

**Pilot Project Report of Guardians and Conservators  
for Cases filed in District Courts**

**For the period July 1, 2018 through June 30, 2019**



**Office of the State Auditor  
Brian S. Colón, Esq.**

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BRIAN S. COLÓN, ESQ.  
STATE AUDITOR



NATALIE CORDOVA, CPA  
DEPUTY STATE AUDITOR

## State of New Mexico Office of the State Auditor

Chief Justice, Honorable Judith K. Nakamura  
Administrative Office of the Courts

The Office of the State Auditor (OSA) gained an understanding of the guardianship and conservatorship processes of the New Mexico Courts (“Courts”), Administrative Office of the Courts (AOC), and the Developmental Disabilities Planning Council (DDPC) of the State of New Mexico. It is important to note the DDPC was not a party to the Memorandum of Understanding (MOU), but played a key role in participation by supplying information requested by the OSA for this project.

In addition, the OSA performed a compliance review and evaluation of protected persons’ accounts, estates, inventories and reports in accordance with the MOU between the AOC and the OSA titled *Pilot Project: Audit, review and compliance of guardians and conservators for cases filed in district court*. This Report provides a summary of procedures performed, the results of those procedures, and observations and recommendations for improving the process.

The consulting procedures under this engagement do not constitute an examination, investigation, or an audit made in accordance with U.S. generally accepted auditing standards, the objective of which would be the expression of an opinion on the items outlined in the attached supplement or on the financial statements of the entity taken as a whole. Our responsibility under this engagement was not to detect fraud. Accordingly, we do not express such an opinion or give any other form of assurance. We performed our engagement under the AICPA Statement on Standards for Consulting Services, the Audit Act (NMSA 1978, Sections 12-6-1, *et seq.*), and the Audit Rule (2.2.2 NMAC).

This Report, and the observations and recommendations included in the report, are intended solely for the information, use, and reliance by any agency of the State of New Mexico, the New Mexico State Legislature, and impacted stakeholders. This Report is not intended to be, and should not be, used by anyone other than these specified parties.

*Office of the State Auditor*

Office of the State Auditor

October 29, 2019

## **Executive Summary**

### *Scope of the Memorandum of Understanding and Legal Overview*

#### ***Introduction***

The Office of the State Auditor (OSA) was engaged to independently identify risk factors and provide recommendations pertaining to guardianship/conservatorship of protected persons. The OSA and Administrative Office of the Courts (AOC) entered into a Memorandum of Understanding (MOU) in June of 2018 creating a pilot project for audit, review, and compliance of guardians and conservators.

The pilot project substantially consisted of two primary functions:

- (i) The OSA conducted audits of a sample of the guardianship contracts entered by the Developmental Disabilities Planning Council (DDPC) with contract guardians acting on the behalf of protected persons to assess contract compliance, including the timeliness, and accuracy of reports required to be filed with the district courts; and
- (ii) The district courts were authorized to enter an order of referral for individual guardianship/conservatorship cases for audit (based on the reports the guardians and conservators are required to submit that the Court is required to review).

Many state agencies play a unique role in the guardianship and conservatorship process with, at times, oversight that may be insufficient for particular interrelated aspects, and collaborative efforts are necessary to address the complex existing challenges. Refer to the diagram of involved agencies on page 12.

#### ***Purpose***

The purpose of this Report is to communicate the summarized results of the procedures performed under the MOU, to provide recommendations for standards, practices, and policies and procedures to be implemented pursuant to 2018 Senate Bill 19 and 2019 Senate Bill 395, and to provide recommendations for the adoption of any rules or legislation necessary to implement the recommendations contained in the Report. Both of the Senate Bills are discussed in further detail below.

#### ***Recommendations***

The OSA identified many areas where additional oversight is appropriate or advisable moving forward. As described in this Report, the Courts may wish to take steps to provide increased access to review conservatorships. Additionally, DDPC's Office of Guardianship (OOG) should seek to address issues with contract sufficiency, representative payees, final expenses, boarding homes, and powers of attorney, among others. Notable observations also included matters that may require further discussion and review by OOG, the Courts, AOC, and the OSA, as further discussed in this report. Additionally, continued collaborative efforts between the OSA and the OOG to

develop procedures for referrals, controls for identifying contract deficiencies, etc., would be beneficial.

The OSA received four (4) referrals from judges during the initial term of the MOU. Based on reports from constituents, and the fact that this was an initial pilot project, it appears there may have been a lack of awareness of the option for (i) district court judges to enter an Order of Referral to the OSA, or (ii) other interested parties to Motion the Court to enter an Order of Referral to the OSA. The Courts may wish to consider a more accessible process for referrals to provide increased opportunities for review of concerns.

During the initial pilot project, the OSA received complaints directly from interested persons. Moving forward a mechanism for OSA referrals to the Court should be considered, as the OSA is not an “interested party” for purposes of filing in any related matters.

### ***Background***

As of the date of this report New Mexico law allows the Court to impose a guardianship or conservatorship on a person only if it is the least restrictive alternative, meaning, everything else has been tried and will not work. A guardian is a person or an entity appointed by a court to make certain health care and personal care decisions for an incapacitated person, which may include certain limited financial decisions if the guardian is granted such authority by the Court as provided in NMSA 1978, Section 45-5-312(B)(4). By contrast, a conservator is a person or entity appointed by the Court to make financial decisions for an incapacitated person. Because incapacitated persons are deemed in need of protection, oversight of guardians and conservators is essential for upholding the rights and well-being of incapacitated persons.

New Mexico law defines an “incapacitated person” as a “person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person’s personal affairs or the person is unable to manage the person’s estate or financial affairs or both.” Less restrictive means may include health-care powers of attorney and financial powers of attorney, or a trust. Prior to the appointment of a guardian or conservator, any alternative options should have been explored and exhausted.

Per NMSA 1978, Section 45-5-301.1, “guardianship for an incapacitated person shall be used only as is necessary to promote and to protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations. An incapacitated person for whom a guardian has been appointed retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court.” A district court judge has discretion to authorize a plenary (full) guardian or limited guardian based on the needs of the protected person.

Per NMSA 1978, Section 45-5-401(B) “appointment of a conservator may be made in relation to the estate and financial affairs of a person for reasons other than minority if the court finds that the person has property that may be wasted or dissipated unless proper management is provided; that funds are needed for the support, care and welfare of the person or those entitled to be supported by him; that protection is necessary or desirable to obtain or provide funds; and that: (1) the person is incapacitated; or (2) the person is unable to manage his estate and financial affairs effectively for reasons such as confinement, detention by a foreign power or disappearance.”

Much of the testwork completed by the OSA pertained to indigent protected persons with guardians. Conservatorships potentially pose a higher risk of financial misconduct based on a conservator’s financial authority and the amount of assets at issue in conservatorships, and may require increased oversight moving forward.

### *Goals of All Parties*

In the MOU, it was stated, “[t]he AOC wishes to proceed with a pilot project in conjunction with the State Auditor to establish baseline data and meet the intent of the 2018 legislation to provide for audits of accounts, estates, inventories and reports of protected persons under guardianship or conservatorship.” The partnership between the OSA and the courts aims to identify mechanisms to safeguard protected persons and their assets through reporting on guardians and conservators by conducting professional independent compliance reviews.

The OSA entered into this MOU with the AOC in their effort to fulfill the legislative intent of Senate Bill 19 with sections requiring report review and compliance of guardians and conservators with the requirements of any audit of an account, inventory, report, or property of a protected person. The February 2018 fiscal impact report for Senate Bill 19 stated “[t]he annual review, or auditing, of reports by conservators should be conducted by an agency under the executive branch to prevent a potential conflict of interest for the judicial branch.”

The OSA anticipates the MOU and its scope will continue to evolve to adapt to the challenges of underlying issues and identified risks. In fiscal year 2020 the OSA received funding for three (3) new full-time employees to work on guardianship and conservatorship matters. There is substantial need with relation to protecting one of the state’s most vulnerable populations. Monitoring guardians/conservators is imperative to ensure they are in compliance with their evolving duties.

### *History and Impact of Legislation*

#### *New Laws*

In the 2018 legislative session, Senate Bill 19 was passed, which amended the Uniform Probate Code as it pertains to guardianships and conservatorships in efforts to ensure protected persons voting rights, supplemented provisions requiring conservators’ reports, increased accountability and bonding requirements, and changed the procedures for appointing guardians and conservators.

The House Appropriations and Finance Committee substitute for House Bill 2 included a \$1,000,000 contingency appropriation from the DDPC fund to the AOC to enact the provisions of Senate Bill 19. The bill required the courts to monitor guardians, conservators, and those with other protective arrangements through various means. Sections of the bill required the courts to establish procedures for monitoring reports filed by a guardian and conservator.

New laws impacting guardianship and conservatorship proceedings went into effect on July 1, 2018, which impacted the scope of the OSA's review. On July 1, 2019, additional new laws went into effect. These laws will each have a significant impact in some areas moving forward. The relevant legislation was Senate Bill 19, passed in 2018, and Senate Bill 395, passed in 2019. Both of these pieces of legislation have broad impact on the overall administration and oversight of guardianship and conservatorship proceedings. This report primarily focuses on the changes arising out of Senate Bill 19, as those laws were in effect for the initial term of the MOU.

### ***Increased Reporting Requirements***

Among the changes resulting from Senate Bill 19, the petition for guardianship or conservatorship must now include information related to the alleged incapacitated person's representative payee, nominated guardian or conservator, trustee or custodian, VA fiduciary, or agent under a health-care or financial power of attorney. It is a positive step to require this information in any petition, as it is important it is utilized to ensure there are no less restrictive means of caring for the alleged incapacitated person.

### ***Increased Access***

The existence of a guardianship or conservatorship proceedings is now public record under NMSA 1978, Section 45-5-303(J) with respect to guardianships and NMSA 1978, Section 45-5-407(M) with respect to conservatorships. The new Rule 1-079.1 NMRA provides that the docket is open to public access provided that the court shall not disclose diagnostic, treatment, or other medical or psychological information. It is important to ensure court clerks, judges, and other pertinent staff receive training to ensure compliance with these requirements and protection of private information for persons in need of protection as well as alleged incapacitated persons.

Access to court records post-adjudication has also changed and will need to be monitored during implementation. NMSA 1978 §45-5-309(D) and §45-5-405(D). The protected person, guardian or conservator, and any other person the court determines shall have access to the court records. Similarly, access to reports has increased, as under NMSA 1978 Section 45-5-303(L), NMSA 1978, Section 45-5-407(O), and Rule 1-079.1 NMRA, the protected person, petitioner, visitor, guardian ad litem, attorney of record, power of attorney, and any other person the court determines has access to the reports of guardian or conservator.

### ***Notice Requirements***

The notice requirements also changed with respect to post-adjudication notices of hearings. *See* NMSA 1978, Section 45-5-309(D) and Section 45-5-405(D). This also pertains to pre-adjudication notice requirements, including ensuring personal service on the alleged incapacitated person and notice of rights to alleged incapacitated person.

### ***Separate Accounts***

Another important change in the new legislation is the firm requirement for separate accounts and records set forth in NMSA 1978, Section 45-5-107. Protected person's accounts must be kept separate from the guardian's or conservator's accounts, and guardians and conservators are required to maintain books and records for seven (7) years. NMSA 1978, § 45-5-107(C).

### ***New Report Forms***

Mandatory report forms have been revised and should continue to evolve to capture the most useful data for identifying issues and trends. These include, but are not limited to the Guardian's Annual Report ("Guardian's Report"), Conservator's Inventory, and the Conservator's Annual Report ("Conservator's Report"). Additionally, an initial Guardian's Report or Conservator's Inventory is required to be filed within 90 days of the appointment. The new Guardian's Report form expands inquiry into the type of facility where a protected person lives, cleanliness, nutrition, personal care and safety with additional questions concerning health. The Guardian's Report form now also asks about significant mental health issues over the past year, as well as the compensation charged by the guardian and the source of such compensation. Additionally, the Guardian's Report now make inquiry into the guardian's arrest and conviction record, as well as into any investigations of the guardian by Children Youth & Family Department or the Internal Revenue Service. The new Conservator's Report form looks back at the previous three (3) years, and breaks assets and liabilities into small components.

### ***New Definitions and Roles***

Other key changes include the addition of statutory definitions for "professional guardian" and "professional conservator". SB 395 further authorized the court to appoint an investigator to assess the protected person's capacity and provide a detailed report on the status of the protected person's capacity and the continued need for a guardian in compliance with a ten-year review.



## *Glossary of Terms*

### *Guardianship Terms*

**Plenary Guardian** – a “full” guardian appointed by the court to exercise all legal rights and powers of the incapacitated person after the court has found that the incapacitated person lacks the capacity to carry out all the tasks necessary to care for his or her person. If a protected person has small income streams (as opposed to substantial assets needing management) such as a paycheck or Social Security, the judge may appoint plenary guardianship to manage these income streams. The difference between a plenary guardian and a conservator is based on the “significance and complexity” of assets a protected person may possess that require professional management, such as a large stock portfolio, trust, or significant assets such as homes and cars. A judge uses their discretion in making these determinations.

**Limited Guardian** – the court appoints a limited guardian if it determines the incapacitated person is able to manage some but not all aspects of his or her personal care. The court is required to specify the powers the limited guardian shall have and may further restrict each power so as to permit the incapacitated person to care for himself commensurate with his or her ability to do so. A limited guardianship appointment limits the guardian’s powers to those enumerated in the court order, thus the limited guardianship.

**Professional Guardian** – a court-appointed guardian who is a person or entity that serves as a guardian for more than two individuals who are not related to the guardian by marriage, adoption, or third degree of blood or affinity (in lay terms, a guardianship is a business, not an individual family guardian) In New Mexico the DDPC’s OOG is responsible for contracting with professional guardians for indigent protected persons.

### *Conservatorship Terms*

**Professional Conservator** – a person or entity that serves as a conservator for more than two individuals who are not related to the conservator by marriage, adoption, or third degree of blood or affinity (in lay terms, a conservatorship business).

Per NMSA 1978 Sections 45-5-312(D) and 45-5B-108(B), a guardian or conservator shall not revoke a power of attorney for health-care instead of finances. Medical or financial decisions made by an agent with proper authority under a valid power of attorney takes precedence over a guardian’s or conservator’s respective decisions and the guardian or conservator is required cooperate with the agent under the power of attorney. While the new report forms ask about the existence of powers of attorney, there is no way of tracking or ensuring compliance, which could be significant for providing least restrictive means to protected persons who have at least some of the alternatives for less restrictive means already in place.

Per NMSA 1978, Section 45-5-314(E) “[a] guardian of a protected person shall fully comply with the requirements of any audit of an account, inventory, report or property of a protected person”, and per NMSA 1978, Section 45-5-409(G), “[a] conservator shall fully comply with the requirements of any audit of an account, inventory, report or property of a protected person”. This statutory, in conjunction with the MOU provides the OSA authority to proceed as agreed upon with the AOC and the Courts.

In addition to state court appointed guardians and conservators some private pensions and the following federal agencies authorize protective arrangements called representative payeeship for those who receive federal funds if the recipient is unable to receive those funds due to physical or mental disability. The Veterans Administration (VA) uses the term “fiduciary” in lieu of representative payee.

- **Social Security Administration-Representative Payee**
- **Veterans Administration-Fiduciary**
- **Railroad Retirement Board-Representative Payee**
- **Office of Personnel Management-Representative Payee**

### *Key Results and Observations – Conservatorship*

The following is a summary of key results based on procedures performed pursuant to the MOU. The underlying issues that resulted in all of the recommendations are also detailed in this report.

#### ***Key Results Related to Conservatorships:***

- Received 4 referrals from judges. Since the MOU was for a pilot project, procedures had not been defined for a specific referral process, other than judge referrals pursuant to Court order. One of the goals of the pilot project was to identify risk factors so judges would have a better understanding of what types of items or concerns to refer to the OSA. In order to achieve this goal, the OSA deemed it necessary to expand the population of cases reviewed. The data contained in this report and percentages presented are based on the original referrals and the OSA’s expanded population.
- OSA Review of 9 Conservator Inventory Reports - Form 4-997 indicated 19% of the forms:
  - Were not completed for the correct reporting period
  - Appeared to be late in submission
  - Lacked verification process for information contained in reports
- OSA Review of 340 Conservators’ Reports - Form 4-998 indicated at least 13% of these forms:
  - Were not completed for the correct reporting period

- Lacked supporting information or verification process for information contained in the reports
- Contained conflicting information

***Key Results Related to DDPC Corporate Guardians (See further details in Observations and Recommendations):***

- Guardian coordinator certification compliance
- Potentially insufficient insurance and bonding
- Lack of clarification surrounding extraordinary costs
- Compensation paid to guardians, reduced by gross receipts tax
- Guardian compliance related to powers of attorney and advanced directives
- General contract sufficiency

***Other Important Issues Identified During the Pilot Project***

The OSA identified potential issues where further review and analysis may be warranted that were not initially identified as concerns. They are as follows:

**Representative Payees** – Social Security’s Representative Payment program is intended to provide financial management for the Social Security and Supplemental Security Income (SSI) payments of beneficiaries who are incapable of managing their Social Security or SSI payments. When friends and family are not able to serve as payee, Social Security looks for qualified persons/organizations to be a representative payee. The OSA has identified payments made to representative payees on behalf of protected persons as a potential risk area. The OSA intends to work with the Courts and AOC to determine if representative payee accounts can be incorporated into the review process.

**ABLE Accounts** – As of September 30, 2019 New Mexico Protected Persons had 327 ABLE Accounts with a combined market value of \$1,207,928. House Bill 61 established the rules for ABLE New Mexico, and the Office of the State Treasurer administers this program. ABLE stands for “Achieving a Better Life Experience”. These accounts are a legal means of maintaining eligibility for public benefits, such as Medicaid, while allowing the protected person the opportunity to save to for disability related expenses to supplement other public benefits provided. ABLE accounts were first offered to New Mexicans in 2018. Up to \$15,000 per year can be deposited into an ABLE account and the balance cannot exceed \$100,000. ABLE accounts are new to New Mexico and oversight for these accounts has not yet been developed. However, plenary guardians do have access to these accounts. OSA recommends ABLE accounts be considered as an area to include in future reviews performed.

**Pooled Trusts** – During our review OSA identified one “pooled trust”. While trusts are substantially different in light of the obligations and fiduciary duties of trustees, and applicable authority under the Uniform Trust Code, it may make sense to have a mechanism for oversight of

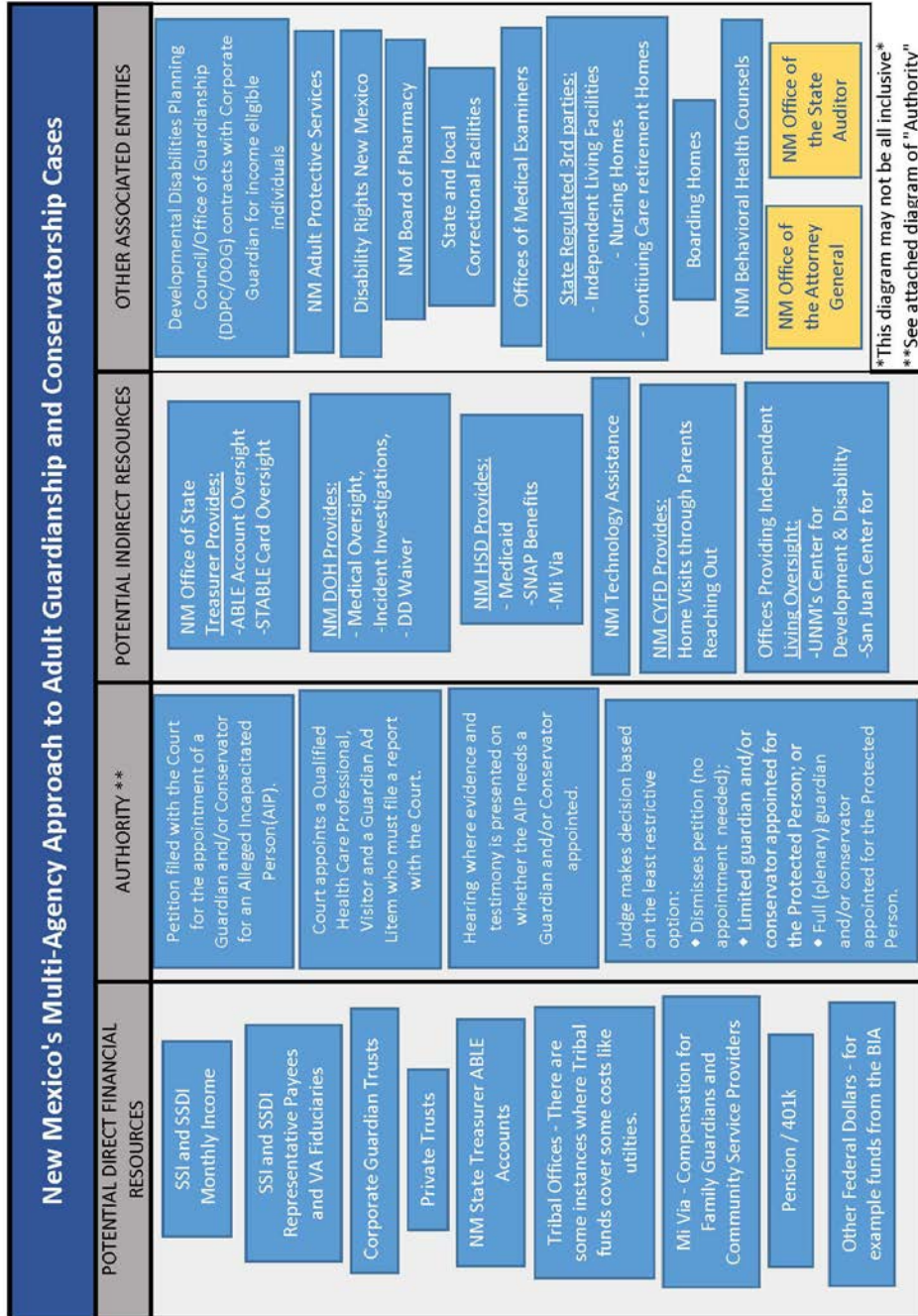
any “pooled trusts”, particularly as it pertains to beneficiaries who are also protected persons. The OSA reviewed the trust statements identified and held follow-up discussions. Trust accounting documentation reviewed for protected persons who are also beneficiaries of the pooled trust lacked specificity. The follow-up discussions indicated trust account statements are not always readily available to the guardian. The OSA recommends further consideration as to whether pooled trusts may be included in a future scope of work so that any potential risks can be identified and actual expenditures reviewed.

In the ensuing fiscal year, the OSA recommends increased focus on review of financial affairs of protected persons with substantial assets.

**Multiple Agency Involvement** – There are many different state and federal agencies that can potentially be involved in a protected person’s healthcare, financial care, and overall well-being. The following diagram lists the entities OSA has identified as being involved. The center column of the diagram shows the protected person. The left side of the diagram shows potential financial resources for the protected person and the right side shows potential non-financial resources. The box to the far right includes more remote resources.

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Diagram 1



\*This diagram may not be all inclusive\*  
\*\*See attached diagram of "Authority"

## **Conservatorship Observations and Recommendations**

### *Testwork Scope and Procedures Performed*

In conjunction with the scope of the MOU the OSA reviewed the Odyssey court case filing system. This included the register of actions, the order of appointment, and reports filed with the district courts. The OSA's review included the conservator's reports. The OSA reviewed these reports for the risk factors listed below. If the OSA noted risk factors, the OSA wrote a letter to the district court judge with a list of the risk factors identified and requested additional documentation to be obtained from the conservator.

### *Increased Risk Factors and Potential Risk Factors in Conservators' Reports*

The following were considered risk factors in the conservators' reports reviewed:

#### ***General Risk Factors:***

- Late, missing, or no annual reports
- Late, missing or no inventory reports
- Reports filed in bulk all on one date rather than the specified due date
- A reporting period that was not yearly or the correct term
- Missing transactions
- Round numbers for transactions
- Conservator reported co-mingled funds
- Conservator inconsistently reporting amounts throughout the different pages of the report
- Incomplete sections of the report
- Lack of prior period information for conservators who had been the same for years
- The conservator did not report the proper period for the report
- The conservator indicated that the protected person (PP) has sole control over money
- Differences between what the guardian reported and the conservator reported

#### ***Asset and/or Liability Related Risk Factors:***

- Substantial assets
- Loans/debt
- Unaccounted/understated assets, missing bank accounts
- Number of bank accounts (either no bank account listed, or a large number)
- Disposal of previously listed personal property or assets
- The conservator not appearing to understand how to calculate net assets

***Income/Expense Related Risk Factors:***

- Missing re-occurring income such as VA, Social Security, Developmental Disabilities Waiver, etc.
- Disproportionate rent expense for multiple individual households
- No real estate or rent but utilities or household expenses
- Notable changes in total income (or a single line item of income) from the prior year
- Notable change in total expenses (or a single line item of expenses) from the prior year
- Payment of interest or penalties, late fees, bank fees, etc.
- Checks written directly to the conservator
- Charging large fees for conservator services or reimbursement of expenses
- The conservator indicated mortgage expenditures but listed no real estate as an asset
- The protected person's expenditures were greater than their income or the conservator has reported income that exactly matches expenditures
- Notable miscellaneous or large expenditures compared to prior years

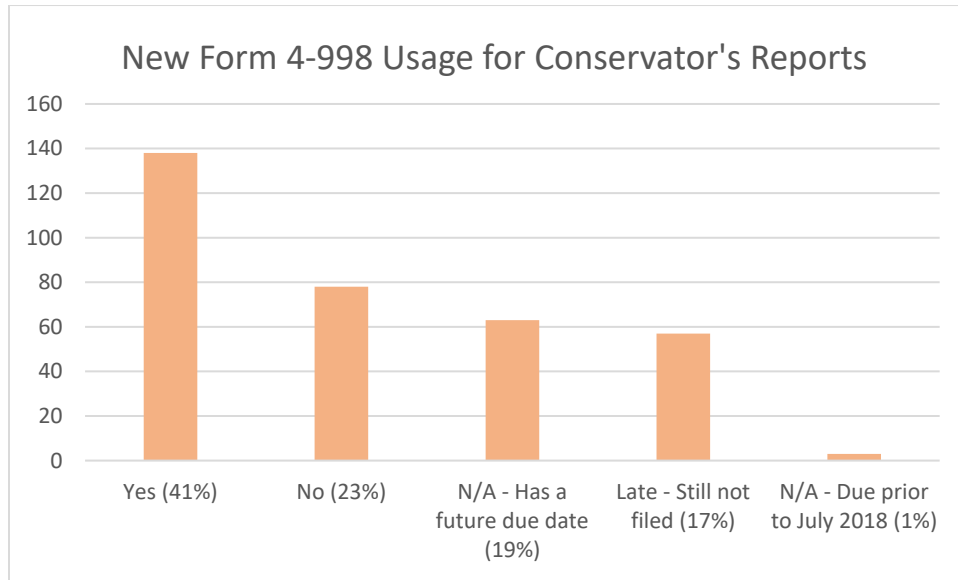
***Statistics on Conservators***

The OSA reviewed 340 open conservatorship cases filed between 1983 and 2018. It is important to note the OSA only conducted testwork of reports filed on the new Form 4-997 (Conservator's Inventory) and Form 4-998 (Conservator's Report). The OSA was provided a list of all reports filed. However, some of the reports filed were not the annual report. Instead their annual report had a due date in the future (FY20) and we were unable to review these at the time of fieldwork. The following statistics were compiled from the population of 340 conservatorship cases:

- 80 out of 340, (24%), were corporate/professional conservators as opposed to individual/family member conservators; and
- 138 out of 340, (41%), of reports filed with the courts for conservators were on the new forms. The breakdown is illustrated below.

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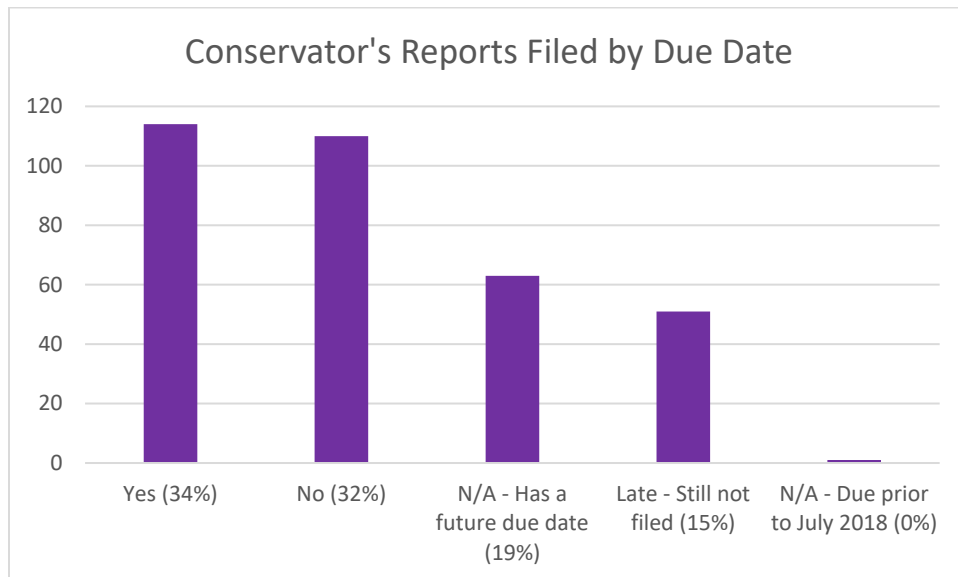
**Chart 1**



*Note: The “No” data in Chart 1 refers to Conservators’ Reports that were filed, but not on the new form. The “Late - Still not filed” data refers to cases where a Conservator’s Report was late and had not been filed at the time of the review.*

Of the Conservators’ Reports filed, the OSA observed 34% of reports were filed with the courts within 30 days of the due date. These results are included in Chart 2 below:

**Chart 2**



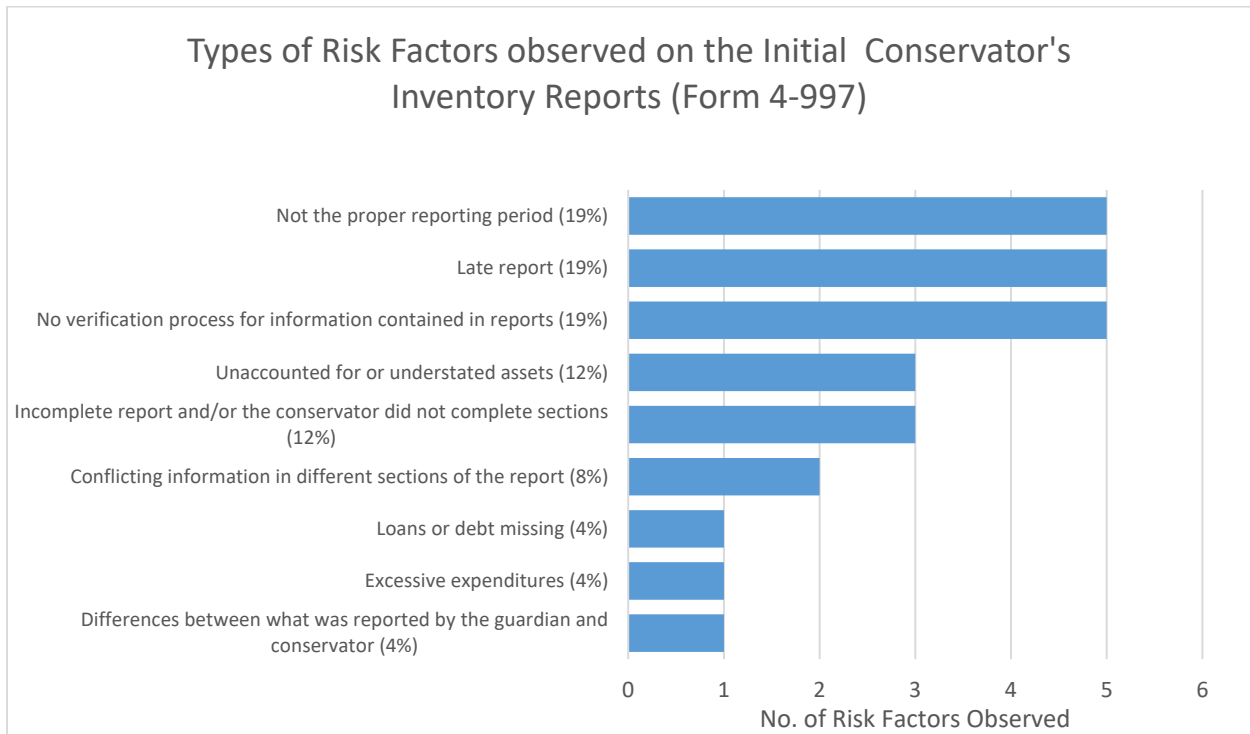
*Note: The “No” data in Chart 2 refers to Conservators’ Reports that have been filed, but were late. The “Late - Still not filed” data refers to Conservators’ Reports that were late and had not been filed at the time of the review.*



In connection with the OSA’s testwork performed, the OSA wrote 43 letters to district court judges informing them of increased risk factors identified in annual Conservators’ Reports and initial inventory reports of conservators. In part because the process was new, and not yet standardized, the OSA only received responses from the judges in 11 of these cases. Additionally, the OSA noted in some cases documents were uploaded to Odyssey as a result of the OSA’s letter. The OSA also noted in some cases, the conservator or firm would correspond directly with the OSA and provide documents. In 18 out of 43 cases (42%), the OSA noted that the OSA’s letter was filed in Odyssey to be part of the record.

The OSA reviewed 9 cases in which an initial conservator’s inventory report was completed on the new Form 4-997. In those 9 reports, the OSA observed 26 risk factors and categorized them in Chart 3 below:

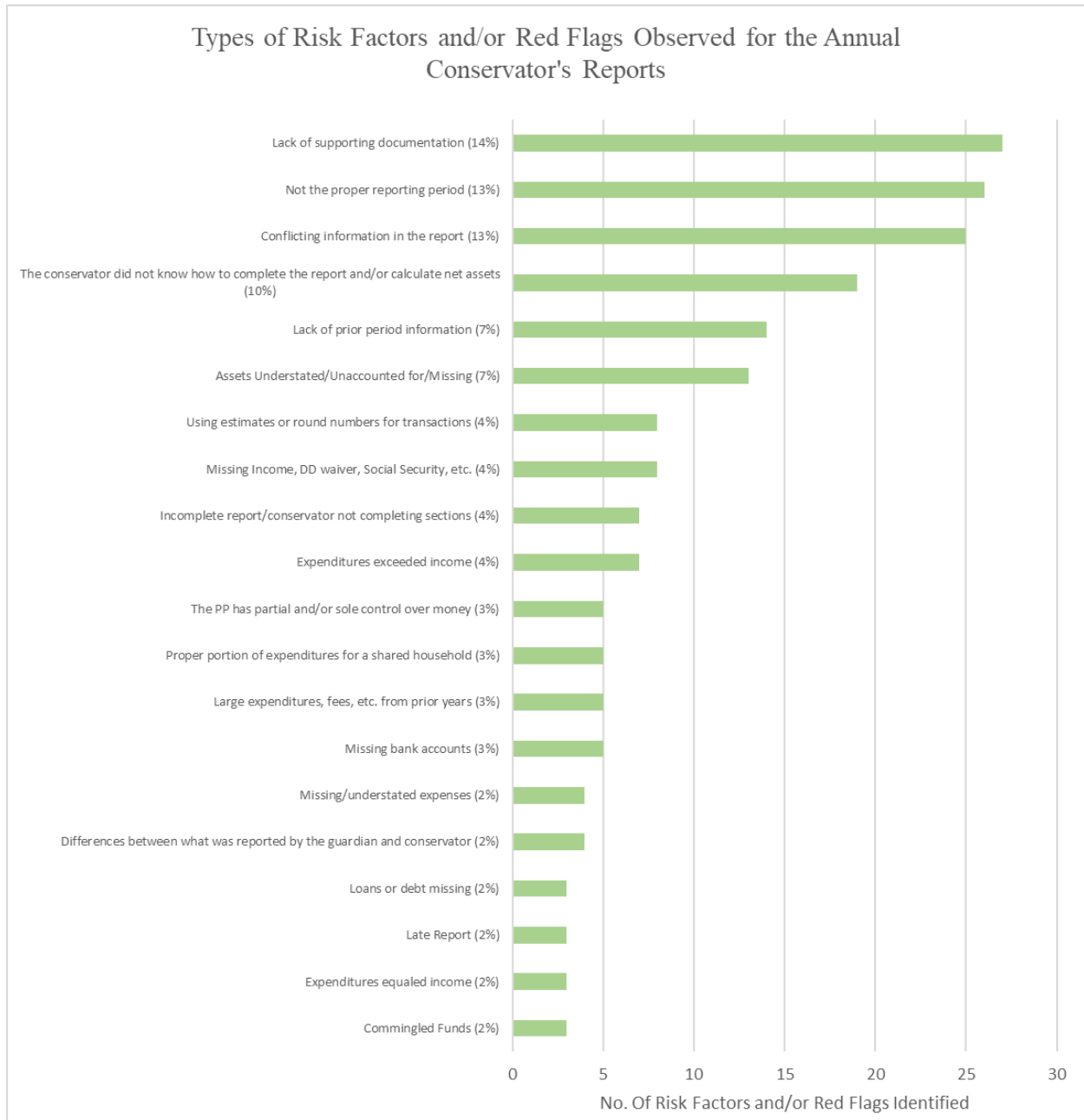
**Chart 3**



The OSA reviewed 41 cases in which the annual Conservator’s Report was completed on the new Form 4-998. In those 41 reports, the OSA observed 194 risk factors and categorized them in Chart 4 below:

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**Chart 4**



*Recommendations Based on Conservator Testwork Performed*

1. The OSA recommends the Courts develop and implement new standardized requirements for reports filed in district courts by guardians and conservators on outdated forms. The procedures should be designed to ensure all reports ultimately filed are on the new required forms. The new forms assist judges in making thorough evaluations, and subsequent referrals to the OSA when appropriate. As noted in the statistical section only 41% of reports were in the new format.

2. The OSA recommends the Courts and AOC consider providing training to conservators on how to complete the Conservator's Inventory and Conservator's Report.
3. The OSA recommends the Courts consider requiring conservators to provide additional supporting documentation (i.e., bank statements) when they submit a report. The OSA encourages the Courts to make recommendations in the interest of pursuing legislative and/or rule changes necessary to accommodate supporting documentation. This would enable a more complete review by judges supported by financial data, and would also enable the OSA to provide more timely feedback for any related referrals. This process would also provide an opportunity for the conservator to verify the documentation before the Conservator's Report is submitted.
4. The OSA recommends the Courts and AOC consider increasing the Odyssey search capabilities. This will improve both court and auditor ability to access data and narrow any sample population for a specified risk.
5. The OSA recommends the Courts consider designing and implementing a consistent statewide process for judges to follow for review of guardianship and conservatorship reports and cases. This process should include policies and guidelines for appropriate referrals to OSA, and other recommended procedures for a judge's consideration. These new procedures should also include specific steps related to follow-up and closure of referral correspondence received from OSA. Thorough and consistent policies and procedures will enhance the Courts' ability to identify risks, provide a mechanism to incorporate any statutory changes and facilitate improved monitoring.

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## **Guardianship Observations and Recommendations**

### *Scope and Procedures Performed – Contract Guardian Compliance*

#### ***Background***

The DDPC's Office of Guardianship (OOG) was established by the enactment of NMSA 1978, Section 28-16B-1, *et seq.*, the Office of Guardianship Act. The DDPC's OOG is a statewide, publicly funded guardianship service program for guardians of last resort for income and resource-eligible incapacitated adults (18 years or older at time of determination), when there are no less restrictive forms of intervention, such as a medical and financial power of attorney. Guardianship includes the appointment of a guardian as a surrogate decision maker for personal and health care decisions for adults with limited or no capacity to make or communicate decisions. Examples include adults with a development disability, traumatic brain injury, dementia, drug use, or other related condition. The program also provides legal services for guardianship court proceedings (proceedings prior to guardianship appointment) through contracts with attorneys, guardians ad litem, and court visitors. This is also an essential service for the indigent, as they routinely have no funds for attorneys or to pay for the proceedings leading to guardianship appointments by the court. The number of protected persons served by the various DDPC guardian contractors during the pilot project was approximately 925.

The DDPC's OOG is the state agency authorized to contract with professional guardians on behalf of indigent persons with no funds available to petition for a guardian and no family member willing or able to be appointed guardian. All guardians contracted with DDPC are considered professional guardians, and must be registered to conduct business in New Mexico, and must serve more than one protected person. DDPC petitions the appropriate district court for appointment of a contract guardian. These contract guardians go through the same pre-guardianship petition and hearing process as any other court-appointed guardian. These professional guardians, once appointed, have legal obligations to fulfill and the judge has ongoing responsibilities to monitor the case throughout the lifetime guardianship, or until it is terminated by law or death of the protected person. The primary tool the courts use to comply with the ongoing responsibility of monitoring is Form 4-996, the Guardian's Report.

The Guardian's Report is a multi-use form and is meant to be used for all the reports that the court required guardians' reports. This includes the "90 Day Report", which is filed once, 90 days after guardianship is assigned, the "annual" report, and the "Final Report", which is sent to the courts when the protected person dies or the guardianship is terminated by another reason. The Guardian's Report is designed so that all three reports can be successfully completed on the same form by completing the appropriate sections based on the type of report. These reports contain an extensive amount of information for the Court to review, including but not limited to detailed personal information about the protected person, the current health status and any changes, living arrangements, questions about the quality of care received, any incidents, financial status,

information on other relevant parties such as fiduciaries, representative payeeships and trusts and other important information the judge may need for their ongoing monitoring responsibilities.

### *Overview of Contract Compliance Audit with Contract Guardians*

The MOU with the AOC specifically identified the population of contract guardians for potential review, which, at the time of signing, included 23 guardians under contract with DDPC's OOG providing guardianship services to 925 protected persons.

During this initial phase, the OSA ultimately performed compliance testing on nine guardianship contractors. The OSA sampled three northern New Mexico guardian contractors, two southern New Mexico guardianship contractors, and four greater Albuquerque area guardianship contractors, for a coverage of 39.1% of the total guardianship contractor population with DDPC.

The OSA selected guardianship contractors with caseloads as high as 173 protected persons and as low as 10 protected persons to better understand the unique issues experienced and differences between larger corporations and sole proprietor professional guardians. The nine contractors selected had an aggregate protected person population of 647, or 69.9% of the 925 protected persons served by guardians contracting with DDPC's OOG.

The observations and recommendations contained in this Report were prepared by OSA and provided to DDPC. Responses provided by DDPC are included and the content of responses is not edited by OSA. In each of the observation responses below, DDPC elected to include the following paragraph describing the MOU between the OSA and the AOC:

“The Memorandum of Understanding (MOU) between the Office of the State Auditor (OSA) and the Administrative Office of the Courts (AOC) dated June 27, 2018, states the following regarding OSA's review of the Developmental Disabilities Planning Council's (DDPC) contract guardians:

The State Auditor shall conduct a financial and compliance audit of a sample of the guardianship contracts entered by the Developmental Disabilities Planning Council, hereinafter DDPC, with any contract guardians acting on behalf of the protected persons who are under guardianship to assess compliance, timeliness, and accuracy of reports required to be filed with the district courts by contract guardians under contract DDPC. The audit of contract guardians may also include a review of financial transactions undertaken on behalf of the protected person and a review of any grievances filed with DDPC.”

For purposes of this Report, the OSA has included this statement from each separate response here for readers, rather than including the statement with each individual response, in order to reduce repetition.

Also, as the OSA was finalizing this Report at the beginning of fiscal year 2020, a new executive director was appointed for DDPC. The OSA accommodated the leadership transition and intentionally delayed releasing the Report until the new director was able to provide responses to, and in some cases address, the observations and recommendations presented.

*Observations and Recommendations Based on Guardian Contract Compliance  
Testwork*

**Observation #1 – Guardian Coordinator Certification**

*Condition* – The OSA reviewed nine guardianship contractor agencies with aggregate total of 53 guardian coordinators. Of the 53, 13 coordinators were not yet certified but were in compliance for 2019 because they had not yet been coordinators for 18 months. If these numbers were projected to the fiscal year 2020 contract starting July 1, 2019, the number of out-of-compliance guardians could increase by 13, or 22.5%.

*Criteria* – The 2019 DDPC contract with guardianship contractors required that any coordinator hired must obtain their Certification for Guardianship Contractors (CGC) within 18 months of being employed, as stated in section 1 (E)(3) of the DDPC/Contractor contract. The 2020 DDPC contract has been released and this requirement has changed to now require any coordinator hired on or after July 1, 2019 to be CGC certified within 90 days of employment, not 18 months and could have significant consequences for the contractors beginning July 1, 2019. Auditors noted that DDPC’s OOG is accommodating existing, but still uncertified coordinators, by allowing these individuals until December 31, 2019 to attain certification.

*Cause* – New Mexico House Bill 395 was amended in the 2019 legislative session and NMSA 1978, Section 45-5-311 (D) now states “[a] professional guardian shall not serve or be appointed guardian of the incapacitated person unless the professional guardian is certified and is in good standing with the national or state organization recognized by the Supreme Court that provides certification for guardians”. New Mexico does not have an agency to certify guardians, so our state defers to the National Center for Guardianship (NGC) certification.

The courts appoint a guardian, but with respect to professional guardian entities in the business of providing guardianship services, the company itself cannot be certified as the certification requirement is on an individual basis. As a result, contracts have been written to ensure all staff and contractors actually providing guardianship services have been certified.

*Effect* – The number of uncertified guardian coordinators will be the same at the beginning of fiscal year 20, however, these same uncertified guardian coordinators may cause some court appointed professional guardians to fall out of compliance with state law.

Professional guardian contractors with existing non-certified coordinators less than 18 months employed are considered in compliance with the 2019 contract, but those very same coordinators will be considered out of compliance if they do not achieve certification by December 31, 2019. New guardian coordinators, hired on or after July 1, 2019 have 90 days to achieve certification

employed more than 90 days beginning July 1, 2019, or the beginning of the 2020 contract. The professional guardian contractors are concerned the contract term change, necessitated by the change in state law will automatically create non-compliance and repercussions. Additionally, the contractors expressed concerns that the renewed pressure for these uncertified coordinators will have an adverse effect on coordinator recruitment. Prospective coordinators may be more hesitant to accept a position knowing that they have only 90 days to attain certification. The fee for the initial exam is \$375 and retakes are \$275.

*Recommendation* – NMSA 1978, Section 45-5-311(D) should be evaluated and may require legislative action to modify the statute to distinguish between professional guardian businesses and the individuals actually providing guardianship services as either key owners/employees and guardian coordinators. Statutory required certification levels and the time permitted for attaining required certification should also be reviewed to ensure an appropriate cost benefit relationship.

*Response* - DDPC Response to Observation #1 – Guardian Coordinator Certification

DDPC requests OSA to provide clarification on Observation #1 regarding what actions OSA is recommending that are within DDPC’s powers or authority. Even if the statutory requirements are reviewed by DDPC as recommended by OSA, what further actions DDPC can take are limited. DDPC does not have the power or authority to take legislative action. The statutory requirements were recommended by the Supreme Court to ensure every individual with the power to make decisions on behalf of a protected person achieves a certain level of certification and training. Both the New Mexico Supreme Court and the New Mexico Legislature agreed this certification requirement is an important policy priority. DDPC recognizes that the certification requirement creates a higher standard for protected persons to receive quality guardianship services.

DDPC has already reviewed the statutory certification requirements extensively. DDPC has also been monitoring and regularly communicating with contract guardians regarding certification requirements since before the statutory requirements became effective on July 1, 2019. DDPC has developed a plan to promptly address contract guardian certification non-compliance issues, should any arise. DDPC’s priority is ensuring that New Mexicans receive quality services from contract guardians. Therefore, DDPC does not recommend any changes to existing statutory certification requirements.

The responsible position for this response is the DDPC Executive Director. DDPC has completed the recommended actions within the scope of DDPC’s powers and authority.

**Observation #2 – Professional Liability Insurance Policies Need for Clarification**

*Condition* – Only one out of the nine contractors we reviewed had amendments covering acts of misconduct. Eight contractors had insurance policies that did not comply with contractual requirements.

*Criteria* – The 2019 DDPC contract, at section O-Insurance, requires the Professional Liability Insurance be a minimum of \$500,000, cover acts of misconduct, violations of civil and criminal misconduct by the contractor and its coordinators, and list DDPC as an additional insured.

*Cause* – After several discussions with contractors, OSA legal staff, and DDPC we identified a potential trend. Insurance companies appear to avoid insuring “acts of misconduct”, “willful misconduct”, or “criminal misconduct”. The face of the insurance policy may actually cover misconduct, but the policy details specifically exclude many forms of misconduct, including criminal acts. The policies generally cover “gross misconduct”, but due to legal interpretations between “gross misconduct” and “willful acts of misconduct”, insurance companies may not, in substance, insure gross misconduct.

*Effect* – Without adequate and appropriate insurance coverage, a protected person and the taxpayers of New Mexico are at increased risk of losses in the event that the insurance policy coverage is inadequate. Additionally, guardianship contractors risk being in non-compliance with the DDPC contract and may be vulnerable to liability.

*Recommendation* – We recommend the DDPC consult with the New Mexico Office of Superintendent of Insurance, and perform an analysis of what type of insurance coverage and what amounts of insurance coverage should be included in the guardian contracts. Amounts of coverage should be based on a broad variety of circumstances that potentially affect protected persons and are sufficient to cover the risk of loss. The contract language regarding insurance should be updated based on the results of this analysis.

*Response* – DDPC Response to Observation #2 – Professional Liability Insurance Policies Need for Clarification

In August of 2019, DDPC consulted with a private attorney with legal expertise in guardianship and insurance issues to discuss the type of insurance coverage and what amounts of insurance coverage should be included in the guardian contracts. As a result of the legal consultation, DDPC has been working on updating contract language for the next fiscal year. DDPC has also already contacted the Office of Superintendent of Insurance (OSI) to discuss the same issues and is still awaiting a response.

The responsible position for this response is the DDPC Executive Director. If OSI does not respond, DDPC plans to follow up with OSI by March 1, 2020, regarding DDPC’s request that OSI work with DDPC to analyze what type of insurance coverage and what amounts of insurance coverage should be included in the guardian contracts. The timeline to perform the analysis depends on OSI’s availability and ability to work with DDPC on this project.

**Observation #3 – Bonding**

*Condition* – During our reviews of contract guardians, the OSA noted the following regarding bonding:

1. One bond exists and covers many different activities, such as rep payee, conservator and guardian;



2. Old bonds, effective prior to guardianship contracts; and
3. Concern by contractors regarding adequacy of bonds and confusion over who qualifies as a “person who administers or authorizes payments of protected persons’ funds....”

*Criteria* – The 2019 DDPC contract, Section P-Bonding, requires a Fidelity Bond covering each person who administers or authorizes payments of protected person’s funds or those moneys received pursuant to the contract in an amount of \$10,000 if the contract is less than \$100,000 or 25% of the contract amount if over \$100,000. The policy is to cover fraudulent or dishonest acts of these said employees, acting alone or colluding with others, and that its agents will perform their duties faithfully. DDPC is required to be the additional insured.

*Cause* – There is a general lack of understanding about contractual requirements for bonding. The contract does not appear to contain adequate specific elements to ensure compliance.

*Effect* – Without adequate and appropriate insurance coverage, a protected person and the taxpayers of New Mexico are at increased risk of losses in the event that the insurance policy coverage is inadequate.

*Recommendation* – OSA recommends the DDPC consult the New Mexico Office of Superintendent of Insurance and perform an analysis of what type and amount of bond is required for professional guardian contracts. Additionally, OSA recommends the contract be clarified to specify which positions require a bond.

*Response* – DDPC Response to Observation #3 – Bonding

In August of 2019, DDPC consulted with a private attorney with legal expertise in guardianship and insurance issues to discuss the type and amount of bond that should be required in the guardian contracts. As a result of the legal consultation, DDPC has been working on updating contract language for the next fiscal year. DDPC has also already contacted the Office of Superintendent of Insurance (OSI) to discuss the same issues and is still awaiting a response.

The responsible position for this response is the DDPC Executive Director. If OSI does not respond, DDPC plans to follow up with OSI by March 1, 2020, regarding DDPC’s request that OSI work with DDPC to analyze what type and amount of bond should be required in the guardian contracts. The timeline to perform the analysis depends on OSI’s availability and ability to work with DDPC on this project.

**Observation #4 – Extraordinary Costs (Per Diem, Birth Certificates, Unexpected Costs)**

*Condition* – Five out of the nine corporate guardians in the sample indicated the following regarding DDPC reimbursement of corporate guardians for extraordinary costs:

- a. According to guardians, requested mileage reimbursements have been denied, even in non-routine situations.
- b. There is the potential for substantiated out-of-pocket costs to be denied reimbursement such as costs for food and utilities.

- c. Corporate guardians may not request reimbursement due to the perception the request will be denied.

*Criteria* – Contract Section DD “Extraordinary Costs and Other Matters Relating to Compensation” states “Requests for reimbursement of extraordinary costs must be approved in advance by Agency Executive Director or designee”. Additionally, the way the contract is worded, even if approved in advance, “Agency may reimburse contractor, subject to available resources”.

*Cause* – In most cases extraordinary costs are not known in advance and there is no way to make a request for reimbursement in advance. However, guardians are legally responsible for “care, custody, or control” of protected persons and therefore may continue to incur extraordinary costs.

*Effect* – The way the contract is worded legitimate costs paid by the guardian will not be reimbursed because they have not been approved in advance. In substance, the way the contract is currently written the guardian’s compensation is essentially reduced when the guardian is not reimbursed for necessary and substantiated amounts paid on behalf of the protected person.

Additionally, there are specific costs that, if incurred by a guardian on behalf of a protected person, indicate that “the system” is not working as intended. Specific costs such as food and utilities are examples of “a person falling through the cracks”

*Recommendations* – This section of the contract should be reviewed for sufficiency and a listing of extraordinary costs defined. Due to the nature of guardianship there will be potential extraordinary costs that cannot be foreseen. These other costs that cannot be identified and approved in advance should also be contractually defined and there should be a reasonable mechanism in place for reimbursement.

OSA recommends defining circumstance critical costs (such as food) requiring immediate escalation to the appropriate authority so that all affected parties and state and local agencies can facilitate a rapid resolution for the protected person. We recommend contract amendments to identify what constitutes a critical cost and provide for reimbursement to the guardian of substantiated amounts for a reasonable time period. These amounts should be considered a reimbursement, not part of compensation per the contract.

*Response* – DDPC Response to Observation #4 – Extraordinary Costs (Per Diem, Birth Certificates, Unexpected Costs)

DDPC Office of Guardianship is primarily funded by state general fund dollars, with very limited Medicaid funding. The type and amount of extraordinary costs can be paid only to the extent that funding sources allow. For example, DDPC does not have the authority to pay for food and utilities. Contractors are not entitled to extraordinary costs. Generally, DDPC works with contract guardians to be as flexible as possible within funding constraints to cover extraordinary costs. DDPC does not include specific definitions of extraordinary costs in contracts to avoid unnecessarily limiting payment of extraordinary costs. DDPC has no further response without further documentation or information regarding specific extraordinary costs requested or allegedly denied.

The responsible position for this response is the DDPC Executive Director. DDPC plans to take no further action regarding this issue.

**Observation #5 – Contract Compensation Amount and GRT**

*Condition* – The contract is based on a flat fee per month per protected person. The following issues were noted:

- All nine contractors audited stated they remit gross receipts tax on the monthly fee and this effectively reduces their actual pay for the work performed, as the total of \$325 per month per Protected Person, less New Mexico GRT, on average is 8% less amounting to approximately \$299 per protected person.
- All nine contractors emphasized each protected person is unique and require different levels of care. A protected person residing at a managed care facility may only require one monthly guardian visit. A protected person responding well to medical care may require a few visits each month. Many protected persons require 24/7 access to their guardian.
- Additional expenses such as significant travel for hospital stays, fees associated with obtaining legal documents, and many other extraordinary costs paid on behalf of the protected person are incurred by the guardian contractor. These amounts are not consistently tracked. Due to the variety of situations it is not possible for OSA to determine a specific dollar amount of this impact.

*Criteria* – The 2019 DDPC contract, section 2.A, states that DDPC “shall pay to the Contractor in full payment for services satisfactorily performed at the rate of \$325 per Protected Person per month ... The total amount payable to the Contractor under this agreement, *including gross receipts tax and expenses*, shall not exceed....”

*Cause* – The wording in the contract indicates gross receipts tax (GRT) is included in the total dollar amount.

*Effect* – The amount of the contract does not include GRT. A flat fee amount does not appear to be appropriate given the variety in services necessary in each individual circumstance.

*Recommendation* – We recommend a thorough re-evaluation of the cost structure of the DDPC guardian contractors to consider such items at GRT and extra costs, and possibly a tiered system of pay based on a medical analysis of the complexity of the case as opposed to a one size fits all fee.

**Response - DDPC Response to Observation #5 – Contract Compensation Amount and GRT**

DDPC plans to request special appropriation funds in the 2020 Legislative Session to conduct a rate study to evaluate compensation for contract guardians.

The responsible position for this response is the DDPC Executive Director. DDPC does not currently have the resources to conduct the rate study without additional funding. DDPC cannot determine a timeline to conduct the rate study until further funding is obtained.

### **Observation #6 – End of Life Planning**

*Condition* – Out of the 64 files reviewed, 23 did not contain advanced directives. Even in cases where advance directives were present, the guardians noted that they were often difficult to obtain, and expressed concerns over this requirement. Additionally, it may be inappropriate for corporate guardians to make a determination as to whether a particular protected person has testamentary capacity to execute any power of attorney or advance directive.

*Criteria* – Section K of the guardian contract requires that all case files comply with National Guardianship Standards. These standards require advance directives for protected persons.

*Cause* – The National Guardianship Association Standards of Practice require all guardianship company case files to include an advance directive. In addition to the usual difficulties associated with discussing end-of-life planning, an individual may not be verbal, or may be a verbal individual but possibly unable to understand why the conversation must take place, New Mexico also has varying cultural beliefs regarding end of life planning and the discussion of any such issues.

*Effect* – The guardianship companies may have to choose between being in compliance with their contract and breaking separate laws regarding treatment of cultural beliefs and faiths. Also, in many cases, since the Court order generally requires that the protected person be consulted concerning their care whenever possible, this places the coordinator in the position of having to choose whether to distress the individual under their care concerning an issue that may or may not be imminent, or be out of compliance with their contract.

*Recommendation* – We recommend that consideration be given to updating the contract to include documentation regarding the consideration of advanced directives based on the individual protected person, as opposed to specifically following the National Standards of Practice.

### **Response – DDPC Response to Observation #6 – End of Life Planning**

In response to similar concerns contract guardians have shared with DDPC, DDPC has already revised the fiscal year 2020 contracts to allow contract guardians to submit a written statement if they believe they cannot comply with a particular provision of the National Guardianship Association Standards of Practice. Further, DDPC conducts training and discussion opportunities for contract guardians regarding the commencement, administration, and termination of their legal duties and obligations. Specifically, on December 19, 2019, DDPC held a roundtable discussion with contract guardians regarding the subject of advance directives. Additionally, DDPC regularly communicates with contract guardians and attempts to address concerns as they arise.

The responsible position for this response is the DDPC Executive Director. DDPC has completed the recommended actions within the scope of DDPC's powers and authority.

### **Observation #7 – Estate Administration**

*Condition* – It was noted during the OSA’s interviews that guardianship coordinators may end up bearing some costs of a deceased protected person’s final expenses.

*Criteria* – Guardianship ends at the death of a protected person.

*Cause* – There may be a lack of understanding of the limits and duties of guardianship upon the death of a protected person. In the cases where an interested person is not available to administer the decedent’s estate, coordinators and contractors may choose to act, and feel a personal and ethical responsibility for accommodating an individual person’s wishes, but are not legally authorized, responsible for, or compensated for the costs involved.

*Effect* – There is the potential for inconsistent treatment of a protected person’s estate.

*Recommendation* – We recommend the DDPC’s OOG provide more information about the limits of a guardian’s legal responsibilities upon the death of a protected person and update the contract language to include a reference to NMSA 1978, Sections 45-5-306 and 45-5-307. Additionally, we recommend DDPC’s OOG provide specific guidance to contractors regarding who bears the financial responsibility for a deceased protected person’s final expenses.

### **Response – DDPC Response to Observation #7 – Estate Administration**

DDPC conducts training and discussion opportunities for contract guardians regarding the commencement, administration, and termination of their legal duties and obligations. Further, DDPC regularly communicates with contract guardians and attempts to address concerns as they arise. DDPC cannot, however, provide more specific guidance regarding financial responsibility beyond restating the law.

The responsible position for this response is the DDPC Executive Director. DDPC has completed the recommended actions within the scope of DDPC’s powers and authority.

### **Observation #8 – General Contract Concerns**

OSA’s review noted contractor guardians encountered difficulties in certain areas of compliance of which several areas may require further review by DDPC’s OOG. Each area for review was detailed separately as different areas of the contract were referenced.

#### **Observation #8 (a) Professional Guardian Certifications:**

*Condition* – OSA identified one corporate guardian who was not certified as a guardian through the Center for Guardian Certification (CGC). This corporate guardian contracted with others to serve as guardian coordinators. The corporate guardian indicated this had been appropriately disclosed to DDPC’s OOG. However, there was no official communication from DDPC’s OOG indicating this was acceptable.

*Criteria* – The Contract at paragraph 1(E)(1) states “Before contracting with the agency the contractor shall successfully obtain certification through the CGC or shall disclose non-certification to the agency....”

The Contract at paragraph 1(E)(4) states “Contractor and its Guardianship Coordinators shall maintain their CGC certification throughout the term of this agreement. Contractor shall immediately notify the agency if any CGC certification lapses, and shall re-obtain certification within 30 calendar days.”

*Cause* – The court appointed guardian is not always the guardian coordinator. The court appointed guardian is, in many cases, a corporation or other business entity, and thus would not be licensed.

*Effect* – The requirements of the contract regarding CGC certification may contradict themselves.

*Recommendation* – OSA recommends the contract should be reviewed and updated as necessary to ensure potentially conflicting sections are clarified.

*Response* – DDPC Response to Observation #8 – General Contract Concerns

New Mexico law is clear that any individual acting as the guardian and making decisions on behalf of a protected person must be certified within a specified period. DDPC’s contract has been updated to comply with New Mexico law.

The responsible position for this response is the DDPC Executive Director. DDPC has completed the recommended actions within the scope of DDPC’s powers and authority.

**Observation #8 (b) Employee/Subcontractor Guardian Coordinators:**

*Condition* – 4 out of 9 guardians sampled do not employ guardian coordinators, instead they have a sub-contractor relationship with their guardian coordinators. All 4 contractors stated they notified DDPC of the sub-contractors and provided required information within the prescribed timeframe. However, there may not have been written approval received from DDPC’s OOG.

*Criteria* – The Contract at section 8 states “The contractor shall not subcontract any portion of the services to be performed without prior written approval from the agency”.

*Cause* – DDPC’s OOG may not consistently provide written approval for sub-contractors to contract guardians

*Effect* – Legal guardians may not be able to show compliance with their signed contracts and may be technically out of compliance.

*Recommendation* – It is recommended that DDPC’s OOG provide standard written approval as appropriate for sub contract guardian coordinators so that contract compliance can be achieved.

*Response - Employee/Subcontractor Guardian Coordinators:*

DDPC regularly conducts contract compliance reviews and employs corrective action plans when necessary. Typically, DDPC works with contract guardians to resolve compliance issues at the lowest level of escalation.

The responsible position for this response is the DDPC Executive Director. DDPC is already reviewing the files of contract guardians who utilize subcontractors, and plans to provide written approvals for subcontractors, if necessary and appropriate, by March 1, 2020.

**Observation #8 (c) Non-Certified Guardian Coordinator Caseloads:**

*Condition* – It was noted that 13 out of 53 guardian coordinators, working at 4 different corporate guardian entities, had not yet received CGC certification. These 13 guardian coordinators carry a total case of 132 protected persons. All 4 corporate guardian entities indicated to auditors that a guardian coordinator not yet certified does not actually make decisions affecting a protected person. Instead, the company owner, or another certified guardian makes decisions for these protected persons.

*Criteria* – The Contract at section 1(F) states “In accordance with the National Guardianship Association (NGA) Standards of Practice no Guardianship Coordinator shall carry a caseload of more than thirty protected persons.”

*Effect* – When a non-certified guardian coordinator’s caseload is effectively handled by a certified coordinator, the certified coordinator’s caseload could exceed the thirty protected person’s maximum caseload required for contract compliance. This actually occurred in 2 of the corporate guardian entities reviewed.

*Cause* – The Contract is silent with regards to non-certified guardian coordinators’ caseloads.

*Recommendation* – It is noted that new statutory requirements for FY20 DDPC’s OOG will require guardian coordinators to be certified in 90 days, as opposed to the current 18 months, and this will change the circumstances surrounding the issue. However, the Contract should be updated to include specific language addressing uncertified guardian coordinator caseloads.

*Response - Non-Certified Guardian Coordinator Caseload:*

New Mexico law is clear that any individual acting as the guardian and making decisions on behalf of a protected person must be certified within a specified period. DDPC’s contract has been updated to comply with New Mexico law. Certified guardians may carry up to 30 cases. No loophole exists for any staff designated as “guardian coordinators” who ostensibly do not make decisions affecting a protected person.

The responsible position for this response is the DDPC Executive Director. DDPC does not plan to take further action on this issue.

### **Observation #8 (d) Face-to-Face Visits:**

*Condition* – Our interviews with corporate guardians raised various concerns regarding documentation of the face-to face-visits. The concerns expressed to us include:

- a. When a protected person elopes and cannot be located it is not possible for a face-to-face visit. However, time and effort, sometimes significant, is expended to search for the person.
- b. Some protected persons are unable to sign indicating there has been a face-to-face visit because of their personal health status. Most of the time a caregiver (authorized third party representative) will sign on behalf of the protected person acknowledging the visit. However, there are times when no signature can be obtained for this.
- c. Some protected persons are incarcerated and they are unable to sign indicating there has been a face-to-face visit, even if the guardian has seen the protected person. Sometimes a signature will be obtained and the incarceration facility staff member (authorized third party representative) will sign on behalf of the protected person acknowledging the visit. However, most of the time no signature can be obtained for this.

Additionally, during the review of case files, for two of the nine guardians reviewed, auditors observed cases where the face-to-face visit was signed by the guardian on behalf of the protected person.

*Criteria* – The Contract at section 1(H), “Face-to-Face Visits”, states “the guardianship coordinator shall have at least 1 face-to-face visit per month with each protected person. Each face-to-face visit shall be documented by the signatures of both the guardianship coordinator and the protected person or their authorized third party representative.”

Contract section BB(2)(i) includes a contract verification statement requiring signature and specifically includes the dates of the visit(s) to the protected person.

*Effect* – There may be situations where guardians will not be paid for services rendered. There is also the possibility guardians could be paid for services not rendered.

*Cause* – The contract contains requirements for notification when a protected person elopes. Specifically, the guardian must notify DDPC, must file a missing person’s report with law enforcement and must file a notice of elopement with the court. Although the guardian is required to perform tasks related to the protected person the fact they have not had a face-to-face visit prevents the guardian from receiving compensation.

Additionally, although there are no other contractual requirements, the guardian is court appointed and is still the missing person’s guardian. Guardians are not relieved of their responsibilities and still attempt to locate missing protected persons to ensure their safety and well-being.



There are no statutory requirements for other entity staff (such as care facility staff) to sign anything on behalf of a protected person otherwise unable to sign. Staff at these types of facilities have their own policies and procedures to adhere to.

Many incarceration facility officials will not sign indicating there has been a face to face visit. Incarceration facilities may not be requiring staff to sign on behalf of a protected person because they are not even aware an incarcerated person has a guardian.

*Recommendation* – The contract requirements regarding elopement should be evaluated by all affected parties. The contract should be updated to more closely resemble the work performed by the guardian, the work expected by the court, and the work required by state law.

The contract should also be evaluated to expand the documentation of a face-to-face visit to possibly accept another form of documentation, such as nursing care facility records or court records indicating long term care or incarceration.

The phrase “authorized third party representative should be further clarified in the contract to ensure all parties to the contract have a thorough understanding of who is an authorized third party.

The contract should be updated to include language stating when it is permissible for the legal guardian to sign for a face-to-face visit on behalf of a protected person. This updated language should be designed to provide guidance to the guardian and provide appropriate controls.

*Response – Face-to-Face Visits:*

In response to similar concerns contract guardians have raised with DDPC, DDPC has already reviewed the contract provisions regarding this issue. DDPC regularly communicates with contract guardians and attempts to address concerns as they arise. DDPC may grant exceptions to contract guardians who provide detailed information regarding the work performed on behalf of the protected person despite the inability to conduct a face-to-face visit or obtain adequate documentation of a face-to-face visit. Further, DDPC regularly conducts contract compliance reviews and employs corrective action plans when necessary.

The responsible position for this response is the DDPC Executive Director. DDPC does not plan to take further action on this issue.

**Observation #8 (e) Contractual Compensation:**

*Condition* – Auditors noted the compensation amount stated in the contract did not always equal the number of protected persons served. When questioned, guardians stated they are signing contracts, and promising services, to a different number of protected persons than the contract amount covers because they are assured the contract will be amended if necessary.

*Criteria* – Sound business practices and strong internal controls over procurement require contracts be based on the most accurate information available at the time of award.

*Cause* – Per discussion with the DDPC’s OOG, they intentionally keep the ensuing year’s contract amount at the same amount as prior year. They are very aware that in most cases, every year, the number of protected persons increases as new cases are assigned. They also stated that many protected persons fall off the rosters as well. The DDPC’s OOG policy is to perform contract amendments in January of each year, as half the year has passed and they have a better idea of just exactly what the compensation should be for the year.

*Effect* – DDPC and contract guardians may sign a contract that obligates the contractor to perform work for more protected persons than the contract amount permits. Guardianships does not terminate until a judge approves the termination or upon the death of a protected person, therefore, contractors may not be paid for work performed. In some circumstances, contractors were signing a contract that both they and DDPC’s OOG knew may be potentially inaccurate. Contractors in those cases were relying on a “promise” of an amendment in January to make them whole.

*Recommendation* – While OSA recognizes DDPC OOG’s unique circumstances related to the number of protected persons at any one time during the year it is essential that contracts awarded be as accurate as possible. A complete and comprehensive evaluation of compensation policy and contract sufficiency is recommended. Specifically, the contract should be written based on sound business practices and contain amounts that accurately reflect the amount of services expected to be performed in the original contract amount. Contractors should not rely on a “promise” to amend in the future.

*Response – Contractual Compensation:*

DDPC has been evaluating and refining the contract management process, as well as tracking historical data, to reflect the most accurate information and budget projections. Additionally, DDPC has submitted budget adjustment requests from OOG’s fund balance and plans to request supplemental appropriations for fiscal year 2020, as well as advocate to right-size future fiscal year budgets for OOG. Ultimately, OOG is primarily funded by state general fund dollars, and the number of cases OOG can process is limited by funding sources. When funding is unavailable, OOG has no choice but to stop processing cases and allow the waitlist to grow.

The responsible position for this response is the DDPC Executive Director. DDPC has completed the recommended actions within the scope of DDPC’s powers and authority.

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## Exit Conferences

Exit Conferences were held as follows:

On July 31, 2019 the Courts, AOC, and OSA held an exit conference, in which the contents of the report was discussed, with the following individuals in attendance:

New Mexico Courts:

Honorable Shannon Bacon, Supreme Court Justice

Office of the Administrator of the Courts:

Patricia Galindo, Senior Attorney

Celina Jones, General Counsel

Office of the State Auditor:

Brian Colón, Esq. State Auditor

Natalie Cordova, CPA, Deputy State Auditor

Jesse Gallegos, Esq. Deputy Chief of Staff

Elise Mignardot, CPA, Director

Kevin Chavez, CPA, Supervisor

On September 30, 2019 DDPC OOG, the Courts, AOC, and OSA held an exit conference with the following individuals in attendance:

Developmental Disabilities Planning Council Office of Guardianship:

Alice Liu McCoy, Executive Director

Maria Bourassa, Program Manager

Office of the Administrator of the Courts:

Patricia Galindo, Senior Attorney

New Mexico Courts:

Honorable Nancy Franchini, District Court Judge

Office of the State Auditor:

Elise Mignardot, CPA, Director