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# Committee Meeting

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## JOINT SELECT COMMITTEE ON MEDICAID REIMBURSEMENT

"To take testimony from invited individuals from the Department of Human Services regarding the application made by the Department for Medicaid uncompensated care retroactive claims, to July 1, 1988, for disproportionate share payments for State and county psychiatric hospitals"

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**LOCATION:** Room 319  
State House  
Trenton, New Jersey

**DATE:** October 20, 1992  
1:25 p.m.

### MEMBERS OF JOINT SELECT COMMITTEE PRESENT:

Senator Dick LaRossa, Chairman  
Assemblyman Richard Bagger, Vice-Chairman  
Senator John O. Bennett  
Assemblywoman Harriet Derman  
Assemblyman Bernard F. Kenny, Jr.



### ALSO PRESENT:

Robbie Miller  
Office of Legislative Services  
Aide, Joint Select Committee  
on Medicaid Reimbursement

**New Jersey State Library**

### ***Hearing Recorded and Transcribed by***

The Office of Legislative Services, Public Information Office,  
Hearing Unit, 162 W. State St., CN 068, Trenton, New Jersey 08625-0068

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SENATOR  
DICK LaROSSA  
*Chairman*

ASSEMBLYMAN  
RICHARD BAGGER  
*Vice-Chairman*

SENATE  
JOHN O. BENNETT

GENERAL ASSEMBLY  
HARRIET DERMAN  
BERNARD F. KENNY, JR.

**New Jersey State Legislature**  
**JOINT SELECT COMMITTEE ON MEDICAID REIMBURSEMENT**  
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**C O M M I T T E E   N O T I C E**

TO: MEMBERS OF THE JOINT SELECT COMMITTEE ON  
MEDICAID REIMBURSEMENT

FROM: SENATOR DICK LaROSSA, CHAIRMAN

SUBJECT: **COMMITTEE MEETING - October 20, 1992**

*The public may address comments and questions to Robbie Miller,  
Committee Aide, or make other inquiries to Sophia Love, secretary, at (609)  
292-1646.*

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The Joint Select Committee on Medicaid Reimbursement will meet on  
**Tuesday, October 20, 1992 at 1:00 P.M. in Room 319, Legislative Conference  
Room, Legislative State House.**

The committee will take testimony from invited individuals from the  
Department of Human Services regarding the application made by the  
department for Medicaid uncompensated care retroactive claims, to July 1,  
1988, for disproportionate share payments for State and county psychiatric  
hospitals.

Issued 10/7/92



## TABLE OF CONTENTS

	<u>Page</u>
Alan J. Gibbs Commissioner New Jersey Department of Human Services	3
Saul M. Kilstein Director Division of Medical Assistance and Health Services New Jersey Department of Human Services	7
Ann C. Kohler Assistant Director Division of Medical Assistance and Health Services New Jersey Department of Human Services	10
Roseann Krieger Administrator Cost Reimbursement Office of Finance and Accounting New Jersey Department of Human Services	16
 <b>APPENDIX:</b>	
Opening statement of Senator Dick LaRossa	1x
Testimony submitted by Commissioner Alan J. Gibbs	3x
Memorandum to the Honorable Dick LaRossa from Saul M. Kilstein	10x

bgs: 1-63

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SENATOR DICK LaROSSA (Chairman): Good afternoon. I'm glad to see everyone on a bright, sunny, fall day. I know we'd rather be outside, but we'll try to make this as painless as possible.

If I may open with a very brief comment: Today's session should prove to be very instructive. It's the third meeting of the Joint Select Committee on Medicaid Reimbursement.

Once more we will address the application process initiated by the State of New Jersey to receive reimbursement for the State and county psychiatric costs, totaling \$450 million, because we want to better understand why the application was filed in the manner it was and the facts surrounding the application process.

We're going to really look at clarification. We're not questioning what was done, just certain clarification of the technical aspects of having read through what we've done so far. We will continue to discuss and clarify previous comments from our first investigative hearing on September 23, in which we delved into the circumstances surrounding the process itself.

We requested in writing that the following two points be addressed as well during today's presentations: One of those being the necessity of public notice with respect to the State Plan amendment and the allegation that the Health Care Financing Authority -- HCFA -- has not received additional information that it requested in this allegation made in a letter from William Toby, Jr., Acting Administrator, HCFA.

Furthermore, as time permits, we'll begin to discuss the second point of the Joint Resolution: the inclusion of the \$450 million into the projected State revenues. Therefore, today we'll continue to conduct what I've termed as a "nuts and bolts" investigation session.

Let me begin by highlighting -- and I just want to reemphasize this, even outside of the text of my remarks -- reemphasize the cooperative spirit with which the Committee has conducted its outreach with members of the executive branch. On behalf of all the members, Vice-Chairman Richard Bagger, Senator John Bennett, Assemblywoman Harriet Derman, and Assemblyman Bernard Kenny, I want to express our gratitude for the very candid and productive series of official proceedings to date. I greatly appreciate the openness with which everything has been done.

We're very, very, fortunate that four key individuals will be available to testify before us today from the New Jersey Department of Human Services under the leadership of Alan Gibbs, who we're pleased to have with us today -- that is, Alan Gibbs, Commissioner; Roseann Krieger, Administrator for Cost Reimbursement; Saul Kilstein, Director of the Division of Medicaid Assistance and Health Services; and Ann Kohler, Assistant Director, Office of Budget and Fiscal Affairs.

Again, the Senate Concurrent Resolution, SCR-65, empowers this body with the following public policy focus; that is to review the issues and circumstances surrounding the executive branch's December 1991 application to the Federal Health Care Financing Administration -- HCFA -- regarding the \$450 million reimbursement for disproportionate share payments for State and county psychiatric hospitals.

In order to meet our fact-finding charge, the enabling legislation established the Joint Select Committee and set forth two key areas of review in order to determine the circumstances surrounding the reimbursement dispute, and I quote: "The Committee shall examine the decision on the part of the executive branch to include all of the \$450 million in the projected State revenues for Fiscal Year 1992," and that, "The Committee shall examine and determine the exact amount of retroactive reimbursement payments for State and county psychiatric hospitals."



The hallmark of our first two hearings has been the focusing on the facts and just the facts.

Today's hearing will continue that tradition, and once more, I ask the members please try to refrain from issuing opinions which might lead to premature conclusions. The pursuit of the facts has and will continue to dominate the deliberations of the Joint Select Committee. I think it is inordinately important that we stick to the facts and not draw any kinds of conclusions that could perhaps put anyone at a disadvantage.

Those conclude my opening remarks.

Does anyone have anything further to add? (negative response)

Does any one of the witnesses have any statement they'd like to make?

COMMISSIONER ALAN J. GIBBS: Yes, Mr. Chairman, if you would permit me, I'd like to make a very brief opening statement. I have copies available for members of the Committee, and I don't propose to read it. If you would introduce into the record the letter that I had sent last time which tried to provide an overview of all this. I don't intend to go over all that.

I would like to say at the start, I think the issue is now at a sensitive stage in terms of our obtaining Federal approval. The central issue of dispute between us and the Health Care Financing Administration deals with the requirement of public notice, or their interpretation that public notice was required.

While we are certainly willing to give you the facts while this matter is under appeal, I want to avoid deliberating the merits of the State's position on the issue of public notice.

Let me just bring you up to date on three things that have happened since the last hearing: First, after about a

year of negotiation and correspondence regarding the State Plan amendment, we have now formally filed the State Plan amendment, and we did that on October 19. The importance of that is that it now starts the clock ticking. HCFA now has 90 days in which to respond to that.

The second thing that has happened is that we have identified a problem with HCFA regarding their timeliness in deferring our claim for \$412 in disproportionate share funds for various periods from July 1, 1988 through December 31, 1991. HCFA was required to act on a deferral no later than July 29, 1991 and to send us a notice explaining the deferral of our claim within 15 days thereafter. HCFA's action was two days late, and no deferral letter was received by the State until two days after we requested it on August 14,(sic) 1992, well beyond the 15-day period.

When we contacted HCFA to question whether a referral notice was forthcoming, officials there took two days to locate the letter, which was then faxed to us on August 17. However, HCFA maintained that the August 4 letter was mailed, despite the fact that I didn't get it and none of the people who were copied on the letter, including Director Kilstein, received a copy of it.

I raise this issue for two reasons. First, it raises the question that the State may be entitled to receive immediately the \$412 million claimed while the review of our State Plan amendment proceeds. The second reason for raising it is that it is an example of HCFA breaching its own regulations in terms of not processing that in a timely manner.

The third thing that has occurred is that on October 1 we received a grant award from HCFA that included the full quarterly allocation for disproportionate share payments for State and county facilities. Receiving this grant award is encouraging and suggests that HCFA anticipates our entitlement to receive at a minimum, the Federal reimbursement from October 1, 1991, under the provisions of the new Federal law.

The fact that we've now submitted a formal State Plan amendment; the fact that we've now received on October 1, the grant award which is based on allowable Federal reimbursement from October 1, 1991; the fact that we have a favorable ruling by the Federal Department of Appeals Board in the California case, I think bodes well for New Jersey's case.

Now we've got to wait for HCFA to approve or disapprove -- in whole or in part -- our State Plan amendment. We believe our claim is valid and our State Plan amendment is approvable. When we know what HCFA's decision is, we will then be able to plan whatever future actions might be needed. If they reject the State Plan amendment, we can, and intend to, exercise our appeal rights.

In addition, we've written again to the New Jersey congressional delegation asking their assistance in urging HCFA to approve the State Plan.

And that brings me to one of the issues that you were interested in, Mr. Chairman, which is the allegation, I think as you put it, contained in the letter from Mr. Toby that we had not addressed all of their concerns. I want you to know that the letter that Bill Toby, the Acting Administrator of HCFA in Washington, D.C. sent to the congressional delegation was prompted by the fact that, in May, the Governor had asked our congressional delegation to write HCFA urging them to support our claim. Mr. Toby was writing in response to that. In essence, what Mr. Toby requests, that we provide-- What he requested or what he said was that he had not yet received the formal submission of the State Plan amendment. And, as Director Kilstein explained, I think, both in the letter and in previous testimony, we have been working with the Federal government up until this last week, on the 19th, trying to negotiate approval on an informal basis, but we are now in a formal mode.

I believe that we've met all of the technical requirements in our responses to HCFA, and I believe that we've been responsible in meeting our obligations in this regard. We now await the Federal government to approve this State Plan amendment.

That's the essence of my statement, Mr. Chairman.  
Thank you.

SENATOR LaROSSA: Thank you, Commissioner.

Do you have copies of that for us?

COMMISSIONER GIBBS: Yes. I thought they had been distributed beforehand.

SENATOR LaROSSA: I'm sure we'll have some correspondence or questions on that, but does anyone have any specific questions for the Commissioner on his statement?  
(negative response)

If I may, I'd like to turn to the chart that I had requested, and I guess Commissioner Kilstein and-- I just would like to get some clarification on something, having read the volume of information that we're dealing with, and I'm not sure that a doctoral dissertation would have been any less complicated or any less voluminous. On the chart, if you can verify or clarify something for me: Going to OBRA '88-- Oh, let me back up. I just want to verify one other thing. I believe on the testimony you gave us last time, that OBRA '90 was passed -- passed Congress in November of 1990.  
(affirmative response) Okay, I just want to verify that. I know sometimes Congress, by the time it gets introduced and gets passed, there's a long lead time, so I just want to reconfirm that.

Going back to OBRA '87: Looking at the chart -- correct me if I'm wrong -- the FFP moneys going from, if you will, column two to column one, the 487 to the \$15 million, that in essence the differential is the total amount for all intents and purposes that is in dispute?

You know what chart I'm looking at, Saul? Is that where the 454 comes from? I'm sorry, I'm looking at--

COMMISSIONER GIBBS: The chart that we've supplied, in response to your question--

SENATOR LaROSSA: Yes, is this the basis of the dollar amount that is in dispute, is really what I'm saying?

COMMISSIONER GIBBS: The total of 974 and 487?

SENATOR LaROSSA: Actually the 487 because -- correct me if I'm wrong -- the 984 is what we-- Does that include something or doesn't include something?

S A U L M. K I L S T E I N: Just to clarify: The 984 refers to total Federal and State expenditures from July 1, '88 through December 31, '91. The 487 reflects the anticipated FFP -- Federal financial participation -- Federal matching funds for that same period. The total dollars would be for that inclusive period, but some of the numbers that are at variances-- There was a claim for some \$74 million submitted for the quarter ending September 30, '91, and a claim for approximately \$412 million submitted for the quarter ending December 31, '91. So, if you add those two together, you get the \$487 million figure.

SENATOR LaROSSA: Okay. All right. Now, going from -- and again, I apologize for belaboring this, but yet it's-- When you only hear it once or twice, you might need to hear it 10 times before it totally sinks in, in your own language. When OBRA '88 was enacted, and then we go to OBRA '90, was there, in your mind, a substantive change in what was achieving-- In other words, if, in fact, the application said-- Did it change the dollar amount? Did it change what you were able to apply for? Did it change the way you were able to-- What really was the substantive difference between OBRA '88 and OBRA '90?

MR. KILSTEIN: I'll take a high level stab at answering that, and then ask Roseann, perhaps, to fill in any technical points that I may overlook, or misstate.

OBRA '87 as we read it, did not allow us to distinguish between hospitals within a class. So we have State and county hospitals providing psychiatric services, and private hospitals providing psychiatric services. What OBRA '90 did was, it allowed us to disaggregate within a class of hospital and set up different types of disproportionate share payment methodologies for different classes of hospitals. Then, critical to our position, Congress specifically made that provision retroactive to OBRA '87, and advised states that, in essence, consider this provision to have been in effect as if it was enacted as part of OBRA '87.

So, what it did was, it allowed us for the first time, with clear congressional support, to put forward the State Plan amendment that we submitted in November of '91.

SENATOR LaROSSA: All right. So you're saying that there was a substantive change in terms of what OBRA '88 allowed as opposed to what OBRA '90 was allowing you to do.

MR. KILSTEIN: Yes.

SENATOR LaROSSA: Okay. Now, in that period of time-- That really answers the question. To your knowledge, were there any other states -- or any states, at all -- that were receiving any reimbursement comparable to OBRA '90, under OBRA '87?

What I'm saying is that if it allowed you to break out-- There's a very, very muddy scenario that we're getting. When OBRA '87 took effect, one of the things we mentioned before is that it codified for reimbursement things that New Jersey had been doing all along, and basically it said now you can get reimbursed for it. But, in fact, when OBRA '90 occurred, it basically allowed you to break it up, because part of the problem in doing it under OBRA '88 is that the State's share-- If the interpretation of OBRA '90 had been applied under OBRA '88, it would have made it very, very, expensive for the State to actually participate. If I can draw the analogy,

I'd use -- not in disputing it before, but it's to an extent-- If we have educational funding and educational funding goes up, in terms of what is provided from, say, the State, there's a local share which contributes to that. So it isn't just the matter that you're getting more from the State or the Federal government. It's that it's also requiring an additional spend up from the State. So, in fact, the question is that: Was there any impact of the possibility that if the State had applied under OBRA '88 to do some of this, that it would have been a significant spend up on the part of the State?

MR. KILSTEIN: We would have had to apply the same methodology to private psychiatric facilities and that would have required new State contributions that were not previously being made.

SENATOR LaROSSA: Okay. Any quantifiable guesses to what that could possibly have-- (negative response)

So, basically, it would not have been-- Even if you had interpreted the regulations as allowing you to make the claim at that time, is it conceivable that it probably would have been too expensive for the State to really do that and participate? Is that reasonable? (affirmative response)

Okay. So then, by OBRA '90 being enacted, it basically really created an economic climate that made it more feasible to do that, because now you can separate out the kinds of hospitals that you were applying to the formula, as it were.

That's the only clarification I wanted to make on my points.

Members of the Committee?

Assemblyman Bagger?

ASSEMBLYMAN BAGGER: Sure. Thank you, Mr. Chairman. I have just a couple of questions for the Commissioner, and then I'd like to head off in a little bit of a different direction.

In your statement, Commissioner, you reported the good news that for the quarter -- the most recent quarter -- on October 1, '92, HCFA had included the disproportionate share payments for county and State facilities in the State's reimbursement. Does that reflect the quarter ending September 30, or the quarter beginning October 1?

COMMISSIONER GIBBS: The quarter beginning October 1 -- its announcement of a grant award. The Feds do this every quarter for the next quarter.

ASSEMBLYMAN BAGGER: So that is carried through the end of our State's fiscal year. We will have received in our current Fiscal Year '93 budget three out of the four quarters for the disproportionate share for the State?

COMMISSIONER GIBBS: Well, we actually don't have any of the money in hand yet, which is important to note. But the significance of this is that in establishing the grant award levels, they are clearly signaling that we're going to get this. That's not a surprise. I've always felt that we were going to get this, but it is an indication -- and a favorable indication.

ASSEMBLYMAN BAGGER: The July 1, '92 grant award from HCFA did not include the disproportionate share?

MR. KILSTEIN: It did not.

ASSEMBLYMAN BAGGER: And when will the State actually receive the funds from the Federal government for the grant award announced October 1? What's the usual time lag on that?

COMMISSIONER GIBBS: Well, we file claims quarterly.

A N N C. K O H L E R: We'll be filing for the December quarter at the end of January.

ASSEMBLYMAN BAGGER: When will the funds reflected in this quarter for the grant awards from October 1-- Based on past experience, when will those funds actually be in the State Treasury?



COMMISSIONER GIBBS: Well, there are several ways to answer this. The first way to answer it is just follow your specific question, which is: We file in January and we would draw it down. When?

MS. KOHLER: Daily. We're drawing down daily now.

COMMISSIONER GIBBS: The other question is: When would we receive funds from previous quarters, and I would anticipate that that issue is related to the approval of the State Plan amendment. I mean, they've got now 90 days in which to approve the formally filed State Plan amendment. Assuming that they approve it, then we have claims which they have disallowed or deferred, and those would then be turned around to get the money.

ASSEMBLYMAN BAGGER: Let me step back just a little bit. In what form does HCFA pay the State for the Federal share on Medicaid?

MR. KILSTEIN: Let me, again, take a stab at this, and then ask Ann Kohler who's my Fiscal Officer to provide additional details.

You need to differentiate between drawing down the funds on a cash basis, and getting final Federal approval for a claim. What we have, in essence, is a cash advance with contingencies. The contingencies are: We spend it for eligible people in accordance with the approved State Plan, etc., etc. It is a very positive sign since they don't allow you to get the cash advance unless they think you have a real entitlement to the money. But the final determination on this claim as for all the others won't be until we file a claim known as a HCFA 64. The Federal government has 90 days to review that or request additional information, and the final determination on this quarter's expenditures is at least six to nine months off.

ASSEMBLYMAN BAGGER: So, the grant award from HCFA for October 1, '92 is the cash advance that you speak of?

MR. KILSTEIN: Correct.

ASSEMBLYMAN BAGGER: And the final action on the HCFA 64 form is what is six or nine months away, but never before has the grant award creating a cash advance to draw upon included the disproportionate share that we're talking about?

MR. KILSTEIN: Assemblyman, once before, the quarter beginning January 1, '92, the first quarter after we submitted the State Plan amendment contained an advance of the funds suggesting at that time HCFA believed that this was approvable for current services, at least.

ASSEMBLYMAN BAGGER: So the cash advance for this category of reimbursement was made on 1/1/92 and then again on 10/1/92, and not the quarters in between?

MR. KILSTEIN: And missing two quarters in between.

ASSEMBLYMAN BAGGER: The State budget that we're in now, Fiscal Year '93, anticipates receiving four quarters of the disproportionate shares of funding. Is that right? (affirmative response)

And just one other question, Commissioner. You mentioned that the State Plan amendment 88-29C had been formally submitted to HCFA on October 19, which was yesterday, I understand, after the usual period of negotiation over the terms of the draft State Plan amendment. What was it, in particular, that led to the filing of the final State Plan amendment in this time frame? Was there any news from HCFA or developments in the negotiations that led to filing it now?

COMMISSIONER GIBBS: No, but all of the issues that surface during the informal process, during the negotiating process, had been resolved except the issue of the effective date and so it was time to get on. I mean, it's either up or down. There's nothing to be gained by furthering the process of the informal negotiations. They have taken a very rigid position on this. We have taken an equally rigid and more meritorious position, and so it's time to file.

ASSEMBLYMAN BAGGER: Is it fair to say that the whole area of disagreement with HCFA over the State Plan amendment at this point is the effective date?

COMMISSIONER GIBBS: Yes.

ASSEMBLYMAN BAGGER: And I take it that the State Plan amendment that was submitted yesterday had 7/1/88?

COMMISSIONER GIBBS: Yes, it did.

ASSEMBLYMAN BAGGER: I'm going to take this opportunity, if I may, Mr. Chairman, to head down a new -- or at least start down a new avenue that perhaps some of my colleagues will follow me down.

SENATOR LaROSSA: Rich, I just want clarification on one point. Commissioner, I know you didn't say this, but I-- Just an interpretation: Has the Federal uncoupled the dropping of the retroactive from the moneys?

COMMISSIONER GIBBS: No, we have not gotten any notification from them that they have. Now that they have our State Plan amendment, they could approve it as we have submitted it, making it effective on July 1, 1988, or they could approve it in part, that is, picking a different date on which it would be effective and disapproving the retroactive piece. So they have an opportunity to uncouple it if they choose to do that, and if they do and grant it to us prospectively which is what I think they will do, then we would pursue the appeal of the retroactive piece.

ASSEMBLYMAN BAGGER: Mr. Chairman, I think Senator Bennett wanted to follow up, also.

SENATOR BENNETT: Good afternoon. If I could just follow up on the Assemblyman's questions before we go into that different direction because I'd really like to get something -- a rather confusing thought -- straight in my head, if I could.

Commissioner, on October 1, we received this grant award. Are we talking about that-- Is it ballpark, around \$42 million that comes in a quarter?

COMMISSIONER GIBBS: Roughly.

SENATOR BENNETT: Okay.

I'm confused as to-- I thought, in my mind, that that had already been approved.

COMMISSIONER GIBBS: They have technically been approved. It's always been approvable--

SENATOR BENNETT: Okay.

COMMISSIONER GIBBS: --but they've never actually approved that. We don't have an approved State Plan.

SENATOR BENNETT: Well, I thought the only thing we had to do was to get our plan in, basically.

COMMISSIONER GIBBS: During the negotiation process, they addressed a number of technical issues, and said you had to solve these technical issues. Saul and other members of staff can talk about what all they were, but what they also tried to do is to get us to change our State Plan amendment so that when we filed it formally, we would drop our request for the July 1, '88 effective date. And they said all kinds of things about what they approve if we would only drop that July 1, 1988 date. It's always been, in my judgment and I think in the Federal judgment, that there's never been much of a question about this prospective stuff.

SENATOR BENNETT: Right. Okay.

So, was the difference, then, that when we received this latest notice that, notwithstanding the fact that the State continued to make reference to the retroactive payments, we now got this grant award? Or, did we drop our reference to the retroactive payments?

COMMISSIONER GIBBS: No, we have not.

SENATOR BENNETT: Okay. All right.

So, notwithstanding that, then that's the difference? We still are maintaining our reference in our Amendment Plan to the retroactive?

COMMISSIONER GIBBS: We are.

SENATOR BENNETT: But, they now have given us that grant for the quarter notwithstanding that. Is that the difference as to what we used to be dealing with?

COMMISSIONER GIBBS: Essentially, yes.

SENATOR BENNETT: And the fact that we had received a cash -- I mean, not a cash, strike that -- a grant award in January of this year, did those dollars-- Have they been received in hand yet? I got two yeses, and a no. (laughter)

MR. KILSTEIN: On a cash basis, they were part of a grant award which could be drawn down as we made these expenditures, but the claim for the quarter ending March 31, '92 has been filed within the past two weeks. So, HCFA has not acted on that claim and certified that those funds are approved for Federal matching.

SENATOR BENNETT: I wish I could make this simple, at least to my mind. (laughter)

COMMISSIONER GIBBS: I wish we could explain it more simply.

SENATOR BENNETT: The only thing I'm sure of is there are four quarters in a year. (laughter)

So, let me try again. In January of this year, 1992, we received a grant award from HCFA for the full quarterly allotment for disproportionate share payments. Yes or no?

MR. KILSTEIN: Yes, Senator.

SENATOR BENNETT: And then, two more quarters came along, and we did not get it.

MR. KILSTEIN: They were explicitly eliminated from our requested grant award.

SENATOR BENNETT: Okay. Now we have the October 1, or our last quarter, and we've got a grant award again.

MR. KILSTEIN: Correct.

SENATOR BENNETT: Okay, so two out of four. They're in this calendar year. Now, the cash as a result-- The cash that you receive for the disproportionate share payments,

okay? The cash. We won't get October from what you said to the Assemblyman, my understanding is, until somewhere like six to nine months delay? Well, my question is, did we get any cash for the money on January?

R O S E A N N K R I E G E R: I'll take that.

SENATOR BENNETT: Okay.

MS. KRIEGER: Basically, the cash drawdown process is a daily draw. It's analogous to if HCFA made a deposit in the State of New Jersey's bank account and made funds available for our use during the quarter, and each day as we are spending the dollars, we draw the money down and deposit it into the general State fund in New Jersey.

The funds for the January '92 quarter were made available to us. We did, in fact, on a daily basis, draw the money down and did deposit the funds into the New Jersey State Treasury. However, that does not mean that we can keep those funds until the adjudication of the HCFA 64 that Saul just mentioned.

They could come back and say, "Give it all back, because we have disallowed your claim." The same is true for the October '92 quarter. The funds have been made available by HCFA in our bank account which we intend to draw down on a daily basis and deposit those funds into our bank account into New Jersey. We will await adjudication of our HCFA 64 for the quarter ending December '92, to see if at that point we have a resolution of this entire issue. At that point, we will know whether we can keep it forever, or we have to give it back pending the resolution of the appeal.

SENATOR BENNETT: Thank you.

Now, the two quarters in between that we did not get the money deposited in the bank to be able to draw down, did we operate our program differently?

MS. KRIEGER: No, we did not.

SENATOR BENNETT: Where did the money come to make up for the money that was not deposited that we drew down -- which we couldn't draw down because we didn't have it? Did we change operations?

MS. KRIEGER: No, we did not.

SENATOR BENNETT: Where did the money come from?

MS. KRIEGER: The claims that we are making to the Federal government for Federal financial participation in those claims, the expenditures of the dollars by the State of New Jersey, have always been made from the general State fund as a normal part of our appropriations process. The State Plan amendment, and what we're doing here, now takes a cost that has always been State appropriated dollars and brings in Federal financial participation for those dollars.

SENATOR BENNETT: At the end of this calendar year, will we be two quarters ahead or two quarters in the hole?

MR. KILSTEIN: While Roseann is considering her answer-- We will file Federal claims for all four quarters based on our State Plan amendment, and I think we would need to defer to Treasury as to how they establish a receivable for the anticipated Federal funds. I think -- and Roseann can correct me -- on an appropriations basis, the full anticipated costs of our psychiatric facilities is a direct appropriation and the Federal reimbursements that might be received for Medicaid eligibles or for disproportionate share payments is an anticipated revenue.

SENATOR BENNETT: Is that two in the hole? You see what I don't understand? Let me reword the question, because in fairness, I mean-- To this portion, this is so very important, not only to get the answer, but to be able to understand the answer. I now completely understand what you're talking about as to what the grant award is, and that-- I accept that and completely understand it. At some point in time when you plan what you're going to do for the year, we are

planning -- and I'm assuming we'll get to the discussion later -- that we planned on getting those moneys for the entire year. At least at some point in time in the budgetary process we anticipated we would have those moneys being deposited all four quarters. But we'll get to that part later.

I don't want to get to the specifics as to that. What I want to get to are the specifics of the process and what is in reality happening, not related to what we anticipated. My problem with that is that if we continue operating the same way, which I believe we've all agreed that we are, and we receive moneys two out of the four times. We applied all four times, but two out of the four times we received certain moneys to draw down on, and two times we didn't. Therefore, we took it out of our pot of moneys that we have. Are we two quarters ahead in Federal dollars because we planned on the entire amount for that four quarter program, or are we two quarters behind because we didn't get the Federal dollars? I don't know how else to ask that question.

COMMISSIONER GIBBS: I do understand your question. I have a hard time answering it. There is somebody here from Treasury who might do a better job of answering this. Charlene Holzbaur from OMB is here, if the Chair would permit her to respond?

SENATOR BENNETT: But do they do-- They don't do your budget. I mean, this is your budget?

COMMISSIONER GIBBS: Yes, it is my budget. But, let me just say that what I have to operate the State hospitals and what I have in my budget to pay county hospitals -- psychiatric hospitals -- is from an appropriation from the State, of State general funds, and the State, in turn, is filing a claim for 50 percent reimbursement of those expenditures. From an operations point of view, this claiming procedure has no impact on our budget.

SENATOR BENNETT: I understand that. Okay.



COMMISSIONER GIBBS: It's a revenue issue.

SENATOR BENNETT: All right. I understand that. So, if you need \$100 million -- we'll use little figures because I get confused when we use real ones-- (laughter) If you need \$100 million, you'll budget for the \$100 million of expenditures, and then if we get \$50 million back from the Feds that will go back to Treasury but it won't impact on your daily operation. So, then the question is, Treasury then, needs to tell me-- Are they, at this point, based on what we're talking about in figures, \$50 million dollars ahead of the game, or \$50 million in the hole on revenues?

COMMISSIONER GIBBS: Basically, I'm saying -- if the Chair would permit -- Charlene Holzbaur, from OMB, might give a better answer than me.

ASSEMBLYMAN KENNY: Mr. Chairman, before we go off into Assemblyman Bagger's line of questioning-- Is the Senator done with his line of questioning?

SENATOR BENNETT: Yes. I just wanted to be able to get it clarified.

ASSEMBLYMAN KENNY: Okay. I'd just to like to clarify this, too, before we go off.

Our present budget assumes \$140 million, prospectively for this year that we are going to receive this Federal reimbursement. So as a budgetary issue it's already in the budget -- the \$140 million.

We've been funding the psych hospitals for many years; the State of New Jersey has. It's this recent development over the last several years that we're trying to determine how much and to what extent the Federal government is going to give us reimbursement for moneys we are already funded. In this year's budget, we are assuming the \$140 million that we will receive. So, as was stated here, this is a revenue issue between us and the Federal government; not a funding issue. We have the obligation to fund the psychiatric hospitals, and we are doing so. We have been doing so for years.

What I find to be very good news today is that by receiving the fourth quarter grant award as a cash advance and having received it for the first quarter in January of 1992, that would seem to me to make the case for New Jersey that, in fact, on the substance and on the merits that the reimbursement has been recognized by the Federal government. The nature of the reimbursement has been recognized; that is, the disproportionate payments to the psychiatric hospitals. The Federal government recognized that on its merits when they gave us the cash allowance in advance in January '92, and again in the fourth quarter.

Is that not correct, Commissioner?

COMMISSIONER GIBBS: Yes.

ASSEMBLYMAN KENNY: And prospectively, having recognized this cash advance, the merits of the disproportionate payment have been, in effect, verified or confirmed by the Federal government. So, when we turn then to the issue of the \$400-plus million, which is the reimbursement back to July of 1988, the only issue, to my knowledge, is the notice issue. I mean, so the whole-- I mean, it's not a merit issue. The merits are clearly there because they've already recognized it on two occasions, and so it is strictly the notice issue which, I understand, is the legal issue that will be argued in the appeals process.

Now, when you take the grant award that we received twice, the question that comes to my mind is, "What sort of arbitrary conduct is it on the part of the Federal government that they give it to us for the first quarter and the fourth quarter, but not the second and the third?" Have you had any discussions as to why they would give it to us at the first and the fourth, and not the second and the third?

COMMISSIONER GIBBS: No, I haven't, and I cannot always explain the actions of the Federal government.

ASSEMBLYMAN KENNY: Okay.

So, they give us the \$40-some million on two occasions, but they withhold it for the second and third quarter.

SENATOR LaROSSA: Bernie?

ASSEMBLYMAN KENNY: Yes?

SENATOR LaROSSA: I was going to ask almost the exact same question. I just want to, if I may--

ASSEMBLYMAN KENNY: Go ahead. Sure.

SENATOR LaROSSA: So that, when the Federal government said that the last quarter of '91 -- they basically said we were eligible-- Effectively, at the \$42 million a quarter, they said you're okay on one, skip two. Now we're okay on the fourth quarter, and we're in, if you will, the fifth quarter, now that theoretically we should be eligible for. So, in essence, if nothing has changed, then, the total moneys, prospectively, should be at the end of this quarter, up to \$210 million, except that, for some reason which is unknown to any of us -- unless somebody in this room does know it -- that there have been two quarters in there that have for some reason, just vanished. At this point, we just don't know why it hasn't been accepted, or do we?

ASSEMBLYMAN KENNY: Well, I asked the question and no one there has volunteered an answer as to why we didn't get it the second and third quarter. But, I think it's important to understand the fact that we have been funding these hospitals for many years and we've been doing it out of our State revenue; that there's no issue as to the funding. The real issue now is to what extent, based on the Federal legislation, we're going to be reimbursed for past years -- since 1988 -- and to what extent we're going to be getting timely payments as we go along in the future.

The California decision which you referred to, that goes to the notice issue, right? So that would be to our advantage when we argue on the retroactive payments back to 1988.

Before we go back to the Chair and Mr. Bagger: Last spring, the Speaker and the Senate President went to Washington and came back with a proposal that we would get, as I recall, a quarter's payment. Is that correct?

COMMISSIONER GIBBS: As I recall, what the Federal government had said to them was that they were prepared to approve this prospectively, and they were prepared to pay the last quarter of calendar '91 -- from October 1, 1991 to December 31, if we would drop the claim for retroactivity before that. What the Federal officials did, was try to make it sound good by saying, "Well, look, You guys only filed your public notice on December 28 -- and technically, we don't have to give it to you before December 28 -- but we'll give you this wonderful deal if you'll only withdraw your request for going back to 1988." I think that was the nature of the proposal. That's the kind of thing that was communicated to us.

ASSEMBLYMAN KENNY: All right. And it was during that period of time, which was last spring, the second and third quarters, that we did not receive payment from the Federal government. Isn't that correct? When that trip was made to Washington, that was during the same time when they were withholding payments. Isn't that correct? Everybody is nodding their head affirmatively.

COMMISSIONER GIBBS: Yes.

ASSEMBLYMAN KENNY: So, in fact, and I think you sort of answered this question to Senator Bennett, as we sit here today, no strings are attached to receiving this cash allowance. We still have our claim in for the retroactive payments.

COMMISSIONER GIBBS: Yes. We formally filed the Plan amendment with an effective date of July 1, 1988.

ASSEMBLYMAN KENNY: When the Speaker and the Senate President went to Washington, did they consult with you before going and ask for your expertise or anybody from your Department as to that discussion that was going to take place?

COMMISSIONER GIBBS: No, I didn't have any prior discussions.

ASSEMBLYMAN KENNY: Okay. I don't think it's really speculative, but I would just say it's clear to me that the whole issue here is the retroactive amount of money that's an issue and that the Federal government has taken this inconsistent position because -- as evidenced in their response to the Speaker and the Senate President -- they're trying to get out of the obligation on the retroactive payments: to withhold certain quarters when they feel like it, then they give it; then they don't. That's what, in answer to the Chair's question, as to why they did not give the second and third quarter: because they don't want to establish a precedent for recognizing the merits of the reimbursement claim which is that we are entitled to the dollars for reimbursement. They don't want to establish that pattern, so they withhold it for the second and third quarters. Now they give it to us for the fourth quarter, but we still don't have a firm commitment to those dollars at this point in time.

So, the whole thing-- I feel like the State of New Jersey's being held hostage by the Federal government, until we relinquish the claim to the \$400-some million. I think that's really, really what's going on. That's why, I believe, that this Committee has to just line up behind the State and make the case for the reimbursement of the retroactive payments back to July of 1988, which, except for the notice issue, we're clearly entitled to. I think we can rest on the California decision that we have a good case to be made.

So, I commend the Commissioner for the work the Department has done in this area, and I hope we just continue to proceed with the good news.

Thank you.

ASSEMBLYWOMAN DERMAN: Mr. Chairman, I just have a few questions, if I may?

Well, it's certainly good news with respect to the January payment and the last quarter payment, but I assume it would be better news if those were payments attributable to the quarters January 1, '90 and January 1, '89. Is that not true?

COMMISSIONER GIBBS: Oh, sure.

ASSEMBLYWOMAN DERMAN: But they're not.

COMMISSIONER GIBBS: No.

ASSEMBLYWOMAN DERMAN: So, clearly, they're distinguishable -- that we're talking about current payments or prospective payments, rather than retroactive payments. So, we really still have no sense of how HCFA will react with respect to our retroactive payments.

COMMISSIONER GIBBS: We don't know how they're going to formally respond. But everything they've done in the informal process has clearly indicated that they do not wish to make these retroactive payments. I think you can predict what their response is going to be to the State Plan amendment.

ASSEMBLYWOMAN DERMAN: I still have a little question with respect to the time lag -- when we actually get the money in our bank account, so to speak. How long does that really take, when we can make cash drawdowns on a daily basis, from the time the claim for the quarter is approved till we actually have access to the cash?

COMMISSIONER GIBBS: You have access to the cash at your own risk, in effect, right away, but you file your quarterly claims, sort of, after the fact; after the end of the quarter. Should they disallow it, you have been spending money which they say you cannot spend, so, you owe the Federal government. You don't necessarily have to write them a check. What they do is, they just reduce the next quarterly grant awards on which you do draw your cash by the amount that they have disallowed. (confers with associates) Isn't that essentially the process they follow? (affirmative response)

So on a cash basis, starting October 1, the money is available to us. They have not yet approved the State Plan. If they disapprove the State Plan, they can come back and say, "Well, we made it available to you on a cash basis, but we've not approved this, so you have to give it back. Next quarter we'll reduce your cash -- what you can draw on cash -- on all your other programs, by the amount we now disallow."

ASSEMBLYWOMAN DERMAN: So clearly, when you receive a grant award, then there is comfort in drawing down the money?

COMMISSIONER GIBBS: I'm sorry, would you repeat the question?

ASSEMBLYWOMAN DERMAN: The grant award, does that then signal that you can comfortably draw down the money?

COMMISSIONER GIBBS: Not always, but a pretty good signal that you can draw down the money. You can clearly draw down the money. Whether or not you can retain it is subject to the claiming process.

ASSEMBLYWOMAN DERMAN: But there's more comfort-- Well, can you draw down if you don't get a grant award?

COMMISSIONER GIBBS: No.

ASSEMBLYWOMAN DERMAN: Okay. But even with a grant award you draw down at your own risk.

COMMISSIONER GIBBS: Sure.

ASSEMBLYWOMAN DERMAN: Okay. One other question I have, Commissioner, with respect to Mr. Toby's letter to which you referred. He indicates in that August 6 letter that there's still additional information which had been requested and was never proffered by your Department. I assume that that information has been provided?

COMMISSIONER GIBBS: Yes. He was giving a response in that letter that's basically oriented around the formal process. There were a number of issues that were discussed between the State and the Federal government during the informal process and the draft documents for the State Plan,

and there were questions. We have provided all of that information, and we're doing so on a timely basis in an informal way.

I think he's technically correct in the letter when he said, you know, we don't have a formal Plan Amendment in front of us on which to react. He now does. We've met all the technical requirements. The only difference between what they wanted in the informal process, and what we wanted, goes to the effective date, and that goes to the issue of public notice. There, we disagree, and we have filed the formal Plan Amendment, now.

MR. KILSTEIN: Assemblywoman, I would add that in addition to the Commissioner's comments, the letter was technically inaccurate, because as a matter of record, the Department had submitted to the New York region a response to all outstanding questions on July 20. As of the August 6 response to the congressional delegation, the correspondence from Mr. Toby did not reflect that fact. So, as a matter of whose court the ball was in, in fact, it was back in Mr. Toby's court. As a matter of technicality, the Commissioner's statement is the other part of this response, which is they will provide a formal response -- which is what the congressional delegation requested -- upon receipt of a formal, final State Plan amendment request.

ASSEMBLYWOMAN DERMAN: Mr. Leary responded on December 28, 1990, looking for additional information that apparently he still didn't have March 10, 1992. Apparently all of that information has been submitted?

MR. KILSTEIN: That's correct.

ASSEMBLYWOMAN DERMAN: Thank you.

SENATOR LaROSSA: Assemblyman Bagger.

ASSEMBLYMAN BAGGER: Thank you, Mr. Chairman.

This discussion is really very helpful to all of us, and as I move in a new direction, let met start by trying to



summarize where we've just been, and you can let me know if I'm off the track.

I think we, around this table, all agree that the current entitlement of the State to the disproportionate share reimbursement for the State and county facilities is not legally in question. The State is entitled to it. There's really no question the State's been entitled to it from the Federal government's perspective since October 1, 1991, and that really on the retroactive application, the only issue in dispute with the Federal government is the notice question and the retroactivity of the State Plan amendment. In a quick and dirty way, is that a fair statement?

COMMISSIONER GIBBS: Yes, it is.

ASSEMBLYMAN BAGGER: It seems to me, given that set of facts, that the Federal government's failure to make the cash advance for the quarters beginning April 1, '92 and July 1, '92 is inexplicable. Do you have any explanation or has the Federal government ever given any explanation for their failure to pay those quarters' cash advances?

COMMISSIONER GIBBS: Well, no. I can surmise, and maybe Saul can, sometime in the spring, late February -- I'm not sure -- they deferred the first claim, and they may have decided that since they deferred that first claim that, therefore, they would not include funds for this program in the next quarter. That may be the explanation. I do not know that is a fact; I'm surmising.

MR. KILSTEIN: The Commissioner is exactly right. By the April 1 quarter, the Health Care Finance Administration had deferred a claim on this State Plan amendment, had issued a letter in the middle of March explaining its reasons for believing the State Plan amendment was not approvable, and that would, I think, explain the decision not to include it on the April 1 grant award.

With regard to the July 1 grant award, which is subsequent to the State providing ample legal analysis and justification for the State's position, I think -- and I am surmising and speculating -- that it became a negotiating tool where HCFA indicated that it believed its options were the total disapproval of our State Plan amendment for current and prior periods. The State was being vigorously pushed in the direction of relinquishing its demand for Federal matching funds back to 1988, and the heat was clearly turned up by a second success of rejection of our request on that grant award.

ASSEMBLYMAN BAGGER: I can say for a moment, partially what got us on this very informative tack we've been on for the last few minutes was my question that the State's Fiscal Year 1993 budget anticipates as a revenue, receiving four quarters of the disproportionate share funding. I believe that was the testimony before, that that is anticipated as a revenue. We've had two quarters, again, in this fiscal year. In the July 1 quarter there was no cash advance and in the October 1 quarter there was, which we all agree is very good news.

So, to sort of answer Senator's Bennett's question: On the revenue side, it looks now like we're one quarter in the hole. As Assemblyman Kenny pointed out, this is not an expenditure issue at all; it's just a revenue issue.

As I focus on revenues, perhaps in the first instance I should direct my questions to Ann Kohler as Assistant Director of the Department's Office of Budget and Fiscal Affairs. Ann, I'm interested in whether you or your office prepares for any purpose within the Department an estimate of the total Federal Medicaid reimbursement that the State will be receiving in any fiscal year?

MS. KOHLER: We prepare a report called the HCFA 25, which is filed quarterly with the Federal government. That includes a projection of all Title XIX Medicaid expenditures in the State regardless of where those costs are being incurred.

They include services that are outside of our Division, but are eligible for Medicaid funding.

ASSEMBLYMAN BAGGER: The HCFA 25 is quarterly report?

MS. KOHLER: Yes, it's a quarterly report. It provides the basis for HCFA to start advancing us -- to give us these grant awards.

I believe copies of some of those reports have been shared with the Committee.

ASSEMBLYMAN BAGGER: And when did the State first begin including the disproportionate share funding for county and State psych hospitals?

MS. KOHLER: November '91. That would be the November '91 submission certified the January '92 grant award.

ASSEMBLYMAN BAGGER: See, we're beginning to get this.

Are those HCFA 25 projections used for any internal State budgeting purposes?

MS. KOHLER: They're generally not used for State budgeting purposes because the State budget appropriates money differently. For example, the State and county psychiatric hospitals that we're discussing here, the State appropriation for them goes to the Department of Human Services, the Division of Mental Health and Hospitals, not to my division. So, we budget money differently.

ASSEMBLYMAN BAGGER: I can easily recognize how it would not be a necessarily helpful document for the expenditure side of the State budget. Is the HCFA 25 used in any way in connection with the revenue side of the State budget?

MS. KOHLER: I don't believe so. I'd really defer to Treasury on that, but I don't believe it is.

ASSEMBLYMAN BAGGER: Are there uses to which the HCFA 25 is put, other than submission to the Federal government?

MS. KOHLER: Sometimes we'll use it to respond to surveys -- you know, general type information. But it's not-- There are certain commonalities between preparing the 25 and

preparing our budget in that we use some of the same transactors, but that's the only time we use it.

ASSEMBLYMAN BAGGER: Do you play any role, or does your Office of Budget and Fiscal Affairs within the Department, play any role in developing estimates of Medicaid reimbursement to New Jersey that is then forwarded to the Commissioner or to OMB or Treasury, in connection with the revenue side of the State budget?

MS. KOHLER: Only if we have special projects like this where we've identified a potential source of revenue, then we would raise it up to the Commissioner as a potential way of bringing in more Federal dollars to the State. But we don't do revenue estimates.

ASSEMBLYMAN BAGGER: Did you ever do revenue estimates within your office in connection with the disproportionate share funding that we're discussing today?

MS. KOHLER: Those estimates are prepared by the Department. We worked with Roseann's office in the Department to do the estimates that we then included on HCFA 25.

ASSEMBLYMAN BAGGER: And did either you or Ms. Krieger develop an estimate at any time with the total amount of retroactive funding for disproportionate share that the State should be entitled to?

MS. KOHLER: We did estimates for each quarter that we later used to be the basis of our claim.

ASSEMBLYMAN BAGGER: And when did you do that work?

MS. KOHLER: In November '91.

ASSEMBLYMAN BAGGER: And you calculated what the State should be entitled to for the period beginning July 1 '88 through -- at that time -- November '91?

MS. KOHLER: Yes.

ASSEMBLYMAN BAGGER: And how did it come to be that you prepared that estimate? Was that an initiative of your office, or Ms. Krieger's area, or were you doing that at the request of the Director or Commissioner or anyone else?

MS. KOHLER: We were working on the project together, the two areas within the Department.

ASSEMBLYMAN BAGGER: Your area and the Cost Reimbursement area?

MS. KOHLER: Yes.

MR. KILSTEIN: Assemblyman, keep in mind that this was during the period of the active debate on the national level of what became Pub. Law 102-234, and we were watching the provisions and the opportunities still available under Federal law to move forward with this initiative. The State Plan amendment was submitted on November 22. The November 15 HCFA 25 was submitted within that same time frame. So the two activities had to move simultaneously. The claim for the quarter ending September 30 was filed in the beginning of December, and the claim for the remaining quarters from July 1, '88 through December 31, '91 was submitted preliminarily at the end of December. So these estimates would have had to be attendant to both the preparation of the 25 and the claims for the two quarters.

ASSEMBLYMAN BAGGER: Once the estimates were prepared in November '91, to whom, Ms. Kohler, did you present the estimates? Did that go to Director Kilstein?

MS. KOHLER: Yes, we shared them with the Director. We shared them with the Commissioner, and we prepared to include them on the Federal claim.

ASSEMBLYMAN BAGGER: This question goes to whoever's most capable of answering it.

Does the Department on an annual basis provide an estimate to Treasury or OMB on what the State should include as a ongoing revenue item for Medicaid reimbursement from the Federal government?

MS. KOHLER: We don't estimate revenues in our Department. The only time we estimate revenues is if we have some kind of new initiative where we think we could potentially

claim a Federal match for something that's currently all State funded.

ASSEMBLYMAN BAGGER: Such as what we're discussing today?

MS. KOHLER: Such as this. Right.

ASSEMBLYMAN BAGGER: Mr. Chairman, with your permission, I'll yield to Senator Bennett.

SENATOR LaROSSA: Okay. Senator.

SENATOR BENNETT: Thank you.

One question just on a backup: For the quarter ending on January 1, 1992 -- you may have already informed me, but now that I'm understanding it a little bit, the HCFA 64 document was filed when?

COMMISSIONER GIBBS: For the quarter beginning January 1. We refer to it, though, as the quarter ending March 31. The final claim, the HCFA 64, was submitted within the past two weeks.

SENATOR BENNETT: Isn't that an unusually longer period of time? I thought that they were submitted approximately three months following the end of the quarter.

MS. KOHLER: What we try and do initially is, we submit an interim report to the Federal government that includes most of our expenditures. To file your Federal report, we have to have various other reports. We do what we call a cost allocation plan where we charge to HCFA some portion of the State's operating expenses, and so we have to wait. It's like a trickle down thing. We have to wait until the Governor's plan is done and a little bit of his costs come over. And we have to wait till the Department's plan is done, and some of the Commissioner's costs come to us, and the county plans are done. So, it takes a long time before we have all of the administrative costs of the entire State separated out into all its various buckets so that we can file a final claim.

SENATOR BENNETT: Okay. It's just that when you testified the last time we were here-- I was under the impression that, generally, we submitted it three months approximately from the time that the quarter ended, because you would then get your expenses in. Then the Feds essentially had three months after you submitted it to review and tell us whether or not those cash advances were going to stay valid, or we were going to have a question with them.

MS. KOHLER: We try and get them in but sometimes, since we're so dependent upon the other agencies filing all their administrative cost allocation plans, we may be delayed.

SENATOR BENNETT: It just seems from three months to seven is a little slippage at a time that we're most anxious to get a determination as to whether or not there's validity in those claims -- especially in that grant that we hadn't gotten for two more quarters. That's why I was curious, but you've answered the question on that.

I understand that the estimates on this program -- and we're talking about this new revenue -- the retroactivity went to the Director and to the Commissioner. At some point in time did those estimates then go beyond the Commissioner to Treasury?

COMMISSIONER GIBBS: I'm sure they did.

SENATOR BENNETT: Well, from whom would they have gone?

COMMISSIONER GIBBS: They would have gone not directly from me, but from the Assistant Commissioner for Budget and Finance -- who at the time was Brian Newman, or someone in the Budget Office as a part of this operation. But I'm sure they went to the Treasury. I didn't directly provide them, but I know the Department did.

SENATOR BENNETT: Okay. Could we find out when they went, approximately, to Treasury on those estimates as to the work that had been prepared? That's on the disproportionate share?

COMMISSIONER GIBBS: Yes. We'll have to follow up. I don't have such document--

SENATOR BENNETT: That's okay. No, I understand you wouldn't have that at this moment, but if we could follow up as to from whom it came within the Department, and to whom it was directed. I think that document is not, in my recollection, part of what we have to date. Is that correct?

SENATOR LaROSSA: That's correct. Yes.

SENATOR BENNETT: Okay. We don't have that transferral document.

COMMISSIONER GIBBS: Nor do I know what form the document would take, actually. I mean it may have gone over as a part -- or been discussed as a part of the budget process in the fall of last year and be in the budget document. But I will follow up.

SENATOR BENNETT: Okay. At the time that those estimates had gotten to the Commissioner's Office, do you-- At some point in time, did you, as the Commissioner, become confident that those revenues were going to be revenues that would be received from the Federal government?

COMMISSIONER GIBBS: My own recollection of all this is that during 1991, as we dealt with the whole issue of disproportionate share, my earliest attentions were on the issue of acute care hospitals and the eventual tax program that was put into effect in order to capture Federal financial participation in the Uncompensated Care Trust Fund Program. Then following that, and that got to be quite involved with negotiations which I didn't participate in, but which I had to be kept abreast of with the Federal government--

Sometime in the fall of '91, and I don't know when, my attention was turned to the disproportionate share issue with State and county psychiatric hospitals. So, one of the first meetings I had on that subject was with the three people who are sitting with me at the table today, when they came to brief



me on the whole issue and took me through the Federal rules and the Federal regulations, the State Plan requirements and what the language said, and what the effective date could be in terms of July '88. So I gave them the go-ahead to pursue this with vigor. That occurred sometime before we actually filed in November, sometime in the fall, and I just don't know when -- September or October, I suppose, in the fall of '91. But, that's when I became involved, and I'm sure at that time that the estimates that you have before you were supplied to me. I can remember large dollar estimates being discussed in that room.

SENATOR BENNETT: Okay. But specifically, not the amount of the estimates that were worked on by your staff, but the issue as to whether or not you felt that those moneys would be-- When you felt it could be anticipated that those moneys would be received-- Not the amount of the moneys, but when you felt that the disproportionate share estimates that had been prepared by your staff, did you reach a time frame when you felt it was going to be comfortable that those moneys would come back?

COMMISSIONER GIBBS: No, I think at that time I was focused more on making sure that we started the process for filing of Federal claims and to get this as fast as possible. I don't think at those early meetings I had any sense of when that money would be received: whether we'd get it in a month, two months, six months, or eight months. I don't think I was focused on that. I was really focused on what do we have to do to go get this.

SENATOR BENNETT: Okay. At some point in time-- I believe there's a document in here that you communicated with Rodney Frelinghuysen and Harold Colburn, with respect to the submissions on the retroactive claim in December, and referred to it as, "testing the waters," and then went on to state that, "as expected, the claim was deferred by HCFA." Would it be

safe to assume that at that particular time, you were not confident that New Jersey would be receiving the funds in question?

COMMISSIONER GIBBS: No, no, no, it wouldn't because it's--

SENATOR BENNETT: You were confident that they were going to receive the funds, then?

COMMISSIONER GIBBS: Well, the issue-- The Feds frequently defer something while they ask questions. To me, deferral doesn't mean that you're not going to get it. It means that they've got a number of questions. They expect you to answer those questions and provide additional information. So, the deferral that came in the early part of '92 wasn't a surprise to me, and didn't shake my confidence in this.

When the disallowance--

SENATOR BENNETT: When did you become confident? I'm still trying to zero in on that. If that didn't shake your confidence, when did you as Commissioner become confident that New Jersey would, in fact, receive this money? When did you become confident of that fact?

COMMISSIONER GIBBS: After several meetings with these folks, learning about what the Federal rules require, what the specific language was, I, then, became confident that we had a very good basis for getting this back to July 1 of 1988.

SENATOR BENNETT: Could you tell me when that was?

COMMISSIONER GIBBS: No, I could not tell you exactly when that was -- sometime in the late fall of last year, I guess.

SENATOR BENNETT: And when you became confident of that fact, did you communicate that confidence to the Treasury or to the Governor?

COMMISSIONER GIBBS: I never had a conversation with the Governor about this subject at all. One of the things I did early on, when we filed the claims, was to alert the

Treasury that, in fact, we were filing these claims, and to give them an idea of what the size was both prospectively and retroactively. Then, I guess, I had another discussion with Treasury during the budget process when the issue again came up of what the status of those claims were. And, yes, I did express confidence.

SENATOR BENNETT: That was in the process, but-- You say that you didn't directly discuss this with the Governor. Do you know who recommended to the Governor that these moneys be included?

COMMISSIONER GIBBS: I do not know.

SENATOR BENNETT: When did you become aware that those recommendations of the moneys were included in the budget?

COMMISSIONER GIBBS: When the budget came out.

SENATOR BENNETT: Prior to that time you did not know that.

COMMISSIONER GIBBS: No, I did not.

You have to understand that what most agency heads discuss with Treasury-- I knew a lot of things that were in my budget before it came out-- But what agency heads most always discuss with the OMB Director is, "What am I going to be allowed to spend?" So, I had no idea about what revenue estimates were in the budget till it came out.

SENATOR BENNETT: Commissioner, what I'm trying to find out, though, is-- The people sitting in front of us today are recognized by everyone in this room -- and perhaps everyone in the State -- as the experts when it comes to disproportionate share funding in the State, and if there's going to be an estimate of revenues that is going to be determined by a budget -- that document to be contained in it is going to be included in the State of New Jersey's budget one would suspect -- and perhaps I'm wrong to suspect that the experts that are knowledgeable, and have the information with respect to that disproportionate share, would relay and get

that information at some point in time to someone that would then have it included in the budget document.

I'm trying to find out who that person or persons were. If it wasn't any of the four of you, that's fine. We'll then have to ask Treasury where it came from. But that's really what I'm trying to find out. You've made it clear that it, basically, wasn't you. I'm just trying to find out if it was anybody of the four people that were there, on the estimates as to the degree of confidentiality there was, as to having those moneys be included in the budget prior to the budget document being submitted publicly. That's what I'm looking for the answers for.

COMMISSIONER GIBBS: Well, I understand what you're looking for.

SENATOR BENNETT: And, if it's not any of you four, that's fine. I mean, I'll accept that, but then I'll ask someone else who it was.

COMMISSIONER GIBBS: Well, I mean, Treasury got the numbers, I'm sure, from us, in some form, someplace. Whatever form number that was, or whether it was in a budget submission that came out of our Budget Office, or whether it was just based on the discussions that we had about this, they got the numbers from us. I don't think Treasury went around and invented any numbers anywhere.

SENATOR BENNETT: But they could not possibly have given any editorial comments to it without input from you, because you're the only people in the State of New Jersey that would know, probably, even what disproportionate share means, much less how it functions. (laughter)

COMMISSIONER GIBBS: And there are degrees in expertise, right? And the three most expert people are here sitting next to me. I can tell you that I had a conversation with OMB Director Keevey and, at one stage, with Treasurer Crane about this and about what's the status of the filing, and do you think this is a good claim.

We had just been through the very successful experience of the disproportionate share program for acute care hospitals so, I mean, this was something that was on our mind at all times.

SENATOR BENNETT: Could you give a time frame to when those discussions were held with--

COMMISSIONER GIBBS: In the late fall. See, I don't keep meeting notes, but, in the late fall, around the time we were filing the claims, which is also the same time that the budget's being put together.

SENATOR BENNETT: Did you ever send over-- You, at some point, submit your proposed budget to OMB and the Governor?

COMMISSIONER GIBBS: Yes.

SENATOR BENNETT: Okay. And at what time frame is that submitted?

COMMISSIONER GIBBS: Well, it goes over in pieces, starting in September and all the way up till December. There's a lot of preliminary pieces of the budget that get put together that deal with current services. Then you work on a lot of changes to current services between then and December. I'm sure documents went over from our Budget Office to OMB throughout the period of September to December.

SENATOR BENNETT: And if there are estimates-- While I understand that, normally, revenues are not projected within the Department except if it's a new program or something exceptional, based on what you've been saying. At some point in time then, would this qualify as information that would have been sent over from your office with respect to the budget documents?

COMMISSIONER GIBBS: Well, it's certainly discussed in the budget context. I just can't tell you what documents got submitted over there.

I'm not evading your question. Am I trying to answer firsthand? No.

SENATOR BENNETT: No, I know that. I certainly don't mean to infer that you are. I mean, there are a lot of papers that go back and forth, but there's a difference between document submission and conversations. That's very important to me. You talked about conversations with the Treasurer and conversations with OMB, but I'm most curious as to the documentation of it.

In late fall, according to what Ms. Kohler says, my understanding was that the estimates were done sometime in November; that they were prepared between the two divisions.

COMMISSIONER GIBBS: Right.

SENATOR BENNETT: So that we have to be talking subsequent to November, or obviously subsequent to them doing the work.

COMMISSIONER GIBBS: Yes, I'm sure.

SENATOR BENNETT: And at some time prior to final documentation being viewed by OMB, so one would suspect from late November to the first of January as the time frame that we're looking at, I would suspect. And, you know, if you'll be able to share that documentation with us--

COMMISSIONER GIBBS: I will do that.

SENATOR BENNETT: Did you give your opinion, and if it was in writing, if you could make it available; if it's not in writing, I'd just like to know when you may have given your editorial feeling, based on the briefings of your staff people of the viability of securing these funds in the next fiscal year?

COMMISSIONER GIBBS: I don't recall ever doing it in writing at all. I do recall having conversations about that. I just talked about those a minute ago, and I would say they were in late fall. You're probably right to say, though, they probably were after November and before January. But I don't believe I did anything in writing.

SENATOR BENNETT: Okay. I guess we'll have to ask Treasury if they would anticipate sums of moneys based on just verbal representations and editorial comments that way, but that's really not a question to ask you.

I'll give somebody else a chance.

SENATOR LaROSSA: Harriet?

ASSEMBLYWOMAN DERMAN: Okay. I want to go back to your meeting when you were briefed by your staff. At that time, did they express any caveats to you about their concerns with respect to ever getting this money from the Federal government?

COMMISSIONER GIBBS: No. I mean, they took me through an educational process. One of my questions was, "Well, tell me why you think it's retroactive to July 1," and they went through all of that, and it was the expertise that they showed in all of that that gave me my confidence.

ASSEMBLYWOMAN DERMAN: Perhaps I should ask them directly.

Ms. Kohler, when you were briefing the Commissioner, did you express at all, any concerns? Particularly, it's very clear in testimony here, that the Federal government, through its agency -- HCFA -- had one goal in mind, and that was to spend as little as possible and provide as little as possible to the State, notwithstanding the mandate of Congress, compared to what we, as a legitimate State providing these services, were trying to do; that there was some tension and that perhaps we would not be able to receive all that we would try to receive.

MS. KOHLER: Well, we were confident that our claim is supportable. I believe we're still confident. There are times that HCFA doesn't want to give us the money, but they have to.

ASSEMBLYWOMAN DERMAN: Ms. Krieger, how about you?

Please don't make me repeat that question, because I can't. (laughter)

MS. KRIEGER: I would pretty much agree with what Ann said, that at the point in time -- in the fall -- when we did brief the Commissioner and we provided our estimates of what we thought the claim could be, we felt as though we had a good claim that we could substantiate, and we felt that we should file our claim and submit our State Plan amendment.

ASSEMBLYWOMAN DERMAN: Ms. Kohler, were you surprised to see it in the Governor's budget in January 28, 1992?

MS. KOHLER: Again, I don't do revenue estimates, so what I expected to see in the budget was expenditure information.

ASSEMBLYWOMAN DERMAN: But, were you surprised to see that this item actually was an item--

MS. KOHLER: I did not know it was going to be in the budget.

ASSEMBLYWOMAN DERMAN: You did not know it was going to be in the budget?

MS. KOHLER: No.

ASSEMBLYWOMAN DERMAN: If you had been asked, would you have said that it was a proper source of revenue?

MS. KOHLER: I really am not familiar enough with how they estimate revenues to make a statement about that.

ASSEMBLYWOMAN DERMAN: Ms. Krieger, were you surprised to find that it was in the budget?

MS. KRIEGER: I don't normally get involved, at all, in the budget process. My function is cost reimbursement and rate setting, and it is not within my function to refute the budget documents or get involved at all in either the budgeting of expenditure data or revenue data.

ASSEMBLYWOMAN DERMAN: Ms. Krieger, in your previous tenure and here, have you ever been the source -- and I use that in terms of information -- for an item that did end up in the State budget in prior years?



MS. KOHLER: Yes, I worked on the disproportionate share adjustment for acute care hospitals, the Uncompensated Care change. I believe the budget has \$340 million -- \$330 million. So a year before, I had worked on that project.

ASSEMBLYWOMAN DERMAN: Ms. Krieger, how about you?

MS. KRIEGER: Until I was involved parenthetically with the Division of Medical Assistance in the acute care hospitals, but only as a part of the function of being an employee of the Department of Human Services with Federal financial participation. I would not consider myself an expert as far as the disproportionate share claim goes for the acute care hospitals. My first involvement to this degree was with the State and county facilities.

ASSEMBLYWOMAN DERMAN: So, Ms. Kohler, then you ordinarily did not become involved in the establishment of a receivable for the State of New Jersey except with respect to acute care. You had been involved in that process.

MS. KOHLER: Well, that was one area where something I had worked on had been in the budget as a revenue.

ASSEMBLYWOMAN DERMAN: Any other times?

MS. KOHLER: I worked very closely with the Department on claiming Federal matching funds for what's now the Community Care Waiver for Developmentally Disabled. That had been a project where in the past, all of our group home placements had been totally funded with State dollars, and by obtaining a Federal waiver for Medicaid from HCFA are now able to claim Federal match for half of those costs. So I also worked on that. (brief pause)

MR. KILSTEIN: Assemblywoman, if I could just take this moment of silence to fill in one bit of my own perspective and, in part, a response to some comments Senator Bennett made.

This Division doesn't pursue frivolous claims for Federal financial participation. We have, I think, a stellar track record in getting the Federal dollars when we submit a

claim. There was a lot of noise on this issue in Washington and around the country during the early months of the fall. Once the parameters of the new Federal law became known to us, once we completed our research, including the review of the Virginia administrator's decision on this matter, and once we had the analysis of the eligible clause in the psychiatric facilities, I think we pursued this. We submitted the State Plan amendment, the HCFA 25 and the claims, with a sincere belief that we were on solid legal, procedural, technical grounds.

ASSEMBLYWOMAN DERMAN: Had you ever hired outside counsel before with respect to any of your claims?

MR. KILSTEIN: Yes, Assemblywoman.

ASSEMBLYWOMAN DERMAN: With respect to what issues were they?

MR. KILSTEIN: I can't give you a specific one within the Division. I know that the Department of Human Services has engaged special counsel in various instances where there have been Federal disallowances of Title XIX funds.

ASSEMBLYWOMAN DERMAN: Ms. Kohler, when you met with the Commissioner, would your meeting have been based on a written report summary of the status of the claim?

MS. KOHLER: I don't believe so. I believe it was more just verbal discussions about the concept and the potential kinds of dollars that we'd be bringing in.

ASSEMBLYWOMAN DERMAN: Could you check your records for us?

MS. KOHLER: Sure.

ASSEMBLYWOMAN DERMAN: And, Ms. Krieger, would you have gone to the Commissioner when you sat down with a memorandum or any supporting documents?

MS. KRIEGER: There were summaries of our claim that were prepared early in November. Some of our first briefings with the Commissioner were to outline the issue -- to present

the background that was necessary to go with his position. Then, after the Commissioner listened to what we said and agreed that this was a good avenue to pursue, we then prepared our documents as far as calculating the amount of money we would claim and doing all of the necessary work we had to do -- the State Plan amendment; all the steps that were taken from that point forward.

ASSEMBLYWOMAN DERMAN: Commissioner, I would appreciate it if you would also check your files and make sure that you don't have any notes, memoranda, or other documents, and provide us with them.

COMMISSIONER GIBBS: Well, I can recheck them again, but I've already checked my files at the start of the Committee process, and I don't have any. I do recall the meetings that we had. I actually don't recall documents. If we had documents they would have been working documents, which I don't normally keep. I would be happy to, once again, check my files, but I did once, and there aren't any.

ASSEMBLYWOMAN DERMAN: Do you remember with whom you had conversations from the Treasury or OMB; what officials they were, exactly?

COMMISSIONER GIBBS: Well, I'm not sure of all of the people, but certainly Mr. Keevey and Mr. Crane.

SENATOR BENNETT: Excuse me, there are some documents that we don't have that you said that you would get. Is the transmittal of the information--

COMMISSIONER GIBBS: From the Budget Office--

SENATOR BENNETT: Not just budget, but the transmittal of the anticipated revenues under this disproportionate share from your office, or from your Department to OMB. Somehow those figures had to get from you to them.

COMMISSIONER GIBBS: Right. That's exactly right.

SENATOR BENNETT: And that's the documents that you do have that we don't have, so far.

COMMISSIONER GIBBS: Well, I can tell you I don't have it in my office files.

SENATOR BENNETT: I'm sure. No question of that. Wherever it is-- (laughter)

COMMISSIONER GIBBS: All right.

ASSEMBLYWOMAN DERMAN: Okay. Thank you.

SENATOR LaROSSA: Okay. Assemblyman Bagger?

ASSEMBLYMAN BAGGER: Thank you, Mr. Chairman.

Just to make sure there's no misunderstanding, I'd like to just say, I think, on behalf of the entire Committee, that we applaud both the forthrightness with which all of you have responded to our inquiries and provided information -- going out of your way. Also, we applaud the initiative of the Division and the Department in seeking to maximize the State's Medicaid Reimbursement from the Federal government.

The questioning that we're involved in now goes to a concern that a number of us have about the advisability of having included this item as a revenue in the Fiscal Year 1992 budget in the mid-fiscal year corrections. We understand that that is an issue we'll have to discuss in more detail with the Treasurer, but our exacting questions on this point are not meant in any way to question the professionalism of your Department or to detract from admiration for your trying to maximize the State's revenues.

ASSEMBLYMAN KENNY: Excuse me, Mr. Chairman.

SENATOR LaROSSA: Yes.

ASSEMBLYMAN KENNY: I just don't understand what the issue here is. You want to question whether or not the administration was correct in putting the \$400-some million in the budget, and yet we've heard repeated testimony that the merits of the amount in question have been verified and affirmed by the Federal government. They've already paid us on two cash advances, recognizing the merits of the substantive claim. The only issue is the notice issue.

SENATOR LaROSSA: They've only paid us prospectively. They haven't paid us retroactively.

ASSEMBLYMAN KENNY: I know, but the only issue as to the reimbursement is the notice issue, and the notice issue has already been dealt with, in part, in this California decision. It's favorable to us, so why are we New Jersey legislators-- What are we trying to do here? Working against our own interests?

We have a valid claim before the Federal government for \$450 million. Had we not put that in the budget, now how would that look to the Federal government? What kind of valid claim is it if you don't put it in your budget?

I'm starting to get a little bit-- I'm sitting here as the only Democrat, you know. I've been going along with these hearings under the idea that we're here to get \$450 million, or whatever the number is, from the Federal government, instead of letting them beat us up and trying to hold us hostage which they've been doing for the last year, and trying to get us to give up a claim that they're obviously worried about. In fact, you know, the Speaker and the Senate President come back here with the ridiculous offer that they bring to the Governor -- which he rightly rejects -- saying, "Give up your claim and we'll give you a quarter and we'll recognize you in the future." The Governor said, "No," to that, and I'm glad he said, "No," to it because we may get a lot more than we would have gotten from the Speaker and the Senate President.

Now, I mean, let's just get off this thing. If the purpose of this hearing is to sabotage the State of New Jersey, I'm not going to be a part of it. If the purpose of this hearing is to solidify and stand behind these people in getting the \$450 million, then I'm going to be a part of it.

You know, I resent the question by Senator Bennett, and the Assemblywoman, trying to get into the heads of these

people to uncover motivations as to whether this is frivolous, or whether this is speculative. This is real. The only issue is the notice issue. That's been claimed here and ascertained repeatedly -- a notice issue as to the method of reimbursement. We've been paying these bills of psychiatric hospitals for years, and the reimbursement issue is-- There is no reimbursement issue because we've been doing it the same way for years. The reason behind the notice requirement is when you change your method of reimbursement. We've never changed the method of reimbursement. We've been doing it for years, therefore, the notice issue is a bogus issue that the Federal government is standing behind not to pay us.

Now, I'm not a lawyer for the State arguing this in court, but it's a bogus issue. You guys -- and lady -- should be behind the State of New Jersey, not trying to uncover some sort of scheme. I mean, I'm serious. This is really getting to the point where, you know, I'm not going to sit on this Committee anymore if this goes another step further in trying to hurt the State of New Jersey. I'm going to be out the door, if there are any more questions trying to uncover motives. We should stand behind the Governor, stand behind the Treasury, and if you want to talk about motives, when we met over in Edison College, back in the Budget -- Assemblyman Bagger was there -- and we sat around the table that day when the Republicans revealed their budget after having kept everybody in the dark for months and months--

SENATOR LaROSSA: Assemblyman Kenny, we're off the topic. We're totally off the topic. This is a Medicaid hearing--

ASSEMBLYMAN KENNY: We're not off the topic. You know what was in that budget? One-hundred-twenty-seven million dollars of retroactive Medicaid reimbursement. Our disproportionate share was put in that budget by the Republicans. You put in \$127 million.

SENATOR LaROSSA: You're on the budget. We're trying--  
ASSEMBLYMAN KENNY: So, if you found it right to put that in there--

SENATOR LaROSSA: You're out of order, Assemblyman.

ASSEMBLYMAN KENNY: You're out of order, Mr. Chairman, for undermining this State on this hearing. This hearing is out of order.

SENATOR LaROSSA: You're out of order.

ASSEMBLYMAN KENNY: You're out of order for undermining this State.

SENATOR LaROSSA: Assemblyman, you're out of order.

ASSEMBLYMAN KENNY: I'm telling you-- I'm telling you-- Are you going to continue this process of trying to do a third degree on experts in this area? Are you going to continue to do a third degree?

SENATOR LaROSSA: That's why we're talking to them -- because they are the experts. We've only heard one side.

ASSEMBLYMAN KENNY: Yeah, well, we're on the same side. We are on the same side here. You're trying to make a partisan issue out of something. We are on the same side.

SENATOR BENNETT: You're making it a partisan issue.

ASSEMBLYMAN KENNY: You're making it a partisan issue, Senator.

SENATOR BENNETT: Don't point your finger at me. Who do you think you are?

ASSEMBLYMAN KENNY: I'll do whatever I want. There's six or seven of you, and you're making a partisan issue out of this \$450 million.

SENATOR BENNETT: You're a disgrace.

SENATOR LaROSSA: Assemblyman.

ASSEMBLYMAN KENNY: Who the hell made you the king of the world to say who's a disgrace or not?

SENATOR LaROSSA: Can we have some order, please? Can we have some order, please.

The purpose is to get to the bottom of what happened. There obviously is a substantial difference of opinion between the State of New Jersey and the Federal government.

ASSEMBLYMAN KENNY: And I'm on the State of New Jersey's side. What side are you on, Chair?

SENATOR LaROSSA: We're not going to pick a side until--

ASSEMBLYMAN KENNY: Well, I picked my side. I mean, what are we doing here?

SENATOR LaROSSA: You're on--

ASSEMBLYMAN KENNY: I mean, you want to be judge and jury of this issue?

SENATOR LaROSSA: No. You're on the merits.

ASSEMBLYMAN KENNY: We are partisans, ladies and gentlemen. We're legislators in the State of New Jersey. Let us support the State.

SENATOR LaROSSA: Doesn't it make more sense to have all of the information that you can possibly have at your disposal to present a case that will be the strongest case possible for the State of New Jersey, but not to draw any kind of conclusions that are premature?

ASSEMBLYMAN KENNY: We have all the information we need.

SENATOR LaROSSA: We only have one side of it.

ASSEMBLYMAN KENNY: We have all of the information. Well, are you going to bring the Federal officials up here?

SENATOR LaROSSA: We've been trying. We've been trying very desperately.

ASSEMBLYMAN KENNY: Yeah, well I don't see them here. I don't see them here. Until I see some Federal officials who are going to answer the same questions as these ladies and gentlemen have to answer, this isn't fair. Let's get the Bush administration up here and have their department head, who's



the comparable head as our Commissioner, let him come up here -- or her, whoever it is -- and let them answer the same questions as to why they didn't give us the second and third quarters. That's a good question: Why they said to the Speaker and the Senate President, "We'll give you another quarter, but waive \$450 million"? What do they think, we're jerks? Let's get the Federal people up here to answer some questions. And-- Or is Senator Lynch right when he called this a "witch-hunt"?

SENATOR LaROSSA: I think we have conducted these hearings in a very open fashion.

ASSEMBLYMAN KENNY: I don't like the line of questioning that's trying to undermine the State of New Jersey's position in this. You've got a transcript over here, you know, which the Feds are going to get a copy of. They're going to take it into court. They're going to use it against us if they can.

SENATOR LaROSSA: I think the State--

ASSEMBLYMAN KENNY: They're going to use it against us.

SENATOR LaROSSA: Assemblyman--

ASSEMBLYMAN KENNY: You're giving them free information. I don't see them giving us any information.

SENATOR LaROSSA: The State of New Jersey, I think, is making a very compelling case for what they are presenting, and I think one of the facts of the matter is that the more opportunities the State has to reveal their rhyme, reason, and rationale behind what they have done can only serve to further the State of New Jersey's case. But, I think the way these hearings should be conducted are as open as possible. If we're going to question the motives, then, in fact, we will question the motives to make sure -- not to make sure, excuse me, that's a wrong choice of words -- but to, in fact, reinforce the position that the State is taking.

ASSEMBLYMAN KENNY: I would expect that we would all stand behind the Governor and the people of New Jersey, and to make the case for the \$450 million. This is a good claim. It's been repeated by--

SENATOR LaROSSA: You're asking us to prejudge--

ASSEMBLYMAN KENNY: --these people over and over again. The only issue is the notice issue. Let the experts negotiate that issue. It's the only issue.

SENATOR LaROSSA: Assemblyman, let me--

ASSEMBLYMAN KENNY: Would you not have wanted us to put it in the budget? How would that look if the Federal government saw, "Oh, yeah, that's a good claim. Why didn't you put it in the budget then?"

SENATOR LaROSSA: Assemblyman, let me ask a question.

Commissioner, correct me if I'm wrong. On the notice question: Am I correct in assuming that, based on your previous testimony, it was really not a question that we wanted to get into because that was really getting to the merits of the claim?

COMMISSIONER GIBBS: Yeah. I don't want to get into an argument about the merits of a case. I think that the merits of the case will be settled in a quasi-judicial, and perhaps even a judicial mode. That is, HCFA now can accept the plan or reject it in whole or in part. If they reject it in whole or in part, we will appeal it. There's a formal administrative appeals mechanism within the Department, and if you're not satisfied with the outcome there, you always have the choice of going to the Circuit Court of Appeals. So, there's a way of dealing with the notice issue.

What I don't want to see, frankly, is people debating one side or the other about notice, when we want to make our best case to the Federal government.

SENATOR LaROSSA: One of the reasons that I am trying to reject, if you will, with all due respect, the idea of

standing squarely behind anyone-- The simple fact of the matter is when-- My perception is when you do that, no matter how right someone is -- and as you mentioned, the sensitivity of negotiations that are taking place -- conceivably, what you can do is force one of those two sides to dig their heels in even further and create a bigger impediment to try to resolve the issue, which is one of the reasons why I think it's inappropriate. Not to say that we do not want to have New Jersey get all the moneys, but I believe that it would undermine any potential resolution that would be there, which is one of the reasons we're trying to be as objective as possible.

ASSEMBLYMAN KENNY: Mr. Chairman, it's not the Legislature's job to negotiate this claim, and should the Federal government feel that the Legislature does not stand foursquarely behind the Governor and the administration with regards to this claim, they are going to dig their heels more and not give us the money.

I mean, I disagree with you emphatically as to what the purpose of this Committee is at this point. I think we ought to basically terminate this Committee if it's just going to try to work against the interests of the State. We've all been educated about the issue. I think that was fair. I think we know what the issue is. It's the notice issue as to the retroactive payments. We know the Feds are holding the quarterly payments over our heads; so that to get those payments to balance our budget we're going to have to be pressured to give up the-- You know, we all know what the story is here. I mean, so why don't we just let the experts represent the State as to the notice issue, and let's hope that they get the \$450 million because we need it and we're entitled to it? We're giving that money right now--

SENATOR BENNETT: Mr. Chairman.

ASSEMBLYMAN KENNY: Excuse me, I'm just not finished yet.

We're getting that money now, depending upon the arbitrary position of the Federal government when they decide to give it to us. They've already recognized the merit of the claim that we are paying out and should be reimbursed. The only issue is the notice issue which has been addressed in the California decision.

SENATOR LaROSSA: Unfortunately, Assemblyman, you are still getting into two areas that we simply should not be into: 1) the merits, and 2) drawing conclusions. We haven't even finished the second set of testimony or second set of hearings, and to draw a conclusion and to try to get into any discussion on the merits, I think, is, in fact, undermining what we're trying to achieve.

ASSEMBLYMAN KENNY: I think the hearing is starting to undermine what we're trying to achieve. I think we've achieved quite a bit in being educated, and the public is--

SENATOR LaROSSA: Well, Assemblyman, I disagree with you. And, unfortunately, I'm going to cut you off at that point and turn to Assemblyman Bagger, because I disagree with you. And at this point, you know, we can have this discussion--

ASSEMBLYMAN KENNY: Fine. Mr. Chairman, I have a question.

SENATOR BENNETT: Mr. Chairman, I have a question with respect to the resolution that created us. My understanding, based on the remarks that you've that given us on two separate occasions, was that there was a two-pronged review that was supposed to be determined with respect to the charge that was given to us, and that one of those charges was for us to examine the decision on the part of the executive branch to include all of the \$450 million in the projected State revenues for Fiscal Year 1992. That's contained in our Concurrent Resolution of creation. That's part of our charge. I know of

no questions today that went further than questioning as to where the document came from for that. We're not on the secondary issue. We may agree or disagree that the only issue is notice on the \$450 million. That's a part of what we have to come to on a conclusion.

But I also think that we have a very real issue as to when certain revenues should be included in the budget. I don't know the answer to that question, by the way, yet. That's what I think we're charged with -- when those moneys should be included in the budget, when they should not any longer be included in the budget, and how it comes about that a revenue source of that size of dollars gets included in the budget.

If I'm wrong that that's beyond the scope of our charge, then I certainly will stand corrected. But, I mean, I read the words. That's what appears to be our charge. I don't think that we, as a Committee -- either jointly or individually -- can change the charge that was given to us by the full Legislature. Now, am I incorrect in that?

SENATOR LaROSSA: Well, my interpretation is that, I think, it speaks for themselves in terms of the two specific areas that we're dealing with: One of which is what happened, and 2) to try to get to the bottom of how any dollar amount, least of all a half-billion dollars, finds its way in there. I think that's part of what we're trying to discern now.

ASSEMBLYWOMAN DERMAN: Mr. Chairman, I'd like to say, because Assemblyman Kenny addressed his comments towards my comments, that I suppose that I think in terms as a tax lawyer of tax issues. We don't question whether we're entitled to this money. We all hope we're entitled, and we all expect that we are entitled to it. It's just like income. It's an income for a taxpayer from whatever source derived.

The question is, when is the taxpayer going to recognize the income? Were we entitled to recognize the

income, the receivable, the revenue, when we did, or was it too speculative, too contingent, and too premature? That's the only issue. We do not in any way want to detract from our right to receive it, only when it should have been booked on our income statement.

SENATOR LaROSSA: I'll go back to what I said--

ASSEMBLYMAN KENNY: I'd like to answer that since it was directed to me.

SENATOR LaROSSA: If I may, just prior to-- Again, I think, I'm not going to agree or disagree, but again, we're getting into tangential areas, in fact, that may ultimately be part of what comes into a conclusion. But, again, I believe that it is still bordering on drawing another conclusion that we want to stay away from.

Assemblyman?

ASSEMBLYMAN KENNY: My point is that we all have roles and careers and other parts of our lives, whether it's a tax attorney or whatever it might be, but we sit here -- not whether it's you as a tax attorney, or me as an attorney who deals in real estate -- we sit here as legislators, and that's the role we're here to perform. That's how we evaluate this.

Under our Constitution, the Governor submits a proposed budget, and then the Legislature reviews that budget and addresses issues such as the one here. The Governor has the constitutional authority to certify or not those items that are in the budget.

What we have here is a case where the Governor and the administration submitted a budget that included in the first instance the \$450 million or whatever the exact number is, and based on the testimony that we've heard here repeatedly from New Jersey's experts in this area, we were proper and correct in putting that \$450 million in.

As a State legislator, I stand behind that 100 percent. I would do it if the Governor were a Republican or a

Democrat, because it is not a partisan issue. It's a New Jersey issue, and that is my point. I feel that the line of questioning here, today, to some extent is undermining the State of New Jersey's position.

Let's just argue-- Let's assume, for the sake of argument, that you question these people, and you hurt the position of the State of New Jersey. Is that what you want to do?

SENATOR LaROSSA: I don't think that there is anything--

ASSEMBLYMAN KENNY: Should we be doing that?

SENATOR LaROSSA: I'm sorry. You know, I think you're way off base there, because if any testimony that is given by these people hurts the State of New Jersey, then there's something wrong with New Jersey's claim in the first place. All this testimony can do is reinforce the State's position.

ASSEMBLYMAN KENNY: That's not true. None of us are experts in this area, on this side of the room. And there are all sorts of questions that you could ask and they could be answered in a way that could have any number of effects on how this item is disposed of. Who knows? To me, we are all one here. We all are the State of New Jersey.

SENATOR LaROSSA: Assemblyman--

ASSEMBLYMAN KENNY: Our interest is simple: to get to the \$450 million. So we should not be doing anything to jeopardize that -- intentionally or unintentionally. I believe that the purpose of these hearings should only be to inform us and the public as to the overall issue. That's been done. To go beyond that, I think, is not in the interest of the State.

I have full confidence that it was done correctly, but I don't believe we should be cross-examining ourselves for the benefit of that tape recorder over there which is going to be in the possession of the Federal government which is our adversary in this matter. It doesn't make sense to me, and as

I said before, this is not a partisan thing. I know that we need this \$450 million, and we need it desperately.

SENATOR LaROSSA: There might be a way to get the Feds up here.

Assemblyman Bagger?

ASSEMBLYMAN BAGGER: Well, thank you.

The resolution creating this Committee gave us two areas of inquiry. When I started this down a different path earlier today, I departed, and in my mind, closed off the first area of inquiry for this panel, which related to New Jersey's right to receive the full retroactive amount of the Medicaid reimbursement. The testimony that I've heard today and at our last hearing was convincing. Lest I prejudge things, I've heard testimony that convinces me of the State's entitlement of that claim.

However, there is a very important second avenue of inquiry for this Committee that is solely a State of New Jersey matter. It doesn't relate at all to our claim with the Federal government. It simply is how budgetarily we have, in the past, and should in the future, treat the nonrecurring retroactive claim for reimbursement. We have a one-shot retroactive reimbursement claim that the State can and should -- and I certainly hope will -- receive. We, as a Legislature, as does the administration, faces an important question of when to count on receiving that revenue, when to certify it as a revenue.

In fact, it was in January 1992, that the administration said it should be treated as a Fiscal Year 1992 revenue, which would suggest that it would be received by June 30, 1992. Later, in June, the Appropriations Committee was told by the State Treasurer that well, it looked like it would not be received in Fiscal Year 1992, but yes, it could be counted on as a Fiscal Year 1993 revenue. Approximately a week later, the Treasurer said, "No, because we don't know precisely



when we'll be receiving this money that we're entitled to, you, the Legislature, should not include it as a revenue in Fiscal Year 1993," which created a last-minute havoc in the State budget.

That's the sole area of concern as it relates to timing and recommendations about revenues. I, personally, stand behind the State entirely in our effort to secure every penny that we're entitled to, because we sure do need it, Governor and Legislature alike, as we head into the future.

These questions just relate simply to what fiscal year this should have been recognized, and that is a matter that I recognize is beyond your involvement and areas of responsibility. But it is important for me to know as to what recommendations were made by any of you to any officials in Treasury, OMB, or the Governor's Office, in terms of when, on the calendar, New Jersey could expect to receive these funds. I think I'd like to ask each one of you whether at any time you were ever asked, or volunteered, by any officials in OMB, Treasury, or the Governor's Office for that matter, when New Jersey could actually expect to receive the cash advance that would reflect this retroactive payment, our right to the money notwithstanding?

Commissioner, I guess I'll start with you.

COMMISSIONER GIBBS: I don't recall any conversation with Treasury officials that focused around a date. I mean, the conversations that I had with the Treasury was over the claim, how much was involved, and what the process was for us to get the claims to the Federal government.

I do not recall ever having a conversation that asked me what month do you think we're going to get money.

ASSEMBLYMAN BAGGER: Or whether it would be received cash in hand by June 30, 1992?

COMMISSIONER GIBBS: Right, or whether it should be '92 or-- I mean, I don't recall any conversation like that.

ASSEMBLYMAN BAGGER: Director Kilstein?

MR. KILSTEIN: I'll be uncharacteristically brief.  
No. (laughter)

ASSEMBLYMAN BAGGER: Ms. Kohler?

MS. KOHLER: I never had any discussions on that issue.

ASSEMBLYMAN BAGGER: And, Ms. Krieger?

MS. KRIEGER: My function is to submit areas that we can maximize our Federal revenue, and my job is to do everything within my power for our Department of Human Services to earn this reimbursement. I was not asked the question, nor did I offer an answer.

ASSEMBLYMAN BAGGER: One other question for each of you, and that is-- Well, all of you being the acknowledged experts in these procedures, put yourself in early 1992 -- January 1992 -- acknowledging that New Jersey is entitled to every penny of this money. As of January 1992, what would your professional opinion have been as to whether the cash advance representing these retroactive funds would have been granted to the State by June 30, 1992? And, perhaps, we should do this one in reverse order, just because--

COMMISSIONER GIBBS: I like the pattern you set before -- starting with me. (laughter)

ASSEMBLYMAN BAGGER: Ms. Krieger?

COMMISSIONER GIBBS: It's a speculative question.

MS. KRIEGER: It's a very speculative question.

If you ask me, Roseann Krieger, I'll give you my opinion. Now, Treasurer Crane doesn't ask my opinion when he talks revenue. (laughter)

SENATOR BENNETT: Maybe that's the problem.

MS. KRIEGER: I'm an accountant by profession, and by nature I am a conservative person. The answer that I might give to that question reflects only my personal opinion.

ASSEMBLYMAN BAGGER: That's all I'm asking for.

MS. KRIEGER: And, actually, I doubt if it's relevant.

ASSEMBLYMAN KENNY: I don't think it's relevant. I don't think her personal opinion -- with all due respect -- is relevant to these proceedings, and I don't think the question should be answered.

ASSEMBLYMAN BAGGER: Mr. Kenny is not your attorney in these proceedings, much as he'd like to be.

ASSEMBLYMAN KENNY: Somebody's got to stand up for New Jersey in this room.

SENATOR LaROSSA: I'll simply leave it to the option of if you choose to answer, fine. We've had whatever-- The cooperation is here. If you feel uncomfortable or if you feel that it's inappropriate, please feel free to express that accordingly.

MS. KRIEGER: I really don't think my opinion is relevant, and I don't think that my answer is even pertinent to this whole issue, on the revenue side.

ASSEMBLYMAN BAGGER: Ms. Kohler?

MS. KOHLER: I probably have to say exactly the same thing. Treasury doesn't ask me either. It was not anything we discussed.

ASSEMBLYMAN BAGGER: Director Kilstein?

MR. KILSTEIN: I've never been asked to make a prediction on our revenue. I don't know what parameters are used for this revenue source versus sales tax, income tax, or any other revenue source. It's an expertise I don't possess.

ASSEMBLYMAN BAGGER: And, Commissioner?

COMMISSIONER GIBBS: I seldom answer hypothetical questions dealing with the future or the past, and really don't feel that I'm in a position -- the same position that an OMB Director, or a Treasurer is -- with respect to having to make all kinds of judgments based on all kinds of assumptions for a whole variety of revenue sources. It's an area beyond my own professional experience.

ASSEMBLYMAN BAGGER: But the fact remains that none of you were asked your opinion or your views on that time in question, by anyone, at a time when it would not have been a hypothetical question.

COMMISSIONER GIBBS: Right. That's correct.

ASSEMBLYMAN BAGGER: Just one last question. I take it the State cannot spend Federal Medicaid funds and spend down the reimbursement until such time as the cash advance has been granted? I don't mean on the spending for the psychiatric hospitals because that's on the appropriations side of the budget, but the actual-- We can't spend the Federal government's money until they grant us the cash advance and essentially, at that point, it becomes an account that we can draw upon.

COMMISSIONER GIBBS: Yes.

ASSEMBLYMAN BAGGER: Thank you all very much for your testimony.

COMMISSIONER GIBBS: Thank you.

SENATOR LaROSSA: Commissioner, I want to thank you very much, and Director Kilstein, Ann, and Roseann. Again, I deeply appreciate your time, your courtesy, and your cooperation. Hopefully we will have this entire thing behind us before too long.

COMMISSIONER GIBBS: All right. Thank you, Mr. Chairman. I appreciate being here today, and we'll follow up on the matters that were raised. If we find those documents we'll send them over.

SENATOR LaROSSA: Thank you very much.

**(MEETING CONCLUDED)**

## APPENDIX





**Opening Statement of**  
**Chairman Dick LaRossa**  
**Joint Select Committee on Medicaid Reimbursement**

October 20, 1992

Today's session should prove to be most instructive as part of the third meeting of the Joint Select Committee on Medicaid Reimbursement.

Once more we will address the application process initiated by the State of New Jersey to receive reimbursement for State and county psychiatric costs totaling \$450 million because we want to better understanding why the application was filed in the manner it was and the facts surrounding the application process.

We will continue to discuss and clarify comments made by Department of Human Services officials during our first investigative hearing on September 23rd in which we delved into the circumstances surrounding the application process itself. Additionally, we requested in writing that the following two points be addressed during today's presentations:

1. the necessity of public notice with respect to the State Plan Amendment
2. the allegation that the Health Care Financing Authority (HCFA) has not received additional information it has requested. This allegation was made in a letter from William Toby, Jr., Acting Administrator, HCFA.

Furthermore, as time permits, we will begin to discuss the second point of the Joint Resolution; the inclusion of the \$450 million in the projected state revenues.

Therefore, today we will continue to conduct what I have termed as a "nuts and bolts" investigative session. However, let me begin by highlighting the cooperative spirit with which this committee has conducted its outreach with members of the Executive Branch. On behalf of all the members, Vice Chairman Richard Bagger, Senator John O. Bennett, Assemblywoman Harriet Derman, and Assemblyman Bernard Kenny, let me express our gratitude for a most candid and productive series of official proceedings to date.

We are very fortunate that four key individuals will be available to testify before us today from the New Jersey Department of Human Services under the leadership of Alan Gibbs, who we are pleased to have with us today:

Alan Gibbs, Commissioner

Roseann Krieger, Administrator for Cost Reimbursement

Saul Kilstein, Director, Division of Medical Assistance and Health Services

Ann Kohler, Assistant Director, the Office of Budget and Fiscal Affairs

Senate Concurrent Resolution SCR-65 empowers this body with the following public policy focus:

**To review the issues and circumstances surrounding the Executive Branch's December 1991 application to the federal Health Care Financing Administration (HCFA) regarding the \$450 million reimbursement for disproportionate share payments for State and county psychiatric hospitals.**

In order to meet our fact-finding charge, the enabling legislation establishing this Joint Select Committee sets forth two key areas of review in order to determine the circumstances surrounding the \$450 million reimbursement dispute, and I quote:

- A. *"The committee shall examine the decision on the part of the Executive Branch to include all of the \$450 million in the projected State revenues for Fiscal Year 1992."*
- B. *"The committee shall examine and determine the exact amount of retroactive reimbursement payments for State and county psychiatric hospitals New Jersey is qualified to receive."*

The hallmark of our first two hearings has been the focusing on the facts and just the facts.

Today's hearing will continue that tradition, and once more, I ask that members please kindly refrain from issuing opinions which might lead to premature conclusions. The pursuit of the facts has and will continue to dominate the deliberations of the Joint Select Committee.

Those conclude my opening remarks. Does anyone have anything further to add?



**Joint Select Committee on Medicaid Reimbursement  
October 20, 1992**

**Testimony**

**Alan J. Gibbs, Commissioner  
Department of Human Services**

Chairman LaRossa and members of the Select Committee. Thank you for the opportunity to appear before you this afternoon to discuss the issue of Medicaid reimbursement.

I understand that my letter of September 23, 1992 is a formal part of the Committee's record and, thus, will not repeat the general overview it provided. Moreover, at your September 23, 1992 hearing, Roseann Krieger and Ann Kohler provided the Committee with detailed information on New Jersey's disproportionate share claim for federal reimbursement and the technical aspects involved in securing federal approval for the requested amendment to our Medicaid State Plan.

I would also like to remind the Committee again, as I did in my letter to the Committee of September 23, 1992, that this matter is currently at a very sensitive stage in the process of obtaining federal approval. The central issue is our strong disagreement with HCFA about the requirement for public notice in this case. While we are certainly willing to give you the facts while this matter is under appeal, I would like to avoid deliberating the merits of the State's position on the issue of public notice.

With that in mind, I would like to take this opportunity to update you on New Jersey's claim for disproportionate share payments to state and county psychiatric hospitals, and to describe to you how I believe we must proceed on this claim in the near future.

Since the Committee's first hearing, there have been three developments.

**First**, after nearly one year of negotiation and correspondence regarding State Plan Amendment 88-29C, the Department has formally submitted its State Plan Amendment to the Health Care Financing Administration (HCFA). This took place on October 19, 1992. As you know, this starts the clock running on HCFA's formal review of this final submission. They have 90 days to respond.

**Second**, we have identified a problem with HCFA regarding their timeliness in deferring our claim for \$412 million in disproportionate share funds for various periods between July 1, 1988 and December 31, 1991. HCFA was required to act on a deferral no later than July 29, 1992 and to send us a notice explaining the deferral of our claim within 15 days thereafter. HCFA's action (issued in the form of a supplemental grant award) was two days late and no deferral letter was received by the State until two days after we requested it on August 24, 1992.

When we contacted HCFA to question whether a deferral notice was forthcoming, officials there took two days to locate the letter, which was then faxed to us on August 27, 1992. However, HCFA maintained that the August 4, 1992 letter was mailed, despite the fact that I, the addressee, and those copied on the letter, including Saul Kilstein, and Brian Newman, our former budget director, never received a copy.

I raise this issue for two reasons. First, it raises the question that the State may be entitled to receive immediately the \$412 million claimed while the review of our State Plan amendments proceeds. Second, this breach of HCFA's own regulations affects the entire response timetable with regard to New Jersey's submission of claims for federal funds.

**Third**, on October 1, 1992 we received a grant award from HCFA that included the full quarterly allocation for disproportionate share payments for state and county facilities. Receiving this grant award is very encouraging and suggests that HCFA anticipates our entitlement to receive, **at a minimum**, federal reimbursement from October 1, 1991 under the provisions of the new federal law.

The fact that we have now submitted a formal State Plan Amendment; the fact that we have received the October 1, 1992 grant award which is based on allowable federal reimbursement from October 1, 1991; and, as Roseann Krieger and Ann Kohler have discussed with you previously, the fact that we have a favorable ruling by the federal DHHS/DAB in California's appeal of HCFA's disallowance of its claim for disproportionate share payments, bodes well for New Jersey's case.

Now we must wait for HCFA to approve or disapprove—in part or whole—our State Plan Amendment. We believe our claim is valid and our State Plan Amendment is approvable. When we know HCFA's decision we will be able to plan future actions accordingly. If they reject our State Plan Amendment, we can, and intend to, exercise our appeal rights. As I mentioned earlier, the 90-day period permitted for HCFA to respond to our formal State Plan Amendment submission began on October 19, 1992.

In addition, we wrote to New Jersey's Congressional Delegation on October 8, 1992 to solicit their assistance in urging HCFA to approve our State Plan.

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And, Mr. Chairman, while I am on the subject of New Jersey's Congressional delegation, I would like to address your concern about the letter of August 6, 1992 from William Toby, Jr., Acting Administrator of HCFA in Washington D.C. to the Congressional delegation.

On May 29, 1992 the Governor wrote to the Congressional Delegation, asking them to write to HCFA in support of our claim. Mr. Toby's letter was in response to a letter our entire Congressional delegation sent to HCFA in that regard.

In essence, Mr. Toby requests that we provide HCFA with a formal State Plan Amendment. As Mr. Kilstein explained in his September 16, 1992 transmittal to the Committee and at your hearing on September 23, 1992, this letter describes the process we have been following with HCFA in which the State, in customary fashion, refrained from submitting a "final" plan until many issues and questions were resolved.

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With all due respect to Mr. Toby's position, his letter, in fact, merely explained the regulatory provisions related to the lengthy, technical review process. New Jersey has responded fully to all of HCFA's requests, with one exception. We steadfastly refuse to forego our entitlement to the disproportionate share monies we're entitled to receive from July 1, 1988 forward.

In conclusion, we have met all the technical requirements in our responses to HCFA's requests for information regarding our disproportionate share payments. We have been responsible in meeting our obligations and we believe that the federal government should now meet its obligations.

Thank you.







State of New Jersey  
DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES  
CN 712  
TRENTON, NEW JERSEY 08625  
(609) 588-2600

ALAN J. GIBBS  
Commissioner

SAUL M. KILSTEIN  
Director

M E M O R A N D U M

HAND DELIVERED

TO: Honorable Dick LaRossa, Chairman  
Joint Select Committee on Medicaid Reimbursement

FROM: Saul M. Kilstein, Director *S. M. Kilstein*  
Division of Medical Assistance and Health Services

DATE: October 16, 1992

SUBJECT: Request For Information Dated October 6, 1992  
Disproportionate Share Payments to State and  
County Psychiatric Hospitals

This memorandum is in response to the Committee's October 6, 1992 request for additional information relating to the State's application to the federal government for federal financial participation for disproportionate share (DSH) payments to state and county psychiatric hospitals.

Per the Committee's request, I am attaching a combined response to the two questions outlined in the October 6, 1992 correspondence directed to Commissioner Alan J. Gibbs, Ann Kohler, Roseann Krieger and me. Attachment 1 is the Department's response to the Committee's Question 1 regarding the definition of disproportionate share as it relates to specific areas. Attachment 2 is a chart providing the disproportionate share payment adjustment amounts calculated under the payment methodology described in the pending State Plan Amendment 88-29C, and the estimated amount of disproportionate share payment adjustment amounts calculated using the Medicare minimum payment methodology described in section 1923(c)(1) of the Act.

The Department looks forward to continuing its discussions with the Committee regarding the issue of the necessity of public notice with respect to State Plan Amendment 88-29C. We are also anxious to clarify for the Committee the implications of William Toby's letter of August 6, 1992, to

Honorable Dick LaRossa  
October 16, 1992  
Page 2

Congressman Smith. As we have amply documented, the State has complied with all HCFA requests for additional information related to State Plan Amendment 88-29C. As explained in my memorandum dated September 16, 1992, as a matter of long-standing practice and mutually accepted convention, previous State submissions were identified as "informal" responses. As a result, HCFA was not bound by the provisions of 42 CFR 430.12 to provide a formal response. Acting Administrator Toby was merely conveying a technical point related to HCFA's obligation to respond to a "formal" State response.

If additional documents or information are required, please contact me at 588-2600.

SMK/rk  
Attachments

c Alan J. Gibbs  
Samuel Crane  
Richard F. Keevey  
Jack Callahan  
Robbie Miller

683

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NEW JERSEY DEPARTMENT OF HUMAN SERVICES  
DISPROPORTIONATE SHARE PAYMENTS  
STATE AND COUNTY HOSPITALS

Section 1902(a)(13(A) of the Social Security Act requires payments to hospitals to take into account the situation of hospitals which serve a disproportionate share of low income patients with special needs.

The following is a definition of disproportionate share (DSH) payment adjustment in the context of specifically identified areas.

a) Patient reimbursement by Medicaid

Disproportionate share payment adjustments are additional payments made to hospitals that are providing inpatient care to low-income patients (also called charity care). By definition, charity care is hospital care provided to individual patients who have no source of payment (including Medicaid), third-party insurance, or personal resources. Therefore, patient reimbursement by Medicaid is guided by the relevant provisions of Title XIX of the Social Security Act and the approved New Jersey Medicaid State Plan and is unaffected by disproportionate share payment adjustments. Nevertheless, actual disproportionate share payment adjustments could be made as an add-on to such patient per diem reimbursement rates.

b) Hospital reimbursement by Medicaid

Disproportionate share payment adjustments are payments made to hospitals over-and-above the normal payments to hospitals for inpatient care provided to Medicaid eligible patients. Such payments can be made as an adjustment to Medicaid payments for eligible hospital payments or as direct payments to qualifying disproportionate share hospitals. State Plan Amendment 88-29C utilizes the direct payment methodology.

c) Cost of indigent patient care

Disproportionate share payment adjustments are additional payments made to hospitals representing the cost of indigent (charity) patient care. Charity care is further defined in HCFA draft regulations as care provided to individuals who have no source of payment, third-party or personal resources.

d) Cost of hospital operations

The DSH payment adjustment amount applicable to a State and County hospital is calculated using the total cost of hospital operations as reported on the most recent Medicare/Medicaid cost report for the hospital's reporting period. The Medicare/Medicaid cost report is an established, extensively documented, hospital industry accepted method of accumulating and allocating cost related to patient care.

685

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NEW JERSEY DEPARTMENT OF HUMAN SERVICES  
ESTIMATED TOTAL DISPROPORTIONATE SHARE PAYMENT ADJUSTMENTS  
STATE AND COUNTY HOSPITALS

QUARTER	DSH PER OBRA '90 Sec. 1923(c)(3) (1)	FFP (2)	DSH PER OBRA '87 Sec. 1923(c)(1) (3)	FFP (4)
09/30/88	61,673,116	30,836,558	1,871,958	935,979
12/31/88	61,673,116	30,836,558	1,871,958	935,979
03/31/89	61,673,116	30,836,558	1,871,958	935,979
06/30/89	61,673,116	30,836,558	1,871,958	935,979
09/30/89	65,538,315	32,769,158	2,096,979	1,048,490
12/31/89	65,538,315	32,769,158	2,096,979	1,048,490
03/31/90	65,538,315	32,769,158	2,096,979	1,048,490
06/30/90	65,538,315	32,769,158	2,096,979	1,048,490
09/30/90	75,224,496	37,612,248	3,253,662	1,626,831
12/31/90	75,224,496	37,612,248	3,253,662	1,626,831
03/30/91	75,224,496	37,612,248	3,253,662	1,626,831
06/30/91	75,224,496	37,612,248	3,253,662	1,626,831
09/30/91	82,569,471	41,284,736	1,287,814	643,907
12/31/91	82,569,471	41,284,736	1,287,814	643,907
TOTAL	974,882,650	487,441,325	31,466,026	15,733,013

FOOTNOTES:

Section 1923(c)(3) of the Social Security Act permits States to define different DSH payment methodologies for each type of hospital. Column 1 and 2 represent the State's current claim for DSH for state and county hospitals under this option.

Section 1923(c)(1) of the Social Security Act defines the formula used to calculate the minimum required DSH payment amounts (Medicare methodology).

686

NATOR  
CK LAROSSA  
Chairman

SEMBLYMAN  
CHARD BAGGER  
Vice-Chairman

NATE  
HN O. BENNETT

NERAL ASSEMBLY  
ARRIET DERMAN  
ERNARD F. KENNY, JR.



New Jersey State Legislature  
JOINT SELECT COMMITTEE ON MEDICAID REIMBURSEMENT  
LEGISLATIVE OFFICE BUILDING, CN-068  
TRENTON, NJ 08625-0068  
(609) 292-1646

October 6, 1992

Mr. Saul Kilstein, Director  
Department of Human Services  
Division of Medical Assistance  
and Health Services  
7 Quakerbridge Plaza  
CN 712  
Trenton, New Jersey 08625

Dear Mr. Kilstein:

The Joint Select Committee on Medicaid Reimbursement will meet on Tuesday, October 20, 1992 at 1:00 P.M. in Room 319, the Legislative Conference Room in the State House, Trenton, New Jersey. Pursuant to its authority, the committee requests your appearance before it on that date.

It is the committee's intent to clarify the facts and issues presented to it at its September 23, 1992 meeting and to discuss the current status of the State's claim for disproportionate share payments. Additionally, the committee would like to address 1) the issue of the necessity of public notice with respect to the State Plan Amendment and 2) the allegation that the Health Care Financing Authority (HCFA) has not received additional information it has requested. This allegation was made in a letter from William Toby, Jr., Acting Administrator, HCFA, a copy of which is enclosed for your reference.

Further, the committee requests a response to the two questions set forth on the attached sheet, by Friday, October 16, 1992. Please be prepared to discuss those responses fully at the hearing on October 20, 1992.

Kindly advise Robbie Miller, committee aide, of your appearance by Friday, October 16, 1992.

Very truly yours,

Dick LaRossa  
Chairman

DL:M/sl  
Enclosures  
c. Alan J. Gibbs. Commissioner

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AUG - 6 1982

The Administrator  
Washington, D.C. 20201

The Honorable Christopher H. Smith  
House of Representatives  
Washington D.C. 20515-1401

Dear Mr. Smith:

I am responding to your letter requesting that the Health Care Financing Administration (HCFA) expeditiously approve the State of New Jersey's Medicaid State plan amendment (SPA) TN 88-29C regarding disproportionate share hospital payments for State and county psychiatric hospitals.

Federal regulations at 42 CFR 430.16(a) require that a SPA be considered approved unless HCFA, within 90 days after receipt of the SPA in the regional office, either sends the State written notice of disapproval or written notice that additional information is needed to make a final determination. If HCFA requests additional information, the 90-day period for HCFA action on the SPA begins on the day it receives that information. There are no Federal regulations that impose time limits on States to respond to HCFA's requests for additional information.

To date, all additional materials submitted by the State of New Jersey concerning the subject SPA have been draft responses to our requests for additional information. The 90-day time period described above does not begin until the State submits a formal response to our additional information requests. We are currently working with the State of New Jersey to resolve outstanding issues regarding this SPA. Representatives from the State met with staff of the Medicaid Bureau on June 10 to discuss our concerns.

HCFA's approval of this SPA is contingent upon the State of New Jersey satisfactorily demonstrating to HCFA that this SPA complies with all the statutory and regulatory State plan requirements. However, we can take no further action until we receive the additional information requested.

Please be assured that HCFA is aware of your concerns pertaining to the effect of this SPA on the provision of crucial health care services for the indigent population within the State of New Jersey. A similar letter is being sent to each of the cosigners of your letter.

Sincerely,

William Toby, Jr.  
Acting Administrator

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## QUESTIONS

1. Define disproportionate share as it relates to the following:
  - a. Patient reimbursement by Medicaid
  - b. Hospital reimbursement by Medicaid
  - c. Cost of indigent patient care
  - d. Cost of hospital operation

2. Column 1 of the schedule below shows Division of Medical Assistance disproportionate share hospital payments, State and county hospitals, for the 13 quarters from 9/30/88 through 12/31/91. Column 2 shows the amount of federal financial participation claimed by the State for reimbursement. These payments and reimbursement requests were calculated under the provisions of OBRA 1990. Assuming OBRA 1990 had not been passed and the provisions of OBRA 1987 had been in place during these quarters, what is your estimate as to the amount that the payments would have been? Please indicate your estimate in Column 3.

	<u>Column 1</u>	<u>Column 2</u>	<u>Column 3</u>
Quarter	Disproportionate share payments per OBRA '90	Federal financial participation	Disproportionate share payments per OBRA '87
9/30/88	61,673,116	30,836,558	
12/31/88	61,673,116	30,836,558	
3/31/89	61,673,116	30,836,558	
6/30/89	61,673,116	30,836,558	
9/30/89	65,538,315	32,769,158	
12/31/89	65,538,315	32,769,158	
3/31/90	64,513,315	32,256,658	
6/30/90	64,513,315	32,256,658	
9/30/90	75,224,496	37,612,248	
12/31/90	75,224,496	37,612,248	
3/31/91	75,224,496	37,612,248	
6/30/91	75,224,496	37,612,248	
9/30/91	82,569,471	41,284,736	
12/31/91	82,569,471	41,284,736	









