

**Response of the Board of Directors of The Center for Discovery to  
the Second Draft Report of Findings Made During a Fiscal Review of the  
Center by the Commission on Quality of Care and  
Advocacy for Persons with Disabilities**

**July 10, 2009**

**Prepared By:**

**PROSKAUER ROSE LLP  
1001 Pennsylvania Avenue, N.W.  
Suite 400 South  
Washington, D.C. 20004**

**PROSKAUER ROSE LLP  
1585 Broadway  
New York, NY 10036**

I.	INTRODUCTION AND EXECUTIVE SUMMARY.....	1
II.	Response to CQC’s Second Draft Report.....	8
A.	Notwithstanding CQC’s Opinion to the Contrary, the Center Established the Executive Director’s Compensation in a Manner that Should be Lauded as a Best Practice Model.....	8
(1)	Background.....	8
(2)	Discussion.....	10
(a)	Two Outside Independent Experts Assured that the Compensation-Setting Process Was Appropriate and Complied with IRS Reasonableness Standards. ....	10
(1)	The Committee Retains Grant Thornton.....	11
(2)	The Committee Retains Deloitte Tax LLP .....	14
(3)	The Board of Directors’ Deliberations .....	17
(b)	CQC’s Assumption that Mr. DiCalogero Had a Conflict of Interest Precluding Him from Advising the Compensation Committee Is Wrong as a Matter of Law.....	21
(c)	CQC Continues To Falsely Assert that the Center Is Comparable to the UCPs in Defiance of Law and Fact.....	24
(d)	As Did CQC’s First Draft Report, the Second Draft Report’s Discussion of Executive Compensation Ignores the Law and Misrepresents Facts.....	28
(e)	CQC Inaccurately States that the Compensation Committee Compared the Executive Director’s Compensation Only Against “much larger” Agencies and Never Explained its Compensation Decisions.....	32
(f)	CQC’s Assertions that Mr. DiCalogero Attended Executive Sessions of the Compensation Committee and of the Board Are Wrong. ....	38
(g)	CQC’s Statement that It Is Not Clear Why the Center Did Not Obtain an Opinion Letter from Grant Thornton Is Wrong .....	40
(h)	CQC Misstates IRS Requirements Regarding the CFO’s Compensation. ....	42
(i)	CQC’s Discussion of Mr. Savoy’s Role in the Compensation Review Process and of His Departure from the Board Is Incomplete, Misleading and Inaccurate.....	43
(1)	CQC’s Description of the Votes of the Compensation Committee and of the Board of Directors, and Mr. Savoy’s Role in Those Votes, Is Incomplete and Misleading.....	44
(2)	All Three Remaining Members of the Compensation Committee Confirmed that Mr. Savoy Approved the Proposed Compensation.....	48

(j)	CQC Inaccurately States that a Board Member’s Request for Corporate Records Was Improperly Denied. ....	49
(k)	CQC’s Assertion that Mr. Savoy Was Not Reelected to the Board in Retaliation for Legitimate Activities Is False. ....	51
B.	The Center Reasonably Paid Costs Incurred as a Result of a Catastrophic Injury and, Likewise, Reasonably Settled a Potential Liability Claim .....	55
(1)	Contrary to CQC’s Arguments, the Center’s Actions Were Reasonable and Responsible.....	55
(2)	CQC Wrongly Characterizes the Chief Financial Officer’s Airfares as Personal Commuting Expenses .....	59
C.	CQC’s Petty Cash Analysis Which Appears to Have Been Conducted on an Ad Hoc Basis, Is Incomplete and Its Findings Are Inaccurate .....	60
(1)	Introduction.....	60
(2)	CQC’s Petty Cash Review Was Not Thorough, Failed to Seek Pertinent Evidence, Ignored Relevant Evidence, Failed to Conduct Necessary Interviews and Relies on Speculation Rather than Facts.....	61
(a)	Failure to interview pertinent witnesses; failure to conduct proper interviews .....	63
(b)	Failure to take into account pertinent documents .....	66
(3)	Analysis of Illustrative Examples of CQC’s Supposedly Problematic Expenditures Demonstrates the Legitimacy of the Expenditures and the Consequences of CQC’s Failure to Conduct an Appropriate Investigation.....	68
(a)	Easily Obtainable Evidence Belies CQC’s Assertion that a Receipt Was Altered .....	68
(b)	The Evidence Refutes CQC’s Claim that Pharmacy Receipts Were Defaced as Part of a Cover-Up.....	70
(c)	CQC’s Challenge to Legitimacy of a Large Disbursement is Based on CQC’s Failure to Investigate and is Contradicted by the Evidence.....	72
(d)	CQC’s Challenge to Expenses Incurred in Connection with a Fund Raising Event Resulted from an Inadequate Investigation.....	73
(4)	Internal and External Review of Administrative Petty Cash Confirms that the Vast Majority of Expenditures Are Legitimate .....	74
III.	Conclusion .....	77
Addendum A:	Detailed Description of the Center for Discovery’s Compensation-Setting Process.....	A-1
Addendum B:	Summary Description of the Center for Discovery’s Background, Growth, Population, Programs and Operations.....	B-1
Addendum C:	Recommendations in draft report of findings.....	C-1

## I. INTRODUCTION AND EXECUTIVE SUMMARY

In May 2009, Governor Patterson directed the Commission on Quality Care and Advocacy for Persons With Disabilities (“CQC”) to “refocus” on its “core mission of protecting those with disabilities and investigating complaints of inappropriate care and treatment.”<sup>1</sup> The patent and repeated errors of fact and law made by CQC in its “fiscal review” of the Center of Discovery (the “Center”) provide compelling evidence of the need for CQC to “refocus.” In addition, CQC’s investigation of the Center demonstrates a profound need for CQC to limit investigations to areas in which CQC is competent, to conduct investigations pursuant to standard protocols and to make only evidence-based findings.

In the summer of 2006, CQC began “a fiscal review of . . . The Center for Discovery.” CQC describes that “fiscal review” as “a limited review of [the Center’s] finances and controls over expenditures mainly for 2005 . . . .” Second Draft Report at 1.<sup>2</sup> Never at any point during its investigation has CQC raised any question about the quality of treatment, care or programs provided by the Center. To the contrary, government regulators and independent third parties have consistently, and frequently, acknowledged that the Center is one of the premier service providers in its field.<sup>3</sup>

As CQC’s fiscal review progressed, the Center repeatedly requested that CQC provide any information regarding issues requiring the Center’s attention. Eventually, on April 26, 2007,

---

<sup>1</sup> See Anna Helhoski, *Jonathan Carey’s Father Asks Paterson for OMRDD Commissioner’s Resignation*, Legislative Gazette, May 18, 2009 at [http://www.legislativegazette.com/back\\_issues/09-518\\_web.pdf](http://www.legislativegazette.com/back_issues/09-518_web.pdf).

<sup>2</sup> In this Response, the draft report issued by CQC on February 9, 2009 is referred to as the “Second Draft Report.” This is because CQC originally issued another draft report on May 6, 2008. The May 6, 2008 draft report, which was rescinded in its entirety, is referred to as the “First Draft Report.”

<sup>3</sup> A summary description of the Center for Discovery’s background, growth, population, programs and operations is annexed as Addendum B.

before its investigation concluded, CQC met with the Board of Directors. At that time, CQC expressed concerns related to financial and corporate governance issues, primarily financial reporting and record keeping.

Following that April 2007 meeting, the Board took immediate action, directing that the Board's outside counsel investigate and report on CQC's concerns. The investigation was conducted by a team of attorneys with expertise in a variety of fields and included numerous interviews of Center personnel as well third parties, including, among others, the principal authors of the Grant Thornton LLP and Deloitte Tax LLP compensation surveys used by the Board to establish the Executive Director's compensation, as well as the Center's outside labor counsel and its expert insurance consultants. Counsel also responded to several document requests from CQC, reviewing, analyzing and logging tens of thousands of documents, eventually producing approximately 3,000 documents to CQC.

On August 14, 2007, the Board, for the first time, responded in writing to CQC's concerns, submitting a fifty-page report with forty-nine supporting exhibits. The report is attached as Exhibit A and referred to herein as "August 2007 Report." The August 2007 Report acknowledged that CQC had identified some record keeping and financial reporting issues that needed to be addressed, corrected or improved and detailed the actions that had been, or would be, taken to do so. The August 2007 Report explained in detail that CQC's concerns regarding executive compensation, the settlement of health insurance and air ambulance claims, and the handling of petty cash, were based on erroneous legal standards, faulty analysis, incomplete investigation and speculation.

The Board was hopeful that CQC would consider and address the matters discussed in its August 2007 Report, especially those items on which the Board had disagreed with CQC, with the same gravity, respectful consideration and seriousness that the Board had accorded the concerns articulated by CQC. That, however, was not to be. On May 6, 2008 CQC issued the First Draft Report, which was permeated with misstatements and misquotations of law, as well as by factual inaccuracies and omissions.

On July 31, 2008, the Board of Directors responded to the CQC's First Draft Report. The Board's July 2008 Response, attached hereto as Exhibit B,<sup>4</sup> and referred to thereafter as "July 2008 Response," summarized the failings of the First Draft Report, saying that the Board . . .

had hoped that CQC's [First Draft Report] would present an objective, evidence-based analysis of the questions presented. We hoped that the Draft Report would reflect thorough, fair and balanced consideration of the evidence — whether such evidence corroborated CQC's concerns or refuted them. We hoped that the Draft Report would reflect professional restraint, be limited to CQC's areas of expertise, acknowledge ambiguities in the evidence where they exist and eschew gratuitous accusations of questionable validity and of little, if any, utility. CQC's Draft Report decidedly does none of these things.

Instead, CQC has produced a piece of deeply flawed advocacy journalism. CQC's Draft Report repeatedly claims, but never demonstrates, the experience and expertise to second-guess the nationally and regionally acknowledged experts on whom the Board and Center management relied. It ignores and gives no

---

<sup>4</sup> The exhibits to the Board's August 2007 Report and July 2008 Response largely overlap. For the sake of brevity, we include here as in Exhibit A all 49 exhibits to the August 2007 Report but have elected not to include the July 2008 Response in Exhibit B.

weight to the fact that few, if any, other agency boards have gone to the lengths that the Center's Board has to assure compliance with Internal Revenue Service rules and to address complicated tax, employment-law and insurance issues. It omits significant facts. It misstates the law. It rests on unsupported and inaccurate assumptions. It reflects failure to interview important witnesses. It demonstrates a refusal to critically examine important evidence. It is gratuitously demeaning.

July 2008 Response at 5.

After considering the July 2008 Response, CQC notified the Center that it was taking the nearly unprecedented step of rescinding the First Draft Report in its entirety. CQC advised the Center that the Commission intended to thoroughly rewrite the report. By its actions, CQC essentially admitted, as the Center had twice demonstrated (in the August 2007 Report and the July 2008 Response) that the findings made in the First Draft Report were legally and factually erroneous.

The Center's Board was encouraged that CQC's actions heralded a new day. Indeed, the Board's optimism was enhanced because, in a June 2008 report entitled "A Critical Examination of State Agency Investigations into Allegations of Abuse of Jonathan Carey" (2008) ("OIG Report")<sup>5</sup>, the New York State Inspector General had called CQC to account for many of the same types of investigative failures, omissions and inadequacies identified in the July 2008 Response. The OIG's June 2008 Report, for example, found that CQC had "failed to conduct a thorough investigation," had "made dubious claims," that the investigation lacked "oversight" and "overall leadership," disseminated "misleading information," utilized an investigatory

---

<sup>5</sup> Available at:

<http://www.ig.state.ny.us/pdfs/A%20Critical%20Examination%20of%20State%20Agency%20Investigations%20into%20Allegations%20of%20Abuse%20of%20Jonathan%20Carey.pdf>

approach that was plagued with “systemic problems,” applied a policy that “appears to be at odds with the plain language and the legislative intent of the law” resulting in false findings and conclusions that problems existed “where there was none.”

The Board anticipated that CQC would take seriously the Inspector General’s criticisms as well as those detailed in the August 2007 and July 2008 Response and would assure that similar failures did not continue to plague CQC’s investigation of the Center. The Board, once again, hoped that CQC’s findings would be balanced, fair, objective, based on consideration of all of the evidence, rest on sound legal grounds and be confined to CQC’s areas of competence.

The Board was again gravely disappointed. Without conducting any additional investigation, CQC issued a deeply flawed Second Draft Report on February 9, 2009. Although CQC’s Second Draft Report articulates CQC’s findings in different language and sometimes shifts CQC’s legal or factual focus, the Second Draft Report essentially rehashes many of the ill-considered, legally and factually baseless allegations and arguments made in the First Draft Report.

Like the First Draft Report, CQC’s Second Draft Report is not an objective analysis prepared by disinterested investigators pursuant to accepted investigative and auditing protocols. Instead, the Second Draft Report, like its predecessor, continues to be “a piece of deeply flawed advocacy journalism,” Ex. B, July 2008 Response at 5, that revels in innuendo, implication and speculation. The Second Draft Report, like its predecessor, also ignores the law, omits important facts, misstates other facts and never even acknowledges the existence of the Center’s July 2008 Response or the August 2007 Report.

For example, among other things, CQC’s Second Draft Report:

- Continues to challenge the process used to establish the Executive Director's compensation, dismissing as merely "informative" and virtually ignoring the significance of two studies by different independent compensation experts, both of which confirm that the executive director's compensation was reasonable, that it had been set based on appropriate data from comparable entities and that it satisfied IRS reasonableness standards;
- In defiance of law and without regard for the facts, continues to assert that the reasonableness of the executive director's compensation should be determined based on comparisons to salaries paid by New York UCPs — entities for which CQC's Second Draft Report provides incomplete and inaccurate data;
- Falsely states that the Board and its Compensation Committee failed to explain their rationale for setting the executive director's compensation toward the upper end of the range of compensation paid by other entities;
- Ignores and misstates facts while questioning payment of air ambulance charges for a severely injured consultant and the structure of a health insurance settlement reached with the Center's health insurer (based on expert advice) to resolve potentially enormous liability claims;
- Falsely states that a Board member who refused to meet or communicate with the Board and who appeared to have provided inaccurate conflict of interest information was not reelected on account of his legitimate efforts to fulfill his fiduciary duties; and

- Without conducting an adequate investigation, challenges the propriety of petty cash expenditures found, upon review and investigation by the Center and its outside auditors, to be legitimate.

Even if they might at one time have been viewed as innocent errors, in light of the history here, the Second Draft Report's failures can no longer be considered mere inadvertencies.

Given that CQC largely ignored the July 2008 Response and the August 2007 Report, the Center's Board of Directors initially concluded that CQC's allegations should not be dignified with a third response. Ultimately, however, the Board concluded that CQC has gone unchallenged for too long and, as a result, has lost its way, spending its resources "investigating" matters: (1) that have little or nothing to do with quality care or advocacy for persons with disabilities; (2) that in the larger scheme, will result in no appreciable improvement in the lot of the disabled; and (3) that cause even the best providers – the Center certainly fits into this category – to divert and waste large amounts of resources dealing with CQC without any possibility of a net gain. By responding, the Board hopes that it can contribute to refocusing CQC on what, as noted by the Governor, should be the Commission's core mission – advocacy and quality of care – and also initiate a return to evidence-based dialogue.

Even though CQC ignores them, the Board believes that repeating the facts and analysis found in its August 2007 Report and in its July 2008 Response, as if those documents had not previously been submitted to CQC, would be counterproductive because it would insulate CQC from accountability for its failure to seriously consider and address the substance of the Report and the Response. Therefore, the August 2007 Report and the July 2008 Response are attached as Exhibits A and B, respectively, and incorporated by reference. This response, for the most part,

addresses only CQC's new issues and perspectives. However, in some instances it expands on the analyses in the April 2007 Report and July 2008 Response.

## **II. RESPONSE TO CQC'S SECOND DRAFT REPORT**

### **A. Notwithstanding CQC's Opinion to the Contrary, the Center Established the Executive Director's Compensation in a Manner that Should be Lauded as a Best Practice Model**

#### **(1) Background**

CQC's First Draft Report claimed that the Executive Director's compensation was unreasonable and excessive, arguing that it failed to satisfy IRS standards. First Draft Report at 5-8.

However, rather than demonstrate that the Executive Director's compensation was unreasonable, CQC's First Draft Report demonstrated that CQC lacked the expertise and ability to apply IRS standards. CQC repeatedly misapplied basic concepts (such as comparability), Ex. B, July 2008 Response at 9-19; selectively quoted, and sometimes outright misquoted, IRS regulations, Ex. B, July 2008 Response at 7-14; failed to develop a complete and accurate factual record, Ex. B, July 2008 Response at 21-28; and virtually ignored two expert studies commissioned by the Center's Board of Directors, both of which concluded that the Executive Director's compensation satisfied IRS reasonableness guidelines, Ex. B, July 2008 Response at 23-28.

Now, in its Second Draft Report, CQC no longer purports to evaluate the reasonableness of the Executive Director's compensation pursuant to IRS regulations. Indeed, other than a couple of passing references, CQC virtually ignores the IRS reasonable compensation standards.<sup>6</sup> This,

---

<sup>6</sup> The references are descriptive rather than analytic. *See, e.g.*, Second Draft Report at 4 (noting that one concern of the Center's Compensation Committee was to ensure compliance with Internal Revenue Code § 4958 Due Diligence requirements regarding the evaluation and setting of executive compensation); at 4-5 (the accounting firm, Grant Thornton, concluded that the information provided to the Compensation Committee constituted comparable compensation data appropriate for establishing the rebuttable presumption of reasonableness under IRC § 4958); and

despite the fact that the IRS standards have long been universally recognized as the metric against which the reasonableness of executive compensation must be, and always is, tested.

Although the Second Draft Report never claims that Mr. Dollard's compensation is unreasonable, CQC attacks the process the Center used to set executive compensation, arguing that it was flawed. CQC builds its case on three interrelated false assertions:

- (1) that the executive compensation was not based on data selected pursuant to objective criteria by someone free of conflict of interest;
- (2) that the Compensation Committee and the Board improperly relied on data provided by Vincent J. DiCalogero, CPA, who was not independent because he had an existing consulting relationship with the Center and because he was a friend of Patrick Dollard; and
- (3) that the Center's services, licensure and funding are comparable to New York UCPs so that the compensation should have been set based on data regarding the compensation paid the executive directors of those UCPs.

Second Draft Report at 3-4, 8.<sup>7</sup>

As was the case with the unfounded claims in CQC's First Draft Report, the contentions made by the Second Draft Report are based on an inadequate investigation, ignore, omit or misstate the

---

at 5 (compensation within the 75<sup>th</sup> percentile for the market of similarly situated organizations is considered reasonable by the Internal Revenue Service).

<sup>7</sup> CQC rests this conclusion, in part, on allegations made by Camille Savoy, a former member of the Center's Board of Directors and of the Board's Compensation Committee. Yet, CQC has in its possession documents showing that the allegations are false and that Mr. Savoy's assertions in other areas were also false.

facts and are directly contradicted by basic and well-known legal principles. First, the propriety of the data relied upon, and the reasonableness of Patrick Dollard’s compensation, were confirmed by two objective, independent outside experts—Grant Thornton and Deloitte Tax LLP. Second, as a matter of law, Mr. DiCalogero was independent. Third, CQC’s assertion that the Center is comparable to the UCPs is blatantly false.

Remarkably, CQC criticizes both the Center’s Compensation Committee and the Board of Director’s conduct in the compensation setting process even though CQC has never interviewed any member of the Committee or of the Board and never interviewed the authors of the independent outside studies on which the Committee and the Board relied. Moreover, CQC’s assertions are so clearly wrong that, had they been made in a court of law, they would be sanctionable.

(2) **Discussion**

(a) **Two Outside Independent Experts Assured that the Compensation-Setting Process Was Appropriate and Complied with IRS Reasonableness Standards.**

CQC concludes its discussion of the Executive Director’s compensation by stating that “going forward,” the “specific agencies used for comparison [should be] selected on the basis of objective criteria selected by individuals or entities who are free of conflict of interest.” Second Draft Report at 8. CQC’s opinion that Patrick Dollard’s compensation was not based on objective criteria selected by independent entities is directly contradicted by evidence that extraordinary steps were taken to assure that the decisions of the Compensation Committee and of the Board were based on appropriate data, free of any hint of undue influence from any

quarter, and to assure that the Executive Director's compensation was reasonable under IRS rules.<sup>8</sup>

Two outside, independent experts conducted their own analyses, reviewed and confirmed the appropriateness of the Center's data and validated the reasonableness of the result. Rather than consider the significance of those expert studies, CQC dismisses them as merely "informative." Second Draft Report at 6.

Notwithstanding CQC's insinuations, because the Committee and the Board relied on clearly independent outside experts, whether or not Mr. DiCalogero had a conflict of interest is irrelevant.<sup>9</sup> The process did not depend on Mr. DiCalogero's independence. The system included checks and balances to assure that compensation was set properly and based on appropriate data.<sup>10</sup>

### **(1) The Committee Retains Grant Thornton**

In order to assure compliance with IRS §4958 governing the reasonableness of executive compensation, the Compensation Committee unanimously determined not to rely only on its own analysis or only on the data provided by its consultants, Mr. DiCalogero and Dr. York, but to

---

<sup>8</sup> The Compensation Committee was established when Elizabeth Berman, the Board's President at the time, asked Ed Gianconteri to be the Chairman of the Compensation Committee. Ms. Berman also requested that George Todd and Camille Savoy serve on the Committee." Ex. C, Memo re SDTC Establishment of Comp. Comm. attaching (a) December 9, 2004 notes from Ed Gianconteri, (b) Dec. 16, 2004 letters from Gianconteri to all Board Members, (c) Procedures of Comp. Comm./Establishment of New Contract. All Board Members were contacted via telephone to notify them of the formation of the Compensation Committee. All Board members gave their unanimous written consent.

<sup>9</sup> In fact, as discussed *infra* at Section A(2)(b), Mr. DiCalogero did not have a conflict of interest. CQC once again makes an assumption with no basis in law.

<sup>10</sup> The limited description of the compensation setting process in CQC's Second Draft Report is misleading in that it leaves the impression that the process was somewhat cursory. The detailed description of the compensation setting process set forth in Addendum A, attached hereto, demonstrates otherwise.

request an assessment and opinion of the reasonableness of Patrick Dollard's proposed compensation package "from the agency's independent external auditor – Grant Thornton." Ex. A, August 2007 Report at 7-8, and Ex. 6 at 222; Ex. B, July 2008 Response at 20-25. Thus, the Compensation Committee resolved to seek a letter that would "discuss the Committee's compliance with IRC Code 4958 which relates to the IRS Due Diligence requirements regarding the evaluation and the setting of the executive compensation of the Executive Director." Ex. A, August 2007 Report, Ex. 6 at 222. Grant Thornton was provided with all of the information considered by the Compensation Committee to that point. August 2007 Report, Ex. 6 at 222.<sup>11</sup>

The decision to seek an outside opinion assuring compliance with IRS reasonable compensation standards was not made on the spur of the moment. To the contrary, although never mentioned by CQC, the written "Procedures of Compensation Committee/Establishment of New Contract" established by the Board provided that the proposed compensation package would be presented to the Board only after "the due diligence review has been finalized." Ex. C. *Compare* Ex. A, August 2007 Report, Ex. 6 at 219 (committee minutes discussing review of "due diligence

---

<sup>11</sup> CQC's discussion of the genesis of the Grant Thornton report is one illustration of the Second Draft Report's slanting of facts. The Second Draft Report states: "The Committee requested Mr. DiCalogero to provide Grant Thornton with all necessary information in order to issue the opinion." Second Draft Report at 5. CQC thus conveys the false impression that "Mr. DiCalogero . . . provide[d] Grant Thornton with all necessary information in order to issue the opinion." That is totally inaccurate. In fact, the Committee asked Mr. DiCalogero to provide Grant Thornton only with all information *needed from the Center*. CQC knows this but chooses to twist facts to support its false premise that Mr. DiCalogero exercised improper influence over the compensation-setting process. Grant Thornton, as is evident even from the very first page of the cover letter accompanying its report, independently collected and analyzed its own data. Ex. A, August 2007 Report, Ex. 1 at 1404. Indeed, the independent data sources are identified on page one of the cover letter as well as in the report itself. Ex. A, August 2007 Report, Ex. 1 at 1404, 1408. Moreover, lest there were any doubt, the Center provided CQC with an e-mail dated May 23, 2007 from the principal author of the Grant Thornton study. The e-mail states:

The attached spreadsheet contains the specific data points from each published compensation survey referenced in the SDTC report. The composite average of these points was the basis for the summary market data shown in this report, *independent of any information sent by Vincent DiCalogero*. Our analysis of the survey market data showed that the projected compensation for the SDTC President was in line with the 75<sup>th</sup> percentile of the market.

Ex. A, August 2007 Report, Ex. 9 at 8803 (emphasis added).

package” regarding requirements “for executive compensation ... established by IRC Code 4958”).

Acting wholly independently of the Center and of its consultants, Grant Thornton developed and analyzed its own data. Ex. B, July 2008 Response at 25; Ex. A, August 2007 Report at 9-10.

Grant Thornton, as requested by the Compensation Committee, also reviewed the data that had previously been presented to the Committee. Ex. A, August 2007 Report, Ex. 1 at 1404.

With respect to the reasonableness of Mr. Dollard’s compensation, Grant Thornton concluded:

Based on the information reviewed, Mr. Dollard’s base compensation and total compensation fall approximately within the 75<sup>th</sup> percentile of comparable organizations. We understand that compensation based on comparable data that is between the 25<sup>th</sup> and 75<sup>th</sup> percentile of external market data regarding functionally comparable positions, in like organizations, and in like geographic areas is normally considered reasonable.

Ex. A, August 2007 Report, Ex. 1 at 404-55. Grant Thornton also independently confirmed that the data Mr. DiCalogero and Dr. York had provided to the Compensation Committee was appropriate:

We believe the information provided to you constitutes comparable data appropriate for establishing the rebuttable presumption of reasonableness as it pertains to the intermediate sanctions legislation under Internal Revenue Code Section 4958.

Ex. A, August 2007 Report, Ex. 1 at 1405.

CQC mentions the report but ignores the substance of the Grant Thornton analysis. Yet, Grant Thornton's conclusions were not based on a superficial review. As discussed in the Center's July 2008 Response, in addition to reviewing the data and information previously provided to the Compensation Committee, Grant Thornton independently selected and developed its own multiple data sources.<sup>12</sup> Grant Thornton's letter, report and analysis covered nine pages, relied upon four independent data sources and referenced two others. Ex. A, August 2007 Report, Ex. 1 at 1404, 1408 and 1412.

## (2) The Committee Retains Deloitte Tax LLP

Despite having voted to have Grant Thornton conduct the analysis, Ex. A, August 2007 Report, Ex. 6 at 222, one of the Compensation Committee members, Camille Savoy, now questioned Grant Thornton's independence and requested that a second independent analysis be done. Ex. A, August 2007 Report, Ex. 6 at 224. Mr. Savoy's suggestion that Grant Thornton was not independent because the firm was the Center's outside auditor was so patently inaccurate that it bordered on ridiculous. Cf. Ex. A, August 2007 Report, Ex. 8 at 6071-72.<sup>13</sup> If Mr. Savoy did not

---

<sup>12</sup> Page one of the Grant Thornton letter states that the following independent, comparative data sources were reviewed, in addition to data compiled by Mr. DiCalogero and Dr. Clarence York, another advisor of the Committee:

- ECS/Watson Wyatt Top Management Compensation Report;
- 2004 William M. Mercer Executive Compensation Survey;
- PRM Consulting Management Compensation Report in Not-For-Profit Organizations; and
- Unifi Not-For-Profit Compensation & Employment Practices.

August 2007 Report, Ex. 1 at 1404, 1408; July 2008 Response at 24.

<sup>13</sup> Mr. Savoy questioned Grant Thornton's independence because Grant Thornton was the Center's outside independent audit firm. Ex. A, August 2007 Report, Ex. 7 at 224. To say the least, this view is naïve. Rather than undermining Grant Thornton's independence, the firm's status as the Center's outside auditor should have been viewed as confirmation of Grant Thornton's independent status. Moreover, Grant Thornton's status as the Center's outside audit firm was not new. Grant Thornton's role certainly was known to Mr. Savoy when he voted to have the firm conduct the review. The only new fact at the time when Mr. Savoy asked for a second review was that Grant Thornton disagreed with the position that Mr. Savoy would later take opposing the Executive Director's Compensation.

know that, the other, more experienced, members of the Compensation Committee surely did. Yet, the Compensation Committee treated Mr. Savoy's concerns as if they were well founded and "[b]ased [u]pon Camille Savoy's concerns," decided to engage a second independent expert. Ex. A, August 2007 Report, Ex. 7 at 224-25; Ex. 8 at 6071-72.

Deloitte Tax LLP, another highly regarded executive compensation expert, was retained to conduct a second, wholly independent reasonableness review. Ex. A, August 2007 Report, Ex. 8 at 6071; Ex. 2 at 947-48. Deloitte described the reasons for and the scope of its engagement as follows:

Because of Grant Thornton's status as the current auditor of [the Center], the Committee determined that it would be prudent to have an independent third party review the Plan, as well as Mr. DiCalogero and Grant Thornton's analysis, to determine whether [the Center] meets the rebuttable presumption of reasonableness with respect to the Plan. The Committee engaged Deloitte to provide that analysis.

Ex. A, August 2007 Report, Ex. 2 at 948.

After completing its analysis, Deloitte opined as follows:

Based on our analysis of the facts provided to us during our review of the Plan and discussions with members of the Committee, we conclude that:

- (1) The approval of this Plan is not likely to impair SDTC's tax-exempted status.

- (2) By following the recommendations described above, SDTC will have established a rebuttable presumption of reasonableness of the compensation for purposes of IRC Section 4958.

Ex. A, August 2007 Report, Ex. 2 at 952. Deloitte considered more than twelve data sources that it selected and developed independently. Ex. B, July 2008 Response at 24-25 n.23.<sup>14</sup> Deloitte's letter, report and analysis runs twenty-eight pages.

---

<sup>14</sup> The Deloitte report says the following with regard to its data sources:

Deloitte reviewed market studies conducted by Vincent DiCalogero, CPAs and Grant Thornton, LLP, as well as its own data. The data relied upon by Deloitte in making its determination includes:

- Total cash compensation:
  - Published survey data
  - 990 Data (NY Metro Area & National Residential Adult & Children's Services Organizations)
- Benefits:
  - Published survey data on prevalence and level of benefit (*i.e.*, premiums and contributions paid by employer)
  - Published survey data and Deloitte data on total benefits as a percent of salary
  - 990 Data (NY Area & National Residential Adult & Children's Services Organizations).

Ex. A, August 2007 Report, Ex. 2 at 950-51, 961.

Deloitte's analysis also states that the firm used the following twelve "published survey data" sources:

1. Clark Consulting: 2004 Executive Benefits Survey;
2. Watson Wyatt: 2004/2005 Survey Report on Non-Qualified Benefits and Perquisite Practices;
3. William M. Mercer: 2004/2005 Compensation Planning Survey;
4. Council on Foundations: 2002 Grantmakers Salary and Benefits Report;
5. William M. Mercer: 2003/2004 Spotlight on Benefits;
6. Watson Wyatt: 2004/2005 Survey Report on Employee Benefits;
7. Buck Consulting;
8. 2002 total Compensation Survey of Foundations;
9. Saratoga Institute 2003 Compensation and Benefits Benchmarking Report;
10. Watson Wyatt: 2004/2005 Top Management Compensation Report;
11. William M. Mercer: 2004/1005 Executive Compensation Survey; and
12. PRM Consulting: Management Compensation Report in Not-For-Profit Organizations.

Ex. A, August 2007 Report, Ex. 2 at 974.

According to its report, Deloitte confirmed the reasonableness of the proposed compensation after “mak[ing] an independent assessment of reasonableness versus marketplace practices.” Ex. A, August 2007 Report, Ex. 2 at 949. Deloitte also confirmed that the “market studies conducted by Vincent DiCalogero, CPAs and Grant Thornton, LLP” were “appropriate comparability data.” Ex. A, August 2007 Report, Ex. 2 at 950. Further, the principal author of the Deloitte study, when interviewed, adamantly stated that, if Mr. DiCalogero’s data were not appropriate or reliable, Deloitte would have dismissed such data out of hand. Ex. A, August 2007 Report at 12 n.18; Ex. B, July 2008 Response at 27. CQC never mentions the data sources utilized by Grant Thornton and Deloitte, nor does it consider whether, standing alone, such data validated the reasonableness of Mr. Dollard’s compensation.

### (3) The Board of Directors’ Deliberations

After receiving Deloitte’s formal opinion, the Compensation Committee met again. At that third meeting, Mr. Savoy requested that yet another (*i.e.*, a third) expert review be obtained. Ex. A, August 2007 Report, Ex. 8 at 6071. The remaining three members of the Compensation Committee, however, believed that the requirement for an independent review had been satisfied and that a third opinion was neither warranted, economically justifiable nor necessary.<sup>15</sup> Ex. A, August 2007 Report, Ex. 8 at 6071. *See, e.g., Menard v. Comm’n*, 560 F.3d 620 (7<sup>th</sup> Cir. 2009)

---

<sup>15</sup> To put the credibility of Mr. Savoy’s opinion in perspective, it should be noted that two of the three members voting against retention of a third expert, unlike Mr. Savoy, had substantial experience setting executive compensation. George J. Todd, M.D. is Chief of the Department of Surgery at St. Luke’s–Roosevelt Hospital and is a member of the senior advisory staff of Continuum Health Partners, Inc. Dr. Todd is responsible for determining the annual compensation of, among others, thirty-two full-time surgeons. John Milligan, former Executive Vice President of Fleet Bank, was responsible for setting employee compensation at Fleet Bank and also as a member of the Board of another not-for-profit. In contrast, Mr. Savoy was a retail jeweler with no known experience in setting executive compensation. Ex. B, July 2008 Response at 14 (discussing background of Board members).

(Posner, J.) (only reason for Board to consult with an outside compensation expert “would have been to provide some window dressing in the event of a challenge by the IRS”).

At the Board meeting called to review the Committee’s recommendation, the Board of Directors received the Compensation Committee’s recommendation that the package be approved, the Compensation Committee minutes reflecting the steps taken, as well as all of the data and information reviewed by the Committee, including the Grant Thornton and Deloitte studies. Ex. A, August 2007 Report, Ex. 8 at 6071-72.<sup>16</sup> Mr. Savoy renewed his request that a third independent expert be engaged to review the contract. Ex. A, August 2007 Report, Ex. 8 at 6071-72.

Mr. Savoy’s request was considered, discussed at some length, and rejected:

[i]t was indicated that the requirement for independence was fulfilled by choosing Deloitte & Touche as the center [sic] had no relationship with Deloitte & Touche.” [In addition,] “[i]t was indicated that the ‘external auditors,’ in order to function as external auditors, must be ‘independent’ for the agency. This was noted specifically in regards to the firm of Grant Thornton. Auditors, in the Rules of Accounting, must be independent in order to render their opinion, however, [sic] it was indicated that the IRS would look more favorably upon a compensation study performed

---

<sup>16</sup> Based on a comment by a Board member at the commencement of the process, CQC falsely implies that all Board members were not aware of the current contract’s terms before approving the new contract. Second Draft Report at 3. The comment was made at the beginning of the compensation process, not when the Board was considering the new proposal. Further, the Board member’s comment about the contract reflected the fact that the prior contract had been entered into ten years earlier, in 1994. Moreover, even if some members of the Board could recall the terms of a ten year old contract, there had been turnover on the Board in the intervening years. Finally, however good or bad the Board members’ memories may have been, the prior contract terms were in the information given to the Board before the Board took up the proposed new contract. Ex. A, August 2007 Report, Ex. 8 at 6071-72. CQC just ignored the facts to create a false impression of impropriety.

by someone other than the auditors, in that it would add more value.

Ex. A, August 2007 Report, Ex. 8 at 6071-72. Then, after “[i]n depth [sic] methodology and survey data discussions,” the Board of Directors went into Executive Session. Ex. A, August 2007 Report, Ex. 8 at 6072-73.

CQC’s assertion that Patrick Dollard’s compensation was set based on Mr. DiCalogero’s supposedly biased data is directly contradicted by the Board minutes. Following an Executive Session, the President of the Board, Elizabeth Berman, moved, and the Board approved, the “[e]mployment agreement with Patrick Dollard (Executive Director) *incorporating the terms and provisions set forth in the Deloitte & Touche review of the Compensation Plan.*” Ex. A, August 2007 Report, Ex. 8 at 6073. Thus, if there was ever any doubt, the minutes expressly state that the Board based Mr. Dollard’s compensation on Deloitte’s work, not that done by Mr. DiCalogero. Because even CQC cannot question Deloitte’s independence, this is one more inconvenient fact ignored by CQC.<sup>17</sup>

There is no mandate that an employer retain an independent expert.<sup>18</sup> Further, those employers who choose to retain an expert generally hire only one expert. Here, however, the Board of

---

<sup>17</sup> CQC ignores other evidence that the contract was approved based on Deloitte’s work, rather than on advice from Mr. DiCalogero. Specifically, the contract approved by the Board did not include several significant terms originally approved by the Compensation Committee. Patrick Dollard had requested, and the Committee had proposed, a ten-year contract term. Ex. A, August 2007 Report, Ex. 5 at 217. At the recommendation of Deloitte, however, the contract term was reduced to five years. Ex. A, August 2007 Report, Ex. 2 at 951. Second, the proposal also originally included a provision that the Executive Director’s base salary would increase ten percent per annum. Based on Deloitte’s recommendation, the automatic escalation clause also was removed and replaced with a provision that any annual increases would be at the discretion of the Board. Ex. A, August 2007 Report, Ex. 2 at 951.

<sup>18</sup> The recently completed comprehensive “IRS Hospitals Report,” available at <http://www.irs.gov/pub/irs-tege/frepthosproj.pdf>. (herein “IRS Hospitals Report”), for example, found that 36 percent of respondent hospitals utilized a “related” expert, *i.e.*, an expert employed by the hospital to set executive compensation. *Id.* at 133. Nevertheless, the Hospitals Report found that executive compensation generally was reasonable. *Id.* at 5.

Directors' and the Compensation Committee's compliance with IRS's governing regulations, the reasonableness of Patrick Dollard's compensation and the propriety of the data used to set that compensation have been verified by two independent reports: once by Grant Thornton and once by Deloitte Tax LLP. Ex. A, August 2007 Report, Ex. 1 at 404-05, 1405.

There should, therefore, be no question that the compensation-setting process was appropriate, that the compensation was set based on clearly independent advice and that the compensation was reasonable.<sup>19</sup> CQC ought to be using the Center's compensation-setting process as a best practices case study to train other agencies in the appropriate methods of establishing reasonable compensation.

Indeed, as hard as CQC tries to promote its false view to the contrary, the Center's compensation process clearly was significantly more robust than the usual and customary process utilized by not-for-profit entities to set executive compensation.<sup>20</sup> The compensation-setting process had numerous checks and balances to assure independence and objectivity and that pertinent information was presented and fairly considered. Second, a wealth of information from at least four different sources, all experts in their own right, two of whom were unquestionably wholly independent of the Center and Mr. Dollard, was considered. Third, discussion was vibrant and dissenting voices were heard and their concerns were considered and addressed. Fourth, when independent experts recommended changes in the compensation package, modifications were

---

<sup>19</sup> Because of the importance of the Grant Thornton and Deloitte studies in the Center's compensation setting process, it is not possible to do a fair, objective or balanced assessment of that process without addressing in some detail the role and significance of the two expert reports. Yet, CQC dismisses them as merely "informative," never considering their analysis and never mentioning that both experts independently confirmed the propriety of the data supplied by Mr. DiCalogero. Second Draft Report at 6.

<sup>20</sup> Only forty-eight percent of hospitals in the IRS Hospitals Report reported using an unrelated outside expert to set executive compensation. IRS Hospitals Report at 133.

made. Fifth, the Compensation Committee and the Board included sophisticated, experienced and business-savvy individuals who had significant compensation-setting experience.

CQC's criticism of the Center's compensation setting process simply proceeds in defiance of the facts. Moreover, as reflected by the fact that CQC criticizes the Center's compensation-setting process, but not its outcome, CQC apparently believes that its role is to criticize whether or not the criticism has a basis and whether or not the criticism has a substantive point. Rather than the destructive practice of engaging in criticism for the sake of criticism, CQC should follow the lead of the IRS and adopt an evidence-based, rather than an opinion-based, approach to compliance.<sup>21</sup>

**(b) CQC's Assumption that Mr. DiCalogero Had a Conflict of Interest Precluding Him from Advising the Compensation Committee Is Wrong as a Matter of Law**

CQC's claims that Mr. DiCalogero was not "independent" because of his friendship with Patrick Dollard and because of his status as a consultant to the Center is directly contradicted by black letter law. CQC, an agency with the mission of overseeing not-for-profit entities, surely knows this.

Section 715 of the New York Not-for-Profit Corporation Law (the "NFP Law"),<sup>22</sup> "Interested Directors and Officers," governs transactions involving conflicts of interest. Under New York law, a transaction from which a director or officer stands to benefit is permissible so long as there is advance disclosure (*i.e.*, the material facts are disclosed to the Board, or known to the

---

<sup>21</sup> See, e.g., Elizabeth M. Mills, Michael W. Peregrine and Ralph DeJong, "Lessons to Non Profits from the IRS Hospital Report," 63 *The Exempt Org. Rev.* 345 (April 2009).

<sup>22</sup> There is no New York law governing Board advisors' conflicts of interest. However, the principles applicable to members of the Board serve as a useful surrogate, even if not applicable directly.

Board such that further disclosure is not required) and the transaction has been approved by the Board. Indeed, under Section 715, an interested director may even be present at, and participate in, the Board meeting authorizing the transaction, may be counted to establish a quorum and may even vote on the transaction, provided there are sufficient votes to approve the transaction, without counting his or her vote.<sup>23</sup>

Mr. DiCalogero's assistance plainly was in the interest of the Center. Mr. DiCalogero, an acknowledged expert in not-for-profit executive compensation, had served as a financial and accounting advisor to both the Center and to the Board of Directors for many years. His friendship with Patrick Dollard – as well as with many members of the Board members – was well-known. Moreover, the Compensation Committee took additional steps to mitigate any perceived conflict by retaining completely independent outside experts to provide advice, to review the information provided to the Committee by Mr. DiCalogero, to verify that the proposed compensation was reasonable and to assure that there was no taint as a result of a perceived lack of independence. Mr. DiCalogero, the Compensation Committee and the Board ought to be praised, not criticized, for taking a conservative, principled approach beyond what is legally required.

Moreover, CQC's basic assumption – that a conflict existed – is contrary to law. There is no requirement or practice that advisors to a compensation committee have no prior relationship with the employer. Nor is there any rule that precludes a qualified advisor from assisting in the compensation review of an executive with whom he is friendly.

---

<sup>23</sup> Once again, CQC does not know the applicable law. Compare CQC's statement that "[t]o avoid the appearance of a lack of independence, any member involved in a transaction, either directly or through a relative, should not be present during the deliberations or vote." Second Draft Report at 27. This is yet another instance in which CQC appears unfamiliar with governing law or, alternatively, assumes that its opinion trumps a valid statute.

The IRS Hospitals Report confirms this understanding. The Report notes that, while forty-eight percent of respondents used an unrelated outside expert, as did the Center, to determine executive compensation, thirty-six percent used a related outside expert, *i.e.*, “an expert employed by the hospital.” IRS Hospitals Report at 133. Nevertheless, the Report – as if in direct refutation of CQC – states that “[a]lthough many reported compensation amounts appeared to be high, nearly all [compensation] amounts reviewed in these examinations were upheld as established pursuant to the rebuttable presumption process and within the range of reasonable compensation.” IRS Hospitals Report at 5.

Recently published IRS standards addressing the “independence” of compensation consultants, although not effective at the time in question here, also make clear that it was perfectly acceptable for the Compensation Committee to consider information and data provided by Mr. DiCalogero. More specifically, IRS instructions for the newly designed 2008 Form 990 – the informational tax return filed by organizations, such as the Center – contain a definition of “independent compensation consultant.” Ex. D, 2008 Instructions for Schedule J (Form 990). Although a familial relationship is problematic, nothing suggests that a friendship between the consultant and the executive whose compensation is at issue is problematic. Further, with respect to consultants currently under contract, the Glossary to the new Form 990 provides: “The consultant is independent if . . . a majority of his or her [compensation] appraisals made during his or her taxable year are performed for persons other than the organization, even if the consultant’s firm also provides tax, audit, and other professional services to the organization.” Ex. D, IRS 2008 Instructions for Schedule J (Form 990) at 2.<sup>24</sup> Mr. DiCalogero, who is

---

<sup>24</sup> The principle that a financial services consultant remains “independent,” even if the consultant furnishes other paid services to an organization, is well established in other areas. For example, the auditor independence standards implementing the Sarbanes-Oxley Act of 2002 recognize that an auditor remains independent, even if he or she

considered an expert with respect to executive compensation, meets this test of independence inasmuch as he performs compensation assessments for many, if not most, agencies in New York State. *Cf.* Second Draft Report at 4 n.4.

**(c) CQC Continues To Falsely Assert that the Center Is Comparable to the UCPs in Defiance of Law and Fact**

Under governing law, the reasonableness of executive compensation is established by comparing an executive's proposed compensation to that paid other executives. IRS regulations provide that the fundamental tests of comparability are: (1) whether the entities are "similarly situated"; and (2) whether the executives hold functionally comparable positions. 26 C.F.R. § 53.4958(c)(2)(i). The July 2008 Response explained in detail – and that discussion will not be repeated here – that the tests are fact-intensive; require an understanding of the entities' programs and operations, as well as the actual duties, functions and responsibilities of the executives; and that the tests cannot be applied based only on superficial or structural characteristics.<sup>25</sup>

---

provides non-auditing services. *See* 17 CFR § 210.2-01(c)(4) ("qualifications of accountants; non-audit services"). The AICPA Code of Professional Conduct, Section 101.05 101-3 ("Independence; Performance of nonattest services"), also includes a variety of examples of nonattest services that do not impair auditor independence. Likewise, the New York Attorney General Publication, "Internal Controls and Financial Accountability for Not-for-Profit Boards," at II(G) ("Implementation and Monitoring of Internal Financial Controls; Independent Certified Public Accountants") at 11, states an expectation that a CPA retained as an independent outside auditor also will provide a variety of other financial services.

<sup>25</sup> *See, e.g., Menard v. Comm'n'r*, 560 F.3d 620, 626-628 (7th Cir. 2009) (Posner, J.) ([s]alary is just the beginning of a meaningful comparison because it is only one element of a compensation package; failure to consider functions the executive actually performed as compared to other companies and whether "given the undisputed evidence of [the CEO's] workaholic, micromanaging ways," the CEO "really does do it all himself" was reversible error).

CQC never even made an effort to determine whether the UCPs and the Center were, in fact, comparable. It simply declared that they were. Likewise, CQC never made an effort to determine the functions Patrick Dollard actually performed.

In contrast, the July 2008 Response detailed the legal standards governing “comparability” and applied them to the facts that CQC had ignored. Among other things, the July 2008 Response quoted at length from a third-party study that had recently been completed for the State Education Department. That study had reviewed and assessed the Center’s programs and operations and it makes clear beyond peradventure that, other than licensure, location and funding, the Center and the UCPs have little in common.<sup>26</sup> As it does with other evidence at odds with its opinion, CQC never mentions the study; it just ignores it.

---

<sup>26</sup> The study, conducted independently of the Center for the State by the consulting firm, Education Transformation Group (“ETG”), observed:

- (1) that the Center “stand[s] out as experienced, innovative, entrepreneurial, and committed to excellence”;
- (2) that the Center is an “exemplary residential school[]”;
- (3) that the Center serves those with autism spectrum disorders as well as a significant number of students with multiple, severe disabilities;
- (4) that “approximately 40% [of the children] have a visual impairment”;
- (5) the Center “has its own organic farms and prepares all its own food”;
- (6) that the Center “operates a sophisticated health clinic and diagnostic center”;
- (7) that the Center “also operates an OMRDD adult residential program”;
- (8) that the Center runs a “Family Center ... outfitted with furniture built in the supported employment workshops”;
- (9) that the Center “employs 300 nurses”;
- (10) that the “complex is powered by wind and [its] own geothermal energy”;
- (11) that the Center’s “therapists are integrated into lesson planning” and, rather than pulling students out of class for therapy, “work with each student in the context of the class and the lesson”;
- (12) that technology “is predominant, allowing the most physically restricted students to manipulate their own environment”; and
- (13) that the Center “is driven by the vision of its executive director.”

Despite having the legal meaning of “comparability” laid out and despite having been given concrete factual evidence to the contrary, CQC’s Second Draft Report parrots the First Draft, saying that the Center is comparable to “other agencies serving consumers and operating OMRDD-licensed programs like those of the Center – the remaining 23 independent non-profit affiliates that are part of the Cerebral Palsy (CP) Association of New York State.” *Compare* Second Draft Report at 7 *with* First Draft Report at 7. CQC points to no legal principle supporting that conclusion. Further, CQC has no evidence to support that statement. Thus, the Second Draft Report’s entire description of the Center, its programs, operations and facilities is set forth in three paragraphs comprising a total of thirty-four lines of text.<sup>27</sup> Second Draft Report at 1-2.

The Second Draft Report implicitly admits the troubling fact that CQC never even tried to collect evidence on comparability, stating that CQC conducted only a “fiscal review” described as “a limited review of the Center’s finances and controls over expenditures mainly for 2005.” Second Draft Report at 1. As the July 2008 Response detailed, reviewing the Center’s finances and expenditure controls will reveal little or nothing about whether the Center is “similarly situated” to another agency, as the IRS regulations use that term, or about whether Mr. Dollard’s position is functionally comparable to another executive. Indeed, the Second Draft Report, not surprisingly, contains not one word about the functions or role of Mr. Dollard. This is yet one

---

ETG concluded with a comment that could have been aimed at CQC, stating that the Center “is at the cutting edge of special education, residential programs, parent outreach and optimal environments.” Ex. B, July 2008 Response at 43-46.

<sup>27</sup> The Second Draft Report’s myopic description of the Center’s programs and operations should be compared to the description of the Center attached hereto as Addendum B.

more example of CQC using a twenty percent complete investigation to announce a 100 percent definitive conclusion.<sup>28</sup>

As the ETG study – and the July 2008 Response – make clear, anyone who devoted even a modicum of time to a programmatic or operational review of the Center would see that it is a unique operation in New York. Rather than do such an investigation, CQC simply dictated a conclusion. That approach may be easier, but it is unacceptable. CQC simply refuses to consider or acknowledge facts that the Commission finds uncomfortably at odds with its self-created reality.<sup>29</sup>

---

<sup>28</sup> CQC's ability to authoritatively criticize comparability data compiled by others is undermined by its own inability to construct a complete and accurate data set even using its own definitions, or to see the limitations and omissions in its own data.

For example, "Chart 3" of the Second Draft Report at 7-8 purports to compare Mr. Dollard's compensation to the executive directors of the UCPs. However, CQC fails to note that four of the UCPs (UCP Queens, Handicapped Children's Association of Southern NY, UCP Cayuga and Orange County UCP) did not report any "Contributions to Employee Benefit Plans" on IRS Form 990, reducing total compensation used to assess Mr. Dollard's compensation. In addition, CQC failed to report that the executive directors of two of the UCPs (UCP Capital District and UCP Utica) received compensation from related entities.

More seriously, CQC fails to acknowledge that, historically, not all fringe benefits were listed as "Contributions to Employee Benefit Plans" on the IRS Form 990. For this reason, all compensation experts utilize alternative means (e.g., industry surveys) to evaluate executive benefits. The effect of using the understated Form 990 figures is significant. The fringe benefits reported on the 2005 Form 990 for the UCPs average 12.14 percent of total compensation. In contrast, Deloitte's survey of market practices found that the range of fringe benefits as a percentage of total compensation was, on average, more than twice the percentage reported on the 2005 Form 990s (range: 23.9%-33.4%; average 28.6%). Ex. A, August 2007 Report, Ex. 2 at 968. For this reason, among others, the IRS promulgated a revised Form 990. Surely CQC knows this, but does not acknowledge it. The Board, in contrast, was aware of the underreporting and took it into account. Ex. A, August 2007 Report, Ex. 8 at 6072 ("it was noted that IRS 990's do not report all the compensations [sic] that an executive receives, specifically, other benefits").

<sup>29</sup> In yet another result of an inadequate investigation, CQC's First and Second Draft Reports incorrectly state that the Executive Director's \$9,600 expense allowance was improper and not documented and that the Executive Director received this expense for overnight lodging for business in New York City when, at the same time, he owned an apartment in New York City. Second Draft Rpt. at 3, 9.

If CQC had inquired, it would have learned the following: In 2003, Elizabeth Berman, the Board's President, approved an expense allowance for the Executive Director's hotel accommodations. Indeed, Ms. Berman wrote an internal memo on the issue. The amount of the allowance was based on an analysis, conducted by the Center's CFO, of charges for the Executive Director's hotel stays from 2000 through 2003. In 2003, based on the analysis, the Center offered the Executive Director a flat monthly allowance of \$800 (\$9,600 per year), "representing the average monthly cost to the Center for hotel stays by [the Executive Director] in the greater New York Metropolitan area." Ex. E., Memo from E. Berman. An agreement was signed by the Executive Director and CFO stating that

**(d) As Did CQC's First Draft Report, the Second Draft Report's Discussion of Executive Compensation Ignores the Law and Misrepresents Facts**

The First Draft Report argued that the Center and the UCPs were comparable based on an utterly inaccurate and implausible reading of IRS reasonable compensation rules. Now, CQC argues that a comment supposedly made in executive session by a Board member supports its position that the compensation of the Center's executive director should be set based on compensation paid by the UCPs.<sup>30</sup> Thus, CQC twice repeats the false assertion that, during review of Patrick

---

“[t]he duties and responsibilities associated with this position include and require that the Executive Director represent the company by attending meetings of the Board of Directors, meetings of the Finance Committee, Associate Agency meeting, and other meetings for other agency business, as well as conferences and seminars within New York City. These meetings are after normal business hours and at locations in the New York metropolitan area and, as a result, may warrant the Executive Director to obtain overnight lodging accommodations.” *Id.* Thereafter, in 2005, when the Executive Director purchased an apartment in New York City, his annual expense allowance was reduced to \$5500.

<sup>30</sup> CQC also allowed that comparison to the ARCs might be appropriate because those entities generate most of their revenue from OMRDD and SED, but also noted that several of the ARCs operate in higher cost of living areas such as Metro New York City. This point also was addressed in detail in the Center's July 2008 Response, which, among other things, referred to a published study by Fordham University that found that CQC's assumptions about the disparity of costs between Metro New York City and other areas of the state were not true. Ex. B, July 2008 Response at 10-11 and 10 n.7. Moreover, in yet another example of the manner in which CQC selectively uses data to create faulty inferences supporting its position, rather than objectively reporting findings, the Second Draft Report, referring to data regarding Metro New York agencies compiled by Vincent J. DiCalogero, states:

[T]he comparisons included agencies with much higher revenues than the Center. Twenty-six percent of the comparables ... pertain to agencies with revenues more than double that of the Center. Although the Compensation Committee minutes reflect discussion about Mr. Dollard's compensation, they are silent as to why the Committee felt that the Center should be compared to agencies so much larger than the Center.

Second Draft Report at 7.

Leaving aside the fact that CQC continues to ignore the IRS requirements that entities be “similarly situated” and that positions be functionally comparable and relies entirely on structural comparisons, this is the statement of someone advocating a particular point of view, not a statement that an objective analyst would make. The Second Draft Report completely fails to acknowledge that seventy-four percent of the comparables had annual revenues less than, equal to or slightly higher than the Center. Indeed, the Second Draft Report also fails to acknowledge that 70 percent of the comparables had revenues less than half that of the Center.

CQC's further comment that the minutes “are silent as to why the Committee felt that the Center should be compared to agencies so much larger” also is revealing on several levels. First, the statement is patently untrue as discussed *infra* at Section II.A(2)e). Second, if, as CQC demands, it was incumbent on the Committee to explain its

Dollard's compensation package, "one of the Center's board members, in executive session, stated that the 'most relevant information is the actual information about agencies that deliver similar services.'" Second Draft Report at 6, 8.

CQC's assertion is false in several respects: First, no Board member made any such statement. Second, it was not made in executive session. Third, CQC took the comment out of context and twisted it into something it is not. Fourth, if CQC had done any investigation of the matter, it would have learned that, in response to the comment and at the request of the Board, one of the Board members (who had the required expertise) reviewed and assessed the underlying data utilized by Deloitte.

During its open session, the Board had a lengthy discussion of the Deloitte opinion and report. *Compare* Ex. A, August 2007 Report, Ex. 8 at 6071-73 (reporting on discussion in open session) *with* 6073-74 (Board goes into Executive Session). If CQC had read the Board minutes, it would have found that the Board had expressly refused to go into Executive Session shortly before the comment at issue was made. Ex. B, July 2008 Response, Ex. 8 at 6071.

During the open session, a Board member stated that the Deloitte report discussed compensation studies, rather than presenting the underlying data. The Board member noted that he was

---

rationale (which it did), it also was incumbent on CQC to explain why the Center should be compared only to agencies with equal or lower revenues.

On a more basic level, CQC ignores the fact that any survey – compensation or otherwise – uses a range of data, *i.e.*, below, at and above the target. This is such an elementary proposition that CQC's failure to recognize it raises serious questions about CQC's bias or its abilities, or both.

Finally, although CQC fills almost three pages of the Second Draft Report with charts and analysis of the data provided by Mr. DiCalogero and Dr. York, it completely ignores the additional data in the Grant Thornton and Deloitte reports. Ex. B, July 2008 Response at 34 n.29. That data may be inconvenient, but it is surely relevant.

perfectly capable of reviewing and assessing the underlying data. Ex. A, August 2007 Report, Ex. 8 at 6072.

Corporate Counsel — not a Board member — then offered his opinion that the most relevant information was not the summary of the studies that Deloitte had presented, but the actual data underlying the studies utilized by Deloitte about agencies providing similar services. Ex. A, August 2007 Report, Ex. 8 at 6072. If there were any doubt that Counsel was referring, not to the UCPs as CQC would have one believe, but to the Deloitte studies, it is eliminated by Counsel's follow-up. Counsel commented that the Deloitte data could be made available for review and that, if the Board was not comfortable relying on the studies, the Deloitte report "should be rejected and the Board should react appropriately." Ex. A, August 2007 Report, Ex. 8 at 6072.

Understood in context, Counsel's comment actually makes exactly the opposite point than the one CQC tries to superimpose on it. Specifically, rather than referring to data about UCPs, Counsel was making the point that the national data utilized by Deloitte included "agencies [not located in New York and neither licensed nor funded by OMRDD] that deliver similar services" to the Center. Second Draft Report at 6, 8.

Further, although it is not mentioned in the minutes, the Board member who had stated that "he was qualified and had the ability to challenge an accounting firm," Ex. A, August 2007 Report, Ex. 8 at 6072, when interviewed, noted that the Board took "a break and I did review the data

and concluded that the Deloitte conclusions were justified and other members of the board [sic] were at that point comfortable proceeding.”<sup>31</sup>

Leaving aside that CQC completely mischaracterizes the source and misinterprets the substance of the comment, CQC is claiming that Counsel’s *opinion* is a rule of law or a standard of practice. That proposition is so obviously wrong that it requires no answer.

Moreover, notwithstanding CQC’s opinion, there is no requirement that a Board look at actual data about specific agencies. As was made clear in the Center’s July 2008 Response, reliance on expert, professionally prepared compensation studies is, as a matter of law, one acceptable method of setting executive compensation. Ex. B, July 2008 Response at 7.

Even if the July 2008 Response had not laid out the law for CQC, it is astounding that an agency charged with oversight of not-for-profit entities persists in this error. CQC’s argument is not merely wrong. It is expressly and directly contradicted by state and federal law.

The New York Not-For-Profit Corporation Law expressly provides that directors may rely on “information, opinions, reports or statements including financial statements and other financial data, . . . prepared or presented by . . . counsel, public accountants or other persons as to matters which the directors or officers believe to be within such person’s professional or expert competence.” N.Y. N-PCL § 717(b). Ex. B, July 2008 Response at 31. The IRS rules also

---

<sup>31</sup> Thus, once again, because CQC substituted assumptions for a proper investigation, CQC gets it wrong. CQC states that “the only specific comparables available to the Committee were those entities selected by Mr. DiCalogero.” Second Draft Report at 6. In fact, the data regarding the comparables summarized in the Deloitte study were available to the Board and were reviewed by the very Board member on whom CQC relies for support. The Board member, William C. Myslinski, PhD, holds a doctorate in economics and is an acknowledged expert in market definition and analysis, and is fully capable of analyzing, evaluating, understanding and utilizing market data, such as that utilized in the Deloitte studies. CQC, however, has no way of knowing any of this because CQC never interviewed Dr. Myslinski, preferring instead to take comments out of context and make inaccurate attributions.

make clear that, even if it is capable of doing so, neither the Compensation Committee nor the Board is obliged to examine or analyze primary source data. Ex. B, July 2008 Response at 27-28 n.27 (discussing IRS example of hospital properly relying on expert-prepared surveys). Further, both the IRS Hospitals Report and the instructions to the revised Form 990 make clear that reliance on an outside expert consultant is not only legally acceptable, it is a common method of establishing executive compensation. IRS Hospital Report at 144; Ex. D, IRS Instructions for Schedule J (Form 990) at 2.<sup>32</sup>

**(e) CQC Inaccurately States that the Compensation Committee Compared the Executive Director’s Compensation Only Against “much larger” Agencies and Never Explained its Compensation Decisions**

Once again, CQC misstates the facts. First, the Executive Director’s compensation was set based on an array of agencies that included agencies with higher, equivalent and lower revenues. The

---

<sup>32</sup> The recently released 2009 IRS Hospitals Project Report makes clear that: (1) IRS rejects CQC’s definition of comparable providers; and (2) CQC’s assertions are contrary to standard practice.

The IRS asked not-for-profit hospitals “which of six [IRS-]identified factors were included in the comparability data used by the hospitals” to set compensation for top management. IRS Hospital Report at 135. The comparability factors identified by IRS were: (1) education and experience; (2) specific responsibilities; (3) geographic area; (4) similar services; (5) beds, admissions, or outpatient visits; and (6) other factors. *Id.* at 136. In other words, in contrast to CQC’s structural definition, IRS defined comparability functionally based on a broad, open-ended subset of market definition criteria.

The IRS Hospital Report also makes clear that the criteria are not applied woodenly in practice. For example, although “geographic area” is listed as one point of comparison, the Report notes that, when a hospital was competing for top executives in a national market, as does the Center, “comparability might not be limited to entities in similar geographic areas.” *Id.* In direct opposition to CQC’s assertion that amount of revenue is a virtually dispositive factor establishing or precluding comparability, the IRS Hospital Report states that over ninety percent of respondents considered each of the six comparability factors and seventy-one percent considered all factors, but few “also considered entities with similar levels of revenue in determining comparability.” *Id.* at 135-36. In short, on these points, as on many others, CQC’s world view bears no relation to reality.

Finally, the IRS Hospital Report also makes clear that CQC’s assertion that the Compensation Committee should have reviewed raw (*i.e.*, original source) data about the “specific agencies used for comparison,” Second Draft Report at 8, 6, is flatly wrong and at odds with standard practice. The IRS Hospital Report states: “[P]ublished surveys was [sic] the most frequently reported tool” used to set compensation. *Id.* at 132. Eighty-seven percent of survey respondents reported “the use of published surveys to determine compensation amounts.” *Id.* Indeed, no other data source was used at anywhere near the frequency of published surveys. Once again, CQC presumes that the Commission’s opinion should dictate standard practice, rather than be informed by it.

compensation was not set based solely on comparison with larger agencies, as CQC would have the reader believe. Second, CQC's assertion that the Compensation Committee minutes are silent with respect to the reasons that the Committee felt that the Center should be compared to agencies that, according to CQC, are "so much larger [measured by annual revenue] than the Center," Second Draft Report at 7, is just wrong.

Although the Compensation Committee ultimately recommended, and the Board approved, a base salary of \$350,000, at its first meeting the Committee originally proposed a base salary of \$300,000. According to the minutes, "[T]his recommendation was considered reasonable, and was based upon the \$313,958 *average* base salary of other non-profit Executive Directors as presented in the Executive Compensation surveys." Ex. A, August 2007 Report, Ex. 5 at 8 (emphasis added).

The "Executive Compensation surveys" to which the Compensation Committee minutes refer, and from which the average was determined, included an array of agencies. That array, as it should, included agencies with revenues higher than, lower than and equivalent to those of the Center. Seventy-four percent of the agencies in the survey had revenues less than, equal to or slightly higher than the Center. Ex. A, August 2007 Report, Ex. 11 at 6551. Despite ignoring it, CQC knows this. Second Draft Report at 7.

Thus, although ignored by CQC, the minutes explain that the Committee's starting point was based on an *average* of the array of providers of various sizes (measured by revenues), not merely based on comparison to providers with larger revenues. Other provisions of the first meeting minutes, discussing other contract terms, discuss comparability to "other Executive Director contracts," annual increases "based upon prior year accomplishments" and consistency

with existing practice as reasons for the compensation package. Ex. A, August 2007 Report, Ex. 5 at 218.

The minutes of the second Committee meeting – at which the package was finalized – state that, in addition to predicating the amount of compensation on comparisons of salaries paid executive directors of other agencies, the Compensation Committee was equally, if not more, concerned, with the Center’s operational success, its national recognition and the growth and performance of the Center under Mr. Dollard’s leadership and about Patrick Dollard’s failure, in the preceding ten years, to receive any additional salary increases (*i.e.*, beyond the automatic six percent provided by the contract).<sup>33</sup> In addition, the Committee wanted to lock Mr. Dollard in for the foreseeable future.

The February 2, 2005 meeting minutes state that “the Compensation Committee *unanimously* agreed to a base salary of \$350,000 for the Executive Director effective 1/1/2005.” Ex. A, August 2007 Report, Ex. 6 at 220 (emphasis in original.) According to the minutes, “[T]his recommendation was considered reasonable” because, among other things:

- (1) “The Compensation Committee determined that it was in the best interest of the Agency to retain the existing Executive Director until his retirement”;
- (2) “The Compensation Committee felt that it would be appropriate for the compensation of the Executive Director to fall within the

---

<sup>33</sup> CQC, however, must be aware of the subjective aspects of the Committee’s reasoning because the Committee’s two objective reasons (both relating to the amount of compensation) are mentioned in the Second Draft Report at 4. Both objective components of the Committee’s reasoning are inextricably intertwined with the more subjective factors considered by the Committee; it is not likely that CQC read the minutes closely enough to find the objective portions of the rationale without seeing the subjective component. CQC just chooses to ignore those components.

upper quartile of the Rankings schedule that lists the dollar value of the Executive Director's compensation within the 990 surveys”;

- (3) “SDTC-The Center for Discovery is a premiere [*sic*] placement facility for medically frail and autistic individuals, and is highly regarded in the industry”;
- (4) “The Committee felt that the Executive Director deserved a compensation package comparable to the performance and reputation of the Center”;
- (5) “[T]he Executive Director has not received any additional salary increases (other than the normal 6% each year) over his past 10-year term”; and
- (6) “This large increase in base salary represents a one-time catch-up adjustment to salary that would move the Executive Director's compensation level to where the Committee deems appropriate.”<sup>34</sup>

---

<sup>34</sup> The false impression created by CQC's assertion that the Board never provided a rationale for its compensation determination is exacerbated by CQC's selective and slanted factual presentation, its omission of some facts and its discussion of facts out of context. These problems permeate the Second Draft Report's compensation discussion.

For example, CQC notes that the Executive Director's 2005 contract provided total compensation of \$512,600. Second Draft Report at 3. In a footnote appended to that sentence, CQC states that: “This latest contract replaced a prior ten-year contract . . . . The prior contract called for an annual base salary of \$145,000 plus fringe benefits, including a discretionary amount set at 45 percent of his salary.” Second Draft Report at 3 n.2. By juxtaposing Mr. Dollard's 2005 *total* compensation of \$512,600 with the *base* salary, \$145,000, CQC implies that this is a meaningful comparison and that a substantial unexplained and unjustified salary increase was given.

The appropriate comparison, of course, as even CQC must recognize, is base salary to base salary or total compensation to total compensation. Second Draft Report at 4 (discussing proposed year-to-year increase in base salary). Yet, even when CQC makes an appropriate comparison, it slants the facts and presents only the portion or perspective that supports its point of view.

Thus, CQC states that the Compensation Committee originally proposed that Mr. Dollard's *base* salary be increased “from \$245,000 to \$300,000, a 22 percent increase over the previous year.” Second Draft Report at 4 (emphasis added). Similarly, the Second Draft Report states that “Mr. Dollard's *total* compensation from 2001 to 2006 increased from \$381,462 to \$549,630, which represents a 44 percent increase over the six-year period.” Second Draft Report at 3 (emphasis added).

CQC simply ignores critical facts that give an entirely different gloss to the salary increase – whether base or total compensation. First, CQC never acknowledges that the Compensation Committee explained that the increase “represents a one-time catch up adjustment . . . to a level . . . [that] the Committee deems appropriate” and that Mr. Dollard “has not received any additional salary increases” such as merit or other similar increases “(other than the normal 6% each year) over his past 10-year term.” Ex. A, August 2007 Report, Ex. 7 at 220-21. Moreover, CQC's temporal frame of reference, 2001 to 2006, includes four years under the old contract and only two under the

The Committee also separately explained its rationale for the benefits provided:

- (1) “Fringe Benefit Distribution . . . The Compensation Committee felt that it would be appropriate for the compensation of the Executive Director to fall within the upper quartile of the Rankings schedule that lists the dollar value of the Executive Director’s compensation within the 990 surveys. SDTC – The Center for Discovery is a premiere placement facility for medically frail and autistic individuals, and is highly regarded in the industry. The Committee felt that the Executive Director deserved a compensation package comparable to the performance and reputation of the Center; and
- (2) “[T]he Executive Director position of this type of Agency includes a great deal of stress related to monitoring the health and well-being of all consumers, sometimes dealing with immediate life and death situations. This type of position requires the ability to take [a sabbatical]. This type of benefit is common in universities, hospitals, and law firms.”

Ex. A, August 2007 Report, Ex. 6 at 220-21. Thus, the Committee clearly stated that the Executive Director’s compensation package was justified not merely based on simple numerical

---

new, thereby artificially increasing the percentage change, and also includes the “one-time catch-up adjustment,” but the average annual increase across the six years is still only 7.3 percent.

If Mr. Dollard’s total (taxable and nontaxable) compensation is examined from a perspective that includes the last year of the prior contract through 2008, the most recent year of the new contract, a much different picture emerges. During that period, total compensation (adjusted only for one-time nonrecurring events) increased from \$505,659 to \$581,507. In other words, over the period, total compensation increased an average of 3.75 percent annually (a total of fifteen percent over the entire period). Ex. A, August 2007 Report, Ex. 6 at 220. By way of comparison, cost-of-living adjustments made by the Social Security Administration in the 2004-2008 period averaged 3.64 percent.

CQC, rather than presenting a complete picture, told only part of the story – the part that it perceives reflects badly on the Center. That is CQC’s modus operandi.

comparison to other agencies, as favored by CQC, but based on the actual, extraordinary performance and success of the Center under Patrick Dollard's leadership.<sup>35</sup>

Likewise, Deloitte noted that the Committee's recommendation was based on subjective as well as objective factors and goals. Deloitte stated that:

During the past ten years, under Mr. Dollard's direction, SDTC's programs have expanded significantly. SDTC's financial situation has also steadily improved, growing from a company with \$17.7 million in assets in 1995 to \$64.7 million in 2003.

August 2007 Report, Ex. 2 at 947. Deloitte made another point which CQC also chooses to ignore: "As a result" of Mr. Dollard's extraordinary success, "SDTC's Board desires to enter a new contract with Mr. Dollard such that Mr. Dollard remains as SDTC's Executive Director for the foreseeable future." Ex. A, August 2007 Report, Ex. 2 at 947.

As the extensive case law discussed in the Center's July 2008 Response makes clear, these factors are all legitimate bases for establishing the reasonableness of executive compensation. Indeed, courts repeatedly have rejected CQC's premise that compensation must be predicated solely on an objective comparison based on agency revenues and salaries. Instead, courts have repeatedly held, and reaffirmed, that the reasonableness of compensation may be determined based solely on subjective assessment of factors such as the employee's performance, commitment, responsibility and success, even where there is no evidence of compensation paid by comparable entities. Ex. B, July 2008 Response at 40 n.36. *See also Menard v. Comm'n'r.*,

---

<sup>35</sup> Note that the Committee was composed of Board members, all of who were very familiar with the Center's programs and reputation. Ex. B, July 2008 Response at 13-14. Moreover, one of the documents before the Committee was a document containing the "Evaluation and Accomplishments of Executive Director." Ex. A, August 2007 Report, Ex. 6 at 219.

560 F.3d 620, 625-628 (7<sup>th</sup> Cir. 2009) (holding that “the only point” of seeking outside advice about compensation and other executives “would have been to provide some window dressing in the event of a challenge by the IRS”).

Even if there were some questions about the action of the Committee or the Board – and, on this record, there should be none – compensation decisions made by a Board based on expert advice “in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions” are protected against second-guessing by the business judgment rule. *See, e.g., People v. Grasso*, 11 N.Y.3d 64, 70 (2008) (citing N-PCL §717). *See also* Not-For-Profit Corporation Law §§ 717(b), 719, Ex. B, July 2008 Response at 29-30. CQC is not exempt from this statutory rule.

**(f) CQC’s Assertions that Mr. DiCalogero Attended Executive Sessions of the Compensation Committee and of the Board Are Wrong.**

CQC reports that, in support of his assertions that Mr. DiCalogero manipulated the Compensation Committee, Mr. Savoy asserted that Mr. DiCalogero was present during executive sessions of the Board and the Compensation Committee. Second Draft Report at 3. Despite documentary evidence – which is in CQC’s possession – that the allegation is false, CQC reports and adopts the allegation as if some actual impropriety were alleged. Thus, the Second Draft Report makes yet another plainly false allegation, besmirching the integrity of Mr. DiCalogero, the Compensation Committee and the Board.<sup>36</sup>

---

<sup>36</sup> Despite repeating the allegation as though it had some basis in law or practice, CQC never identifies a legal or practice standard that makes a consultant’s attendance at a Board meeting or Executive Session improper. Of course, consultants commonly attend Board meetings and often are asked to participate in Executive Sessions. As a principal financial advisor to the Board and the Center it would be surprising if Mr. DiCalogero did not attend Board meetings, especially at a time when the Center was undergoing rapid growth.

Five meetings are potentially the subject of this allegation. Four of the meetings involve the Compensation Committee; the fifth is a Board of Directors' meeting.

The Compensation Committee met on four separate occasions (on January 6, 2005, February 2, 2005, February 16, 2005 and March 23, 2005). Ex. A, August 2007 Report, Ex. 5 at 217-18; Ex. 6 at 219-21; 223-25; Ex. 7 at 223-25; and Ex. 8 at 6071. According to the minutes of the January and February meetings, no executive sessions occurred. Ex. A, August 2007 Report, Ex. 5 at 217-18; Ex. 6 at 219-22. An executive session of the Committee is reported in the minutes of the March 23, 2005 meeting. Ex. F, March 23, 2005 Comp. Com. Minutes. At that time, according to the minutes, both "Vincent J. DiCalogero and Clarence York were asked to leave the room" while the Compensation Committee discussed Mr. Dollard's proposed compensation package. *Id.* Neither adviser returned "until the meeting was completed and adjourned." *Id.*

The recommendation of the Compensation Committee to the Board of Directors regarding Patrick Dollard's compensation package was presented at the Board meeting on March 30, 2005. Ex. A, August 2007 Report, Ex. 8 at 6071. When the Board went into executive session, its advisors, including corporate counsel, were excused. Ex. A, August 2007 Report, Ex. 8 at 6072. This is evident because the minutes also indicate that the Center's outside General Counsel "was asked to return during the executive session to comment 'on issues that arose during the executive session.'" Ex. A, August 2007 Report, Ex. 8 at 6073. Following that consultation, the

---

It is beguiling that Mr. Savoy made this charge to CQC for two reasons: First, as far as it appears from the Board minutes, Mr. Savoy never brought any such concern to the Board. Second, during the compensation review process, Mr. Savoy twice asked that an Executive Session be called. In both instances, the Complainant's request was honored and, as discussed in the text, all non-Board members, including Mr. DiCalogero, left the room. *See infra* at Section II.A(2)(i).

minutes note that “[t]he Board returned to an executive session.” Ex. A, August 2007 Report, Ex. 8 at 6073.

Unless CQC failed to read or understand the relevant Compensation Committee and Board of Directors’ minutes (all of which were provided to CQC), the Commission knows that the allegation is false. Moreover, CQC could have easily learned – or confirmed – that it was false through interviews with other Compensation Committee or Board members, but no such interviews were conducted. As it stands, it appears that the Commission has included the allegation in the Second Draft Report for the same reason that the Complainant appears to have made it – to create a false inference of wrongdoing.

**(g) CQC’s Statement that It Is Not Clear Why the Center Did Not Obtain an Opinion Letter from Grant Thornton Is Wrong**

CQC attempts to undermine the reliability of one of the Center’s expert reviews by noting that the Compensation Committee failed “to obtain an ‘Opinion Letter’ from its independent external auditor, Grant Thornton, in order to ensure that due diligence requirements were met.” Second Draft Report at 5. The Second Draft Report states that Grant Thornton, despite being qualified to do so, “did not issue an ‘Opinion Letter’ as initially requested by the Committee; . . . what was issued was what the Committee described as a ‘Comfort Letter.’” Second Draft Report at 5. CQC then states ominously: “Committee minutes did not explain why an ‘opinion letter’ was not pursued from Grant Thornton,” Second Draft Report at 5, inferring that there might have been some substantive problem causing the omission.

CQC’s statement that there is no explanation for the supposed “failure” to obtain an opinion letter from Grant Thornton could be made only by someone who did not read, or ignored, the

minutes and the Grant Thornton letter or, alternatively, by someone who did not care about accuracy. The statement is evidence of CQC's repeated failures to pursue the evidence where it leads, rather than where CQC wished it to go.

The facts are as follows: The Compensation Committee, after initially voting to seek an opinion letter from Grant Thornton, opted to receive a comfort letter instead for two reasons.

First, the compensation package was supposed to have become effective on January 1, 2005, but almost two months later, in February 2005, had not yet been finalized or put in place. When contacted, Grant Thornton advised that the preparation of a formal opinion letter would require a significant amount of time because of the detail required, the necessity for multilevel internal approvals and other constraints and demands on the firm's resources. This is reflected in the statement in Grant Thornton's letter that the firm was "more than qualified to render an opinion, but it would necessitate much more involvement and higher fees," and was confirmed through interviews. Ex. A, August 2007 Report, Ex. 1 at 1405.

Second, when Camille Savoy questioned Grant Thornton's independence, the Committee agreed to obtain a second opinion. Ex. A, August 2007 Report, Ex. 7 at 224. Obviously, if the Committee was seeking a second independent expert opinion from a firm other than Grant Thornton, there was no reason to also pay Grant Thornton for a formal opinion. Moreover, in view of the Committee's desire to assure unquestionable, independent oversight of its work, it would have made no sense to pursue an opinion letter from Grant Thornton after Mr. Savoy questioned that firm's independence.

The ultimate irony in CQC's assertion that there is no explanation "why an 'opinion letter' was not pursued from Grant Thornton," Second Draft Report at 5, is not just that it is wrong, but

CQC also seems not to know the law in this area, despite its penchant for second-guessing those who do. Thus, CQC apparently assumes that an opinion letter was required. To the contrary, IRS regulations make clear that reasonableness can be determined by an expert consultant who is not a CPA and who, therefore, would not be qualified to issue an opinion letter. Ex. D, 2008 Instructions for Schedule J (Form 990) at 2. CQC's assumption that some adverse consequence could attach to the failure to obtain a formal opinion from Grant Thornton, or that an explanation is required for the "failure" to do so, simply ignores the evidence and the law and is another example of a conclusion with no foundation.

**(h) CQC Misstates IRS Requirements Regarding the CFO's Compensation.**

CQC's Second Draft Report states that "Internal Revenue Code § 4958 regarding reasonable compensation pertains not only to the CEO, but also applies to any person in a position that exercises substantial influence over the organization." Second Draft Report at 9. CQC also states: "However, the Commission found no separate Board approval or compensation comparison for Robert Van Dusen, the Center's CFO." Second Draft Report at 9.

CQC seems to be under the impression that the provisions of "Internal Revenue Code § 4958 regarding reasonable compensation" are mandatory, such that executive compensation cannot be deemed reasonable unless the provisions of the regulations implementing Section 4958 are satisfied. CQC made the same mistake in its First Draft Report. First Draft Report at 5, 8.

In fact, the regulations are not mandatory and compensation may be reasonable, whether or not the regulatory process has been pursued. This point was made, complete with citations to

governing law, in the Center's July 2008 Response. Ex. B, July 2008 Response at 19. Yet, CQC continues to erroneously insinuate that the Center has broken the law.<sup>37</sup>

There is yet another irony here: CQC criticizes the Center for failing to utilize the reasonable compensation regulations to evaluate and establish the CFO's salary. However, CQC's Second Draft Report does not use the IRS rules to assess the reasonableness of Mr. Dollard's compensation. A better illustration of the "do as I say, not as I do" is hard to imagine.

Nonetheless, as noted in the Second Draft Report, the Center, as a matter of good practice, has elected to set the CFO's compensation based on the advice of independent outside compensation experts. Second Draft Report at 9.

**(i) CQC's Discussion of Mr. Savoy's Role in the Compensation Review Process and of His Departure from the Board Is Incomplete, Misleading and Inaccurate.**

CQC once again selectively juxtaposes some facts and omits others to create the false impression that Camille Savoy, the Commission's complainant, was a solitary voice of reason who unsuccessfully attempted to hold back a flood tide of unprincipled cronyism and, further, that the Center retaliated by dismissing him from the Board. As is often the case with the Second Draft Report, when all of the facts are known, a much different picture emerges. In fact, the behavior, statements and other actions of Mr. Savoy throughout the compensation review process – and, indeed, in interacting with CQC – were so clearly erroneous, erratic and inconsistent that the

---

<sup>37</sup> Section 4958 creates an optional process that organizations may follow to create a rebuttable presumption that executive compensation is reasonable. If the process is followed, and the reasonableness of the compensation is later challenged, the IRS has the burden of proving that the compensation is unreasonable.

However, the regulations also specifically provide that failure to follow the regulatory process, that is, failure to establish the rebuttable presumption of reasonableness, gives rise to no presumption that the compensation arrangement is unreasonable. 26 C.F.R. § 53.4958-6(e). Thus, there is no basis for CQC's inference that Mr. Van Dusen's compensation is unreasonable or that the Center acted inappropriately or illegally because such compensation was not set pursuant to IRC § 4958.

Second Draft Report, at the least, should never have republished Mr. Savoy's allegations, let alone done so in a way that makes it appear that the Commission is adopting and ratifying the false allegations.

**(1) CQC's Description of the Votes of the Compensation Committee and of the Board of Directors, and Mr. Savoy's Role in Those Votes, Is Incomplete and Misleading.**

CQC's Second Draft Report states: "According to the 2/2/05 minutes, the Committee unanimously approved all the provisions of the proposed contract, although later minutes reflect that one member disputed this account, stating that he never agreed to the proposal." Further, according to the Second Draft Report, on March 23, 2005 the Compensation Committee recommended "the proposal to the full Board for their approval" by a "vote [of] .... 3 to 1 with one member voting to disapprove the proposal." Second Draft Report at 5.

CQC fails to acknowledge that: (1) Mr. Savoy, on the record, did, in fact, approve the proposal; (2) that the minutes of the Compensation Committee meetings state that he did so, both collectively and when polled individually; (3) that Mr. Savoy was present when those minutes were reviewed but did not dispute their accuracy; and (4) that *all* three other Committee members confirmed that Mr. Savoy had voted to approve the proposal. By failing to include all of the facts, the Second Draft Report makes it appear that Mr. Savoy acted in a consistent and reasonable manner, treats his claim to have opposed the proposal as legitimate and deprives the disinterested reader of facts needed to assess the reasonableness and appropriateness of the reaction of the Compensation Committee and of the Board to Mr. Savoy's demands.

CQC's Second Draft Report does not acknowledge, for example, that the February 2, 2005 minutes list, and discusses in thirteen separate paragraphs, each proposed contract term, including base salary, annual raise, benefits, leave and multiple other proposed terms. Ex. A, August 2007 Report, Ex. 6 at 220-21. Nor does the Second Draft Report acknowledge that each of thirteen separate paragraphs state: "[T]he Compensation Committee *unanimously* agreed" to the proposed terms discussed in that paragraph.<sup>38</sup> Ex. A, August 2007 Report, Ex. 6 at 220-21 (emphasis in original).

The Second Draft Report also ignores that, to assure no misunderstanding, the minutes conclude by stating that the Committee Chair polled the members, including Mr. Savoy, individually with respect to the entire package. The February 2, 2005 minutes include the statement, printed in bold typeface, that **"these recommendations were voted on and unanimously approved by all of the Compensation Committee members, including John Milligan as Chairman of the Finance Committee. In addition, Committee Chairman Ed Gianconteri polled each member individually for their response:**

**Ed Gianconteri – Yes, approve all provisions**

**George Todd – Yes, approve all provisions**

**Camille Savoy – Yes, approve all provisions**

**John Milligan – Yes, approve all provisions."**

Ex. A, August 2007 Report, Ex. 6 at 222 (emphasis in original). The minutes conclude with a statement that leaves no doubt that the recommendations were to go to the Board: "These

---

<sup>38</sup> Two of the paragraphs (with respect to a proposed sabbatical and the annual raise) used slightly different wording, saying that the terms were "*unanimously* approved." Ex. A, August 2007 Report, Ex. 6 at 220-21.

recommendations, once finalized, are to be forwarded to the SDTC's Board of Director's [sic] for full Board approval." Ex. A, August 2007 Report, Ex. 6 at 222.

On this record, the evidence – ignored by CQC – that Mr. Savoy was, at least, mistaken when he denied voting to approve the compensation package is arguably indisputable. Yet, there is more.

According to the minutes of the Committee's next meeting, "[a]t the start of the meeting, Vincent J. DiCalogero reviewed the Minutes of the prior meeting on 2/2/2005." Ex. A, August 2007 Report, Ex. 7 at 223. The minutes also state, "The Compensation Committee reviewed and discussed . . . information [which] included the following: . . . Minutes of Compensation Committee Meeting 2/2/05. . . ." Ex. A, August 2007 Report, Ex. 7 at 223. Mr. Savoy never questioned the accuracy of the February 2, 2005 minutes, however, or stated that he had not approved the compensation package.

The first indication that Mr. Savoy had any problem with the proposed compensation package occurred only after receipt of the second outside expert opinion from Deloitte stating that the proposed package was reasonable and satisfied IRS requirements. At the March 23, 2005 Compensation Committee meeting, Mr. Savoy "indicated that he believed the Deloitte & Touche package should be the beginning of the Compensation Review for the Executive Director." Ex. F, March 23 Comp. Com. Minutes at 2. Despite the work done over the last months, despite two expensive expert reviews, despite the fact that the fact that three months of the contract period already had expired and despite his failure to express any reservations previously, Mr. Savoy "wanted to begin the compensation anew." *Id.*

Continuing a pattern, the Second Draft Report also fails to mention that, among other things, "[t]he Committee reminded Camille Savoy that he previously approved and recommended a

higher compensation package [than that approved by Deloitte and currently before the Committee] at the Committee Meeting on 2/2/05.” *Id.* At that meeting Mr. Savoy, along with the rest of the Committee, had recommended an “Annual Salary of \$350,000, [and] Annual Mandated Salary Increase of 10%.” *Id.* Thereafter, the Committee voted 3 to 1 to approve “the Deloitte & Touche Compensation Package.” *Id.* Yet, despite having been confronted with his prior vote to approve the package, the Mr. Savoy still never claimed that he had voted against the proposal previously or that the minutes of the earlier Committee meetings were wrong. *Id.*

The proposed compensation package was presented to the full Board of Directors on March 30, 2005. Ex. A, August 2007 Report, Ex. 8 at 6071-74. The minutes of that meeting state: “The Compensation Committee minutes noted that Camille Savoy had previously approved and recommended a higher compensation package (base salary).” Ex. A, August 2007 Report, Ex. 8 at 6071. At this point, shortly after his request for a third independent review was turned down again, this time by the full Board – after having his affirmative vote recorded in the February 2, 2005 minutes without objection, after raising no objection to the content of those minutes when they were reviewed by the Compensation Committee at its February 16, 2005 meeting and after failing to disagree when he was reminded of his affirmative vote at the Committee’s March 23, 2005 meeting – Mr. Savoy, for the first time, “requested that it be noted in this meeting’s minutes that he never agreed to a higher [salary] number.” Ex. A, August 2007 Report, Ex. 8 at 6071.

Because the Second Draft Report discusses Mr. Savoy’s voting record in the context of CQC’s discussion of the Compensation Committee’s action and minutes, CQC’s statement that “later minutes reflect that one member of the Compensation Committee disputed this account, stating

he never agreed to the proposal,” Second Draft Report at 5, furthers the inaccurate impression that Mr. Savoy disputed the accuracy of the Compensation Committee minutes in a reasonable and timely fashion. To the contrary, Mr. Savoy waited until the proposal was presented to the Board for final action after it had been under review for almost three months, until substantial time had been spent by the Compensation Committee in four meetings reviewing large amounts of data and other information, and until two expensive expert compensation reviews had approved the proposal.

The evidence is overwhelming that Mr. Savoy’s statement was false. Yet, CQC never mentions such evidence.

**(2) All Three Remaining Members of the Compensation Committee Confirmed that Mr. Savoy Approved the Proposed Compensation**

The incompleteness of CQC’s Second Draft Report, as well as its lack of objectivity and balance, are demonstrated by another aspect of the Second Draft Report’s discussion of Mr. Savoy’s claim that “he never agreed to the proposal.” Second Draft Report at 5. Specifically, the Second Draft Report states “that one member of the Compensation Committee disputed [Mr. Savoy’s . . . claim] that he never agreed to the proposal.” Second Draft Report at 5. To the contrary, although never acknowledged by CQC, the Board minutes record that Mr. Savoy’s claim was refuted expressly by all three remaining members of the Compensation Committee. Ex. A, August 2007 Report, Ex. 8 at 6071.

According to the Board minutes, George J. Todd, M.D., a member of the Compensation Committee, stated that he “respectfully disagreed with Mr. Savoy’s statement.” Ex. A, August 2007 Report, Ex. 8 at 6071. Thereafter, the “[r]emaining [two] members of the Committee also

indicated that they heard Mr. Savoy's approval of the higher figure." Ex. A, August 2007 Report, Ex. 8 at 6071. Thus, although ignored by CQC, all three of the remaining members of the Compensation Committee confirmed that they each had heard Mr. Savoy agree to the salary proposal, precisely as recorded in the Compensation Committee's minutes. Ex. A, August 2007 Report, Ex. 8 at 6071.

If CQC believes that it is worth noting Mr. Savoy's claim that he never approved the compensation proposal, why did CQC not mention that all three remaining members of the Compensation Committee expressly stated that they had heard Mr. Savoy approve the proposal? In fact, Mr. Savoy's actions, rather than protecting the Center as suggested by the Second Draft Report, were needlessly causing the Center and its Board to expend time, money and resources to address questions that had been exhaustively investigated internally and externally to the satisfaction of everyone but Mr. Savoy. Mr. Savoy's unreasonable conduct and his, at least, mistaken statements raise questions about his motives and should have caused the Commission to refrain from repeating claims that impugn the integrity and professionalism of those with whom he disagreed.

**(j) CQC Inaccurately States that a Board Member's Request for Corporate Records Was Improperly Denied.**

CQC alleges that "[t]he Center denied a Board member access to Center records" that he felt were necessary to carry out his fiduciary oversight duties. Second Draft Report at 24. Once again, CQC uses facts selectively (and always chooses the worst interpretation) to create an inaccurate impression of wrongdoing – here that the Board engaged in a cover-up and retaliated against a Board member for trying, in good faith, to fulfill his responsibilities. CQC even fails to

disclose that the Director in question was Mr. Savoy. When all of the facts are known, it is the Center that acted appropriately and Mr. Savoy whose conduct will not bear scrutiny.

Mr. Savoy, by letter, requested that the Executive Director collect and provide him with corporate records falling into five categories.<sup>39</sup> Second Draft Report at 24. According to CQC, Mr. Savoy's request was rebuffed by a "denial letter" from the Center's counsel. Second Draft Report at 24. CQC notes that Mr. Savoy never received the requested documents from the Center. He did, however, obtain some of the information requested on his own by reviewing the publicly available IRS Form 990s.

CQC's characterization of counsel's response as a "denial letter" is wrong. Counsel merely advised Mr. Savoy that individually he had no authority to direct a Center employee to set aside his usual and customary duties to perform different tasks at his discretion and direction. Indeed, rather than deny the request, counsel expressly told Mr. Savoy how to properly access the information sought and also told him that the process already had been set in motion for him.

Ex. G, 04/15/05 letter from S. Stein.<sup>40</sup> If, in fact, Mr. Savoy's document request had been denied

---

<sup>39</sup> Mr. Savoy's letter asked the Executive Director to assemble and provide: (1) the corporate bylaws; (2) the names, salaries and job descriptions of the Center's five highest paid employees; (3) the names of the Center's five highest paid consultants, total monies paid to each of them in the last two years, and a description of the services provided; (4) the names of the Center's five highest paid subcontractors, total monies paid to them in the last two years, and a description of their services; (5) copies of all competitive bids solicited by the Center in the last two years for the following projects: building construction, landscape contracting, equipment purchases and furnishings. Second Draft Report at 24.

<sup>40</sup> The letter states:

No member of the Board of Directors has an independent and unilateral right to direct any employee of [the Corporation] to take any action (including a direction to produce information or documents) unless that board member has been authorized to take such action by the Board of Directors.

Ex. G, 04/15/05 letter from S. Stein.

Another portion of the letter quoted by CQC actually confirms the right of a member of the Board of Directors to the documents:

[I]t is correct that members of the Board of Directors may have access to financial and other corporate data and documents....

by counsel, no presentation to the Board was required and the statement makes no sense. In short, the issue was not Mr. Savoy's right of access, but his lack of authority, acting on his own initiative, to direct corporate employees.<sup>41</sup>

Corporate employees' labor is a corporate asset and only the Board of Directors, not an individual member, has a right to direct that labor. The principle serves to preserve the Board's control over corporate employees, prevents Directors from unilaterally diverting corporate resources for their own purposes and, in cases such as this, allows the Board to determine the most efficient, least intrusive way of responding to the Director's request. This approach, in contrast to allowing individual Directors to dictate what corporate employees do and when, preserves the Board's ability to marshal and allocate corporate assets.

**(k) CQC's Assertion that Mr. Savoy Was Not Reelected to the Board in Retaliation for Legitimate Activities Is False.**

CQC's assertion that Mr. Savoy was not reelected to the Board of Directors in retaliation for his refusal to approve the Executive Director's compensation, for seeking corporate documents or for other well-intentioned efforts to fulfill his duties as a Board member is wrong. Second Draft Report at 24. Once again, the Second Draft Report ignores critical facts.

---

*Id.* That right, as the letter states, must be exercised appropriately, however. Thus, counsel states that:

Your letter will be referred to the board of directors for consideration at its next scheduled meeting on May 11, 2005.

*Id.*

<sup>41</sup> A second letter reiterates the point that an individual Director may not direct the actions of corporate employees. Ex. H, 04/25/05 letter from S. Stein. This letter also notes that Mr. Savoy "had already secured copies of the relevant portions of the IRS 990 forms filed by [the Center] for 2002 and 2003 that included the data on the five highest paid employees and five highest paid consultants requested in your letter dated April 8, 2005. This information is public and may be obtained by anyone." *Id.*

In fact, the Board had well-founded, documented concerns that Mr. Savoy had breached, and was continuing to breach, his fiduciary duty in several respects. It was coincidence that these concerns came to a head when Mr. Savoy sought to obtain Center records outside normal channels.

For example, in responding to Mr. Savoy's request that Center staff provide him with certain documents, counsel's letter states, "the scope and tenor of your request for information could reasonably be construed as indicating a concern on your part regarding possible impropriety or other wrongdoing that has affected or will adversely affect [the Center]." Ex. G, 04/15/05 Letter from S. Stein. Mr. Savoy, on two occasions, was asked to bring any pertinent information to the attention of the board immediately. Exs. G and H, 04/15/05 and 04/25/05 Letters from S. Stein. However, Mr. Savoy never responded in any way to either request. Instead, Mr. Savoy ignored the requests.

Because of its concerns that possible wrongdoing, known only to Mr. Savoy, might be occurring, the Executive Committee of the Board asked Mr. Savoy to meet with them before the Board's annual meeting on May 11, 2005. Mr. Savoy was informed that the Executive Committee "intended to discuss your request for information regarding 'all competitive bids' solicited by SDTC for the past two years for construction, equipment, furnishings and landscaping and for information regarding the compensation of the top five employees and consultants" – a request that was on the Board of Directors' agenda for its annual meeting that same day. Ex. I, Minutes of Annual Board Mtg. at 1.

In addition, Mr. Savoy was told that "the Executive Committee also had another matter that it wished to discuss with you..." *Id.* at 2. The Board had recently learned that the Commission's

Complainant appeared to have breached his fiduciary obligations. “The Executive Committee asked to meet with [Mr. Savoy] in order to make [him] aware of these concerns in person and hear [his] response so that the Executive Committee could determine how to proceed and whether these matters required consideration by the entire Board of Directors.” *Id.*

First, it appeared that Mr. Savoy had breached his duty of confidentiality:

Two members of the Compensation Committee of which you were a member have reported that you acknowledged to them that you disclosed to third parties confidential information and confidential deliberations of the Compensation Committee.

*Id.* Mr. Savoy previously had been “informed that the information provided to the Compensation Committee and its deliberations were confidential and should not be disclosed to third parties.”

*Id.*

Second, it also appeared that Mr. Savoy had inaccurately responded in two respects to questions on the 2005 Conflict of Interest Questionnaire. The Complainant had failed to disclose possible conflicts of interest. Specifically, Mr. Savoy responded “no” to a question asking whether he had any interest in any entity doing business with SDTC. *Id.* However, Mr. Savoy, who was a retail jeweler, had sold jewelry to the Center in calendar year 2004. *Id.* In addition, Mr. Savoy also responded “no” to a question asking whether he “had revealed SDTC confidential matters to persons not entitled to know the same,” despite orally acknowledging to Compensation Committee members that he had, in fact, done so. *Id.*

Mr. Savoy initially agreed to the meeting. However, Mr. Savoy called the Center at the last minute on the day of the meeting – after the Executive Committee had already left for the

meeting – and “left the message that [he] would not be attending either [the Executive Committee or the Board] meeting.” *Id.* at 1.

In sum, while it is true that Mr. Savoy’s name was removed from the slate of directors standing for reelection to the Board, the Commission’s inference that the Board retaliated against Mr. Savoy in pursuit of a cover-up or other nefarious scheme is wrong. CQC ignores, for example, that Mr. Savoy had:

- Attempted to unilaterally direct the work of a corporate employee;
- Requested information of a type and in a manner that reasonably suggested, at the very least, that he was concerned that improper activity was occurring;
- Failed to share any such concerns with the Board of Directors despite repeated requests;
- Admitted to two Compensation Committee members that he had breached the confidentiality of the Committee;
- Responded inaccurately on a conflict of interest form asserting that he had not engaged in any transactions requiring disclosure when, in fact, he had done close to \$30,000 in business with the Center in the preceding year;
- Denied disclosing confidential information to third parties, despite his admission to other Compensation Committee members that he had done so;
- Refused, without offering any excuse, to attend a meeting with the Executive Committee to discuss these concerns despite previously agreeing to do so; and
- Refused to attend the 2005 annual meeting of the Center’s Board of Directors, again without offering any excuse.

Thus, it reasonably appeared to the Board – and would so appear to any reasonable person – that Mr. Savoy had breached his fiduciary obligations in a number of ways. Some would contend, and with good reason, that, in light of his apparent misconduct and his last minute refusal to meet with either the Executive Committee or the Board of Directors, it would have been inappropriate for the Board of Directors to reelect Mr. Savoy, at least until such time as he responded to the Board’s questions. CQC, because it ultimately has no responsibility, may be willing to ignore the evidence of Mr. Savoy’s misconduct, but the Board, unlike CQC, is accountable and could not do so.

**B. The Center Reasonably Paid Costs Incurred as a Result of a Catastrophic Injury and, Likewise, Reasonably Settled a Potential Liability Claim**

**(1) Contrary to CQC’s Arguments, the Center’s Actions Were Reasonable and Responsible**

CQC alleges that the Center improperly paid medical and other expenses incurred as a result of a severe spinal cord injury suffered in Texas by “J.V.,” the son of Robert Van Dusen, the Center’s Chief Financial Officer.”<sup>42</sup> Second Draft Report at 12. The expenses fall into two general categories: (1) medical expenses (including air ambulance charges); and (2) round-trip airfares for the CFO to travel from Texas, where he was attending his son, to the Center; Second Draft Report at 13-14.

With respect to the air ambulance charges, CQC states that “at the time the payment was made, there was no basis for the Center to cover the unreimbursed personal medical expenses of an employee or consultant” Second Draft at 13. CQC also argues that the round-trip air charges

---

<sup>42</sup> As it did in its First Draft Report, CQC continues to refer to the familial relationship between J.V. and the CFO. Because CQC has no facts suggesting that J.V. received special treatment on account of his relationship with the CFO, it uses the relationship, which is otherwise irrelevant, and innuendo to create a false impression. That is inappropriate.

incurred on behalf of the CFO “should be considered commuting expenses of [the CFO] because he was in Texas on personal business.” Second Draft Report at 13-14.

As the Center explained in its July 2008 Response, J.V. suffered a catastrophic spinal cord injury that rendered him a quadriplegic. J.V. had worked for the Center in various capacities for many years and, at the time of his injury, was a bona fide information technology consultant to the Center. Ex. B, July 2008 Response at 47.

Prior to his injury, J.V. had mistakenly been classified as an employee and allowed to purchase health insurance through the Center’s carrier.<sup>43</sup> After J.V. was injured, the Center’s health insurer questioned whether J.V. was technically an employee or an independent contractor and,

---

<sup>43</sup> Once again, CQC plays fast and loose with the facts. The Second Draft Report states:

As a consultant, J.V. did not receive any benefits as an employee. Although J.V. was not eligible to receive any benefits, the Center allowed him to pay the full cost for health insurance and carried him on the Center’s health insurance policy.

Second Draft Report at 12.

First, CQC assumes its conclusion by saying that “as a consultant” J.V. was not entitled to benefits. J.V.’s entitlement to benefits did not depend on his status as a consultant. Eligibility for benefits depended on whether he was legally an “independent contractor” or an “employee.” As CQC knows, J.V.’s status as an independent contractor or an employee was not clear. Labor counsel opined that “several factors” pointed to independent contractor status, but also said that “many of the major factors” pointed to employee status. Ex. A, August 2007 Report, Ex. 20 at 7076-76.

Second, the Second Draft cultivates the belief that the Center “allowed” this noneligible consultant to access a benefit not available to others, perhaps because he was the CFO’s son. In fact, the Center had a generally applicable policy that consultants who worked more than a specified number of hours per week were eligible, at their own expense, to participate in the Center’s health insurance plan. Ex. B, July 2008 Response at 48. Thus, at the time of J.V.’s accident seven other consultants, five of whom were unrelated to Center management, participated in the health insurance program. Ex. B, July 2008 Response at 48 n.40. Further, the Second Draft Report states that the Center changed its policy to no longer allow independent contractors to obtain health insurance. Second Draft Report at 12 n.12. Instead, when J.V.’s injury surfaced, the other consultants were transferred to employee status to assure health insurance coverage. Ex. B, July 2008 Response at 47 n.38.

Finally, the Second Draft Report states that J.V. was retroactively converted to employee status, with withholding records created and backdated to December 2004. Second Draft Report at 13 n.14. This is hardly surprising and, in fact, would seem reasonable and appropriate for a variety of reasons. The Center, as noted, had received an opinion from labor counsel that J.V. likely was an employee, not an independent contractor. It was, therefore, prudent to assure compliance with applicable requirements. Second, if J.V. was, in fact, an employee as counsel’s opinion suggested, classifying him as such might be advantageous for J.V. and for the Center in securing payment of health insurance.

therefore, ineligible for coverage under the Center's plan. Ex. B, July 2008 Response at 48; Ex. A, August 2007 Report at 17-18.

As the July 2008 Response also makes clear, the Center consulted with counsel and with expert insurance consultants.<sup>44</sup> All advised the Center that “someone was going to pay the costs of Jordan’s medical and hospital treatment – either GHI would pay under the policy or [the Center] would be liable as a result of representing to Jordan that he was eligible for coverage and deducting premiums from wages.” Ex. B, July 2008 Response at 49, *quoting* August 2007 Report at 19. Based on its advisors’ advice, the Center negotiated a settlement with the health insurance carrier that capped the Center’s potential liability at less than \$250,000. In light of the potential, “the settlement was not merely reasonable it was an excellent outcome.” Ex. B, July 2008 Response at 49 *citing* August 2007 Report at 17-21.

The costs of the air ambulance originally were paid under the mistaken belief, based on conversations with the health insurance carrier, that the costs would be reimbursed by insurance. Ex. B, July 2008 Response at 51. When it became clear that the belief was mistaken, the Center was in the position of only being able to look to J.V. for reimbursement, but he had just been impoverished as a practical matter. Ex. B, July 2008 Response at 51; Ex. A, August 2007 Report at 22.

In short, the Center was confronted with two extraordinarily difficult and potentially explosive issues. Those issues were addressed reasonably and appropriately.

---

<sup>44</sup> CQC continues, as it did in the First Draft Report, to ignore the major role played by the Center’s outside insurance experts.

On the one hand, J.V. was in a critical, unstable condition that required immediate action. The Center mistakenly believed that it was merely fronting the cost of the air ambulance to which J.V. was entitled under the Center's health insurance plan. The Center also was painfully aware that its refusal to do so would leave J.V. in a hospital that was unable to care for him and deprive J.V. of access to urgently needed specialist care. In retrospect, the consequences of refusing to front the cost could have been catastrophic for J.V. and, possibly, for the Center.<sup>45</sup>

On the other hand, when it became known that GHI might provide no insurance coverage of any type, the Center also was facing potentially enormous liability. Failure to address the issue would not only put the Center at risk, it also could have put J.V. at risk. This because, until his coverage status was resolved, it was not clear what ability, if any, J.V. would have to secure care.

The settlement with GHI resolved both issues – coverage of the air ambulance costs and coverage of J.V.'s medical expenses – in a way that protected the Center. The terms of the settlement were negotiated aggressively and at arm's-length by the Center's insurance experts and GHI.

CQC challenges only the initial decision to pay the air ambulance costs and inconclusively questions aspects of the settlement. CQC, however, never challenges the reasonableness of the

---

<sup>45</sup> CQC's challenge to the initial payment of the air ambulance costs is worded carefully. CQC states that "at the time the payment was made" there was no basis for the Center to cover J.V.'s "unreimbursed personal medical expenses." Second Draft Report at 13. As the text discusses, with the benefit of hindsight, CQC is correct there was no basis "at the time of the payment" for the Center to cover J.V.'s expenses. However, the time the payment for the air ambulance was made is not the only relevant factor.

The Center, as is permissible under ERISA, retroactively amended its benefit plan to include air ambulance services. *Dyce v. Salaried Employees' Pension Plan of Allied Corp.*, 15 F.3d 163 (11<sup>th</sup> Cir. 1994) (Retroactive amendment effective eight months earlier upheld). United States Department of Labor Reg. §2520.104D-3(d) (discussing material modification retroactive to prior plan year). Ex. B, July 2008 Response at 56 n.51. Whatever basis, factual or legal, existed for the payment "at the time of the payment," the Center's retroactive modification of the plan ratified the propriety of the payment. CQC may disagree, but that is the law.

entire settlement, nor could it. Failing that, however, CQC has no role to play; whether the terms of the settlement were or were not reasonable is entirely a matter between the Center and its insurer, GHI.

The July 2008 Response explains in detail the rationales for the health insurance settlement and for payment of the air ambulance charges. The July 2008 Response also addresses CQC's other points in detail. There is no reason to repeat that discussion.

(2) **CQC Wrongly Characterizes the Chief Financial Officer's Airfares as Personal Commuting Expenses**

The CFO was not in Texas by choice. The CFO, as would be expected of any parent with a child in the midst of a life threatening crises, had no intention of returning to the Center until J.V.'s condition resolved or stabilized.

Obviously, the Center could not have anticipated or planned for the CFO's absence. Indeed, because J.V.'s injury occurred just as the Center was beginning to close out its books, the CFO purchased office equipment and supplies to outfit a makeshift office so that he could work on Center business while in Texas. When this arrangement became insufficient to meet the Center's needs, the Executive Director asked the CFO to periodically return to the Center. Because the CFO was traveling not of his own volition, but solely at the request, and on the business, of his employer, the Center believed, and continues to believe, that it was fair, reasonable and appropriate that the Center pay the airfares incurred at its behest and on its behalf.

Such airfares can, in no way, be characterized as commuting expenses. Commuting expenses are incurred when an employee travels from his home to his workplace. The CFO was brought back to the Center from a site where he was working while attending to his injured son by the Center

on the Center's business. It was only fair that the Center pay costs incurred at its request on its behalf. *See, e.g., Robbin v. Comm'n'r.*, TC Memo 1970-186, RIA TC Memo P 70186, 29 CCH TCM 848 (1970) (taxpayer who lost job in Boston and took job in New York anticipating it would last one year, but which lasted twenty months, could deduct expenses of returning to Boston on weekends); *Wicker v. Comm'r.*, TC Memo 1986-1, RIA TC Memo P86001, 51 CCH TCM 225 (1986) (expenses traveling from home office to other work sites are deductible and not commuting expenses).

Moreover, even if CQC's analysis were correct – and it is not – the Center would not seek reimbursement from Mr. Van Dusen. This decision has been made for good and sufficient reasons which will not be explained in a public document.

**C. CQC's Petty Cash Analysis Which Appears to Have Been Conducted on an *Ad Hoc* Basis, Is Incomplete and Its Findings Are Inaccurate**

**(1) Introduction**

Although CQC's investigative failures and analytic lapses permeate the Second Draft Report, they are, in some ways, most evident in the Second Draft Report's discussion of what CQC claims are "financial irregularities" in the handling of the Center's Administrative Petty Cash fund. Rather than follow standard practices, CQC appears to have pursued an *ad hoc* investigation that allowed speculation and subjective judgments to substitute for evidence. Indeed, in contrast to other, similar reports from other agencies, the Second Draft Report identifies the scope of the fiscal review, but it never identifies the methodology that governed the Commission's review of the Center. Second Draft Report at 1.

Because CQC did not conduct anything resembling an appropriate analysis of petty cash expenditures, the Center was forced to do so. In contrast to CQC's claims of widespread misuse of petty cash, the Center's review, guided by standard audit protocols and verified by the Center's independent audit firm, showed that only 124 of 1,140 administrative petty cash expenditures spanning a 6-year period (less than \$152 per expenditure or approximately \$3,000 per year) did not meet the standards of the Center's audit protocol.

This response summarizes CQC's more obvious investigatory failures. Thereafter, analysis of some of the allegedly problematic expenditures identified by CQC illustrate that CQC's failure to conduct an appropriate investigation resulted in conclusions that are obviously and clearly wrong. Finally, the protocols utilized, and the results of, the Center's in depth review of all petty cash expenditures are discussed.

(2) **CQC's Petty Cash Review Was Not Thorough, Failed to Seek Pertinent Evidence, Ignored Relevant Evidence, Failed to Conduct Necessary Interviews and Relies on Speculation Rather than Facts**

In the present case, CQC's failures are all the more troubling because CQC's Second Draft Report reflects essentially the same failures for which CQC was taken to task by the Inspector General's June 2008 Report: CQC's Second Draft Report makes findings about supposed "financial irregularities," Second Draft Report at 14, without actually examining the Administrative Petty Cash process used by the Center, without conducting appropriate interviews of individuals with first hand knowledge, without considering important documents and without conducting a forensic review to determine whether any irregularities actually existed.<sup>46</sup>

---

<sup>46</sup> Compare OIG Report at 20, 216-17; (CQC had "conducted cursory investigation" (OIG Rpt. at p. 12), "did not thoroughly investigate" issues (*id.* at 15), had issued findings - "even though no such review was conducted" (*id.* at

The public and the targets of CQC's investigations have the right to expect that any findings or conclusions issued by CQC will be fair and reliable because they were reached in a standardized, objective and thorough process. CQC trades on the expectation that, like most other agencies, its work will comply with basic practice standards and claims credibility that its work does not deserve.<sup>47</sup>

Had CQC conducted an appropriate due diligence investigation, as one would expect if CQC was truly on a quest for accuracy, fairness and truth, CQC would have learned that alternative documentation confirmed that the petty cash expenditures were legitimate business expenses. Instead, CQC opted to do less than one half of what it should have done and, as a result, tells less than one half of the story in a report full of speculation, innuendo, guesswork, misstatements and false accusations.

---

12), conducted a "limited investigation and failed to adequately document [ ] activities" (*id.* at 154), conducted a "superficial investigation" (*id.* at 19), "repeatedly overstated the extent of its investigative activities" (*id.* at p. 12), "made misleading claims about the care and treatment review" (*id.* at 15) "and provided other misleading or inaccurate information . . . in a written response" (*id.* at 15), and "repeatedly attempted to exaggerate the extent of their efforts in investigating [the child's] treatment," (*id.* at 190.)

<sup>47</sup> It also bears notice that, in contrast to CQC's claims, the Administrative Petty Cash process had been in place for over twenty years. Despite frequent audits of the Center by various third parties, the allegations made by CQC have never before been made.

To be sure, the OMRDD May 2006 audit recommended that the Center develop and implement a written policy and procedure to require all meal expenses be supported by itemized receipts to comply with OMRDD reimbursement principles. OMRDD May 2006 Audit at 15. However, no findings of any suspected wrongdoing were identified. On June 26, 2006, the Center submitted its response to OMRDD wherein it indicated that it would change its policy to require presentation of itemized receipts for reimbursement of business meal expenses.

**(a) Failure to interview pertinent witnesses; failure to conduct proper interviews**

The CQC investigators conducted twenty site visits between July 10, 2006 and December 13, 2006, and conducted six staff interviews.<sup>48</sup> Two of the twenty site visits focused on Administrative Petty Cash. All six interviews occurred on a single day, November 20, 2006, approximately one month before CQC requested and received the original petty cash receipts. Five of the interviews involved finance staff, and one interview involved the Executive Director's Administrative Assistant who handled the Administrative Petty Cash. Thus, only one of the six interviews conducted focused on Administrative Petty Cash.<sup>49</sup>

Although the period in question, 1999 – 2006, involved eight years and more than one thousand receipts, the interview of the Administrative Assistant lasted no more than twenty minutes. The interviewers asked only very generalized questions with no context and did not ask the Administrative Assistant to address the vast majority of issues identified in the Second Draft Report.

Not one question was asked regarding the process the Administrative Assistant had utilized in the past for the administering the petty cash fund, not one question was asked regarding what current process was in place for Administrative Petty Cash – and although the CQC investigators

---

<sup>48</sup> CQC assigned two investigators to conduct a financial review. The investigation was overseen by CQC's General Counsel, who per CQC's organizational structure, oversees both the Fiscal Investigations Bureau and the Division of Advocacy and Outreach.

<sup>49</sup> The only additional questioning by CQC in regard to petty cash occurred during a telephone conversation between a CQC investigator and the Executive Director on April 11, 2007. During this conversation, the Executive Director was asked if he knew why pharmacy co-pays were being paid for through petty cash. The Executive Director responded that he had no knowledge of such a disbursement. Additionally, the Executive Director was asked why petty cash was used for restaurant charges. The Executive Director responded that, in the past, petty cash was sometimes used to cover restaurant charges, but that subsequent to the May 2006 OMRDD audit, which had recommended that a more robust process be implemented, the petty cash process had been changed to provide a more organized and sophisticated process that was more in keeping with the current size of the agency. This hardly represents a proper investigative interview, however.

knew that the Administrative Assistant had been in her position for over twenty years – not one question was asked regarding how the Administrative Petty Cash process was handled when she first started and how it may have evolved over twenty years of agency growth. Moreover, no effort was made to pin down who had access to the petty cash fund, or how often and for what purposes.

The only question that even came close to an attempt on CQC's part to understand how the Administrative Petty Cash process was handled was that the Administrative Assistant was asked how she would know whether a specific event, for which a disbursement had been made, took place. The Administrative Assistant responded that the event would generally be reflected on an administrative calendar, which she maintained.<sup>50</sup> No further questions were forthcoming, however. No attempt was made to have the calendars explained or to understand the use made of the calendars. No calendars were reviewed. Nothing. The failure to ask such critical questions about the concerns CQC now raises is mind boggling.

Out of 1,140 petty cash receipts, only two receipts were shown to the Administrative Assistant. CQC investigators showed the Administrative Assistant one pharmacy receipt and asked if pharmacy co-pays were reimbursed. The Administrative Assistant responded in the negative and stated that pharmacy co-pays were not paid through petty cash. When asked why the pharmacy co-pay receipt was included in the petty cash disbursements, the Administrative Assistant stated that the receipt must have been inadvertently placed into a petty cash envelope. The other receipt shown to the Administrative Assistant was a restaurant receipt. She was asked how she would validate a receipt, and she responded that she would check the calendar. Even at this

---

<sup>50</sup> Copies of the administrative calendars were provided to CQC upon request on December 26, 2006, more than a month after the interview, but there was no follow up.

juncture, neither CQC investigator bothered to ask about the process utilized for managing this fund.<sup>51</sup> Compare OIG Report at 103 (discussing fact that CQC conducted limited interviews and missed evidence); 172 (discussing CQC's failure to interview individuals with first hand knowledge).

Had CQC investigators asked, they would have learned that the Administrative Assistant kept envelopes that were annotated with the date, amount and purpose of disbursements previously made for specific events (e.g., fundraising events) and that she also kept a large envelope for general receipts for purchases already made (e.g., office supplies, first aid items, farm supplies, etc.). All envelopes and receipts were reconciled by the Administrative Assistant once a year.

As the agency staff grew from approximately 400 employees when the Administrative Assistant first started in her position to more than 1,000 in 2006 and revenues grew from less than \$20 million to over \$60 million per year, the process that had worked well in early years was not as effective as more and more individuals had access to petty cash. Without a doubt, it was a process that needed to be revised in order to provide greater organization and controls, and the Center readily admitted as much to CQC. See, e.g., Ex. B, July 2008 Response at 53. In fact, the Center had already begun the revision process before CQC initiated its investigation.

CQC's Second Draft Report also suggests, but never outright states, that Center staff engaged in a practice of altering, defacing and obscuring receipts, manufacturing business purposes and impermissible use of petty cash funds. Yet, CQC never asked the Administrative Assistant about the so-called defacement. CQC, likewise, never asked about the items purchased or how the

---

<sup>51</sup> In the Second Draft Report, CQC assumes that this receipt was altered, but that is not the case. See *infra* at Section II.C(3).

Center might have used them. CQC just assumed that the so-called defacement represented a pattern that was part of a cover up.

Not only is there no evidence supporting CQC's speculation, the evidence contradicts CQC's assumption. CQC never reveals that, in almost every instance, the so-called alteration, defacing and obscuring of the receipts, did not conceal pertinent information.<sup>52</sup> Indeed, CQC, in its Second Draft Report, notes that it was usually able to identify the items purchased and, even when some information is missing, cursory examination of the receipts generally reveals the vendor, the amount paid and the nature of the items purchased. Similarly, notwithstanding its innuendo and speculation, CQC never reveals that it made no attempt to determine whether the questioned expenditures were legitimate, as opposed to merely poorly documented.

**(b) Failure to take into account pertinent documents**

In a hearing before the State Senate in March 2007 regarding CQC's investigative process, the then CQC Chairman stated that CQC will "go about doing a thorough investigation, looking at record reviews and interviewing folks, looking at medical records or any record we can find." OIG Report at 162. The OIG Report found otherwise: "[T]he Chairman's description of CQC's investigative standards is not reflected in the agency's investigation . . . ." See OIG Report at 162-63. In fact, as the OIG Report goes on to state, CQC was aware of documentary evidence that was available, but CQC never sought or reviewed this evidence during its investigation. *Id.* Likewise, during its review of the Center, CQC ignored and failed to follow up on documents that rebut the allegations CQC makes in its Draft Reports.

---

<sup>52</sup> Although CQC includes a copy of the Center's Petty Cash Disbursement Receipt in its Second Draft Report, CQC never addresses the fact that the Center's Petty Cash Disbursement receipts to which the vendor receipts are attached also provide information that could have been used to follow up on the expenditure.

CQC states in its Second Draft Report that it identified numerous problems with receipts used to reimburse petty cash and then includes a laundry list of concerns – concerns that were never identified or addressed with Center staff. Second Draft Report at 14. For example, among other things, with respect to one group of receipts (primarily involving restaurant charges), CQC alleges that there is no documentation regarding who received payments and that there are missing receipts and questionable handwritten receipts, Second Draft Report at 14-15, inferring that the events or purchases for which reimbursement was sought were therefore, fictitious.

CQC's inference is pure speculation that is directly contradicted by evidence that CQC chose to ignore. There is supporting, alternative documentation for most of the disbursements. In fact, the legitimacy of virtually all disbursements can be confirmed through investigations– investigations that CQC never performed.

For example, to keep track of petty cash expenditures, the Center used a form denominated "Petty Cash Disbursement Receipt." Although not acknowledged by CQC, in virtually every instance the form was completed, relatively contemporaneously with the disbursement, by filling in the name of the vendor, the date of the expenditure, the amount of the expenditure and the purpose of the expenditure. This information allows investigation of the legitimacy of the expenditure.

Many of disbursements CQC questions also are corroborated by administrative calendars that CQC had in its possession long before it issued either of its Draft Reports. Although ignored by the Second Draft Report, the Administrative Assistant told CQC that these calendars generally record, and confirm, the occurrence of events for which the Petty Cash Disbursement Receipt form records an expenditure.

CQC should have recognized that the calendars were important evidence that would address the legitimacy of many petty cash disbursements, especially the larger disbursements, that CQC has called into question. But CQC never investigated or considered the calendars. In fact, CQC never mentions the calendars at all or their role in the petty cash process in either of its Draft Reports. Instead, apparently based almost entirely on its in-office eyeball review of the receipts, CQC states that improper disbursements were made.

The speculative comments and innuendo that are woven through the Second Draft Report are calculated to lead the reader to believe the disbursements were manufactured as a means to abscond with agency money. In one sense, CQC's misrepresentations here are even more egregious than CQC's failings identified by the Inspector General. In contrast to the investigation scrutinized by the Inspector General, in which CQC had to develop the evidence, in this case, many of CQC's failures could have been avoided if CQC had merely considered objectively the evidence already in its possession.

(3) **Analysis of Illustrative Examples of CQC's Supposedly Problematic Expenditures Demonstrates the Legitimacy of the Expenditures and the Consequences of CQC's Failure to Conduct an Appropriate Investigation.**

(a) **Easily Obtainable Evidence Belies CQC's Assertion that a Receipt Was Altered**

CQC states that a receipt appears to have been altered by adding an additional digit to increase the total reimbursement. CQC bases its claim that the receipt was altered solely on the assertion that it "appeared to have had an extra digit added in slightly different color ink."<sup>53</sup> Second Draft

---

<sup>53</sup> When the receipt is examined, and notwithstanding CQC's claim to the contrary, the color of the ink appears identical across the digits. Ex. J.

Report at 18. A minimal amount of investigation would have demonstrated that CQC's claim is false.

The receipt is attached to a Petty Cash Disbursement Receipt stating that petty cash was used to purchase "Lunch - I.F.I. - Faculty Mtg." Ex. J. It is simply not possible that the lunch receipt could have originally been for only \$11.35.

Eight individuals met at the Center on February 6, 2002 to plan "The International Summit: The Future of Disabilities."<sup>54</sup> The attendees at the meeting included: Terry Hamlin, Richard Humleker, Dennis Raymond, Caryn Anderson, Ginny Sipos, Alice Todd, Dr. Rona Simeonson and Dr. Clarence York.

The February faculty meeting referred to in the Petty Cash Disbursement Receipt proceeded according to a written agenda, a copy of which is attached. Ex. K, IFI Faculty Committee Agenda. In addition, a copy of the précis outlining the content and considerations addressed at the summit also is attached. Ex. L, International Summit–Future of Disabilities.

Lunch was provided for the eight attendees at the faculty meeting. At a total cost of \$111.35 (including tax and gratuity), the cost per person of the lunch was approximately \$14.00. If, as CQC contends, the receipt originally reported an expenditure of only \$11.35, rather than \$111.35, the cost for lunch equates to \$1.42 per person. Of course, it is not conceivable that lunch for eight could have been provided for a total of \$11.35 or \$1.42 per person.

In short, rather than investigate, ask a few questions and do some math, CQC chose to assume the worst: that the receipt was fraudulent and look for corroborating evidence. Moreover, CQC

---

<sup>54</sup> The Summit, which was held June 5 thru 9, 2002 at the Center, featured participation by representatives from Brazil, Egypt, Ecuador, India, Mexico, Peru, Sweden and the United States.

made that assumption and besmirched the reputation of the Center and its staff, based solely on the assertion that one digit of the handwritten cost was “in slightly different color ink.” Second Draft Report at 18. CQC simply ignored the obvious question – “lunch for how many?” – and jumped to the conclusion that the receipt had been falsified.

**(b) The Evidence Refutes CQC’s Claim that Pharmacy Receipts Were Defaced as Part of a Cover-Up**

CQC claims to have found what “appeared to be a pattern with the pharmacy receipts as they were often defaced in the center section of the receipt obscuring that the purchase was for a prescription.” Second Draft Report at 19. CQC’s assertion that there was a pattern of defacement of pharmacy receipts that obscured that a prescription was purchased ignores the evidence.

First, and most obviously, CQC was able to determine that the item purchased was purchased from a pharmacy and that co-payment for a prescription was made. Moreover, CQC fails to disclose that the Petty Cash Disbursement Receipts consistently identify the vendor as “Rite Aid,” “Peter’s” or “Peter’s Pharmacy,” Ex. A, August 2007 Report, Ex. 48 at 1532-35, 1537-45, flatly contradicting the notion that an effort at concealment was underway.

In fact, of the fourteen sample receipts provided as exhibits to CQC’s First Draft Report, thirteen of the receipts are clearly identified (twelve on the receipt itself; one on the Petty Cash Disbursement Receipt form or on both) as coming from a pharmacy. On eleven of fourteen receipts, it can be determined from the face of the receipt that the expenditure included a co-payment for a prescription. Six of the fourteen receipts clearly identify that they pertain to co-payments; five of the fourteen are not as clear, but the fact that a co-payment was involved is

discernible, even from a photocopy. Ex. A, August 2007 Report, Ex. 48. The fact that the item purchased, the vendor, and the payment for a prescription co-payment can be identified in almost every case from examination of the receipts themselves is completely at odds with CQC's assertion that the receipts were defaced as part of pattern to conceal that payments were made for a prescription co-pays.

Finally, because CQC appears to make much of this issue, it is important to understand the materiality of CQC's "finding." Over the course of six years from 2001 through part of 2006, the fourteen receipts that CQC identified as pertaining to prescription co-payments total \$415, in the aggregate. This amount represents 0.4% of all (*i.e.*, not just questionable) petty cash disbursements over six years. In other words, the amount in question is approximately \$40 per year of average annual petty cash expenditures out of total average annual petty cash expenditures of approximately \$17,000 over the six-year period.

Without the least suggestion that prescription co-pays were properly included in the petty cash disbursements, it is reasonable to ask if this issue is sufficiently material as to be deserving of the attention given by the Commission during its investigation or in the Second Draft Report. Certainly, the value of the time and resources invested by both the Commission and the Center addressing these expenditures is many, many, many multiples of the total amount at issue and perhaps a multiple of even the total amount of petty cash disbursements made by the Center over six years. In this case, the investment is well beyond the bounds of reasonableness.

**(c) CQC's Challenge to Legitimacy of a Large Disbursement is Based on CQC's Failure to Investigate and is Contradicted by the Evidence**

The Second Draft Report questions the legitimacy of a Petty Cash Disbursement Receipt in the amount of \$1,500.86 "based on a notation 'receipt lost.'" Second Draft Report at 15. The information provided on the Petty Cash Disbursement Receipt form, however, is sufficient to confirm that the disbursement related to an event, a fund-raising dinner, that actually occurred, to identify who attended the dinner and demonstrate that the Center benefited. The expenditure thus constitutes a legitimate business expense.

The Center's Petty Cash Disbursement Receipt indicates that, on January 28, 2004, a dinner regarding "Cultivation-Development-Fund-raising" was held at Beppe Restaurant. Ex. A, August 2007 Report, Ex. 49 at 1597. Investigation revealed that the dinner was attended by ten individuals, including six of the Center's senior management. Center staff attending the dinner included Patrick Dollard, Richard Humleker, Caryn Anderson, Terry Hamlin, Ginny Sipos, and Dennis Raymond. The remaining four attendees included an individual who, in the period 2000 through 2006, donated \$4,518,000 to the Center as well as three guests invited by that individual.

The dinner was an appropriate means of honoring and thanking a significant donor and of cultivating additional donations. Such dinners are a routine and acceptable means of recognizing the generosity of those making significant contributions to charities. Moreover, viewed solely as an investment in the Center's development, the return on investment on the \$1,500 cost of the dinner is handsome by any measure.

**(d) CQC's Challenge to Expenses Incurred in Connection with a Fund Raising Event Resulted from an Inadequate Investigation**

The Second Draft Report questions the legitimacy of expenses incurred in April 2005 and May 2006 associated with the Center's major annual fund-raising event. Second Draft Report at 15. In April 2005, as noted by the Second Draft Report, a check request was submitted seeking \$2,000 for "Dinner Dance-Variou Tips-etc." Second Draft Report at 15. Similarly, a check request submitted in May 2006 requested \$3,000 for "Monies for Various Necessities for the Dinner Dance." Second Draft Report at 15.

CQC states that: "It is unclear why cash was needed for tips for the dinner dance, as the contract included a 21 percent service charge." Second Draft Report at 15. CQC, however, never investigated the expenditures and, as a result, mischaracterizes the service charge as the equivalent of a gratuity. CQC's error, and the suggestion that the Center, or its staff, were involved in inappropriate use of petty cash funds could have been avoided easily.

The business office at the site of the dinner dance, Chelsea Piers, recently explained that:

The 22% [*sic*] Service Charge is not a gratuity or a tip, it is a fee used to cover personnel, administrative and/or other costs. Tips or gratuities are not required and 100% at the discretion of the client.

Ex. M, 02/11/09 E-mail from M. Barsky. Chelsea Piers also confirmed that contracts, such as those with the Center, always include a service charge. However, it was explained that, notwithstanding the "Service Charge," tipping the staff at events such as the Center's dinner dance, while not mandated, is customary. This is precisely what happened at the Center's dinner dance in both 2005 and 2006.

Interviews confirmed that gratuities were provided to, among others:

- The Captain, Assistant Captain, Service Staff and Catering Director;
- Chelsea Piers Set-Up Crew (including maintenance staff, electrician and events staff);
- Valet parking coordinator (for himself and his staff); and
- the band which had been privately hired by the Center.

The dinner dance is held annually and is the Center's most significant fund-raising event. In 2005 and 2006, the event was held at Pier 60 in New York City. In 2005, the dinner dance was attended by approximately 450 people. In 2006, the dinner dance was attended by approximately 550 people.

In 2005, the event raised \$629,684. In 2006, \$679,237 was raised. Over the years between 2000 and 2006, the dinner dance raised approximately \$3.6 million dollars in donations. Every year the amount of money raised has increased over the prior year.

The Center has for many years, as a standard practice, provided tips to the individuals who helped to make the Discovery Ball an extraordinary success. These gratuities were provided on the theory that the active and enthusiastic involvement of such staff was integral to the Ball's success. CQC could have learned this merely by asking.

(4) **Internal and External Review of Administrative Petty Cash Confirms that the Vast Majority of Expenditures Are Legitimate**

Because analysis of the individual petty cash expenditures challenged by CQC demonstrated, as illustrated in the previous discussion, that CQC's conclusions reflected investigative failures and

inadequacy rather than evidence-based conclusions, the Center conducted both an internal review of all petty cash expenditures and retained the services of an independent audit firm to validate the Center's review.<sup>55</sup> The purpose of the review was to determine if any of the amounts reimbursed constituted properly documented business expenses of the Center based on petty cash documentation or based on alternative documentation. The review addressed whether sufficient and appropriate documentation existed such that a reasonable person would conclude: (1) that business meetings or other agency business related to the expenditure took place on the dates in question; or (2) that items or services purchased were otherwise legitimate business expenses of the Center.

Whereas CQC's review appears unguided by any auditing standards, the Center reviewed the expenditures using a protocol reflecting those legal and professional standards. The review, for example, was conducted using criteria established by IRC Section 274 and IRS Publication 263.<sup>56</sup> Section 274, in pertinent part, defines legitimate business expenses as relating to activities "directly related to, or . . . associated with the active conduct of the taxpayer's trade or business." IRS Publication 463 further explains that an expenditure is "directly related" if:

- The main purpose of the combined business and entertainment was the active conduct of business,
- You did engage in business during the entertainment period, and

---

<sup>55</sup> The Center's review period of six years does not completely coincide with the CQC's review period, which is why its total reimbursements do not precisely match the dollar amount reviewed by CQC.

<sup>56</sup> This section and publication relate to the legitimacy of entertainment expenses. Although entertainment expenses are only one category of expense at issue, the standards generally reflect the principles applicable in other areas.

- You had more than a general expectation of getting income or some other specific benefit at some future time.

IRS Publication 463, Travel, Entertainment, Gift, and Care Expenses at 9-10 (Feb. 4, 2009).

IRS Publication 463 further provides that: “Even if your expenses do not meet the directly-related test, they may meet the associated with test.” *Id.* at 10. An expense satisfies the “associated with” test, if it is:

- Associated with the active conduct of your trade or business, and,
- Directly before or after a substantial business discussion . . . .

*Id.* at 10.

In conducting both the internal review and the validation by the outside audit firm, the Petty Cash disbursements were scrutinized using the following protocol:

1. Determine if the copy of the receipt, vendor invoice and/or Petty Cash Disbursement Receipt form contains vendor name;
2. Determine if the copy of the receipt, vendor invoice and/or Petty Cash Disbursement Receipt form contains the date of the expenditures;
3. Determine if the copy of the receipt, vendor invoice and/or Petty Cash Disbursement Receipt form indicates the items purchased, services received or business purpose of the event;
4. Determine if the copy of the receipt, vendor invoice and/or Petty Cash Disbursement Receipt form agrees with dollar amount of petty cash expenditure;
5. Review Petty Cash Disbursement Receipt forms to determine if a business event or purpose is clearly stated;
6. When necessary or appropriate, review alternative supporting documentation (e.g., administrative and supplemental calendars) to determine if pertinent information is available;

7. Review alternative data such as agendas, minutes, brochures, etc. to corroborate and verify an event occurred; and
8. Based on all available information, determine that expenditure likely was, or was not, a business expenditure.

The universe of 1,140 receipts at issue represented total disbursements of \$102,401. This amount represents approximately \$17,000 a year for the six years in question. This is not an unusual amount given the size and scope of the Center. For example, during the years in question, the Center's total cumulative revenue on a consolidated basis was approximately \$300 million.<sup>57</sup>

Using the criteria set out above, the outside auditing firm determined that only 124 of the 1,140 disbursements did not meet the stringent review criteria. The disbursements were disallowed if they did not meet each and every one of the criteria listed above. Approximately 90 percent of all disbursements were approved. Only \$18,738, or approximately \$3,000 per year over the six period, was disallowed.

If CQC had bothered to conduct this same level of review, it would have recognized that the amount of unsupported disbursements is so small that it did not warrant the tremendous expenditure of resources invested by CQC.

### III. CONCLUSION

For the most part, CQC's Second Draft Report rests on misstatements of law, faulty analysis, inaccurate and incomplete facts, unfounded speculation, assumptions that are contrary to law and

---

<sup>57</sup> At the outset of CQC's investigation, and before any internal audit could be completed, the Executive Director, as a sign of his good faith and belief in the Center, made a payment to the Center equal to the total amount disbursed during the years in question. Ex. A, August 2007 Report at 27-28; Ex. B, July 2008 Response at 53. This payment was made with the understanding that if, upon review, it was determined that any of the expenditures were legitimate business expenses, the Executive Director would be reimbursed for all validated disbursements. This is in fact the case and reimbursements to the Executive Director for all validated disbursement is appropriate.

fact and an inadequate investigation. The Second Draft Report wrongfully challenges the integrity and professionalism of the Board of Directors, the Compensation Committee and Center management and staff. At the end of the day, however, the Second Draft Report, when read in light of the Center's August 2007 Report, its July 2008 Response and this response, reveals that CQC has wandered far a field from its mission into areas that it has neither the ability or the expertise to address.

In light of the history of CQC's investigation of the Center, failures here cannot be excused as aberrational. The Center first pointed out the problems with CQC's work in its April 2007 Report. The Center again documented CQC's failures in its June 2008 Response to CQC's First Draft Report. One year ago — in plenty of time for CQC to ask itself whether the failings identified by the Center stemmed from similar causes — the Inspector General severely criticized CQC for essentially the same things addressed in the Center's April 2007 Report and in the July 2008 Response. Yet, without any further investigation, CQC issued its Second Draft Report, making many of the same, as well as other, claims similar to the charges made at the April 2007 meeting between CQC and the Board and in CQC's First Draft Report. The fact that the Second Draft Report never mentions either the April 2007 Report or the July 2008 Response symbolizes well CQC stubborn refusal to consider and respond to criticism.

As Governor Patterson has directed, CQC is, indeed, an agency that needs to refocus. In addition, CQC needs to consider the meaning of its statement of core values in the real world.<sup>58</sup> However, even more to the point, CQC needs to be made accountable to those CQC disparages. As it stands now, CQC exercises authority without responsibility. Until CQC's authority is

---

<sup>58</sup> CQC's Website includes a statement of core values obligating the Commission to be diligent in seeking accuracy, fairness and truth while inviting review and dialogue.

moderated by responsibility for any malfeasance, CQC has no incentive to modify its behavior, as CQC's failure to address the criticisms leveled in the April 2007 Report, in the July 2008 Response and in the Inspector General's Report unfortunately demonstrate.

## **ADDENDUM A:**

### **DETAILED DESCRIPTION OF THE CENTER FOR DISCOVERY'S COMPENSATION-SETTING PROCESS**

CQC's Second Draft Report focuses heavily on two aspects of the process used to assure the reasonableness of Patrick Dollard's compensation: Mr. DiCalogero's alleged role and the data that he provided to the Compensation Committee. This focus ignores the extensive steps taken, and the broad range of data and information considered by the Board and the Compensation Committee. It also minimizes the Center's efforts to be certain that the right decision was made and to assure compliance with IRS reasonable compensation standards.

When the Center's compensation-setting process is considered as a whole, it is apparent that the assertions in CQC's Second Draft Report are as baseless as those in its First Draft Report.

Indeed, the compensation-setting process, as it actually occurred – in contrast to the abbreviated version described by CQC – was exceedingly thorough and comprehensive and incorporated multiple steps to assure that the process was free of even the appearance of bias.

Upon the expiration of Mr. Dollard's ten-year employment agreement in 2005, the Board of Directors formed a Compensation Committee, composed of three Board members:

Ed Gianconteri, George Todd, M.D. and Camille Savoy. August 2007 Report, Ex. 5 at 217-18.

The Compensation Committee had two highly regarded consultants, each an expert in his own right, both of whom were working for the Center at the time, to act as facilitators and to assist the Committee as needed. The consultants, Vincent J. DiCalogero, CPA, and Dr. Clarence York,

both were intimately familiar with the Center as well as with local and national providers of services to the developmentally disabled.<sup>1</sup>

At its first meeting, the Compensation Committee discussed:

- (1) the Executive Director's existing contract provisions;
- (2) suggested changes to the Executive Director's contract; and
- (3) the request made by Patrick Dollard for a ten-year contract term and lifetime health and dental benefits for himself and his spouse.

August 2007 Report, Ex. 5 at 217.

The Compensation Committee, at this first meeting, was presented with five compensation surveys. These surveys, which had been prepared by Mr. DiCalogero and by Dr. York, included:

- (1) IRS Form 990 Survey of New York Metropolitan Residential Services Organizations;
- (2) IRS Form 990 survey of National Residential Services Organizations;
- (3) Professionals For Non-Profits, Inc. survey of New York City Area Non-Profit Organizations;

---

<sup>1</sup> Dr. Clarence York is a well-known and respected authority in education and services for the developmentally disabled. Dr. York was at one time, for example, the Executive Director of the nationally known Bancroft Center in New England. Vincent J. DiCalogero is a CPA with 30 years' experience. Mr. DiCalogero advises most of the providers of services to the developmentally disabled in New York on economic, financial and accounting issues. He is regarded as one of the premier compensation experts in New York State. Mr. DiCalogero has consulted with the Center on accounting, finance and economic issues for many years.

Although the Second Draft Report emphasizes the assistance that Mr. DiCalogero provided to the Compensation Committee, it hardly mentions Dr. York, the second expert consultant. Second Draft Report at 4. Yet, Dr. York played a significant role, especially with respect to developing and providing data regarding comparable service providers on the national level. August 2007 Report, Ex. 5 at 217. Dr. York also provided support for the idea of including a sabbatical in the compensation package, noting that his compensation at his previous employer had included a sabbatical. August 2007 Report, Ex. 5 at 218.

- (4) Vince DiCalogero's survey of Not For Profit Agencies' Executive Director Contracts; and
- (5) Survey of Long Island For-Profit Companies.

August 2007 Report, Ex. 5 at 217.

After some discussion, the Committee preliminarily recommended parameters for the Executive Director's new contract, which was to be effective retroactive to January 1, 2005. However, the parameters were tentative inasmuch as one member of the Committee, Mr. Savoy, did not attend the meeting. August 2007 Report, Ex. 5 at 217-18.

The Compensation Committee's second meeting was attended by all three members of the Committee. In addition, John Milligan, Chairman of the Board of Directors' Finance Committee, was added to the Compensation Committee at this meeting. August 2007 Report, Ex. 6 at 222.

The Committee began by discussing the minutes of the prior meeting and the tentative parameters for the compensation package developed at its first meeting. August 2007 Report, Ex. 6 at 219. Thereafter, contrary to the suggestion running throughout CQC's Second Draft Report that Mr. Savoy, the commission's complainant, was ignored, "specific issues brought forth by Camille Savoy that required further clarification" were discussed. August 2007 Report, Ex. 6 at 219.

At this second meeting (actually the first full meeting), the Committee had the materials from the first meeting as well as additional materials, including:

- a due diligence package containing the requirements and materials related to reasonableness standards for executive compensation for 501(c)(3) organizations established by IRC Code 4958;
- an evaluation of the accomplishments of executive director;
- copies of the IRS Forms 990 used to assemble the two 990 compensation surveys provided to the Committee at its prior meeting;
- a ranking of the Executive Director's compensation based on the IRS Form 990 surveys;
- the Executive Director's compensation as a percentage of the Center's total revenue;
- Vincent J. DiCalogero, CPA, CPAs LLC firm profile.

August 2007 Report, Ex. 6 at 219-20.<sup>2</sup>

At this second meeting, the Compensation Committee unanimously agreed on proposed terms for the Executive Director's contract. August 2007 Report, Ex. 6 at 220-22. However, rather than rely only on its own analysis or only on the data provided by Mr. DiCalogero and Dr. York, the Compensation Committee also unanimously determined to request an assessment and opinion of the reasonableness of Patrick Dollard's proposed compensation package "from the agency's independent external auditor – Grant Thornton." August 2007 Report, Ex. 6 at 222. The decision to seek an outside opinion was made pursuant to the "Procedures of Compensation Committee/Establishment of New Contract," which provided that the proposed compensation package would be presented to the Board only after the due diligence review had been finalized.

---

<sup>2</sup> To be clear, the materials before the Compensation Committee at both the first and second meeting had been provided to Committee members in advance of the meetings so that they could be reviewed and digested prior to the meetings.

August 2007 Report, Ex. 6 at 219 (committee minutes discussing review of “due diligence package” regarding requirements “for executive compensation... established by IRC Code 4958”).

Thus, the Compensation Committee resolved to seek a letter which would “discuss the Committee’s compliance with IRC Code 4958 which relates to the IRS Due Diligence Requirements regarding the evaluation and the setting of executive compensation of the Executive Director.” August 2007 Report, Ex. 6 at 222. Grant Thornton was provided with all of the information considered by the Compensation Committee to that point. August 2007 Report, Ex. 6 at 222.

At its first meeting, which Mr. Savory did not attend, the Committee determined to recommend an annual base salary for Patrick Dollard of \$300,000, which the Committee believed was appropriate “based upon the \$313,958 average base salary of other non-profit Executive Directors as presented in the Executive Compensation surveys.” August 2007 Report, Ex. 5 at 218. At the second Compensation Committee meeting, however, which was attended by Mr. Savoy, the Committee recommended an annual base salary of \$350,000. August 2007 Report, Ex. 6 at 220.

According to the Committee minutes, this higher base salary was believed to be appropriate based upon salaries paid to other Executive Directors, but also for a variety of other more subjective reasons, including the Executive Director’s performance. It was noted, for example, that the Executive Director had led the Center’s tremendous growth and expansion and that it had achieved unique prominence as “a premiere [*sic*] placement facility for the medically frail and autistic individuals.” August 2007 Report, Ex. 6 at 220; Ex. 2 at 947.

The minutes of the second Committee meeting record that all members of the Committee, including Mr. Savoy, voted to approve the proposal. August 2007 Report, Ex. 6 at 220. In fact, although Mr. Savoy later denied approving the package, August 2007 Report, Ex. 6 at 6071, all Committee members were polled individually and all, including Mr. Savoy, stated that they approved the proposed package. Thus, the minutes reflect that the Commission's Complainant, and all other Committee members, voted "[y]es, approve all provisions." August 2007 Report, Ex. 6 at 220.

Acting wholly independently of the Center and of its consultants, Grant Thornton developed and analyzed its own data. August 2007 Report, Ex. 1 at 1404. Grant Thornton, as requested by the Compensation Committee, also reviewed the data that had previously been presented to the Committee. August 2007 Report, Ex. 1 at 1404. With respect to the reasonableness of Mr. Dollard's compensation, Grant Thornton concluded:

Based on the information reviewed, Mr. Dollard's base compensation and total compensation fall approximately within the 75<sup>th</sup> percentile of comparable organizations. We understand that compensation based on comparable data that is between the 25<sup>th</sup> and 75<sup>th</sup> percentile of external market data regarding functionally comparable positions, in like organizations, and in like geographic areas is normally considered reasonable.

August 2007 Report, Ex. 1 at 1405. With respect to the data Mr. DiCalogero and Dr. York provided to the Compensation Committee, Grant Thornton stated:

We believe the information provided to you constitutes comparable data appropriate for establishing the rebuttable presumption of

reasonableness as it pertains to the intermediate sanctions legislation under Internal Revenue Code Section 4958.

August 2007 Report, Ex. 1 at 1405.

This opinion was not based on a superficial review. As discussed in the Center's July 2008 Response, in addition to reviewing the data and information previously provided to the Compensation Committee, Grant Thornton developed its own multiple data sources, independent of those previously received by the Committee.<sup>3</sup> Grant Thornton's letter, report and analysis covered nine pages and relied upon four independent data sources and referenced two others.

August 2007 Report, Ex. 1 at 1404, 1408 and 1412.

Despite having voted to have Grant Thornton conduct the analysis, August 2007 Report, Ex. 6 at 222, Mr. Savoy now questioned Grant Thornton's independence and suggested that a second independent analysis be done.<sup>4</sup> August 2007 Report, Ex. 6 at 224. Although there ought to have been no question about Grant Thornton's independence, the Compensation Committee decided to go the extra, albeit unnecessary, mile to assuage Mr. Savoy and to eliminate any conceivable question about the Committee's work or about the reasonableness of Mr. Dollard's compensation. Thus, "[b]ased [u]pon Camille Savoy's concerns," the Compensation Committee

---

<sup>3</sup> Page one of the Grant Thornton letter states that the following independent, comparative data sources were reviewed, in addition to data compiled by Mr. DiCalogero and Dr. York:

- ECS/Watson Wyatt Top Management Compensation Report;
- 2004 William M. Mercer Executive Compensation Survey;
- PRM Consulting Management Compensation Report in Not-For-Profit Organizations; and
- Unifi Not-For-Profit Compensation & Employment Practices.

August 2007 Report, Ex. 1 at 1404, 1408; July 2008 Response at 24.

<sup>4</sup> As the Complainant was aware, the Grant Thornton analysis cost the Center \$7,600.

decided to engage a second expert to provide another independent review. August 2007 Report, Ex. 7 at 224-25; Ex. 8 at 6071-72.

Deloitte Tax LLP, another highly regarded executive compensation expert, was retained to conduct a second, wholly independent reasonableness review. August 2007 Report, Ex. 8 at 6071; Ex. 2 at 947-48. Because of Mr. Savoy's concerns about Grant Thornton's independence, Deloitte, in addition to conducting its own analysis, also was asked to review the appropriateness of all information previously considered by the Compensation Committee. This request specifically asked Deloitte to review the information that had been provided by Mr. DiCalogero and by Grant Thornton "to determine whether SDTC meets the rebuttable presumption of reasonableness with respect to the Plan." August 2007 Report, Ex. 2 at 948.

After completing its own analysis, and reviewing the information provided by Mr. DiCalogero and by Grant Thornton, Deloitte opined as follows:

Based on our analysis of the facts provided to us during our review of the Plan and discussions with members of the Committee, we conclude that:

- (1) The approval of this Plan is not likely to impair SDTC's tax-exempt status.
- (2) By following the recommendations described above, SET will have established a rebuttable presumption of reasonableness of the compensation for purposes of IRC Section 4958.

August 2007 Report, Ex. 2 at 952.

Although Deloitte reviewed the data and information compiled by Grant Thornton and by Mr. DiCalogero, Deloitte considered more than twelve independent data sources that it had

developed independently of Grant Thornton and Mr. DiCalogero. August 2007 Report, Ex. 2 at 974.<sup>5</sup> Deloitte's letter, report and analysis runs twenty-eight pages.

After receiving Deloitte's formal opinion, the Compensation Committee met again. At that third meeting, Mr. Savoy requested that yet another (*i.e.*, a third) expert review be obtained.<sup>6</sup> August

---

<sup>5</sup> The Deloitte report says the following with regard to its data sources:

Deloitte reviewed market studies conducted by Vincent DiCalogero, CPAs and Grant Thornton, LLP, as well as its own data. The data relied upon by Deloitte in making its determination includes:

- Total cash compensation:
  - Published survey data
  - 990 Data (NY Metro Area & National Residential Adult & Children's Services Organizations)
- Benefits:
  - Published survey data on prevalence and level of benefit (*i.e.*, premiums and contributions paid by employer)
  - Published survey data and Deloitte data on total benefits as a percent of salary
  - 990 Data (NY Area & National Residential Adult & Children's Services Organizations).

August 2007 Report, Ex. 2 at 950-51, 961.

Deloitte's analysis also states that the firm used the following twelve "published survey data" sources:

1. Clark Consulting: 2004 Executive Benefits Survey;
2. Watson Wyatt: 2004/2005 Survey Report on Non-Qualified Benefits and Perquisite Practices;
3. William M. Mercer: 2004/2005 Compensation Planning Survey;
4. Council on Foundations: 2002 Grantmakers Salary and Benefits Report;
5. William M. Mercer: 2003/2004 Spotlight on Benefits;
6. Watson Wyatt: 2004/2005 Survey Report on Employee Benefits;
7. Buck Consulting;
8. 2002 total Compensation Survey of Foundations;
9. Saratoga Institute 2003 Compensation and Benefits Benchmarking Report;
10. Watson Wyatt: 2004/2005 Top Management Compensation Report;
11. William M. Mercer: 2004/1005 Executive Compensation Survey; and
12. PRM Consulting: Management Compensation Report in Not-For-Profit Organizations.

August 2007 Report, Ex. 2 at 974.

CQC never mentions the data sources utilized by Grant Thornton and Deloitte, nor does it consider whether, standing alone, such data validated the reasonableness of Mr. Dollard's compensation.

2007 Report, Ex. 8 at 6071. The remaining three members of the Compensation Committee, however, believed that the requirement for an independent review had been satisfied and that a third opinion was neither warranted, economically justifiable or necessary. August 2007 Report, Ex. 8 at 6071. *See, e.g., Menard v. Comm'n'r*, 560 F.3d 620 (7<sup>th</sup> Cir. 2009) (Posner, J.) (only reason for Board to consult with an outside compensation expert “would have been to provide some window dressing in the event of a challenge by the IRS”). Thereafter, by a vote of 3 to 1, the Compensation Committee recommended Mr. Dollard’s compensation package for adoption by the full Board of Directors. August 2007 Report, Ex. 8 at 6073.

At the Board meeting called to review the Committee’s recommendation, the Board of Directors received not only the Compensation Committee’s recommendation that the package be approved, but also the Compensation Committee minutes reflecting the steps taken, as well as all of the data and information reviewed by the Committee and the reasons for the Committee’s conclusions. August 2007 Report, Ex. 8 at 6071-72. Mr. Savoy again renewed his request that a third independent expert be engaged to review the contract. August 2007 Report, Ex. 8 at 6071. Mr. Savoy’s request again was considered, discussed at some length, and rejected. August 2007 Report, Ex. 8 at 6071-72.

According to the Board minutes, in response to Mr. Savoy’s request,

“[I]t was indicated that the requirement for independence was fulfilled by choosing Deloitte & Touche as the center [sic] had no relationship with Deloitte & Touche.” [In addition,] “[i]t was

---

<sup>6</sup> The Deloitte study cost the Center \$12,550. Thus, between the Deloitte and Grant Thornton analyses, the Center spent a total of \$20,150 on expert compensation analyses.

indicated that the 'external auditors,' in order to function as external auditors, must be 'independent' for the agency. This was noted specifically in regards to the firm of Grant Thornton. Auditors, in the Rules of Accounting, must be independent in order to render their opinion, however, [sic] it was indicated that the IRS would look more favorably upon a compensation study performed by someone other than the auditors, in that it would add more value."

August 2007 Report, Ex. 8 at 6072. Then, after "[i]n depth [sic] methodology and survey data discussions," the Board of Directors went into Executive Session. August 2007 Report, Ex. 8 at 6072-73.

Following the Executive Session, the President of the Board, Elizabeth Berman, moved for the approval of the "[e]mployment agreement with Patrick Dollard (Executive Director) incorporating the terms and provisions set forth in the Deloitte & Touche review of the Compensation Plan." August 2007 Report, Ex. 8 at 6073. The Board approved the Resolution by a vote of 8 to 1. August 2007 Report, Ex. 8 at 6073.

The contract approved by the Board did not include several significant terms originally approved by the Compensation Committee. Patrick Dollard had requested, and the Committee had proposed, a ten-year contract term. August 2007 Report, Ex. 6 at 220. At the recommendation of Deloitte, however, the contract term was reduced to five years. August 2007 Report, Ex. 2 at 954. Second, the proposal also originally included a provision that the Executive Director's base salary would increase ten percent per annum. Based on Deloitte's recommendation, the automatic escalation clause also was removed and replaced with a provision that any annual increases would be at the discretion of the Board. August 2007 Report, Ex. 2 at 954.

Despite the Second Draft Report's persistent effort to portray him as a noble victim, Mr. Savoy was not ignored; nor were contract terms imposed on the Board. Mr. Savoy's position simply was rejected by an 8-1 vote after fair and reasoned consideration, in a democratic process. However strongly a Board member may feel about his position, no single Board member has the right to dictate an outcome.

## **ADDENDUM B:**

### **SUMMARY DESCRIPTION OF THE CENTER FOR DISCOVERY'S BACKGROUND, GROWTH, POPULATION, PROGRAMS AND OPERATIONS**

The Center for Discovery, located in Harris, New York in the foothills of the Catskill Mountains, is a private, nonprofit agency that furnishes a full range of educational, clinical, residential, recreational, and creative arts services to approximately 130 developmentally disabled consumers in its pediatric and adult residential and day programs. Founded in 1948 as the United Cerebral Palsy Association (UCP) by a group of parents of disabled children from Jeffersonville, the Center over the years has evolved to specialize in serving medically fragile children and adults with significant, multiple disabilities who have not responded to community-based "inclusion" programs, such as those offered by traditional UCPs and ARCs,

The Center serves, and provides residences for, children with significant cognitive and physical delays and co-occurring medical complications, such as seizure disorders, gastrostomy tubes, diminished respiratory status, and many additional concomitant physical medicine concerns. It also serves multiply disabled children diagnosed with autism; NOS; Rett's and childhood disintegrative disorders; mental retardation; social, behavioral and language disorders; and neurological impairment. In contrast with typical UCPs, for example, just forty percent of the Center's pediatric clientele are ambulatory, and forty percent are vision-impaired. Only a few years ago, the Center's population was thought to be incapable of participating in, or benefiting from, the types of wide-ranging therapies and mainstream physical activities that today are commonplace at the Center.

The Center's cutting-edge approach to treatment of the most severely disabled has garnered the type of national and international renown that only facilities, such as the Kennedy Krieger Institute at Johns Hopkins, the Perkins Institute for the Blind, the Woods, Crotched Mountain, and a handful of others, have achieved. It bears emphasis that CQC neither criticizes the Center's programs, services, or quality of care, nor disputes that the Center is at the pinnacle of nationally recognized institutions in its field.

A recent study of the Center by a third party commissioned by the New York State Education Department makes clear that CQC's assertion that the UCPs and ARCs are comparable to the Center is not just baseless, it is so far off the mark that the assertion could not be made by a reasonable person. The Education Transformation Group (ETG), a consulting firm of disinterested, outside experts, was retained by the New York State Education Department to evaluate options for the future direction of The New York State School for the Blind (NYSSB). After describing the internationally renowned Perkins School for the Blind in Boston and the Center for Discovery as "two . . . providers [that] stand out as experienced, innovative, entrepreneurial, and committed to excellence," ETG Report a 6-7, the ETG Report states:

**The Center for Discovery** (Sullivan Diagnostic Treatment Center), located in Monticello, New York, is perhaps even more impressive than Perkins for what it has grown to become in little more than 50 years. Sullivan is an 853 school with some ICF beds. This school serves approximately 90 day students and 150 seven-day resident students on 125 acres. The student populations served include those with autism spectrum disorders as well as a

significant number of students with multiple, severe disabilities. Of these, approximately 40% have a visual impairment.

The classrooms for students with multiple severe disabilities and visual impairment are stimulating, interactive places. Students have adaptive technologies at hand, allowing them to communicate as freely as possible. On/Off “switch technology” is predominant, allowing the most physically restricted students to manipulate their own environment. An interesting feature is cross-discipline teams. Students are not “pulled out” for physical therapy, speech, and occupational therapy; instead the therapists work with each student in the context of the class and the lesson. In this way, students do not miss lesson time and teachers and aides observe the skills that are being worked on and can reinforce them throughout the day. The therapists are integrated into lesson planning and work with teachers and aides in brainstorming new tools and adaptations to increase student independence. All staff members seem very knowledgeable and conscious of providing an environment in which students can experience as much independence and success as possible. Apparently, high contrast materials work well for students with limited vision; tools, buttons, and switches are bright yellow or orange against a dark blue background. Hallway floors are bright orange with white borders and doorways are outlined in dark blue so that students who can ambulate or direct their own wheelchairs are able to navigate with greater independence.

Staff members encourage students and provide positive feedback with the phrases “good job” and “good work” in recognition of their efforts. Older students create, market, and sell greeting cards to employees—working as a team to receive the order, determine

the steps needed to complete the job and assigning tasks. Meaningful work keeps student motivation high. All students, whether they will be able to read or produce Braille themselves, are exposed to Braille (their own name, the names of their possessions, etc.) in the belief that it is important that they know there is a language out there for them.

Sullivan works on the philosophy that students need fresh air and a connection to nature. The school campus is full of nature trails (some created by parents as part of weekend service projects) and animals are a part of the landscape—there are a couple of sheep in an enclosure, a pig in a pen, a pony that'll pull students in a cart. In an indoor discovery science center, hamsters, a dog (who goes home with a staff member), chickens, fish, and snakes delight children.

Student IEPs are remarkably thorough and developed as PowerPoint presentations in order to incorporate photos and videos of the student performing the objectives of the plan. This facilitates communication with parents and CSEs.

Sullivan is undertaking an endowment campaign and, thanks in part to its proximity to NYC, has a tremendously powerful board and substantial donors. The Center for Discovery is driven by the vision of its executive director—an inspirational leader who makes “walking the walk and talking the talk” an everyday occurrence. For example, in order to avoid endangering its medically fragile students with pesticides, food preservatives and food additives, Sullivan has its own organic farms and prepares all its own food. The complex is powered by wind and Sullivan’s own geothermal

energy. New construction is all LEED certified. The new health clinic employs 300 nurses. Sullivan also operates an OMRDD adult residential program and the year-old Family Center is outfitted with furniture built in the supported employment workshops. The senior administrators at the school are experienced in working to change existing systems, having spent a year working to restructure the program of a residential school in NYC. Sullivan is at the cutting edge of special education, residential programs, parent outreach and optimal environments.

Both of these exemplary residential schools [Perkins and the Center] have indicated their willingness to work with the New York State School for the Blind in restructuring its operations and building for the future. Sullivan currently serves the proposed population, operates a sophisticated health clinic and a diagnostic center, and as an 853 school in New York, is familiar with the proposed operating structure. Perkins has the pedigree and focus as a school for the blind, as well as an entrepreneurial approach to diversification to meet market needs, a record of training leaders, and an impressive development record. However, there also are a number of other schools (familiar to NYSED through its out-of-state placements)—such as Woods and Crotched Mountain—that might also be willing and qualified to respond.

ETG Report at 7-9.

The Center's unique programs and preeminence – and its differences from the UCPs and ARCs – also has been recognized by the Federal government as well as by foreign countries. For example, the United States Agency for International Development contracted with the Center to

work with other countries to develop treatment for the developmentally disabled overseas. Currently, the governments of both India and Mexico are using the Center as a model for establishing their own disability programs.

Moreover, the Center serves as a resource for programs and services for the New York State Education Department, as well as for OMRDD, and is a service delivery model many other agencies attempt to emulate. The State of New York continues to encourage the Center to expand its facilities to create more treatment options for autistic children and to bring home those children currently being served out-of-state for lack of available in-state programs. One result is the Center's new educational campus for severely autistic children.

Another significant difference between the Center and the UCPs and ARCs, is the Center's unusually high number of professionals and paraprofessionals, both in the aggregate and on a per-client basis. The Center's staff of approximately 300 nurses is comparable to that of a small or medium-sized hospital. The Center believes that the total number of nurses employed by all New York ARCs, in the aggregate, and the total number of nurses employed by all UCPs, does not equal 300. In addition to nurses, the Center employs numerous licensed health care professionals, including physical, speech and occupational therapists, social workers, psychologists, audiologists and physicians.

The Center's broad-based catchment area currently includes seventeen New York counties and has begun to expand even further as a result of the development of the new autism campus. The Center also serves children from five other states. The vast majority of UCPs and ARCs are limited to a single home county or the immediate vicinity.

Despite fewer professional and paraprofessional staff and a smaller catchment area to manage, most UCPs and ARCs with revenues in excess of \$25 million have Associate or Assistant Executive Directors to assist the Executive Director (ED). Quite the reverse is true of the Center, which has no Assistant Directors.

### **1. The Center's Growth and Expansion**

The institution that would evolve into the Center for Discovery started in 1948 as a clinic on the first floor of a local hospital. By 1965, the Center was able to open its first treatment facility in Liberty, New York.

For years, the Center remained a small, rather isolated institution with a staff of no more than 25 until two events occurred in the 1980s that launched its still ongoing expansion. First, Patrick Dollard took over as executive director in 1980. Second, the State closed Letchworth Village, a State-run hospital for the disabled, where 6000 people had, for decades, been warehoused in overcrowded and understaffed conditions.

The closing of Letchworth was the end of a fifteen-year process of phasing out large-scale, State-run institutions for the disabled. The Center began to provide services to fill the needs of the disabled now residing in the community, and to grow.

In 1982 the Center opened its first residence for ten disabled children, followed by three additional residences in 1985. At that point, the staff had grown to 150. Seven years later, in 1992, the Center purchased a fifty-acre farm, the future site of the Thanksgiving Farm. Staff increased to 400 in 1993. By 1995, the Center had revenues of \$17,817,858. The years between

1996 and 1998 saw the funding and development of two six-bed residences for young adults and two six-bedroom residences for multiply disabled, visually impaired children. At the end of that period, the staff had grown to 700.

The Center, however, had no centralized primary health care clinic. As a result, staff had to transport residents by van, sometimes as far away as Manhattan, for many routine diagnostic and treatment procedures. A routine visit to a medical professional often required three days – one to prepare the child for the disruptions and changes to come, one to transport the child to the provider and one to reacclimate the child to his or her program. Such trips often adversely impacted the children who generally require a consistent, recognizable and controlled environment. The trip – which required multiple staff to accompany the child -- also diverted an enormous amount of professional and paraprofessional staff time that should have been devoted to providing therapies, education and programming.

To solve the problem the Center initiated fund-raising, development, design, and construction of the architecturally innovative, environmentally “green,” freestanding Article 28 Health Clinic, which opened in 2003. Clinic staff include a medical director; consulting physicians; health and clinical services administrators; nurses; social workers; psychologists; and physical, occupational, and speech and audiology clinical therapists. The clinic provides children and adults with on-site medical, physical, and psychological support, including primary medicine, primary dental, neurology, psychology, monthly psychiatry, podiatry, gastrointestinal, and dermatology services, among others.

By 2003, the Center's revenues had increased to \$64.7 million, and with the addition of the clinic, the staff increased to 950. One year later, in 2004, the Center announced plans for a \$27 million expansion program, the Center's staff reached the 1000 mark. Mid-way through 2009, the total number of staff topped 1200.<sup>1</sup>

---

<sup>1</sup> Staff Growth at the Center For Discovery, 1980-2009:

<b>YEAR</b>	<b>STAFF COUNT</b>
1980	25
1981	50
1983	75
1984	100
1985	150
1988	225
1990	325
1993	400
1996	500
1999	700
2002	900
2003	950
2004	1000
2007	1100
May 4, 2009	1222

The Center's expansion continued in 2007, when the Carrus Institute opened. The Carrus Institute provides education, programs, services and support for families of persons with disabilities.

By 2008, the Center's revenues had grown to \$74,298,705. At this time, the Center also was engaged in the funding, planning, and construction of the Big Barn Center, an environmental education and learning facility that opened on the Center's Stonewall Preserve in May 2009. During this same period, planning and construction of a new 73-bed residential and day school campus for severely autistic children also was underway. Funding for the campus was secured through placement of a \$36 million public bond offering. The autism campus is scheduled to open in August 2009.

Today, the Center is the largest private employer in Sullivan County, with over 1200 employees, which, in addition to the clinical staff, includes teachers, farmers, life guards, and riding instructors. The Center's numerous buildings are spread over three campuses comprised of 600 acres of wide-open and wooded venues with rolling hills, pastures, ponds, wetlands, and farmland. By 2010, the Center's revenues are projected to be \$100,000,000.

## **2. The Center's Unique Population and Residential Services Programs**

Despite its extraordinary expansion over the years, Center's philosophy and goals have remained the same – that even the most severely disabled have the same rights as the nondisabled to education and life experiences that help them reach their highest potential for independence. Thus, the Center offers pediatric and adult residential services programs to individuals who have the most difficult developmental conditions, including multiple disabilities and cognitive impairments ranging from severe to profound. Most are nonverbal; many are medically fragile and clinically unstable.

A unique feature of the Center is that it functions as the program of last resort for multiply disabled clients. In fact, a requirement for admission to the Center is that the resident must have participated in, but not responded to or functioned effectively in, other programs offered through UCPs, ARCs, or other providers.

Pediatric residences are home to children between the ages of 5 to 21. The residences are located throughout the Center's campus-like setting which also includes an outdoor learning environment, and creative classroom spaces. The pastoral setting is ideal for outdoor and nature-based learning through such activities as fishing, camping, lessons in animal husbandry, and plant and animal identification. Despite the residents' severe physical limitations and co-morbidities, the staff adapts gardening, sledding, skiing, therapeutic horseback riding, and indoor and outdoor sports for children to expand their creativity and grow as individuals.

The adult services program provides residential living to individuals over the age of 21 who have “aged out” of the State’s ICF/MR, Medicaid-supported residential programs, but who continue to need continuing intensive residential programming and support. Each residential home is designed to accommodate different levels of independence and to give residents the opportunity to live as part of a community. The program offers a wide variety of activities to help residents achieve their full potential, including enrichment classes at the local college, exercise classes, yoga, concerts, swimming, and sporting events. Members of the adult residential program perform real, meaningful work at Thanksgiving Farm, growing food for the Center and for the surrounding community.

A key component of the Center’s philosophy is the concept of “reverse inclusion,” meaning that instead of taking the client out of the residential setting to be included in community-based learning, work, and treatment, the community is brought to the individual client in his or her residential setting. For example, the Center makes its facilities and resources, such as the Thanksgiving Farm and its Olympic-size therapeutic swimming pool, available to the community, encouraging participation in the life of the Center. This approach is less stressful and disruptive and far more therapeutically beneficial to the Center’s clients, who have already tried, but not responded to the more traditional models used by most UCPs, ARCs, and other programs.

To determine whether an individual is appropriate for admission, a comprehensive assessment is conducted over several days by professionals skilled in psychology, audiology, speech and language, augmentative communication, oral-motor, motor skills, functional vision, mobility,

environmental access, and durable medical equipment technology. Families, regardless of income level, do not pay to have their children at the Center. The Center's funding comes from the New York State Department of Education, Medicaid, and significant private and public fund-raising.

### **3. The Center's Facilities<sup>2</sup>**

#### **(a) The Elizabeth L. Berman School**

The Elizabeth L. Berman School provides students with learning environments that best fit their individual needs. This pediatric educational program serves individuals from ages 5 to 21, including more than 100 day students from outside the Center.

Students with neuromotor disabilities are in classrooms that address their seating and mobility requirements. Ambulatory and autistic students are placed in classrooms that emphasize schedules and predictability. The classrooms are structured and organized to promote the maximum possible amount of participation and interaction.

Each class is limited to six or fewer children who are taught by a team made up of a certified special educator and two or more assistants to provide the individual attention that each student needs. The classrooms are interactive places where the Center provides the students with adaptive technologies permitting them to communicate as freely as possible by using "On/Off

---

<sup>2</sup> This section by no means describes all of the Center's facilities. Instead, it describes illustrative examples of the facilities operated by the Center. For example, the Center also operates Bed & Breakfast facilities (where families and visitors to the Center can stay overnight), a horseback riding center, a gymnasium and a swimming pool, among many other enterprises.

switch technology” that allows even the most physically restricted students to independently manipulate their own environment.

Consistent with the Center’s philosophy of “reverse inclusion,” its many professionals provide much therapy in the classroom to avoid disrupting the client’s treatment program. Rather than pulling students out of class for physical, speech, and occupational therapy, students instead receive therapy in the context of their classes so they do not miss lesson time. Teachers also can observe and reinforce the skills that are being worked on. Therapists are integrated into lesson planning and work with teachers and aides in designing adaptations to increase student independence. Nature-based learning is incorporated into the curriculum by taking advantage of the Center’s natural setting to encourage sensory experience and to develop an awareness of the interdependence of all living things. For example, children can interact with hamsters, a dog, chickens, fish, and snakes, among other vertebrates and invertebrates, in an indoor science center.

The Center has developed a “Sensitive Teaching Model” for children with autism, which is based on involving the parents, knowing and understanding the individual child, removing obstacles to learning, and promoting health and self-regulation. This approach acknowledges that autism is an interaction disorder and incorporates a healthy, toxin-free diet through use of organic food produced at Thanksgiving Farm, physical activity, environmental and social interaction, technology-assisted communication, and proven educational techniques that help children increase their academic and communication skills and improve their ability to self-regulate.

**(b) The Discovery Health Center**

Completed in 2003, the Discovery Health Center was the first health care facility in the country to achieve Leadership in Energy and Environmental Design (LEED) certification from the United States Green Building Council for its sustainable design and environmental compliance. Built at a cost of more than \$8 million, the 28,000-square-foot primary care clinic features geothermal heating, day lighting of interior spaces, passive solar energy, recycled building content, water-efficient landscaping, and no materials containing toxic vinyl or PVC. Water runoff from the building is used to irrigate Thanksgiving Farm and to supply the fire suppression system. The building uses fifty percent less energy than a comparable health care facility.

In addition to its energy-saving features, the clinic was designed to remove barriers between rooms and floors to allow greater independence for wheelchair-bound residents. There are no wheelchair ramps or expressed staircases to remind residents of the stigma of disability. Residents in wheelchairs, staff, and visitors move from one floor to another by elevator. In addition to primary medical care, the clinic provides dental, neurological, psychiatric, ophthalmologic, and dermatological services to residents. Consistent with the Center's "reverse inclusion" philosophy, 500 people from the surrounding vicinity also receive medical care at the facility.

**(c) The Thanksgiving Farm**

The Thanksgiving Farm supplies the Center with organic, locally grown food to ensure a healthy diet for residents that is free of the synthetic chemicals, fertilizers, pesticides, antibiotics,

hormones, and genetically modified organisms that many believe cause or exacerbate developmental disabilities. The Farm is certified organic and is in the process of applying for Demeter Certification, which recognizes farms that are virtually self-sustaining and designed to provide for the long-term biological health of the soil and surroundings. The Farm merges community-based traditional farming with 21<sup>st</sup> Century sustainable farming techniques by emphasizing the use of renewable resources and conservation of land and water to ensure a safe and fresh food supply. It relies on crop rotation, cover crops, and composted manure from the Farm's own livestock to maintain soil fertility for its twenty-eight-acre organic vegetable farm.

### **(1) Community Supported Agriculture**

Among the Farm's features is a CSA operation (Community Supported Agriculture), in which Center residents and staff participate, that provides organically certified vegetables, herbs, and soft fruits for use in the Center's kitchens and by more than 250 families in the surrounding local communities. The CSA also sells certified organic produce at two farmer's markets in the New York metropolitan area during the summer and fall. The CSA program also contributes to the Center's reverse inclusion program by bringing community residents to the Center.

### **(2) The Healing Gardens**

The Healing Gardens are working gardens growing a variety of medicinal and culinary herbs, flowers, and ornamentals. A total of thirty-three residents (thirty Adults, three Children) participate in the CSA Day Habilitation Program. They live and work on the farm to help grow, harvest, and process the herbs. During the growing season, the work is done primarily outdoors in the gardens. During the winter season, residents work in the greenhouse and the CSA Herbal

Workshop, processing, bottling, and labeling products. These products are then distributed among the residences on the campus, the co-op store, and the Farmer's Markets.

### **(3) The Bakery**

In addition to the CSA operation, the Farm runs an organic bakery, featuring several varieties of handcrafted artisan bread flavored with organic herbs from the Healing Garden and baked in a Spanish-style, wood-fired oven. The oven has been adapted so residents in wheelchairs can stoke the flames and participate in baking. The breads are used in the Center's residences and the Café at the Carrus Center. Staff and families of residents can purchase bakery breads at the Farm's Co-op store.

### **(4) Stonewall Preserve**

The Center's livestock farm is located at the Stonewall Preserve, in Hurleyville, New York, ten miles from the Center's main campus. Stonewall Preserve is a 300-acre historic farm with miles of preserved Revolutionary War Era stone walls. To maintain Stonewall's historic agricultural heritage, the Center partnered with the Open Space Conservancy, a non-profit agricultural land conservation group, which purchased a conservation easement against the property with a grant from the Lila Acheson and Dewitt Wallace Foundation.

The Preserve is now home to five active, adult autistic residents who participate in meaningful daily farm activities that include tending a herd of the Preserve's own breed of Stonewall pigs and a herd of Chiangus cows, which are a mix of Italian Chianina and Angus breeds that produce a lean and healthful beef. All of the livestock is humanely raised and hormone-free.

Education and Day Habilitation groups actively take care of a flock of free-range laying hens that produce 130 eggs per week. The hens rotate around the farm to provide natural fertilization and aeration of the soil through their scratching and foraging. Activities include feeding, collecting eggs, grading and packaging eggs and making sure that the eggs are delivered to the warehouse for distribution to Food Services.

Clients also participate in the organic management of an apiary of bees with 30 bee hives. The bees provide pollination services for the Farm's vegetable crops and herbs and flowers. The Farm harvests hive products such as honey, wax, pollen, and propolis, but a primary focus is bee health, followed by the pollination services they render and extraction of excess honey. Day habilitation projects include assembling and painting beekeeping equipment, bottling honey, labeling jars, and collecting propolis.

**(5) The Big Barn Center for Health and Education**

Located in Stonewall Preserve, the Big Barn Center is dedicated to teaching residents to live in harmony with nature and to fostering a deeper understanding of the environment.

**(d) The Carrus Institute**

The Carrus Institute, dedicated to addressing the special needs of the families of residents at the Center, is central to the Center's holistic approach that involves the consumer's entire family in the treatment program. The Institute serves as a place where families can meet one another, exchange ideas and experiences, visit with professionals who care for their loved ones, attend conferences and classes and be among families and others who understand the stress and strain

associated with having a disabled family member. The Institute is outfitted with furniture built in the Center's supported employment workshops.

The Institute has three main components – a Resource and Research Library, the Wellness and Training Center, and the Conference Center. The Resource Library provides video-conferencing capabilities that allow families to connect with other families to share experiences and insights. Parents and siblings of residents can also take advantage of the Wellness and Training Center's conferences, informal meetings, and health classes to work with professionals to address the special challenges that they face. The Conference Center, equipped with the latest in media and production equipment, is the site of lectures, demonstrations, and professional courses and training relating to issues that affect persons with disabilities and those who take care of them. In the future, the Conference Center also will provide dance and theater presentations.

(e) **Residential Campus for Children with Autism**

The Center will open its new living and teaching campus for children with autism in August of this year. New York State encouraged the Center to proceed with this project because the state currently lacks a sufficient number of in-state residential placements for autistic clients, so those clients must be sent to out-of-state programs.

The campus, which is spread out over a 10-acre site, includes groups of residences in clusters of three that are in close proximity to a homeroom/classroom building. Each group of buildings is meant to relate as a community, while maintaining the individual houses as distinct entities and addresses.

All the houses in a cluster are architecturally different and are connected to the other houses in the group and to a homeroom building via pathways. The buildings are designed to provide a therapeutic environment that enhances the education and treatment of children with autism.

The interiors of buildings feature soothing colors and natural light, and the exteriors blend naturally with the surrounding wooded setting. Each homeroom building provides the anchor for the three clusters of buildings. These buildings include three classrooms, an exercise room, kitchen/dining facility, “sensory space,” and staff office and conference rooms. Within each classroom is a smaller nested classroom so groups can be broken down into two independently functioning parts.

All buildings are environmentally “green” and designed to meet the spatial sensibility needs of children with autism. People with autism generally do not like sudden spatial juxtapositions or large undifferentiated spaces, so the inside of each building gives a sense of being “channeled” through space by bends rather than abrupt, right-angle turns. Space opens up gradually and closes down slowly, leading the body through gentle transitions until the final turn into a classroom or the resident’s bedroom.

**(f) Residential Houses**

Between 1995 and 2004, the Center opened nineteen homes (IRAs, ICFs, and a two-bedroom apartment) for its pediatric and adult consumers. Eleven of these homes originally opened as IRAs. In the spring of 2004, all IRAs were converted to ICFs. In total, the Center operates twenty-seven free-standing homes, located on its campus and throughout the community. These

homes are designed and operated so that residents have the greatest possible independence as well as the opportunity to live in a family-oriented atmosphere.<sup>3</sup>

<sup>3</sup> Timeline of openings of the Center of Discovery homes:

<b>YEAR</b>	<b>CENTER NAME</b>	<b>DATE OF OPENING</b>	<b>NOTES</b>
1994	None		
1995	Rapp Road West IRA	07/08/95	
	Thyme IRA	10/16/95	converted to an ICF on 04/01/04
	Sage IRA	10/23/95	converted to an ICF on 04/01/04
	Parsley IRA	11/06/95	converted to an ICF on 04/01/04
	Rosemary IRA	11/06/95	converted to an ICF on 04/01/04
1996	None		
1997	Sunset Hill North IRA	03/03/97	converted to an ICF on 04/01/04
	Sunset Hill South IRA	03/03/97	converted to an ICF on 04/01/04
1998	Birch ICF	06/22/98	
	Willow ICF	07/12/98	
	Harvest IRA	09/ /98	converted to an ICF on 06/15/04
1999	None		
2000	Otis Armstrong IRA	06/27/00	converted to an ICF on 04/01/04
2001	Spruce ICF	07/17/01	
	Oak ICF	09/10/01	
	Pine ICF	09/24/01	
	Elderberry ICF	12/05/01	Magnet house
2002	Four Seasons IRA	09/04/02	

#### 4. The Center's Therapy Programs<sup>4</sup>

##### (a) Occupational and Physical Therapy

The Center's occupational and physical therapists employ an eclectic approach that incorporates NDT, SI, aquatics, and equine assisted activities in a nature and arts based curriculum.

Occupational and physical therapists collaborate with other professionals in residential, health, and educational programs so that students can integrate sensory motor tasks into every situation.

These therapists also assist in DME and orthotics clinics to ensure that any needed upper and lower extremity splints are provided for optimal alignment and motor performance.

##### (b) Speech Pathology

Speech Language Pathologists teach skills in language, cognition, oral development, feeding techniques, respiration, speech and phonation, and alternative modes of communication. They also coordinate with the Center's medical and dental specialty clinics to facilitate optimal progress in speech language. As with the Center's Physical Therapists, Speech Language

---

	Vista IRA	09/11/02	converted to an ICF on 04/01/04
	2-Bed Apartment	05/08/02	
2003	None		
2004	Mulberry ICF	02/03/04	

Of the 27 homes that the Center for Discovery operates, 18 (or 66.7%) of the homes opened over the past ten years.

<sup>4</sup> This section describes only illustrative examples of the Center's programs.

Pathologists are part of an integrated, interdisciplinary approach that encourages communication skills and mealtime therapies in all locations.

**(c) Music Therapy**

Music is an integral part of the therapy program at the Center. The Center's music therapists engage individuals in making music with instruments, the human voice, or creative movement to foster sensory-motor, cognitive, communication, social, and affective-emotional skills. For many of the children, music facilitates social interaction, provides a communication tool and creates a calm environment.

Music therapy takes place on an individualized or group basis, like any other therapy, but it is also integrated into the daily life of the Center. For example, a harpist often plays in the lobby of the Health Center. In addition, performances by choirs and BK Jamm, a musical group comprised of therapists and some of their students, provide frequent exposure to music as a regular part of life at the Center.

**(d) Psychology**

From the moment that a person is admitted to the Center, psychologists, or integration specialists, observe and assess each individual's response to a variety of situations that reflect the ability to communicate and interact with others. The integration specialist collaborates with other team members to develop, for example, individualized behavior supports and strategies to assist individuals with self-regulation in new or unanticipated situations, which enhances their ability to work and play successfully.

**(e) Therapeutic Aquatics**

The Center employs a dozen certified lifeguards who work with trained aquatic therapists to supervise the activities of residents in the Center's swimming pool. Aquatic therapy allows individuals with limited mobility to move more easily and freely and to achieve a greater range of motion and flexibility while reducing stress on joints. Not only is pool activity fun, but it also improves balance, fosters greater body awareness, and increases the confidence of residents.

**(f) Equine Assisted Therapy**

The Center's Milligan Hill equine assisted therapy program offers residents the opportunity to improve respiration, circulation, balance, and body metabolism along with developing greater muscle strength and agility while riding horses under the careful supervision of riding instructors. The warmth and motion of the horse mimic that of the human body and can also reduce muscle spasticity in the legs, back, neck and arms. Residents' range of motion can also be enhanced by activities such as mounting, dismounting and grooming horses.

**(g) Adaptive Physical Education**

The Center offers a constantly expanding menu of leisure skill activities, both inside the Center's gymnasium and outdoors, designed to provide vigorous physical exercise, social interaction, and fun. Trained specialists adapt and modify indoor and outdoor sports and games to allow even seriously disabled consumers/residents to engage in a variety of physical activities, such as golfing, bowling, skiing, and skating, to name a few.

Numerous physical activities serve as a platform to teach both gross and fine motor skills. Therapists employ sensory activities, such as deep massage, to help residents maintain focus. In addition, many residents receive occupational therapy integrated into their exercise programs. For some residents with challenging behaviors, vigorous physical activity has proven to be an alternative to medication and intrusive behavioral management techniques. The Center staff constantly explores new and imaginative ways to overcome obstacles to participation in a widening array of physical education activities that provide residents with enjoyment, physical well being, and a sense of accomplishment.

## **5. Fund-raising for the Center's Programs**

Currently, the Center is engaged in a campaign to raise \$100 million to expand the campus and to increase the Center's endowment. There are numerous fund-raising events planned throughout the year to help the Center reach its initial goal of raising \$25 million.

For example, The Center for Discovery Foundation sponsors an annual dinner dance in the spring. This dinner dance is the Center's major annual fund-raising event. In 2008, over 700 Board members, parents, families, friends and other guests raised over \$700,000. Since its inception in 1997, the annual dinner dance has raised over four million dollars.

Many other fund-raising events occur throughout the year. These activities include events aimed at raising funds from the public sector (such as golf and tennis tournaments, auctions, etc), private events with wealthy donors and efforts to obtain government and foundation grants.

The Center has, for example, received significant grants from, among others, the Kresge Foundation and the United States Agency for International Development. Individual donors also have given significant funds to the Center through naming opportunities, planned giving of charitable deferred annuities, and challenge grants.

## ADDENDUM C:

### RECOMMENDATIONS IN DRAFT REPORT OF FINDINGS

This addendum responds to the 13 recommendations in CQC's Second Draft Report at 28-29.

*CQC Recommendation 1:*

*"When setting compensation levels the board should consider comparability data from specific agencies delivering similar services and is compiled by an independent party."*

The Board of Directors established Mr. Dollard's compensation package with the assistance of experts in accordance with Internal Revenue Service guidelines. July 2008 Response at 6-46, August 2007 Report at 4-16, July 2009 Response at 8-51. Therefore, the Board respectfully declines CQC's recommendation.

*CQC Recommendation 2:*

*"The board should annually be given a detailed listing of all forms of Patrick Dollard's compensation documenting conformity with the contract amounts. The Commission also recommends that the board retroactively conduct a review of Patrick Dollard's fringe benefit costs and seek corrective actions for any amounts not paid in accordance with the contracts."*

The Board agrees with the first sentence of CQC's recommendation and has instructed the Center's financial office to provide a detailed listing of all forms of Mr. Dollard's compensation to the Board's Finance Committee on an annual basis. With respect to the second sentence of CQC's recommendation, Center management, at the direction of the Board, conducted a review and determined that no corrective action is required.

*CQC Recommendation 3:*

*“The board should approve in advance any compensation for individuals who exercise substantial influence over the organization.”*

As set forth in the August 2007 Report at 17, the Board agreed with CQC’s recommendation and has already implemented changes to address CQC’s concerns by, among other things, resolving to establish the Chief Financial Officer’s compensation on a going-forward basis using Internal Revenue Service safe-harbor guidelines.

*CQC Recommendation 4:*

*“The board should review the circumstances surrounding the special benefits previously afforded to certain employees to determine whether payments were proper. The Commission also recommends that the board continue to ensure that policies regarding employee fringe benefits are clearly stated in writing, preferably in a board-approved up-to-date employee handbook. All special fringe benefits given to select employees, such as the tiered life insurance coverage, extra vacation leave, and the grandfathered sick/personal payout policy, should be specified in writing and include a description of the positions qualifying for the exceptional treatment (the Commission further requests a copy of such written policies).”*

As CQC’s First Draft Report at 11 and Second Draft Report at 10 acknowledge, and as set forth in the August 2007 Report at 16 n.24, the Board already took steps to address CQC’s concerns by approving an updated version of the Center’s employee handbook that, among other things, now includes a revised policy restricting cash-outs for any paid time off accruals either while an individual is employed or upon an individual’s termination or resignation. The Board also instructed Center management to conduct a review of the Center’s existing employee

handbook and to recommend what, if any, additional changes should be made to address CQC's concerns. At the direction of the Board, Center management revised and implemented the employee handbook.

*CQC Recommendation 5:*

*"Time and attendance records should be maintained by the CEO and CFO and reviewed by the board periodically. Reports to the board should include accrued leave balances, activity, and payout amounts. Further, the extent to which the executives are working out of town, especially on combined personal/business trips, should be detailed in the reporting process so that the documentation shows the board has been fully informed and approves the payment of such wages. The Commission further requests explanation as to why no leave time was charged by the CFO during his extended stay in Texas."*

Time and attendance records are maintained in accordance with federal and state law governing exempt employees. The Board agrees that periodic review of sick and vacation time usage should occur on a periodic basis and will conduct such reviews on at least a semi-annual basis. With respect to CQC's concern that no leave time was charged by the Chief Financial Officer, CQC's recommendation fails to acknowledge that the Board provided documentation to CQC reflecting the purchase of office equipment and supplies in Texas, which demonstrated that Mr. Van Dusen worked for the Center while he was in Texas caring for his son.

*CQC Recommendation 6:*

*"The Center should reconsider its perspective on the propriety of the \$21,505 in corporate charges for air ambulance and avoid any similar dealings in the future."*

For the reasons set forth in the August 2007 Report at 17-24 and in the July 2008 Response at 46-56, the Board respectfully declines CQC's recommendation.

*CQC Recommendation 7:*

*"The Center should seek restitution for the personal travel costs of the CFO."*

The son of the Center's then-Chief Financial Officer, suffered a catastrophic injury in Texas on June 11, 2005, leading to, among other things, total quadriplegia and autonomic dysreflexia. After learning of his son's injury the CFO left immediately to be at his son's bedside in Texas. Because the injury was not, and could not have been, anticipated, the Center had no opportunity to plan for the CFO's sudden departure, or for an extended absence from his position as the Center's Chief Financial Officer. Although the CFO plainly needed to be at his son's side during this crisis, the Center was wholly unprepared for the precipitous loss of its Chief Financial Officer.

Therefore, the Center's Executive Director asked the CFO to periodically return to the Center and resume his duties full time as Chief Financial Officer during the period when his son was hospitalized in Texas. Recognizing that the CFO had an ongoing need to be with his son in Texas, and that he anticipated an extended absence from the Center, the Executive Director asked the CFO to consider returning to the Center and resuming his duties on an intermittent basis for a week or two at a time, if and when his son's condition permitted.

The Executive Director advised the CFO that, because the CFO was returning to work at the request of the Center in order to meet the Center's needs, it was fair and appropriate that the Center pay the airfare required to bring the CFO back to work. The Center therefore paid for the

CFO's airfare to return to work because he made the trips at the request of, and for the benefit of, the Center and not for personal reasons.

CQC's Draft Report nonetheless asserts that because the CFO was in Texas for personal reasons, the IRS would not view these trips as business travel, but rather would view them as personal commuting expenses of an employee. Second Draft Report at 12. The Center respectfully disagrees with CQC's characterization and respectfully declines this recommendation.

*CQC Recommendation 8:*

*"The Center should review whether dinner meetings are the most efficient way to conduct business and it should also consider the appropriateness of alcohol purchases. It should establish guidelines on the circumstances when business meals are appropriate, regardless of whether paid for directly by The Center or picked up by a consultant. Itemized restaurant bills should be retained and the cost of alcoholic beverages should be segregated to comply with state reporting requirements. The Center should also consider a monitoring system that would inform the board of the extent to which business meals occur."*

The Board agrees, in part, with CQC's recommendation that policies should be established, records maintained and a monitoring system instituted. Accordingly, the Board instructed Center management to propose guidelines, for the Board's consideration, addressing circumstances when business meals are appropriate.

*CQC Recommendation 9:*

*"The board should encourage complete cooperation with any investigation into the administrative petty cash fund."*

The Board expects complete cooperation with any investigation and believes that the Center has met, and continues to meet, this expectation with respect to the CQC's investigation of the Center's administration of its petty cash fund. To the extent that CQC's recommendation suggests that the Center failed to cooperate completely, the Board respectfully disagrees.

*CQC Recommendation 10:*

*"The Center should ensure that future financial reporting (Form 990, financial statements, consolidated fiscal reports, W-2 and Form 1099) is free of the errors described in this report."*

As set forth in the August 2007 Report at 34-35, the Board generally agreed with CQC's recommendation and took appropriate measures to address CQC's concerns.

*CQC Recommendation 11:*

*"The Center should establish policies for responding to requests from individual board members for access to corporate records."*

The Board agrees with CQC's recommendation that all Board members should be given a copy of corporate bylaws and that access to other corporate records should be given to Board members in response to reasonable requests. The Board disagrees, however, with the CQC's conclusion that a former Board member's request was handled inappropriately. The Board also disagrees with CQC's speculation that the former Board member was not reelected in retaliation for his complaints to CQC. He was not reelected due to legitimate concerns that he failed to fulfill his fiduciary duties.

As reflected by the minutes of the May 11, 2005 Board meeting, which were given to CQC by letter dated May 30, 2007,<sup>1</sup> the former Board member chose not to attend a Board meeting at which he had been told his request for documents was to be discussed and acted upon. The Board member also refused to answer requests by other Board members that he disclose any suspected wrongdoing; refused to explain his failure to maintain the confidentiality both of the proceedings and of information provided to the Board's Compensation Committee; and refused to explain his admitted failure to disclose on his conflict-of-interest statement that he had engaged in financial dealings with the Center. Therefore, it reasonably can be inferred that the former Board member was not making a good faith effort to carry out his duties. *See, e.g., New York Not-for-Profit Corporation Law § 621(c); Wells v. League of Am. Theatres & Producers, Inc.*, 706 N.Y.S2d 599, 602 (Sup. Ct. N.Y. County 2000) (“to prove that their purpose is proper[,] the statute requires members to supply affidavits to the corporation attesting that the information obtained through the inspection ‘will not be used for a purpose which is in the interests of a business or object other than the business of the corporation’”), quoting N.Y. Not-for-Profit Corp. Law § 621(c)); *cf. Crane Co. v. Anaconda Co.*, 39 N.Y.2d 14, 18 (1976) (“at common law, the[e] right [to inspect corporate books and records] is qualified and can only be asserted where the shareholder is acting in good faith”).

CQC's Second Draft Report makes no mention of these facts and, as such, presents an inaccurate picture of what actually happened. CQC's Second Draft Report also fails to mention

---

<sup>1</sup> An additional copy of the May 11, 2005 Board meeting minutes are attached, which include copies of all relevant correspondence related to the former Board member's document request.

that the Board specifically instructed the Center's auditors to pay particular attention to issues raised by the former Board member.

To avoid any ambiguity in how document requests by Board members should be treated in the future, the Board asked its special counsel to develop a formal procedure for addressing such requests.

*CQC Recommendation 12:*

*"The Center's affiliate corporations should continue to ensure the presence of appropriately constituted boards of directors who fulfill the necessary corporate governance legally required by their separate incorporation status."*

For the reasons set forth in the August 2007 Report at 31-33, the Board agreed with CQC's recommendation and took action to ensure that the Center's affiliates have appropriately constituted boards of directors.

*CQC Recommendation 13:*

*"The full board should evaluate all transactions with possible conflicts of interest. Anyone involved in a transaction, either directly or through a relative, should not be present during the deliberations or vote. Pertinent information and approvals should be clearly documented in the board minutes."*

The Board respectfully declines CQC's recommendation. The recommendation requires actions not required by law and is otherwise unworkable. The Center adopted appropriate policies governing conflict of interest and will continue to comply with them.