SPECIAL EXAMINATION

Requested by the Senate Appropriations Committee

The Georgia Appellate Practice and Educational Resource Center, Inc.

The Judicial Council of Georgia
Administrative Office of the Courts

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Project Purpose

This Special Examination was conducted in response to a written request by the Senate Appropriations Committee to review the operations of the Georgia Appellate Practice and Education Resource Center, Inc. (hereafter referred to as the Resource Center). In its request, the Committee asked us to provide:

- a history of the total costs by fund source to operate the Resource Center over the last several years;
- a critique of the Center's purpose, goals, and outcome measures and how efficient and effective the Center has been over the last several years; and
- a critique of how the Center compares to similar post-conviction defense organizations in other states.

Background

The Resource Center is a 501 (c)(3) non-profit organization established in 1988 through the joint efforts of the Georgia Supreme Court, the State Bar of Georgia, the Georgia Attorney General, and the Federal Judiciary. The mission of the Resource Center is to ensure that death-sentenced inmates are competently represented in state and federal post-conviction (habeas corpus) proceedings. Unlike criminal appeals, habeas corpus appeals are civil proceedings in which the plaintiff may challenge the constitutionality of his conviction and/or sentence in both state and federal court. The Resource Center may provide direct representation or may assist private attorneys who volunteer

Post-Conviction Appeals

Persons convicted of a capital crime have the right to test the constitutionality of the conviction and sentence in state and federal post-conviction proceedings. These proceedings are referred to as *habeas corpus* cases, the purpose of which is to provide a method whereby legal or factual errors, uncorrected at trial or on direct appeal, can be addressed.

their time to represent the plaintiff *pro bono* (without compensation). In fiscal year 2004, the Center's expenditures totaled $806,504, of which $800,000 (99%) were state-funded.

The Capital Appeals Process

To determine if any mistakes or miscarriages of justice have been made in a capital case that resulted in a wrongful conviction and/or a death sentence, state and federal law provide the opportunity for subsequent judicial review at many levels. This process is explained on the following pages and illustrated in **Exhibit 1** on page 4.

First Review: State Direct Appeal

1. Motion for a New Trial: Georgia law allows the superior courts to grant new trials for cases when "the verdict of a jury is found contrary to evidence and the principles of justice and equity" and where any material evidence "relating to new and material facts is discovered by the applicant after the rendition of a verdict against him."
2. Direct Appeal: Georgia law requires that whenever the death penalty is imposed, the Supreme Court of Georgia review the sentence. In conjunction with this review, the Court can also consider any errors enumerated by way of appeal. In its judgment, the Court can affirm the conviction and/or sentence or can set aside the conviction and/or sentence and remand the case to the trial court.
3. Certiorari in the U.S. Supreme Court: If relief is not granted through the direct appeal, the defendant may petition for a *writ of certiorari* in the U.S. Supreme Court. This is an order from a higher court directing a lower court to send the record of a case for review. The Supreme Court typically denies these petitions.

Second Review: State Post-Conviction/Habeas Corpus

1. Georgia Superior Court: Following affirmation of a conviction and death sentence on direct appeal, a defendant in a capital case has the right to seek a *writ of habeas corpus* to inquire into the legality of the original conviction and sentence. Habeas corpus cases involve errors that cannot be cured at trial or on direct appeal, such as prosecutorial misconduct, ineffective assistance of counsel, unavailability of evidence at the time of trial or appeal, or legal changes since the time of trial or appeal. The superior court can deny the petition, affirm the

conviction and/or sentence, or vacate the conviction and/or sentence and remand the case back to the trial court.

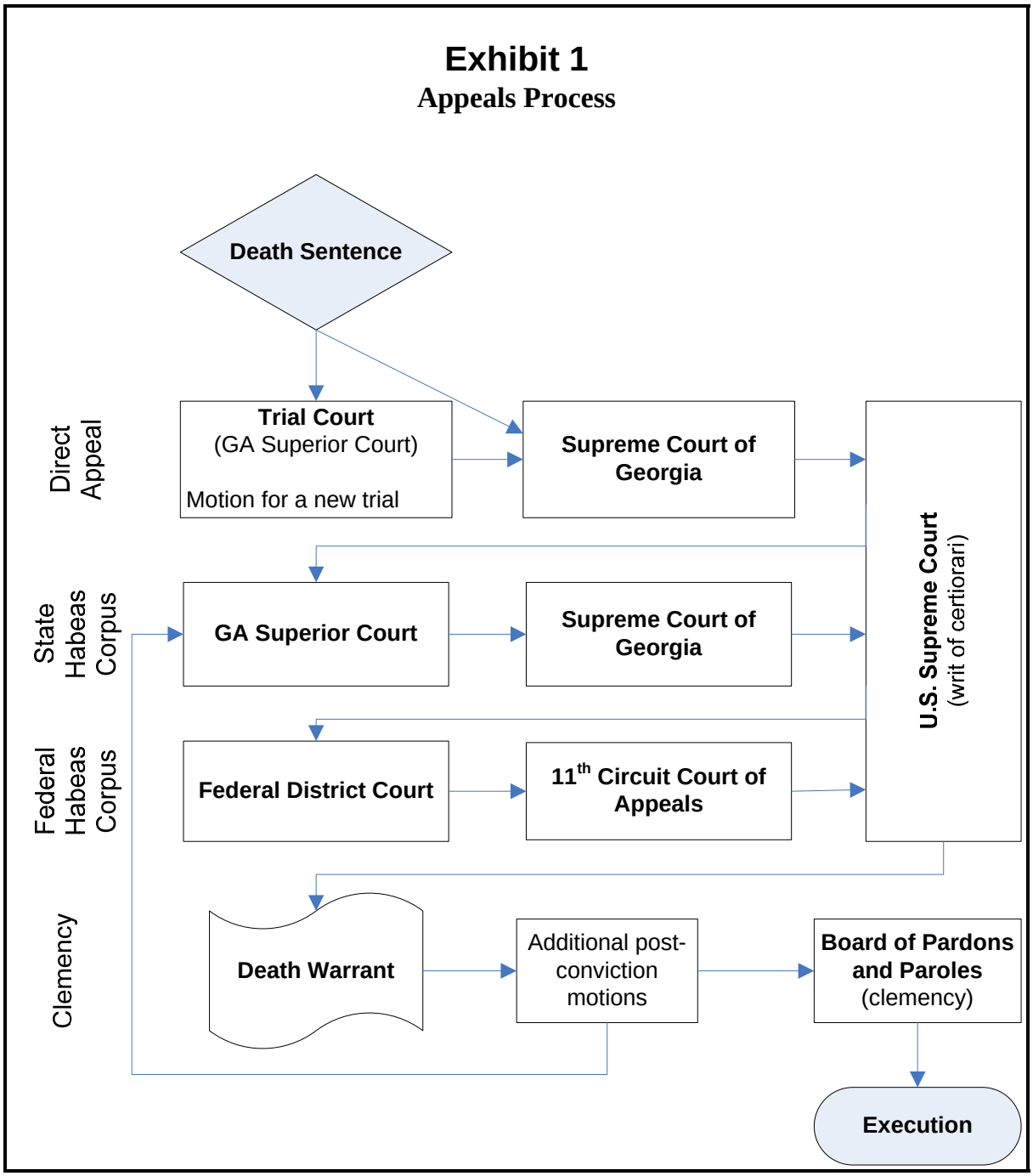
2. Supreme Court of Georgia: Either the defendant or the state can appeal the decision of the superior court to the Supreme Court of Georgia. This Court can either affirm the judgment or it can reverse the judgment and remand the case back to the superior court.
3. Certiorari in the U.S. Supreme Court: The defendant can petition for a writ of certiorari appealing the state habeas corpus judgments.

Third Review: Federal Habeas Corpus

1. Federal District Court: Either the defendant or the state can appeal the decision of the Supreme Court of Georgia by filing a petition for a writ of habeas corpus with the appropriate federal district court. These proceedings are similar to habeas corpus proceedings in the Georgia superior courts.
2. Federal Circuit Court: Either the defendant or the state can appeal the decision of the federal district court to the federal circuit court.
3. Certiorari in the U.S. Supreme Court: If the conviction and sentence remains affirmed, the defendant can again petition for a writ of certiorari in the U.S. Supreme Court appealing the decision of the federal court.

Fourth Review: Clemency Proceedings

The State Board of Pardons and Paroles: After all appeals have been exhausted, the defendant can present a case for clemency to the State Board of Pardons and Paroles. The Board can deny clemency, resentence the defendant, or pardon the defendant.



Scope and Methodology

The scope of this Special Examination was limited to the three issues cited in the request received from the Appropriations Committee—a history of the Center's fund sources; a critique of the Center's purpose, goals, and outcome measures and its efficiency and effectiveness; and a critique of how the Center compares to similar organizations in other states. In conducting this examination, we interviewed personnel of the Administrative Office of the

Courts and the Resource Center, reviewed applicable state and federal laws, reviewed information related to the Resource Center's staffing and caseload, and reviewed the Resource Center's financial audits covering 1989 through 2004. We also contacted officials in other states that have the death penalty to obtain information regarding how these states provide post-conviction representation to persons who have been sentenced to death.

This report has been discussed with appropriate personnel of the Administrative Office of the Courts and the Resource Center. A draft copy was provided for their review and comment; pertinent responses have been included in the report as appropriate.

Analyses Requested by the Senate Appropriations Committee

A History of the Total Costs by Fund Source to Operate the Resource Center Over the Last Several Years

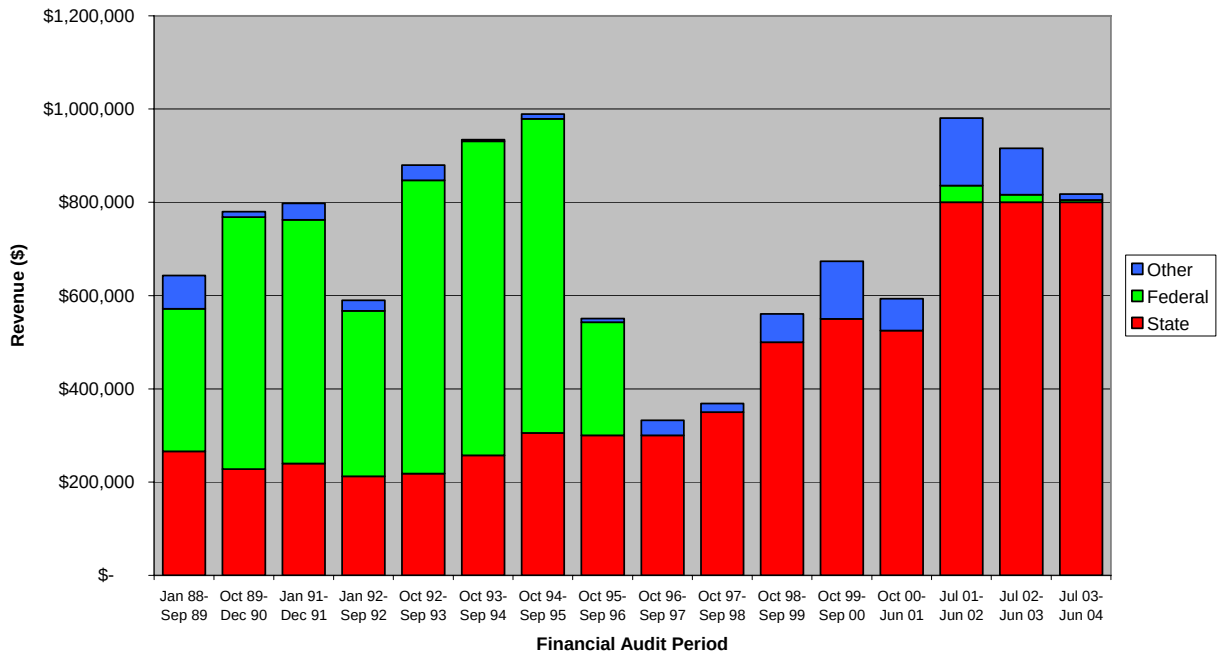
Our review of the Center's funding from its inception to the current year found that it has gone from being funded primarily with federal and other funds to being funded primarily with state funds.

During the first year of the Center's operation in 1988, it had annual revenues of $642,955, of which $305,901 (48%) were federal funds, $265,566 (41%) were state funds, and $71,488 (11%) were other funds (comprised of interest income, a grant from the Georgia Bar Foundation, and in-kind contributions from Georgia State University College of Law). In fiscal year 2004, the Center's revenues totaled $817,672, of which $800,000 (98%) were state funds, $12,626 (1.5%) were other funds, and $5,046 (0.6%) were federal funds. It should be noted that the there is no formulaic basis (such as the cost-per-case multiplied by the estimated number of cases) for determining the amount of state funds appropriated to the Resource Center.

The responsibility for funding the Resource Center shifted from the federal government to the state government in fiscal year 1996 when the U.S. Congress eliminated federal funding for the country's 21 post-conviction defense organizations, including the Resource Center. The federal funds that were received by the Center in fiscal years 2002 through 2004 were obtained as a result of the Center's participation in federal habeas corpus proceedings in the U.S. District Court for the Middle District of Georgia. It should be noted that the Resource Center does not actively participate in cases in the Northern

District because that U.S. District Court has defense attorneys provided by the federally funded Federal Defender Program. The Southern District uses the services of the Resource Center attorneys but does not provide any reimbursement.

Exhibit 2
Revenue Sources



Source: Financial audits of the Georgia Appellate Practice and Educational Resource Center

A Critique of the Center's Purpose, Goals, and Outcome Measures

Although the Center has a clearly defined *purpose*, it has not been required to establish any measurable *goals* or *outcome measures*.

Purpose

Our review found that the Center's purpose—"to assure that each death-sentenced inmate who desires legal representation has competent counsel from the direct appeal through the state and federal post-conviction proceedings"—is in keeping with the public policy of every other state that has the death penalty. Unlike most states, however, Georgia does not have a statutory mandate that death-sentenced inmates be provided with legal representation in post-conviction proceedings. However, in the 1999 case in which the Georgia Supreme Court issued its decision that the state does not have to provide legal

representation in post-conviction proceedings (Gibson v. Turpin), the Court noted, that "such a law might be good policy."

Although death-sentenced inmates are not statutorily entitled to representation in state habeas corpus proceedings, they are entitled to representation when their cases are heard in federal court. As previously discussed, defense attorneys are provided by the Federal Defender Program in cases heard in the U.S. District Court for the Northern District of Georgia. The District Courts for the Middle District and Southern District select and appoint private attorneys or Resource Center attorneys to represent such inmates.

Our review also found that while the Center's overall purpose has remained unchanged, it operates in a substantially different manner than it did when it was established 17 years ago. In 1988, the Center was located at the Georgia State University College of Law, was to serve as a educational resource for the College, and was primarily responsible for recruiting and providing assistance to private attorneys who would represent death-sentenced inmates pro bono. Today, the Center is no longer affiliated with Georgia State and its attorneys usually provide direct representation (as opposed to recruiting and assisting volunteer attorneys).

Goals and Outcome Measures

The Center has not been required to establish any measurable goals or outcome measures nor is it required to meet any goals or outcome measures as a condition of receiving its annual appropriations. Interviews with the Administrative Office of the Courts found that because it considers itself a pass-through for the Center's funding, it does not monitor the Resource Center's overall performance.

A Critique of How Efficient and Effective the Center Has Been Over the Last Several Years

Although the Center has been effective in having capital cases reversed during habeas corpus proceedings, it does not have any benchmarks or performance objectives for evaluating its overall efficiency and effectiveness.

Efficiency

Our review found that the Center does not maintain any quantifiable data for evaluating its efficiency. In its funding requests, the Center contends that it is "the most cost-effective and efficient method of ensuring that death sentenced

inmates are represented in state habeas proceedings." The Center also contends that the previous system of post-conviction representation was haphazard and inefficient, that relying on such groups as the American Civil Liberties Union to provide counsel resulted in an uncoordinated system that often led to lengthy delays in cases being resolved. While it is recognized that the current system is more efficient than the situation that existed prior to the Center being established in 1988, there is no measurable data for evaluating the Center's overall efficiency from year to year.

It should be noted that recently enacted law and court rule have placed time limits on capital post-conviction litigation that may affect the traditional argument that resource centers are necessary to reduce the length of time required to litigate a death penalty case to conclusion.

- In 1996, the federal Anti-Terrorism and Effective Death Penalty Act (AEDPA) was enacted with the specific intent of speeding the pace of habeas corpus appeals in death penalty cases. The Act requires that a federal habeas corpus petition be filed within one year of the conviction becoming final. Although the Act allows time for state habeas corpus proceedings to be completed, it results in petitions for habeas corpus review in state courts having to be filed within that one-year period. The Resource Center has stated that AEDPA has significantly sped up the state habeas corpus process.

- Georgia Superior Court Rule 44 (effective January 1, 1996) imposed strict deadlines for capital habeas corpus cases, including deadlines for filing motions and amendments, for filing briefs, and for conducting evidentiary hearings. According to the Resource Center, this rule has also significantly increased the pace at which cases are proceeding through state habeas corpus review.

<u>Effectiveness</u>

Our review found that the Center has been effective in having cases reversed during post-conviction proceedings. Data compiled by the Center indicates that since 1996, 20 death-sentenced inmates have received post-conviction relief—meaning that the conviction or the death-sentence has been vacated by a state or federal court and has been remanded to the trial court for a new trial or sentencing hearing. During the same time period, 19 death-sentenced inmates have been executed. While the Center considers the 20 reversals to be

indicative of its effectiveness, there are no benchmarks for evaluating these results.

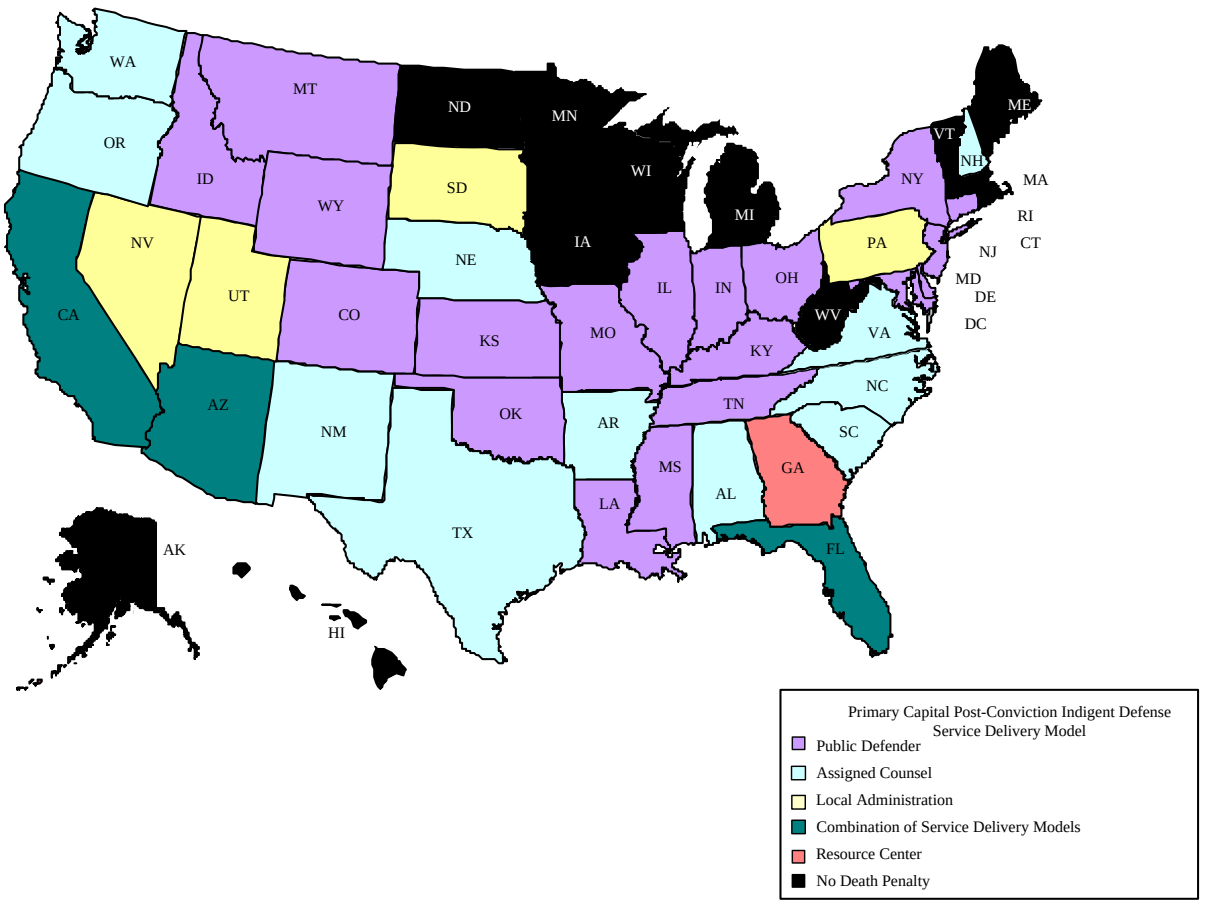
Although the Center has indicated in its funding requests that it is "the most cost-effective" method of representing death-sentenced inmates in post-conviction proceedings, it does not document the number of hours spent per case or the cost per case. To support its assertion of cost-effectiveness, the Center cites a 1992 study completed by the Committee on Defender Services of the United States Judicial Conference that found that staff attorneys of federal post-conviction defender organizations cost less per hour than the average hourly rate of appointed counsel who request compensation.

A Critique of How the Center Compares to Post-Conviction Defense Organizations in Other States

In comparing the Resource Center with similar organizations in other states, we focused on type of service delivery model, staffing to caseload, and expenditures. Overall, we found that Georgia's service delivery model is unlike that found in other states and that it tends to have fewer staff per case and lower expenditures per case than other states.

All of the 38 states that have the death penalty provide for some level of post-conviction representation to death-sentenced inmates. As shown in **Exhibit 3** on the following page, 19 of the 38 states provide post-conviction representation to death-sentenced inmates through a public defender (or similar) office. Eleven states provide these services by assigning the cases to private attorneys who are then reimbursed for their services. Four states have decentralized systems that rely on local funds and courts to assign and reimburse attorneys. Three of the 38 states provide legal representation through some combination of the preceding methods. Georgia is unique in that it relies on a private non-profit entity to provide this service.

Exhibit 3
How States Provide Post-Conviction Representation to Indigent Death-Sentenced Inmates



Sources: Telephone surveys of states with the death penalty, information available on individual state's indigent defense websites, and the Death Penalty Information Center

Staffing and Expenditures

Only a small number of states responded to our request for information regarding their staffing (caseloads) and expenditures. However, in comparison with these organizations from which information was obtained, Georgia's Resource Center has the largest number of cases per staff member and has the lowest expenditures per-case.

- At the time of our review (October 2005), the Resource Center had 63 active cases (including 7 cases handled by volunteer attorneys for which the Center provided assistance), or 7.4 cases per staff member. Information obtained from five other states that had 10 or more active cases found that their caseloads ranged from 1.6 per staff member (in Tennessee) to 6.8 per staff member (in Ohio). It should be noted that

these five states operate programs, such as public defender offices, that directly employ staff rather than appointing and reimbursing private attorneys.

- In comparison with similar organizations in six other states which provided expenditure data, Georgia's Resource Center has the lowest expenses per case. In fiscal year 2004, the Resource Center spent approximately $800,000, or an average of $13,000 per case. Similar data from the six other states found that their per-case expenditures ranged from approximately $24,000 (in North Carolina and South Carolina) to approximately $143,000 (in California).

Performance Audit Operations Division

Established in 1971 as part of the Department of Audits and Accounts, the Performance Audit Operations Division conducts in-depth reviews of state programs. The purpose of these reviews is to determine the degree to which state-funded programs are accomplishing their goals and objectives; provide measurements of program results and effectiveness; identify other means of achieving goals and objectives; evaluate efficiency in the allocation of resources; and assess compliance with laws and regulations.

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