies when the "primary" contract agency for a particular discipline and district cannot serve the student.

Recommendation 4. *Assign and award future contracts based on a systematic needs analysis that considers all factors affecting the need for services including but not limited to the length frequency and duration of services.*

Response to Recommendation 4. The Department has analyzed usage patterns and fill rates. That analysis has resulted in revisions to the RFP as well as the inclusion of more detailed information for bidders to consider in developing their proposals.

We take umbrage at the insinuation - made without meaningful fieldwork or analysis - that we had done otherwise. Department managers had considered all meaningful criteria in the past and have done that again with respect to developing the new RFP.

Further, although the Report would have the reader conclude that the Department's use of RSAs is profligate, the fact is that the rate structure, which was established in the mid-nineteen-eighties, basically has remained the same as the rate structure of today. For the majority of related services, the RSA rate has remained at \$45.00/half-hour. The exceptions are in the area of Counseling where, if services are provided by a social worker rather than a psychologist, the rate is \$40/half-hour, rather than \$45/half-hour; Speech Therapy where a group rate structure was implemented in School Year 2007/2008 to encourage services to be provided in a group and, therefore, maximize the use of available providers; and Bilingual Speech Therapy where the rate was increased by \$9.00/half-hour so as to attract more providers in this shortage area.

Lastly, in all of the discussion about the use of independent related service providers, it is important to bear in mind that only about four percent of all related services are provided to school-age public school students through the RSA process. And, if the new RFP attracts back-up contract agencies, as we have designed the RFP to do, the need for RSA providers may be reduced further.

Recommendation 5. *Ensure that it provides all students Related Services of the type, frequency, duration and manner specified by their IEPs and within prescribed timeframes.*

Response to Recommendation 5. The Department has devoted considerable resources to doing what has been recommended by the Comptroller. Any further statement about the Department's efforts with respect to provision of related services, beyond those that have already been made elsewhere in

our response, would signal that the recommendation is meaningful, when in our view, the recommendation is, on its face, facile.

Recommendation 6. *Institute controls to ensure that available DOE personnel and contracted consultant companies are utilized prior to authorizing the use of independent consultants. These controls should include, but not be limited to: making written determinations that DOE personnel and contracted consultant companies are not available to perform services and employing computer system edits to ensure that DOE personnel and contracted consultant companies are successively exhausted prior to engaging independent consultants.*

Response to Recommendation 6. As discussed elsewhere in this response, the Department already has a process for first attempting to match students with Department related service providers and then with contract agencies before offering parents an authorization to seek an independent related service provider. That process will be enhanced through the use of the new special education student tracking system. We cannot commit to any recommendation, such as making a written determination of unavailability of providers, which is burdensome and unnecessary, and in the end could delay a time-sensitive process.

Recommendation 7. *[For independent related service providers] complete Performance Evaluations and enter cautionary information in VENDEX.*

Response to Recommendation 7. The Department provides VENDEX cautionary information in certain circumstances. Independent related service providers will be a covered category when the internal vendor tracking system is completed.

Independent providers of related services must present their New York State Education Department-issued professional certification to the Department. Further, they are required to be fingerprinted by the Department and receive security clearance in order to provide services. Security clearance includes not only a criminal history background check, but review of the individual's status if (s)he had been a Department employee. If, after the initial clearance an independent provider is arrested, the Department will be notified by the state and will take appropriate action. Further, action may be taken by the Department upon learning that the related service provider has become the subject of a school administrator's verified complaint or is the subject of an investigation by the Department's Divisions of Finance or Contracts and Purchasing or by the Special Commissioner of Investigation. If services have begun, the individual may be directed to cease providing services.

A parent may have selected an independent service provider that is a Department contract agency. In that case, if the DOE becomes aware of relevant negative information regarding the agency, the information will be entered into the Department's Vendor, Compliance, Investigations and Performance

database¹⁰ even if the “misconduct” occurred in the agency’s capacity as an RSA provider. Additionally, the Department either forwards the information to the Mayor’s Office of Contract Services (“MOCS”) for its consideration of inclusion in its VENDEX Caution database or instructs the vendor to self-report the matter to MOCS in its VENDEX Questionnaire. In the latter case, the Department verifies that such action is taken.

Recommendation 8. *Review [independent related service] consultants’ past performance prior to retaining services.*

Response to Recommendation 8. The Department cannot agree to implement this recommendation beyond conducting the review described in Response to Recommendation 7, above.

If we understand correctly, the Comptroller advises that, in addition to relying on the fact that the state licensing division has granted the provider a professional certification and that the provider has cleared the Department’s security clearance process, the Department should further explore the provider’s “performance.” Lacking from the advisement is any analysis or explanation of what a performance review would entail and how it could be implemented in a time-sensitive fashion and in an environment where, as an outgrowth of the *Jose P.* consent decree, it is the parent who selects the provider.

No one benefits from simplistic recommendations.

Recommendation 9. *Maintain RSA Forms used to engage independent consultants.*

Response to Recommendation 9. The Department uses an automated system to generate and maintain RSAs. If the recommendation is that we maintain the authorizations in hardcopy, we decline to do that.

Recommendation 10. *Register all contracts and agreements as required by New York State Education Law Article 52-A, § 2590 (h) and DOE procurement rules.*

Response to Recommendation 10. The Department already registers contracts in compliance with by New York State Education Law Article 52-A, § 2590 (h) and DOE procurement rules. As the Comptroller was advised at several junctures, the Department’s position, which is supported by the New York City Law Department, is that RSAs are not procurements within the meaning of the cited law and rules. Although explained elsewhere in this response, it is useful to restate certain points so as facilitate an understanding of that position. Under federal and New York law the Department has responsibility to make available on a timely basis a free appropriate public education, including appropriate related services, in the least restrictive environment for all children with disabilities, ages 3 through 21, who live

¹⁰ The database contains information about vendors regarding performance and contract compliance, as well as investigations that have examined their conduct.

in New York City. These obligations are also included in the stipulations and orders entered into pursuant to the *Jose P.* matter. Consequently, the Department is required to provide every student with a disability the related services in the frequency and duration listed on the student's IEP. Initially, the Department seeks to provide the services through Department staff. If Department employees are not available, agency contractors, who were awarded a contract through a competitive procurement process pursuant to the Department's procurement policies and procedures, are utilized.

If the Department is not able to provide the services through its employees or agency contractors, the student is entitled, pursuant to the *Jose P.* consent decree, to obtain such services from private providers having appropriate qualifications at the Department's expense. While the Department maintains a registry of related service providers, it does not limit the providers being placed on the list by evaluating them in relation to one another; the independent providers may be placed on the list at any time. Although the list is provided to parents of students with disabilities to facilitate the parents' ability to obtain related services for their child at Department expense, the parent does not have to use anyone on the list and may opt to have his/her child served by another provider. When the parent chooses a provider pursuant to an IEP, the Department has a legal obligation to make the payment to the provider. Since this is the case, the payment by the Department to the provider is a legally mandated payment and is not a procurement of services by the Department.