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PRESENTS

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UNDERSTANDING SPECIAL NEEDS
TRUSTS AND GUARDIANSHIPS



BRINGING A UNIQUE UNDERSTANDING OF KEY ISSUES FACING THE SPECIAL EDUCATION SECTOR

FROM THE EDITOR - KEN CERINI, CPA, CFP, FABFA

Special education providers are grappling with a cluster of issues today: Rates that are insufficient to cover costs, changing regulations that leave many providers unsure of their risks, government audits that seem to be unrelenting, and so much more. While there is a growing demand in special education need, private special education providers (*4410, 4408, and 4410*) don't seem to be getting the love and resources they need to effectively step in and help. As a result, we have seen a tremendous level of closures over the last 5 years, and a growing list of children without appropriate services.

On the school age side, there has been an increase in the number of private schools and more children educated within district or out of state ... all of these are much more expensive options. Who knows if similar alternatives will occur at the pre-school level down the road. I apologize, being an accountant that looks at things from a business perspective, I don't quite understand why SED doesn't look at the education continuum, and the role that special education private schools play in that continuum and invest more in the integration of these systems. It will be a much cheaper option than what is happening under the current model.

So where do special education providers go for answers? That's what we are here for. We go out of our way to push information out to the marketplace and try to provide information and insight that is useful to you. Within this newsletter, you will find an update of the 2018 OSC audits, a look at what's happening in the sector, and a guest article on special needs trust and guardianship that you can share with your families. If there are other topics you would like us to explore, reach out to us, who want to make sure you are getting the information you need to run your school effectively.

Congratulations to the providers who made it through all these difficult hurdles, and best wishes for another successful school year.

Sincerely,



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AROUND THE SECTOR

The landscape that special education providers have been operating in continues to be a difficult one. The rate-setting unit has yet again undergone leadership change with Tracey Coleman taking over the helm in place of Hal Matott and Brian Zawistowski being promoted to Assistant Director. Hopefully, they will be able to add a little stability to a department that has seen significant turnover in the past few years.

The sector continues to see shrinking numbers, with several more schools closing during fiscal 2019. This brings the number of provider closures over 60 statewide in the last five years, with approximately half of them in New York City. This has resulted in a swell in regional need with approximately 500 children without an appropriate placement in NYC alone.

Teacher and teacher assistants are still at a premium, especially in NY City, where the NYC Department of Education has been poaching staff in an effort to fill vacancies in their classes. It has been very difficult for special education providers to compete, as the pay disparity between providers and the school districts is approximately \$36,000 per year, districts only have 180-day years, and the fringe rate statewide is now over 66%. This has significantly contributed to a 28% teacher vacancy rate. Programs should continue to maintain open communication with their regional associates regarding these vacancies so that there are no issues upon programmatic reviews.

While the ability to attract and retain staff is down, we see an uptick in the intensity of the children that are being served by special education providers. Students are requiring increased levels of related services and/or have a greater likelihood of needing behavioral intervention plans. Programs should monitor their costs for related services, counseling, and behavioral support staff. If they are experiencing increases in these areas, that may be a trigger to file for a waiver... *There's a new form for that.*

A new waiver form has been implemented by RSU, who has been working to try to reduce the tremendous backlog of nearly 100 waiver requests. The new form is meant to summarize the request and helps to ensure that RSU understands the nature of the request, which program it is for, and the type of request (*waiver vs. rebasing*). If you have a waiver request in, and haven't completed a waiver request form, you may want to follow-up with your line accountant at RSU to make sure that they are working on your request.

The Division of Budget approved rate increases of 3.6% for 853 schools and 2% increases for 4410 programs, including SEIT. This is less than the 3.6% proposed by SED. SED also made recommendations to increase teacher retention funding by an additional \$4 million. The DOB has not yet made any decision on the additional teacher retention funding.

While many providers continue to lose money on SEIT services, some providers have underspent their rate. Keep in mind, that while you are paid on a fee for service basis (*each unit of service you deliver*), SEIT is still a cost-based reimbursement system. Any unspent SEIT funds are restricted and must be used for future SEIT services or to fund prior losses within SEIT.

At the NY City level, the OAG has started doing reviews of providers' IDEA funding. These reviews commenced during March 2019. In addition, we are aware of at least one provider that the OAG is doing a review of their entire program. This is a provider that has already undergone an OSC audit. We are also aware of a provider that previously underwent an OAG review that is now being audited by the OSC. In these instances, the OSC and OAG are reviewing different years. So when it comes to auditing, I guess piling on is definitely allowable.

On the EI front, the 2019/20 enacted budget included a 5% increase for approved rehabilitation services provided by licensed speech pathologists, licensed occupational therapists, and licensed physical therapists, including supplemental evaluation services. The rate increase is effective April 1, 2019 and is applicable for services provided on or after that date. You do not have to rebill for this, BEI will make retroactive adjustments for any applicable services once they have the necessary system requirements in place. Providers should track these amounts to ensure that they are fully reimbursed for the rate increases.

By now most of you should have received instructions from SED on how to renew your Corporate Practice Waiver. This allows you to continue to provide medical services within an educational environment. Those notices were sent to the name and address on record. If there are changes or questions, they should be forwarded to 4410Waiver@nysed.gov. For most agencies with a waiver, it needs to be renewed by June 30th. If you have not received any communication from SED, I strongly recommend that you contact them at that email address above, attention Ruth.





OSC AUDITS ... THE SAGA CONTINUES

For many of you, the OSC audit is behind you, leaving only the mental scars of a nearly year-long process as a reminder of the importance for your program to maintain adequate records and establish appropriate controls to ensure your school is complying with SED guidelines. For the nearly half of you that have not yet received that inevitable letter, it is important for you to continue to tighten your controls and learn from the OSC audits that have already been issued. The NY State Comptrollers office recently issued its 5th annual summary, providing a synopsis of its findings during its 2018 special education audits.

During 2018, The OSC conducted 17 audits of preschool providers and one audit of a school-age provider. These audits resulted in a cumulative recommended disallowance of almost \$14.8 million. This equates to a 3.98% overall disallowance rate, significantly higher than the 2.76% disallowance rate during 2017. In addition, the OSC audits questioned almost \$8 million of other costs. With these 18 audits, the OSC has now completed approximately 130 audits, with 14 more audits currently underway.

The findings outlined in the report are fairly consistent with the findings that have appeared over the last few years of audits:

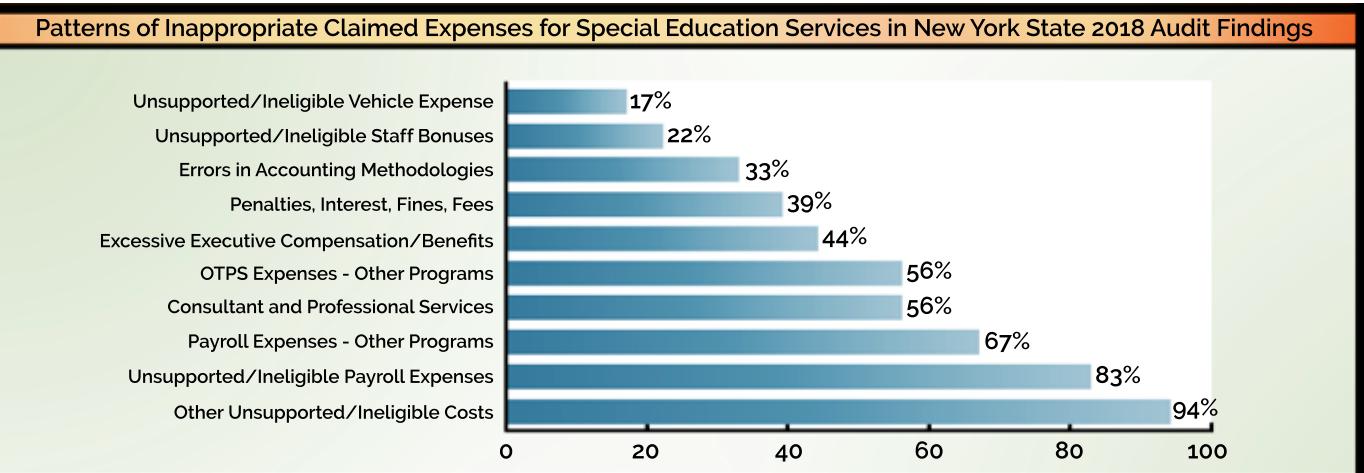
Expenses claimed related to other programs (\$2.9 million disallowances): Providers are required to directly charge expenditures to the programs they pertain to. Any costs that cannot be directly charged should be allocated to the various programs based upon appropriate allocation methodologies. Programs should have documented allocation policies and cost allocations should be consistently applied across all programs, even if those programs have multiple funding streams that provide for different reimbursement rules. Allocation of salaries should consider job descriptions and staff responsibilities. If a program director is responsible for all programs, including evaluations, a portion of their salary should be allocated to evaluations.


Unsupported payroll and bonuses (\$3.3 million disallowances): Providers are required to maintain appropriate substantiation to support employee work effort. This includes time records that appropriately show time in and time out each day. Time records should be approved by the employee's supervisor and should coincide with what the employee was paid. Furthermore, salary notices, payroll change forms, contracts, or some other documentation should exist that supports the salary being paid to staff members. From a bonus perspective, remember that bonuses need to be merit-based and should be supported by performance reviews and a bonus policy. The policy should clearly outline how bonuses will be calculated based upon the employee's performance and the performance reviews should support that the appropriate bonus was given to each employee. Across the board, bonuses are not merit-based.

Unsupported or ineligible OTPS costs (\$8.5 million disallowances): All costs charged to programs must be properly supported by receipts or invoices and must be allowable (*non-allowable costs are outlined in appendix X of the CFR claiming manual and in the RCM*). Programs that have parent companies or entities that provide back-office responsibilities need to ensure that when they are allocating overhead costs, non-allowable costs should be eliminated, fundraising costs should be excluded, and costs charged should not be duplicative in nature. Providers need to have proper purchasing procedures in place that include a bid-quote process to ensure that providers are paying appropriate rates for the goods and services they are purchasing. A few of the disallowances outlined in the report of particular note are:

- ▶ Use of consultants where the organization has the expertise to perform the services internally
- ▶ Payment of penalties, interest, fines, or late fees
- ▶ Vehicle-related expenses without proper logs
- ▶ Less-than-arms-length transactions – remember, providers are limited to the lower of fair market value of the services provided or the actual costs to the related party (excluding any non-allowable costs)
- ▶ Equipment expensed that should have been capitalized and depreciated
- ▶ Unnecessary rent expense
- ▶ Excess staffing (staffing levels in excess of classroom ratios)

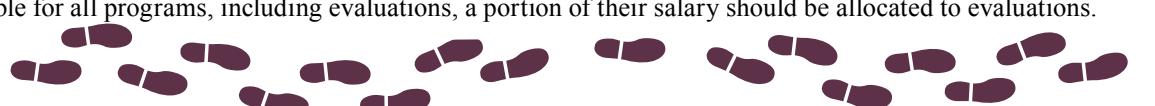
According to the report the following outline the findings with the greatest frequency of occurrences:



Of the 18 audits completed during 2018, two were from upstate, 4 were Westchester/Rockland, and the remaining 12 were NYC and Long Island. Even though the auditors came in to perform a one-year audit, 14 of the 18 audits were expanded to encompass three years.

The report also cited auditing firms for lack of due diligence during the audit process. The OSC believes that appropriate audits would have identified many of the findings that were noted during the OSC audits.

The OSC audits are still happening, and they will continue to happen until all providers have gone through the process. These audits continue to stress the importance of proper controls and oversight and the need to ensure you understand and comply with the CFR claiming manual and the Reimbursable Cost Manual. Providers should also keep in mind that just because they've already gone through an OSC audit, it doesn't mean the OSC won't come back in the future, or you won't be audited by one of your other funders. In NYC, the Board of Education has started to do specific reviews of IDEA funding and full programmatic reviews. It's clear that audits are now part of the landscape that SED providers need to deal with. *Embrace them...* you don't really have a choice.





SPECIAL NEEDS PLANNING: UNDERSTANDING SPECIAL NEEDS TRUSTS AND GUARDIANSHIPS

Creating an estate plan is important for everyone. However, for families with a special needs child, proper planning is nothing short of critical. Understanding the types of Special Needs Trusts is the best place to start to protect your loved ones.

Creating a Last Will and Testament should be the first order of business for parents of a child with special needs. It is important to make sure that your child's inheritance is directed into a **Supplemental Needs Trust** (*also called a Special Needs Trust or "SNT"*) for the child's benefit. SNTs permit disabled individuals to retain funds from an inheritance without eliminating or reducing government benefits, such as Medicaid or SSI benefits. SNTs are highly favored under the law but have very particular rules. It is important to know which trust is right for you and your family as well as the consequences of each.

THIRD PARTY SPECIAL NEEDS TRUSTS

Third Party SNTs are special needs trusts established by an individual such as a parent or grandparent with their assets for the benefit of a third party, such as a child or grandchild with disabilities. A Third Party SNT may be established and funded during the creator's lifetime (*a living SNT*)

or may be established in a Last Will and Testament (*a testamentary SNT*) and therefore not created or funded until the death of the testator. In either case, the creation or funding of the Third Party SNTs has no effect on the beneficiary's eligibility for government benefits. Further, as another individual's assets are used to fund the Third Party trust, there is no pay-back requirement to the State. Instead, any assets remaining in the Third Party SNT at the time of the beneficiary's death may be inherited by other family members or beneficiaries.

SELF-SETTLED SUPPLEMENTAL NEEDS TRUSTS

This type of SNT must be established by a parent, grandparent, legal guardian or the disabled person themselves (*if they have capacity*) under the age of 65. The trust is funded with the assets of the person with special needs, such as lawsuit proceeds, retroactive government benefits or an inheritance which was left outright to them. The trust must be a payback trust and therefore any funds remaining in the trust upon the death of the beneficiary must be paid back to the government as reimbursement for the cost of care.

EXPENDITURES FROM SNTS

Monies held in an SNT can be used to pay for personal care items, vacations, transportation (*including purchase of a car or van*), purchase of a home, modifications to a home (*such as installation of ramps or wheelchair accessible bathrooms*), computer equipment, special medical or therapeutic equipment, personal care aides, and medical care not provided by government programs. Payment for such items must be made directly to the service provider, retailer or vendor. Money cannot be distributed directly to the trust beneficiary.

POOLED TRUSTS

A pooled trust is a type of SNT that is maintained by a non-profit organization which pools the funds of a number of individuals for investment and management purposes. A pooled trust can be funded by a parent, grandparent, legal guardian or the individual with special needs himself. The trust must be funded before the beneficiary reaches age 65 in order to avoid Medicaid penalty periods. While a self-settled trust must be a payback trust, the sponsor can elect to leave any remaining funds with the charitable organization instead of paying back the government.

17A GUARDIANSHIPS

In New York State, when a person turns 18 years of age, they are assumed to be legally competent to make decisions for themselves. This means that no other person, including their parents, can make medical, financial or personal decisions for them. Parents of children with special needs must plan for the child's care beyond the age of 18. If parents wish to continue to make important decisions for their child after age 18, such as medical care and residential placement decisions, they must become the legal guardians of the child. A petition to become the guardian in this case is typically brought in the Surrogate's Court and is appropriate for children with intellectual or developmental disabilities.

A 17A guardianship covers most decisions that are usually made by a parent for a child, including healthcare and financial decisions. The Court can appoint a guardian of the person, the property or both. Certifications are required from physicians and psychologists attesting that the child is not able to manage their affairs because of intellectual disability or developmental disability.

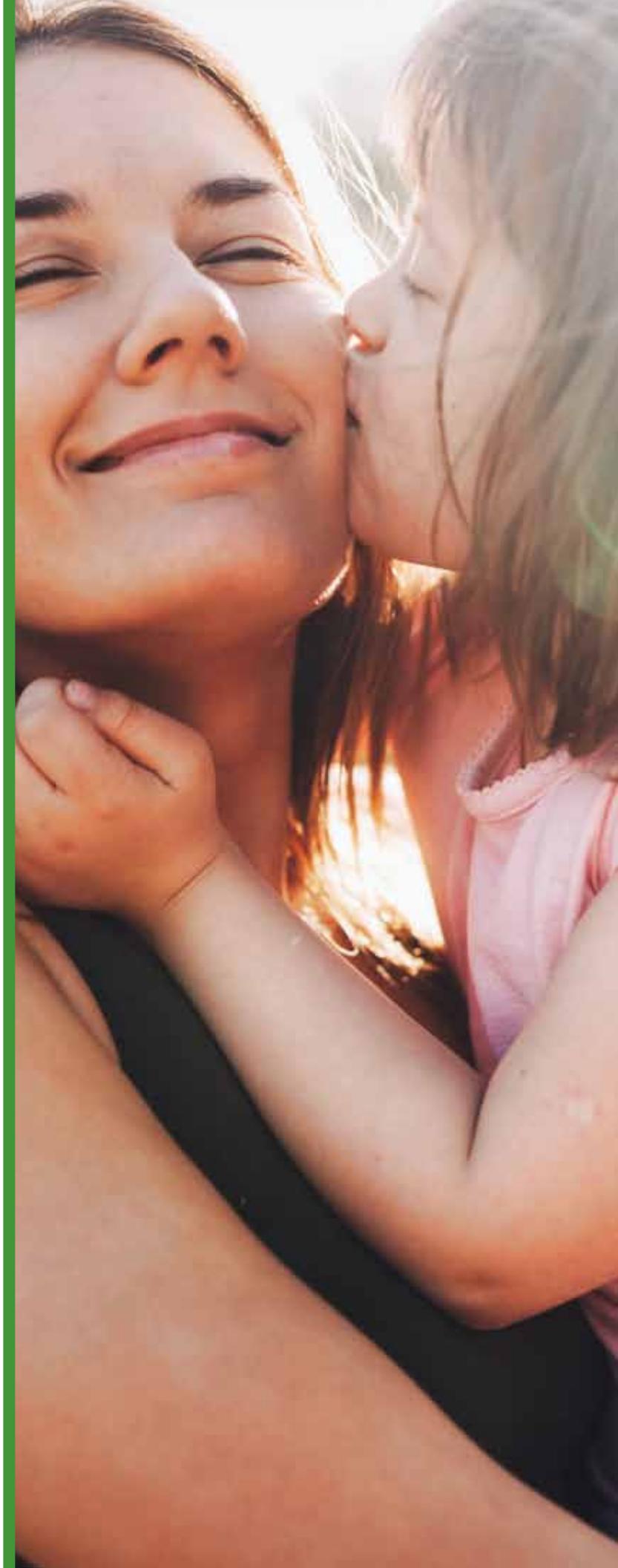
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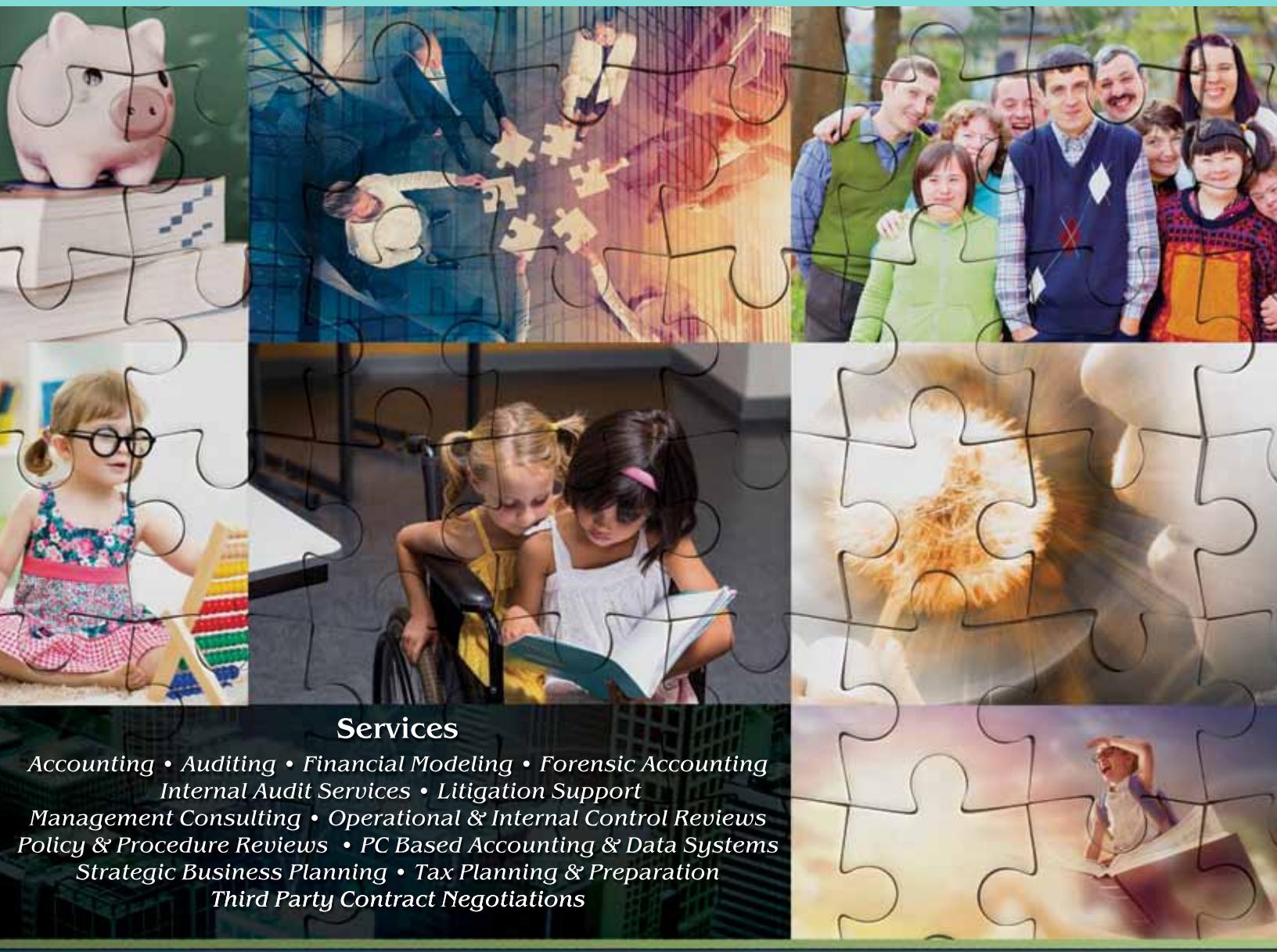


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