



Delaware County Assigned Counsel

Report of Examination

Period Covered:

January 1, 2015 — June 9, 2016

2016M-384



Thomas P. DiNapoli

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State of New York Office of the State Comptroller

Division of Local Government and School Accountability

August 2017

Dear County Officials:

A top priority of the Office of the State Comptroller is to help local government officials manage government resources efficiently and effectively and, by so doing, provide accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of local governments statewide, as well as compliance with relevant statutes and observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations and County governance. Audits also can identify strategies to reduce costs and to strengthen controls intended to safeguard local government assets.

Following is a report of our audit of Delaware County, entitled Assigned Counsel. This audit was conducted pursuant to Article V, Section 1 of the State Constitution and the State Comptroller's authority as set forth in Article 3 of the New York State General Municipal Law.

This audit's results and recommendations are resources for local government officials to use in effectively managing operations and in meeting the expectations of their constituents. If you have questions about this report, please feel free to contact the local regional office for your county, as listed at the end of this report.

Respectfully submitted,

*Office of the State Comptroller
Division of Local Government
and School Accountability*

Introduction

Background

Delaware County (County) is located in eastern New York and has approximately 48,000 residents. The County consists of 19 towns, 10 villages and covers 1,446 square miles. The County is governed by the Board of Supervisors (Board) which is composed of 19 elected members. The Board is responsible for the general management and control of the County's financial affairs. The Board, in accordance with the County Law, is also responsible for establishing a plan for providing counsel to individuals charged with a crime, or otherwise entitled by law to counsel, and who are financially unable to afford counsel.

The County paid over \$2.9 million for assigned counsel costs over the last three years. The County is the eighth largest county in New York State (NYS) in square miles and has the ninth smallest population. According to United States Census Bureau, 14 percent of the population is impoverished, or potentially eligible to be provided counsel by the County.

In 2010, New York State established the Office of Indigent Legal Services (OILS) along with the Indigent Legal Services Board. According to OILS's website, one purpose of OILS is to assist County governments in the exercise of the counties' responsibilities pursuant to article 18-B of the County Law.¹

Objective

The objective of our audit was to review the County's assigned counsel plan and the implementation of that plan, and how courts within the County determined assigned counsel eligibility. Our audit addressed the following related question:

- Is the County's assigned counsel process operating effectively?

Scope and Methodology

We examined the County's assigned counsel process for the period January 1, 2015 through June 9, 2016. We extended the scope back to January 1, 2013 to show historical assigned counsel costs for the County, and forward to July 26, 2017 to include any relevant changes in the law.

We conducted our audit in accordance with generally accepted government auditing standards (GAGAS). More information on such standards and the methodology used in performing this audit are included in Appendix C of this report. Unless otherwise indicated in this report, samples for testing were selected based on professional

¹ See, <https://www.ils.ny.gov>.

judgment, as it was not the intent to project the results onto the entire population. Where applicable, information is presented concerning the value and/or size of the relevant population and the sample selected for examination.

**Comments of Local
Officials and Corrective
Action**

The results of our audit and recommendations have been discussed with County officials, and their comments, which appear in Appendix B, have been considered in preparing this report. County officials generally agreed with our recommendations and indicated they planned to initiate corrective action.

The Board has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and forwarded to our office within 90 days, pursuant to Section 35 of General Municipal Law. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We encourage the Board to make this plan available for public review in the Clerk to the Board's office.

Assigned Counsel Process

Article 18-B of the County Law, in part, requires the governing body of each County to put a plan in place for providing counsel to individuals charged with a crime, or otherwise entitled by law to counsel, and who are financially unable to obtain counsel. It is important that any plan, once adopted, be periodically distributed, monitored and updated to assure its effectiveness. The County Law generally provides that expenses for providing counsel and services are to be a county charge. Although County Law imposes these responsibilities on counties, courts have the ultimate authority for determining if defendants are unable to afford the costs of defense and are eligible for assigned counsel, approving assigned counsel, and approving costs of assigned counsel to be paid by the county. However, the judges and magistrates in the County have expressed that uniform guidance and criteria are needed and would assist them in their decision making. OILS issued eligibility criteria and procedures for criminal court proceedings in April of 2016 for determining assigned counsel eligibility to be used as guidance and best practices for their own individual court criteria and procedures. While courts were not initially required to follow its criteria, the County Law and Executive Law were amended in April 2017 and now require counties to implement OILS criteria by April 1, 2023.

The County adopted a Plan in 1965 to provide representation by counsel. However, the judges and magistrates have not been provided with guidance for determining if indigent defendants qualify for assigned counsel and do not use the criteria and procedures provided by OILS. Instead, they exercise the broad discretion granted them by law; essentially making determinations based on their own personally developed and undocumented criteria and procedures. As a result, there is an increased risk that individuals could be denied counsel in one town or court while being granted such counsel in another town or within the same court. Furthermore, the Board did not periodically distribute or monitor the Plan. As a result, none of the 25 judges we interviewed tracked attorney assignments or submitted quarterly reports as required by the Plan. In addition, although the County paid over \$2.9 million for assigned counsel costs over the last three years, the courts were inconsistent in their determinations of proper charges for providing counsel. County officials told us they believed they were limited in claims review since the decisions were ultimately up to the discretion of individual Judges and that they relied on the Plan to address any needed requirements. However, the Board has not updated the Plan since 1965. As a result, there is an increased risk that

assignments may not be made in the best interest of the defendants and free from conflicts and favoritism.

Determining Eligibility for Assigned Counsel

In 1963, the United States Supreme Court held that, in the case of a state criminal prosecution, an individual has the right to the assistance of counsel when charged with a crime, and individuals who cannot afford counsel are entitled to have one assigned to them. The courts of New York State have reached a similar conclusion.² To address this concern, article 18-B of the County Law was added by the New York State Legislature in 1965.³ Article 18-B of the County Law, in part, requires the governing body of each County to put a plan in place for providing counsel to individuals charged with a crime, or otherwise entitled by law to counsel, and who are financially unable to obtain counsel. The County Law generally provides that expenses for providing counsel and services are to be a county charge.

OILS was established in 2010 to monitor, study, and make efforts to improve the quality of services provided to individuals entitled to counsel. Since the costs for assigning counsel are significant for counties, the topic of assigned counsel has been an important issue for counties and New York State (NYS) lawmakers. In fact, multiple legislations were submitted and denied regarding this topic. A lawsuit⁴ submitted by the New York Civil Liberties Union (NYCLU) was settled in 2014 and required NYS to enhance mandated representation in four key areas.⁵ One of these areas was eligibility standards for representation. The settlement required that OILS issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for mandated representation.

Although County Law imposes these responsibilities on counties, courts have the ultimate authority for determining if defendants are unable to afford the costs of defense and are eligible for assigned counsel, approving assigned counsel, and approving costs of assigned counsel to be paid by the county. However, the judges and magistrates in the County expressed that uniform guidance and criteria are needed and would assist them in their decision making.

Although the County Law does not address standards to guide courts in determining when individuals are financially eligible for the assignment of counsel, OILS issued eligibility criteria and procedures

² See, e.g. People v Witek, 15 NY 2d 392.

³ See Bill Jacket for the Laws of 1965, Chapter 878. We note that article 18-B of the County Law also addresses certain civil matters.

⁴ Hurrell-Harring v. The State of New York

⁵ The four key areas are Counsel at Arraignment, Caseload Relief, Initiatives to Improve the Quality of Indigent Defense, and Eligibility Standards for Representation.

for criminal court proceedings⁶ in April of 2016 for determining assigned counsel eligibility which are available to all courts within the 57 counties outside of New York City to be used as guidance and best practices for their own individual court criteria and procedures. While courts were not initially required to follow its criteria, the County Law and Executive Law were amended in April 2017 and now require counties to implement OILS criteria by April 1, 2023. OILS will also have the authority to monitor and periodically report on the implementation of and compliance with the plan in each county.

The Board adopted a plan in 1965 to provide representation by counsel furnished pursuant to a plan of the Delaware County Bar Association (DCBA), whereby the services of private counsel are coordinated by an administrator (see Appendix A). However, the judges and magistrates in the County have indicated that, in general, they are not provided with any guidance or uniform criteria for determining if indigent defendants qualify for assigned counsel and do not use the criteria and procedures provided by OILS. Instead, the judges and magistrates exercise the broad judicial discretion granted them by law; essentially, making determinations based on their own personally developed and undocumented criteria and procedures. The 25 judges and magistrates we interviewed assigned counsel based on a variety of factors including, but not limited to, personal appearance, type of charge, employment status and whether they receive public assistance and income. For example, one magistrate stated that he determines eligibility by considering the apparent value of the clothing and jewelry worn by the defendant at the time of the arraignment. Another magistrate simply grants all requests for assigned counsel without any review. Only the two County judges used verified information as criteria to grant assigned counsel. Furthermore, only the two County judges have an appeal process for defendants that are denied representation. However, County and DCBA officials, and judges and magistrates have taken steps to update the County's Plan by incorporating OILS criteria on determining eligibility.

As a result, there is significant variability in how representation is provided to indigent defendants throughout the County. This elevates the risk that assigned counsel could be improperly administered. More specifically, there is a potential for people to be denied counsel in one town while possibly being granted such counsel if they were in another. It is possible for an individual, with no change in his or her financial situation, to be approved in one court and denied in another, and vice versa. Moreover, individuals with similar financial circumstances could receive different determinations within the same court.

⁶ <https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf>

Assigned Counsel Plan

The County adopted a Plan in 1965 that outlines procedures for administering the assignment of counsel. The Plan addresses aspects including attorney selection, quarterly reports, and claims for compensation and reimbursement. The Plan requires courts to report to the administrator, at least quarterly, the names of attorneys, and the frequency of their assignments during the preceding quarter. However, the Plan states that judges and magistrates have complete discretion and may make exceptions in attorney rotation when they determine that it is in the best interest of the defendant to assign an attorney based on the nature of the case and the talent of the attorney. Effective procedures for the prudent assignment of counsel, such as considering the nature of the case and the talent of the attorney, can provide assurance that appointments are free from conflicts and favoritism and that defendants are properly represented by qualified attorneys. The Plan also requires that all claims be approved by the assigning judge or magistrate in conformity with County Law. Courts should ensure that assigned counsel claims are itemized, supported and are proper County charges. However, compensation limits may be exceeded, and counsel may be paid prior to the conclusion of their work based on judicial discretion. It is important that County officials periodically distribute, monitor and update this plan to assure its effectiveness.

The 25 judges we interviewed generally assigned counsel on a rotational basis. However, none of the judges tracked attorney assignments, nor did they submit quarterly reports as required by the Plan. In addition, only 12 judges told us they considered the nature of the case and the talent of the attorney when assigning counsel in the best interest of the defendant. Also, although the County paid over \$2.9 million for assigned counsel costs over the last three years, the courts approved claims submitted by attorneys, but were inconsistent in their determination of proper charges. For example, more than half of the courts were unaware of either the allowable hourly rates, limits on total payments, or both. While the 55 claims we reviewed were itemized, the courts did not review claims to ensure that attorney compensation and reimbursements did not exceed statutory limits without documentation indicating they were approved because of an extraordinary circumstance.⁷ In fact, 10 claims totaling approximately \$54,000 may have exceeded statutory limits.

⁷ It has been held that once a charge has been approved by the court pursuant to County Law section 722-b, it is by definition a lawful county charge, subject only to revocation of that approval in the course of an appropriate administrative review (see, e.g., Ops St Comp No. 97-17, citing People v Ward, 199 AD2d 683; see also Levenson v Lippman, 4 NY3d 280; Werfel v Agresta, 36 NY2d 624; 22 New York Code of Rules and Regulations, section 127.1 et seq.).

These claims had no documentation showing that the assigned judge or magistrate made specific exceptions for those claims. Furthermore, attorneys claimed reimbursement for mileage in several ways, such as either miles driven, time spent travelling, or both. Some attorneys chose not to claim travel reimbursement. However, one magistrate told us that he approved a travel reimbursement claim for an attorney who made one trip to a location for multiple cases but claimed mileage for each individual case, as if he had made multiple trips.

These deficiencies occurred because the Board did not periodically update, distribute, or monitor the Plan, nor did it ensure that the Plan was followed. In fact, the Board has not updated its Plan since its adoption in 1965. County officials relied on the Plan to address any needed requirements and believed that they were limited in addressing the process for approval, assigning, and claims review since the decisions were ultimately up to the discretion of individual Judges. However, prior to our audit, County and DCBA officials began working with the judges and magistrates in the County to update their Plan. We were informed by the DCBA President that the DCBA formed a committee to update the County's Plan when the previous volunteer assigned counsel administrator resigned in December of 2014. County officials informed us that they began working with the DCBA to update the plan when OILS issued guidance for determining assigned counsel eligibility in April of 2016.

As a result of the lack of an updated plan, there is an increased risk that assignments may not be made in the best interest of the defendants and free from conflicts and favoritism, that defendants may not be properly represented by qualified attorneys, and that attorneys could be overpaid. In addition, the County could be paying unnecessary claims, which could increase the burden on its residents. Moreover, as OILS is expected to institute clear and discrete guidance and criteria for determining eligibility and the administration of indigent legal services, the County and local courts may be well out of compliance with the expected standards. For instance, OILS recommends that criteria and procedures be uniformly, consistently and transparently applied in all courts, whereas at present there is great disparity in how each court in the County handles assigned counsel. In addition, the criteria used within each individual court in the County does not consider all the factors recommended by OILS. For example, the courts would have to consider applicants with income less than 250 percent of the federal poverty rate as eligible, all applicants eligible unless there is compelling evidence showing that the applicant is not eligible, and several other factors not currently considered. In addition, none of the courts provide, in writing, determinations of applicant ineligibility or the reasons for those determinations.

Recommendations

County officials should:

1. In consultation with legal counsel, continue efforts to work with the DCBA to review and update the County's assigned counsel process to incorporate criteria and guidance provided by OILS.
2. Continue to periodically monitor their process to ensure it meets OILS required standards no later than 2023.

APPENDIX A

EXCERPTS OF CERTAIN SECTIONS OF THE COUNTY LAW AND COUNTY ADOPTED DCBA PLAN

County Laws, section 722:

Plan for Representation

The governing body of each county shall place in operation throughout the county a plan for providing counsel to persons charged with a crime who are entitled to counsel and who are financially unable to obtain counsel. The plan shall conform to one of the following:

1. Representation by a public defender appointed pursuant to county law article 18-A.
2. In criminal proceedings, representation by counsel furnished by a private legal aid bureau or society designated by the county organized and operating to give legal assistance and representation to persons charged with a crime within the county who are financial unable to obtain counsel.
3. Representation by counsel furnished pursuant to a plan of a bar association in each county whereby the services of private counsel are rotated and coordinated by an administrator, and such administrator may be compensated for such service. Any plan of a bar association must receive the approval of the state administrator before the plan is placed in operation.
4. Representation according to a plan containing a combination of any of the foregoing.

County Laws, section 722-b:

Compensation and Reimbursement for Representation

- All counsel assigned in accordance with a plan of a bar association conforming to the requirements of section 722 of this article whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive:

for representation of a person entitled to representation by law who is initially charged with a misdemeanor or lesser offense and no felony, compensation for such misdemeanor or lesser offense representation at a rate of \$60 per hour for time expended in court or before a magistrate, judge or justice, and \$60 per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred. Except as provided for in this section, compensation for time expended in providing representation shall not exceed \$2,400.

for representation in all other cases governed by this article, including all representation in an appellate court, compensation at a rate of \$75 per hour for time expended in court before a magistrate, judge or justice and \$75 per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred. Except as provided for in this section, compensation for time expended in providing representation shall not exceed \$4,400.

- For representation on an appeal, compensation and reimbursement shall be fixed by the appellate court. For all other representation, compensation and reimbursement shall be fixed by the trial court judge.
- In extraordinary circumstances, a trial or appellate court may provide for compensation in excess of the foregoing limits and for payment of compensation and reimbursement for expenses before the completion of the representation.
- Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred, and reimbursement or compensation applied for or received in the same case from any other source.

County Laws, section 722-e:

Expenses

- All expenses for providing counsel and services other than counsel hereunder shall be a county charge or in the case of a county wholly located within a city, a city charge to be paid out of an appropriation for such purposes.

Excerpts of Certain Sections of the Delaware County Adopted DCBA Plan

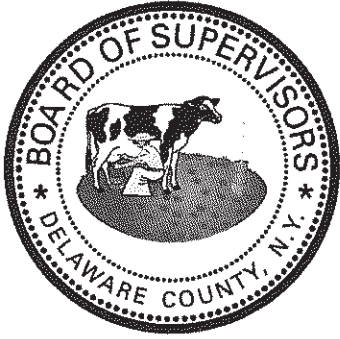
- The Plan administrator shall be the chairman of the DCBA's committee on legal aid.
- A primary and secondary list of counsel available for assignment shall be drawn up at least annually and furnished to the County Judge, each town and village justice, Clerk of the Board of Supervisors, and any requesting Supreme Court.
- The administrator shall annually poll all attorneys in the County for willingness to act as assigned counsel.
- Counsel shall be assigned, in rotation, from the primary list. If the names available on the primary list are exhausted then the assignment shall be made from the secondary list.
- Town and Village justices shall first assign counsel appearing on the primary list located in the same district that the court is located. Such districts are as follows:
 - a) Walton, Tompkins, Deposit, Hancock, Colchester
 - b) Meredith, Hamden, Delhi, Bovina
 - c) Andes, Middletown, Roxbury
 - d) Kortright, Harpersfield, Stamford
 - e) Masonville, Sidney, Franklin, Davenport
- In general, the plan provides that all assignments shall be in rotation. However, when, in the judgment of the assigning judge or magistrate, it would be for the best interest of the defendant because of the nature of the case and talents of any particular attorney on the primary or secondary lists, the assignment can be made out of rotation.
- Each judge or magistrate shall report to the administrator at least quarterly the names of attorneys assigned by him during the preceding quarter.
- All statements by the defendant regarding their finances shall be made under oath in open court or by affidavit sworn to before the court on forms to be provided by the County and approved by the County Attorney and the administrator.

- Compensation and reimbursement for representation shall be made in conformity with Section 722-b of the County Law. Claims for compensation and reimbursement shall be filed on either (a) the usual form of County of Delaware vouchers or (b) on such forms as the Board of Supervisors shall furnish specifically for that purpose.
- Such vouchers shall be submitted by counsel at the conclusion of the representation.
- Claims for compensation for time spent on behalf of such defendant shall be substantially broken down as follows:
 - a) Time spent before committing magistrate
 - b) Time spent in open court
 - 1. Arraignment and plea
 - 2. Plea (when separate from arraignment)
 - 3. Sentence hearing
 - 4. Continuances
 - 5. Trial (list time for each day separately)
 - 6. Other (specify)
 - c) Time spent in preparation (out of court)
 - 1. Interviews with client
 - 2. Legal research
 - 3. Investigative work
 - a. Interviews with witnesses
 - b. Consultation with prosecuting officials
 - c. Consultation with probation officers
 - d. Other
- All expenses of representation shall be itemized by item and amount.
- Such claims must be approved by the assigning judge or magistrate before submission to the Clerk of the Board of Supervisors for audit.
- Services other than counsel consisting of investigative, expert or other services which the defendant is financially unable to afford and compensation and reimbursement shall be furnished and paid for as set forth in County Law, section 722-c.

APPENDIX B

RESPONSE FROM LOCAL OFFICIALS

The local officials' response to this audit can be found on the following pages.



**DELAWARE COUNTY
BOARD OF SUPERVISORS**

**Senator Charles D. Cook County Office Building
111 Main Street, Suite 1
Delhi, New York 13753**

**Telephone: 607-832-5110
Fax: 607-832-6011**

**Tina B. Molé, Chairman
Christa M. Schafer, Clerk**

August 14, 2017

Todd Eames
Chief Examiner
Office of the State Comptroller
Division of Local Government & School Accountability
Binghamton Regional Office
44 Hawley Street
Binghamton, NY 13901-4417

RE: Response Letter and Corrective Action Plan

Dear Mr. Eames:

On or about July 19, 2017, the County received the draft copy of the Delaware County Assigned Counsel, Report of Examination 2016M-384 covering the period January 1, 2015 to June 9, 2016. On July 25, 2017, representatives from the Comptroller's Office met with County Attorney Amy Merklen, County Treasurer Beverly Shields, Clerk of the Board Christa Schafer and myself for an exit interview to review the findings in said report. It was determined that the County's response letter must be submitted by August 18, 2017. Further, the County was instructed that the response letter could also serve as the County's corrective action plan. It is the intent of the County to have this letter serve both as a response to the draft examination report and a corrective action plan.

The examination is critical of the County's assigned counsel plan adopted in 1965. Prior to the notice of audit, the County was working with the Delaware County Bar Association to update the plan. Once the audit began, instead of passing a new plan that may or may not address all of the recommendations in the auditor's report, the County decided to wait for the auditor's response. Having received the draft examination report, the County can now focus on the recommendations of the auditors when finalizing the new plan with the Bar Association, ideally, by the end of 2017.

Within the report, the auditors point out the lack of oversight by the County over the local magistrates and the plan in general. It should be noted that at no time does the report indicate that indigent persons were not provided with adequate legal representation. The new plan will include specific oversight mechanisms to ensure that the plan is being followed and providing legal services fairly to those in need of such services. By the end of September 2017, the County will be sending out a letter containing the Office of Indigent Legal Services (OILS) recommendations to the local magistrates requesting they use it when determining a defendant or respondent's eligibility for assigned counsel. In addition, the oversight will

include an attempt to evenly distribute the assigned work to the list of attorneys provided to the magistrates.

The County is aware of its obligation to ensure that indigent persons receive legal counsel. While the plan is administered by the County, the magistrates have wide discretion as to which defendants and respondents receive assigned counsel, which attorney gets assigned and how much the assigned attorney will be paid.

Also, another consideration when instituting a new plan is the cost of enforcement and the change in the income eligibility level. Since the net income eligibility requirement is at or below 250% of the Federal Poverty Guidelines more people will now qualify for free legal representation which will be absorbed by the taxpayers of this County. Although this is of real concern to this County, a plan will be implemented that will address the OILS recommendations while incorporating the Bar Association and magistrates in the process to ensure compliance with the law.

Again, consider this letter as both a response to your report and a corrective action plan. The County will continue to work diligently with the Bar Association, with input from the local magistrates, to develop an assigned counsel plan.

Sincerely,

Tina B. Mole
Chairman

TBM:cms

APPENDIX C

AUDIT METHODOLOGY AND STANDARDS

We examined the County's assigned counsel process for the period January 1, 2015 through June 9, 2016. We extended the scope back to January 1, 2013 to show historical assigned counsel costs for the County, and forward to July 26, 2017 to include any relevant changes in the law. To achieve our audit objective and obtain valid evidence, we performed the following procedures:

- We interviewed County officials to gain an understanding of the procedures and controls over the assigned counsel process.
- We interviewed 25 out of all 31 County, Town, and Village justices in the County to gain and understanding of their procedures for assigning counsel in their courts.
- We reviewed pertinent demographic data of the County from the United States Census Bureau to analyze assigned counsel costs of other counties and Towns within the County based on population, crime, and poverty levels.
- We compared County Law applicable to assigned counsel to the processes at the County and courts within the county to determine if the County processes complied with County Law.
- We examined the DCBA assigned counsel plan adopted by the County to determine if the courts within the County complied with the adopted plan.
- We reviewed the County's financial reports to determine the total amount of assigned counsel costs over the last three years.
- We judgmentally selected 55 claims out of 1,876 total claims within the audit period, attempting to select at least one claim from each justice in the county and reviewed them to gather claims details and assess whether the claims were proper and adequately supported.
- We examined disbursement data for all assigned counsel claims submitted to the County during the audit period to assess whether any claims submitted exceeded statutory allowable limits without documentation indicating they were approved because of an extraordinary circumstance.

We conducted this performance audit in accordance with GAGAS. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

APPENDIX D

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