IN THE MATTER OF
PREAKNESS HOSPITAL

Initial Decision: March 15, 1982
Final Agency Decision: May 10, 1982

Approved for Publication by the Division of Medical Assistance and Health Services: May 6, 1985

SYNOPSIS

Preakness Hospital, a long term care facility run by Passaic County, requested a change in its system of rate reimbursement to more accurately reflect nursing costs.

The administrative law judge assigned to the case found that Preakness had asked the Department of Health to review staffing patterns to help determine a minimal standard of care for the facility. The end result was the development of a report setting forth minimum staffing requirements. This report was not designed to support an upward revision of Medicaid reimbursement rates but to bolster arguments to prevent budget cutbacks. Preakness, however, utilized this report in a direct appeal for a review of rates. The Division of Medical Assistance and Health Services originally denied the sought-after extra hours of care as being not only above the required hours of nursing care given the patient population, but above the required hours per unit staffing as well.

The administrative law judge concluded that DMAHS’ action in rejecting the request for reimbursement of additional hours of nursing care was not unreasonable. The judge determined that DMAHS should not be bound by a determination of the Department of Health to recommend revised rates of reimbursement to Preakness based on the hours generated by a staffing report, since the statutory role of the Department of Health is limited to assisting DMAHS with the development of rates for reimbursement for long-term care facilities. It is DMAHS which has the authority to render a final agency decision on the validity of Medicaid rates. DMAHS was only required to ensure that minimum standards of nursing care were maintained, and no authority existed for the Department of Health to establish minimum staffing patterns. Thus, DMAHS could not be required to accept as minimum staffing patterns the results of a survey which ignored minimum standards promulgated by regulation.

Accordingly, Preakness’ request for additional reimbursement was denied.
Upon review this initial decision was adopted by the Division of Medical Assistance and Health Services.

Peter T. Bongiorno, Esq., for petitioner
Michael H. Glovin, Esq., for intervenor, County of Passaic
Ivan J. Punchatz, Deputy Attorney General, for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Initial Decision

MOSES, ALJ:
This is an appeal by Preakness Hospital of a denial by the Division of Medical Assistance and Health Services of a requested reimbursement for nursing hours.

PROCEDURAL HISTORY
This matter comes before the court as the result of certain procedural steps that commenced on September 5, 1980. On that date Victor R. Kattak, business administrator, Preakness Hospital, requested the New Jersey State Department of Health to review a patient level of care analysis which had been prepared by Elizabeth A. Kinney, supervising health care facilities evaluator for Health Facilities Inspection Services in order to raise its level of allowable nursing hours for reimbursement from Medicaid. On November 18, 1980 Christine J. Gormley, analyst I, New Jersey State Department of Health, acting on a Level I appeal, adjusted the minimum hour requirements for RNs, LPNs and aides which had to be met over and above unit staffing requirements, based upon the Kinney report prepared by Elizabeth Kinney. These recommended revised rates were forwarded to Charles J. Lydon, coordinator, Health Economics Services, New Jersey State Department of Health. On November 18, 1980 Mr. Lydon sent a memorandum to A. Edward Lepelis, chief—Rate Setting, Division of Medical Assistance and Health Services, indicating the Department of Health’s recommendations for revisions of Preakness’s reimbursement rate to be effective July 1, 1980.
On December 16, 1980 Mr. Lepelis acknowledged receipt of the Level I appeal recommendations regarding Preakness Hospital, and indicated that the issue of unit staffing as well as staffing in excess of unit requirements was under review by the Division of Medical Assistance and Health Services (hereinafter DMAHS) and therefore the recommended revision of Preakness’s rates would be held in abeyance. On February 11, 1981 Mr. Lepelis told Thomas M. Russo,
Director of the DMAHS, that in his opinion, the Preakness Hospital request for staffing above the unit staffing concept went far beyond what he considered to be a reasonable request for reimbursement.

On March 10, 1981 Mr. Russo denied reimbursement based on the recommendations in the Kinney report, indicating that, in his opinion, the DMAHS should only recognize unit staffing for Medicaid reimbursement purposes. On March 16, 1981 Mr. Lepelis wrote to Ms. Gormley, now coordinator, Health Economics Services, Department of Health, telling her of the denial of her recommendations for revised reimbursement to Preakness. On March 26, 1980 Ms. Gormley told Preakness Hospital that its Level I appeal was denied because the health facilities inspection recommendation (Kinney report), requiring a total of 417,560 nursing hours, did not meet a test of reasonableness and extended far beyond Health Department licensing standards, as well as exceeding the nursing screen in the Cost Accounting and Rate Evaluation (CARE) system and going beyond the concept of unit staffing.

Mr. Kattak, business administrator of Preakness Hospital, then requested a hearing before an administrative law judge. Accordingly, the matter was forwarded by the DMAHS, Department of Human Services, to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held in the above-captioned matter on Friday, September 18, 1981 and the above-noted counsel agreed that the following issues had to be determined:

1. Was the DMAHS unreasonable and arbitrary when it rejected the hospital's request for reimbursement for 417,560 nursing hours?
2. Was the DMAHS unreasonable and arbitrary in applying the present system of calculating reimbursement for nursing hours for long-term care facilities to this particular hospital considering the patient population in this facility?
3. If the answer to question two is "yes," does that determination apply to future calculations in regard to reimbursement for nursing care hours?
4. Defense: The DMAHS argues it acted reasonably and complied with all regulations.

Crucial testimony was given by Elizabeth Ann Kinney, supervising health care facilities evaluator, New Jersey Department of Health, and author of the Kinney report. Ms. Kinney personally surveys public nursing homes throughout the State, evaluating the 18 conditions
required for Medicare and Medicaid payments, which include nursing care, buildings, pharmacy and nutrition. The purpose of surveying nursing homes is to assure the State that they are in compliance with the New Jersey Department of Health licensing standards and that they are meeting the requirements for certification for Medicare and Medicaid. She gives an annual inspection to each facility with a follow-up consultation and monitoring visits. Ms. Kinney described how she inspects these long-term care facilities and the procedure she follows if a deficiency is found, which includes giving the institution periods of time to correct deficiencies. The result of these procedures is either eventual acceptance of the correction or movement toward decertification. Her philosophy is not to close facilities but to upgrade care. For example, in November of 1980 Preakness Hospital was decertified for three days as a result of dietary deficiencies, which had arisen in 1978 and 1979, but the problem was corrected, and the hospital was reinstated on December 4, 1980.

The actual steps taken in a physical survey begin when Ms. Kinney decides to go to the facility either for an annual survey or a consultation. She inspects the entire facility for the 18 areas, reviews the specific problems of the facility, including the physical layout, staffing, and quality of patient care. She then speaks to the administrator and describes the result of her survey, which is then put in writing. The institution gets a copy of the survey, as does Social Security, Medicaid, and Health and Standards. No one in her department specifically reviews her report except Mr. Hebeler, director of Health Facilities Inspection Services. When she reviews a facility for Medicare and Medicaid certification she follows the federal guidelines in addition to following New Jersey State licensing requirements. In the area of nursing, Ms. Kinney testified that Medicare and Medicaid are only interested in knowing if the facility is meeting State licensing requirements, which are much more stringent than those of the federal government. Those requirements are a minimum of 2.75 nursing hours (RN, LPN and aides) per patient per day, at the highest level of care, which are sufficient to provide daily minimum care for patients in long-term care facilities.

There are three levels of patients in nursing homes in New Jersey. The levels refer to the average requirements of care. The skilled level patient (SNF) is one who requires 2.75 hours of nursing care per day; Level IV-A requires 2.5 hours and Level IV-B requires 1.25 hours. The regional Medicaid nurse and/or physician assesses the level of care the patient shall receive.
Preakness Hospital was not originally built as a long-term care facility and its two separate buildings, Units I and II, are a mile apart. (Units within a hospital contain wards, usually with 60 patients each under normal conditions, although physical layout can cause a ward to have less patients.) In Ms. Kinney's opinion, the layout of Preakness is not terribly bad, although the units are small, because existing nursing stations are in the center of the floor. Toilet and bathing facilities are not very good. When determining nursing requirements, she took the physical layout of Preakness into consideration.

Ms. Kinney described the "unit staffing" formula for reimbursement from Medicaid, which is the number of nursing units or wards times three tours of duty a day (or 21 a week) times eight hours per shift. The nursing unit is established by the layout of the facility and each unit equals a ward. Ms. Kinney also described the difference between county and proprietary institutions. Private facilities do not generally want total-care patients and she conceded that county homes do get more difficult patients. Proprietary facilities can reject patients and only have to take a percentage of Medicaid patients.

Ms. Kinney stated that she has never recommended more than 2.75 hours for SNF patients. While they may need additional help, she cannot enforce same if the facility is complying with the minimum requirements, although a facility certainly can give more than the minimum. Ms. Kinney was emphatic in stating that her August 5 report, was done for one purpose only, to respond to Ms. Hudak's request for a justification for staffing requirements which would enable the hospital to get additional funds from the Passaic County Board of Chosen Freeholders. It was never to be used for Medicaid reimbursement, but reflected optimal care requirements. In her opinion, minimum or basic care is care which complies with federal and State requirements, makes sure the patients are fed promptly and get grooming, but which leaves a great deal of room for improvement. Nevertheless, it is reasonable care under all the circumstances.

Ms. Kinney reviewed an average week, May 19 through 25, 1980, at Preakness and stated that the minimum hours required for the three levels of care at the hospital that week were 5,829 total hours, or 303,108 hours annually. Preakness had adequate nursing personnel for its 1980 census, and failure to comply with the minimum staffing requirements would not result in loss of license or loss of certification. There is no question that in June 1980 Ms. Kinney recommended 5,829 hours a week as the minimum hours of nursing care, and Medicaid could use this number of nursing hours for reimbursement. However,
she said that more hours were reimbursed to Preakness because it used the unit staffing concept.

Ms. Kinney reiterated time and time again during her testimony that her report was prepared for the purpose of giving Preakness Hospital documentation to support its request to the freeholders for additional staffing in order that it may provide more than the minimum hours actually required by State licensing requirements. The report is a recommendation and not an assertion of specific minimal hours, because the breakdown in it concerning required nursing hours for RNs, is far more than the minimal care required by State licensing regulations. That breakdown comes to 417,560 hours or 8,030 hours per week, much more than the minimum set forth in the nursing coverage worksheet. It was never her intention to use this letter for Medicaid reimbursement, which is why the letter was not sent to the Health Economics section, which sets rates and determines reimbursement. It was due to speaking with Mr. Hub in early 1980 that she assumed he wanted her to do the survey of Preakness because of Ms. Hudak’s request for aid.

Ms. Kinney noted that Mr. Hebeler, director of Health Facilities Inspection Services, New Jersey State Department of Health, “signed off” on her report which meant that he approved the letter to be sent to the facility before it was mailed. She gave the letter to her supervisor, Ms. Gill, who then sent it to Mr. Hebeler, who ultimately mailed it.

Mr. Hub is employed by the New Jersey Department of Health as director of Health Economics Services and is responsible for rate setting for long-term care facilities, including rates for nursing hours. He described the job of analyst I and the job of coordinator of the nursing home rate setting unit, positions held by Ms. Gormley and Mr. Lydon. They review a facility’s cost reports and determine the rate. Mr. Hub gave a general description of the system. The DMAHS approves the designation of a patient as a Medicaid recipient and approves a hospital as a provider of care. An analyst II in Health Economics, Department of Health, reviews data from the facility and a reimbursement rate is established, which is sent to the supervisor and analyst I, who clear up the variances, and is then sent to a coordinator who signs off on the rate. It is then returned to the DMAHS which reviews the rate for errors in computation and interpretation.

There is also an appeals process whereby a facility can request a detailed review of rate setting in the Department of Health. The
State of New Jersey

In Re: Preakness Hospital
Cite as 8 N.J.A.R. 389

analyst is questioned and if the charge in issue is approved, it is put
back into the rate base and the rate is recalculated. In evidence is
the analysis of nursing care rates for Preakness Hospital prepared by
analyst I—Ms. Gormley, based on the Kinney survey. Since the ma-
terials submitted had already been approved by the analyst II and
analyst I on the first appeal level, the Health Economics section
approved the recommendation for additional nursing hours and for-
warded it to Medicaid. Mr. Hub was careful to state that if Medicaid
did not approve the recommended rate, a "caucus" is held between
a Medicaid representative and a Health Economics staff member.
When Mr. Houston of Medicaid and Ms. Gormley of Health Services
met on this case, there was no resolution of the differences because
the recommended rate was outside the guidelines and the request for
additional reimbursement was peculiar to this specific facility. The
final decision on a particular rate problem is always up to the Medi-
caid Division, which reviews the problem and comes up with a final
recommendation to Mr. Russo, the Director of the DMAHS, who
has the authority to render the final decision.

Mr. Hub conceded that once a health care facility's inspection
determines nursing hours the report is sent directly to him. Normally,
the inspection team does not send a letter to the institution. He did
not know specifically on what Ms. Gormley relied when she developed
the rates recommended in her report, and he did not know that she
used the figures the Kinney report. He also stated that when the
hospital, via Mr. Kattak, wrote to Ms. Gormley on September 5, 1980
asking for a revision of the rates, based on the Kinney report, this
was conduct far outside normal procedures and was the only time
such an event has occurred in his section. He pointed out that while
the DMAHS has to give considerable weight to the recommendations
of the Health Economics analysts, who are expert in setting rates, the
DMAHS has the final authority to determine nursing home rates for
Medicaid reimbursement. Mr. Hub did concede that in spite of the
fact that it was highly unusual for a letter to be sent directly to the
analyst to appeal the rates, the analyst did recommend and approve
the revised rates, which he also approved and forwarded to Medicaid.
He allowed that Health Economics Services erred when it did not
follow the authorized procedures in that it did not receive a proper
survey from the health facilities inspection team, but accepted the
Kinney report as the usual survey by a health facilities inspection
team. The entire recommended revision of rates was based on the
Kinney report and Mr. Hub did not know if anyone had ever checked
with the health care facilities unit to determine if it was to be used for reimbursement purposes.

Mr. Hebler, who also is employed by the State Department of Health as director of Health Facilities Inspection Services, discussed the functions of that unit, which are two-fold. It conducts inspections for federal certification for Medicare and Medicaid and for licensure in the State of New Jersey, relying on its manual for investigations and recommendations. Mr. Hebler specifically recalled Ms. Kinney personally bringing him her report in order to enlist support for Ms. Hudak's plea to the Passaic County freeholders. When Mr. Hebler received a copy of a letter from Ms. Hudak to Dr. Goldberg, requesting a review of staffing levels in order to establish new nursing staffing requirements, he asked Ms. Kinney to do the survey. Ms. Hudak's letter spoke about the severe economic situation in Passaic County. In Mr. Hebler's opinion the consultation was provided for that reason, with Ms. Kinney cautioning the hospital she could not recommend beyond minimum standards.

Mr. Hebler relied on Ms. Kinney and rubber-stamped her report. Deputy Commissioner David Wagner then wanted to know why he had "signed off" on the report. His response at that time, and during his testimony, was that he wanted to support Mrs. Kinney and Ms. Hudak in the hospital's presentation to the freeholders. Wagner asked him the question because the hospital was now claiming reimbursement based on the letter and the staffing requirements set forth in it. Mr. Hebler's testimony was somewhat contradictory and abstruse, in that he first said the minimum staffing requirements set forth in the Kinney report referred to the standards of the Department of Health and then testified that he never intended the report to be used for reimbursement purposes.

Agnes J. Siroy is an analyst I in the Nursing Home Rate Setting Unit, New Jersey State Department of Health. She described the two methods of setting rates for nursing care hours in order to obtain reimbursement from Medicaid. Once the minimum hours of nursing care are set for the three levels of patients, the analyst will utilize the actual census of the facility times minimum hours, or the unit approach, already described, will be adopted. The analyst I will adopt the higher number of minimum hours between the census figure and the charge nurse or unit staffing figure for actual reimbursement to the long-term care facility (LTCF), which is reflected in the 359,000 hours for which Preakness is presently being paid.

Bertha Hudak and Linda Janelli supported the contention of Preak-
ness Hospital that the denial of reimbursement was unreasonable because the Kinney report suggested that minimum staffing hours were required beyond those hours reimbursed by Medicaid. Ms. Hudak testified as an expert in nursing and nursing home administration. She wrote to James Hub, director of Health Economics Services, in January 1980, asking for an assessment of Preakness's minimum staffing, with an eye to higher reimbursement for nursing hours. Mr. Hub responded by saying that he would try to help Preakness with its problem by referring her request to Dr. Goldberg, director of Licensing Certification Standards for the Department of Health, to whom Ms. Hudak also wrote.

A survey did, in fact, take place in June when Ms. Kinney came to the hospital and told Ms. Hudak that she would review the staffing patterns and would take more time to assess the facility in addition to performing her regular licensing investigation. In Ms. Hudak's opinion, Elizabeth Kinney, the evaluator, came to Preakness Hospital in June 1980 as a result of the Hub letter. It was Ms. Hudak's understanding and opinion that the Kinney report, which was issued after Ms. Kinney's visit and which is at the crux of this entire appeal, was written as a result of her request for reassessment of minimal staffing patterns in order to apply for a revision in reimbursement. Ms. Hudak denied that the Kinney report was the result of either her or anyone else's at Preakness Hospital asking Elizabeth Kinney to evaluate the hospital and then write a report which would support the hospital's application for additional funds from the freeholders of Passaic County by justifying staffing requests.

Ms. Hudak conceded that in January 1980, when her letter to Mr. Hub was written, Preakness Hospital was encountering severe fiscal problems due to budgetary cutbacks made by the Passaic County freeholders. Those cutbacks indirectly affected the level of staffing at the hospital because vacancies were not filled. Ms. Hudak was careful to point out that there was no problem with patient care even with freezing of staff vacancies.

On September 5, 1980 Victor Kattak, business administrator of Preakness Hospital, wrote to Christine Gormley, analyst I, concerning the Kinney report. That letter, was considered a Level I appeal, asking the analyst to compute the minimum staffing pattern recommended in Ms. Kinney's letter into hours of care which would be reimbursed by Medicaid. When so computed, the staffing patterns described in the Kinney report equal 417,560 hours of care. Ms. Hudak stated that Medicaid reimbursement is based on minimum staffing patterns which
are considered sufficient to provide basic safe care given to the patients. Reimbursement to Preakness from Medicaid is presently based on 359,000 hours of care, based on unit staffing patterns presently in existence. Ms. Hudak agreed that the hospital has never been cited for failure to comply with the nursing requirements to provide minimum care, although Preakness Hospital has never received 100 percent reimbursement for Medicaid. The hospital actually provides 562,000 hours of nursing care annually.

In Ms. Hudak's opinion, minimum care must include keeping a patient clean, dry and comfortable and preventing bedsores. The only citation the hospital has received in recent years was for failure to meet temperature standards for meals, the achievement of which is also part of minimal nursing care.

Ms. Hudak testified that the nature of the patient population at Preakness Hospital is such that the patients there are more difficult in terms of nursing care than those in private institutions. Many have multiple sclerosis or Huntington's Disease, at least one-half is incontinent and approximately 150 are confused and need medical assistance in ambulation. Patients come to Preakness from other nursing homes when Medicare and private benefits run out and attrition at Preakness Hospital is mainly due to death, as Preakness does not refuse admission to any patient. Ms. Hudak compared this policy to that of private nursing homes where patients are admitted selectively and therefore the amount of care required to be rendered by the staff is less. Staffing problems also arise at Preakness because of its preferred practice to avoid padding or diapering a patient who is incontinent, because of problems in moving patients to the dining room, and because of requirements of a general hospital or a doctor to have a staff aide accompany a patient who is sent to them.

Ms. Hudak also discussed the physical layout problems at Preakness Hospital which create a need for more staff. Unit I, which is one mile from Unit II, was a tuberculosis sanitarium which was totally converted to a LTCF in 1976 because as TB cases declined, geriatric care increased. Unit II was the Passaic County Poor House and Old Age Home and was always a long-term care facility.

Ms. Hudak conceded that the 359,000 hours reimbursed by Medicaid were calculated by the unit staffing method which relies on the layout of the facility and the number of wards, regardless of the number of patients, and she further conceded that if the reimbursable hours had been based on the patient census, only 308,000 hours would have been reimbursed. However, Ms. Hudak was explicit and direct
when she stated the hospital could not function if limited to 359,000 hours because the Preakness type of patient requires more hours of care than the minimum set forth in the Cost Accounting and Rate Evaluation (CARE) Manual. It could not maintain a full census and could not change the patients, and therefore there would be more bedsores, the patients would not be fed properly, medications would suffer and ultimately it would have problems with licensure and certification. The lowest number of hours with which the hospital could function and give minimum care is 417,000. It is presently providing 562,000 hours annually, which is above minimum care and is equal to acceptable care. Passaic County freeholders have funded the nursing costs above the 359,000 hours reimbursed by Medicaid.

Linda M. Janelli was qualified as an expert in nursing, with a specialty in gerontology. On October 31, 1981 Ms. Hudak asked her prepare a survey to determine minimal, acceptable and optimal staffing patterns for Preakness Hospital. On November 4, 1981 Ms. Janelli went to Preakness Hospital, did a physical survey, and prepared a report based on the level of care at which patients were assessed and the physical layout. Ms. Janelli defined minimal staffing as the smallest number on staff for safe custodial care. Acceptable staffing is care above minimal which sees to psychosocial needs of the patients and which is more than dressing a patient and having that patient watch television. Optimal care is what every nursing home should desire. In her opinion, on November 4, 1981, Preakness Hospital was providing only minimal care. Initially, it appeared that in determining the staffing pattern required to give that care, Ms. Janelli relied on a specific formula of McCloud and Vaughan, which, in the past, had been applied only to acute-care facilities. Based on this specific formula, she opined that 408,800 annual nursing hours are required for minimal care at Preakness Hospital.

Ms. Janelli conceded that Preakness Hospital is not an acute-care facility and that the formula upon which she relied when determining the 408,800 hour minimum was not used by any governmental unit. She said she only relied on the McCloud and Vaughan pattern for optimal staffing and she used the Level A, B and SNF formulae for minimal and acceptable standards. Based on her observations and on her professional expertise, even if Preakness were completely modernized, 359,000 hours of nursing care would not be enough to operate on a minimal level, as the hospital could only operate at a minimal level with 408,800 nursing hours.

Dr. Joseph Gouzik and registered nurses Dombrowski and Briggs,
who are with the Paterson Local Medical Assistance Unit of Medicaid, visited Preakness on March 30, 1981. The purpose of their visit was to review the levels of care at Preakness Hospital. The visit was the result of a request from Dr. Gouzik's superior, Dr. Ehrlichman, who told them that Mr. Russo wanted this information to determine the standard of care at Preakness Hospital and to evaluate if proper nursing care was being given. This is the first time Dr. Gouzik has done a report of this type as his usual reason to go to Preakness Hospital is to do medical evaluations of Medicaid patients.

Dr. Gouzik and nurses Dombrowski and Briggs evaluated both units at Preakness to determine the standard of care and to determine if adequate nursing care was being provided. As a result of this evaluation, it was his opinion that patients would benefit and care would be enhanced if more nurses were provided. The main reason for this opinion is the fact that physical therapists were moving patients back and forth and there were not enough nurses to provide restorative nursing. Dr. Gouzik evaded the questions in regard to the staffing patterns of nurses who were on duty, but he did state that adequate care was being rendered to the Medicaid patients although the therapist needed help. Any comments about the lack of personnel and the enhancement of care if more personnel were provided was to be considered in terms of the therapist's problem. He felt that the three levels of patients were getting adequate care. In Dr. Gouzik's opinion, minimal care is "just enough to get by"; adequate care means no one is being neglected.

Ms. Dombrowski and Ms. Briggs are regional staff nurses employed by the New Jersey Department of Human Services, DMAHS. Ms. Dombrowski said staffing problems arise at Preakness when a patient has to go to Paterson General Hospital or to see a doctor, since a staff member must accompany that patient until the testing or visit is concluded. Even more basic, Ms. Dombrowski believes the problems at Preakness are attributable to poor utilization of staff rather than to the number of people on staff. Because there are very few volunteers at Preakness, the professional staff has to do more than at other long-term care facilities. She also feels that absenteeism is a problem which contributes to the poor utilization of staff. In her opinion, the patients at Preakness were getting an adequate level of care up to very recently. She thinks the staff is very dedicated but there is now a problem with morale. These conclusions, and the report which she prepared in conjunction with Ms. Briggs and Dr. Gouzik, is based on her observations on March 30, 1981, a representative day,
as well as on her overview from visiting Preakness over the past two years. She understands that hospitals cannot rely heavily on volunteers and that the rule requiring staff members to accompany patients to Paterson General Hospital and to doctors is not a Preakness rule.

Ms. Briggs's testimony was generally corroborative of Ms. Dom- browski's. She felt that the nurse staffing pattern at Preakness provides basic or minimal nursing care to all three levels of patients. Normally she does not look into the number of nurses and aides on duty, which is just what she was asked to do in this situation, but reviews the care given a specific or particular patient.

The court finds the testimony of James H. Houston, chief of Planning and Management, DMAHS, State Department of Human Services, illuminating. Although he had previously been employed as an analyst I, he is now responsible for review of the rate setting method and recommended rates which are received from the Department of Health, Division of Economics Services, because the DMAHS has a contract with the Department of Health to establish rates of reimbursement for Medicaid. Mr. Houston analyses the recommended rates and then makes a recommendation to Mr. Russo, head of the DMAHS, either to accept the rate and reimburse the facility or to return the rate to the Department of Health for further analysis. On appeals from reimbursement rates he reviews the rates for accuracy, interpretation of guidelines, supporting documents and rationale for the recommendation.

Medicaid reimbursement is made on a reasonable cost-related system. The DMAHS compares the costs submitted by the 224 nursing homes participating as providers in the Medicaid program. After the comparison is made the DMAHS arrives at a screen, which is limited for reasonableness based on unit cost. The screen is a percentage somewhat over the median cost and is considered equal to reasonableness. Costs above the screen are determined to be unreasonable, and are discarded and not included in the rate base. The most reasonable rates determined are set out in the CARE guidelines for various categories, such as nursing, administration, general service, etc.

Mr. Houston corroborated the testimony of Ms. Kinney and Ms. Siroy as to the two methods of calculating nursing hours for reimbursement. One method uses the census of the facility by level of care and by payor type, which determines the gross number of patient days, by patient level, times nursing hours, to determine the minimal staffing required. The second pattern is to compare the number of hours recommended by the Health Inspection Unit based on a charge nurse
or unit staffing basis. In that method of calculation the number of units in a facility, as determined by the Department of Health inspection and licensure team, is multiplied by 2l, the number of working shifts a week, by eight hours, the number of hours per shift, by 52 weeks, number of weeks in a year, the total of which should equal the total number of licensed nursing hours which will be reimbursed by Medicaid. This formula is approved by Medicaid. (Aide hours are strictly determined by census.) Eighty-five percent of the LTCFs in the State fall below the screen for reasonableness in calculation of their hourly pay, and 60 to 65 percent of the homes receive total nursing costs.

Mr. Houston discussed the specific recommendations in regard to Preakness Hospital. Mr. Lepelis, a staff member in the Bureau of Planning and Management, DMAHS, reviewed and evaluated the recommendation for nursing home rates received from the Department of Health, on the level I appeal of Preakness Hospital, which included the revised rate based on Ms. Kinney's report. Mr. Lepelis sent a memo to Mr. Russo asking for direction on how to treat the recommendation of the Health Facilities Inspection Unit. He questioned the authority of the unit to go beyond the census and/or unit staffing rate setting formulae. Medicaid is willing to reimburse Preakness on the unit staffing basis, which gives the hospital $430,000 more than it would get on the census basis, but there would be an additional $400,000 cost to Medicaid if it went from unit staffing to the recommendation of the Department of Health based on Ms. Kinney's report.

Mr. Houston testified that Mr. Russo directed him not to approve the additional hours but to implement the 359,000 hours reimbursement based on unit staffing. In Mr. Houston's opinion, the Inspection Unit's recommendations do not meet the reasonable test and go beyond the guidelines and the screen set forth in the CARE Manual. On May 12, 1981 a meeting was held with representatives of Preakness Hospital to discuss the denial of the recommendations.

Mr. Houston stated that Preakness was told the 417,000 hours requested for reimbursement for nursing care was unreasonable for the following reasons: (1) the CARE system which Medicaid uses for reimbursing LTCF's only allows the census or unit staffing measurements of reimbursement, with Medicaid entitled to adopt whichever is the higher figure; (2) the recommendation from the Health Care Facilities inspection staff was not based on any existing authority; (3) there would be an additional cost to the Medicaid program of
$400,000; (4) there was no evidence that Preakness’s patients were substantially different from those in other similar homes throughout the State of New Jersey, and (5) under the existing guidelines no additional consideration can be given to LTCF's run by a governmental entity. Mr. Houston compared the 1979-81 Preakness census with that of other facilities in the State and as a result of that comparison, opined that Preakness was not substantially different as far as patients' level of care. For example, the 1979-1981 statewide range of SNF patients, as a percentage of total patient population, was 5.5 to 6.4 percent. The SNF patient population at Preakness in 1980 was 6.4 percent (the percentage is equal to the number of paid days at the SNF level). Statewide the IV-A level for the fiscal year ending 1979 was 64.9 percent of patient days, for 1980 was 65.8 percent, and for 1981, 66.5 percent. In 1979, Preakness had 70.7 percent at the A level. The statewide average at the IV-B level in 1979-1981 was 29.9 percent, 28.4 percent and 26.9 percent respectively, while Preakness had 22.9 percent. Thus his conclusion is that the patient mix at Preakness is comparable to levels at nursing homes throughout the State.

Mr. Houston conceded, and it is clear as well, that if Department of Health recommendations deviate from established guidelines, then the DMAHS must review those recommendations carefully. But, in doing that review, cost is certainly a factor to be considered in denying certain recommendations. The federal government has rejected classifying and reimbursement of government-run institutions on a different level than proprietary institutions. Mr. Houston, who was unflappable during cross-examination, testified that a reasonable level of reimbursement is that level which statistically incorporates valid numbers of facilities into a sample for measurement. The Kinney report's recommendations exceeded the reasonable level of reimbursements, whether by the unit staffing requirement or the census requirement, and although Medicaid had to rely on the expertise of the Department of Health, as it does not do its own evaluation and inspection, it must apply the reasonable guidelines, absent unusual circumstances, which he did not see here.

ARGUMENTS OF PARTIES

The parties' contentions, with respect to the alleged unreasonable-ness of the denial of reimbursement for nursing hours calculated pursuant to the Kinney report may be briefly summarized. Preakness Hospital argues that the Kinney report sets forth the number of nursing hours which constitute the minimal nursing hours required
for licensure or certification for its facility. Based on that report, Preakness Hospital asserts that minimum staffing patterns mandate 417,560 nursing hours per year, because of its unusual physical layout and the nature of its patients. The hospital argues that since the rate analyst and rate setting department of the Department of Health approved and recommended the revision to permit reimbursement for the 417,560 hours calculated pursuant to the minimum staffing requirements, this is a reasonable request and one which must be reimbursed pursuant to N.J.S.A. 30:4D-7(b), which provides that amounts paid must be reasonable and that the medical assistance provided shall include at least the minimum services required under federal law. Counsel argues that by reimbursing Preakness Hospital for less than the minimum acceptable standard set forth in the Kinney report, Medicaid is preventing Preakness from providing that nursing care which the regulation requires.

The hospital argues that county and other governmental LTCFs should receive a higher per diem rate of reimbursement than proprietary facilities because they have historically been the depositories for the most difficult patients. The hospital is vehement that the Kinney report was not elicited solely for the purpose of supporting its request to the Passaic County freeholders for the funds, and argues that the survey was requested because the hospital felt that it had not been receiving a fair and reasonable reimbursement for nursing hours in view of its physical layout at the facility and the nature and conditions of patients being treated therein. The crux of petitioner's argument is that the Kinney report is not a recommendation for ideal staffing patterns but is a recommendation for minimal staffing patterns, which hours would "increase or decrease depending on the level of patient care...."

The DMAHS described the establishment of the Medicaid program and the regulations promulgated to facilitate its functioning in New Jersey, including the determination of the method of reimbursement which is governed by the CARE guidelines. There are only two methods of calculation for reimbursement of nursing hours, the census method or the unit staffing method, and the number of nursing hours to be reimbursed by Medicaid is the higher dollar amount of the two.

The DMAHS argues that the staffing consultation provided by Elizabeth Ann Kinney, supervising health care facilities evaluator, Health Facilities Inspection Services, was written for one purpose and one purpose only, to be used by Ms. Hudak in an effort to avoid cutbacks in funds for nursing staff by the Passaic County Board of
Chosen Freeholders as a result of the budgetary and fiscal crisis being experienced by that county. This conclusion is supported by Ms. Hudak's initial letter to Mr. Hub, asking for a review of nursing care levels because of serious cutbacks as a result of the county's fiscal problem. The Kinney report of August 5, 1980 set forth ideal staffing patterns in order to justify continued request for appropriations from the freeholders and to maintain the constant level without reduction, and was never intended to be used for State licensure, certification or reimbursement purposes. Furthermore, the staffing patterns suggested in the letter were far in excess of the minimum hours required for either licensure or certification. Failure to comply with the patterns suggested in the letter would never have resulted in loss of licensure or certification.

The DMAHS argues that it was reasonable in rejecting the request for reimbursement at the higher level of hours because the minimum required hours, as established by the State and as reimbursed by Medicaid, are sufficient to allow for adequate maintenance of nursing services at Preakness Hospital. The DMAHS states that there is no official procedure or authorization in New Jersey to calculate minimum nursing hours at a different and higher level for government or public institutions, as opposed to proprietary institutions. Furthermore, the normal procedure which should have been followed by a facility requesting an increase in reimbursement rates was not pursued in this case and the Health Economics Services Division of the Department of Health erred in relying on the Kinney report as the sole basis for its revised recommendations. The Kinney report was compromised when it was used as a basis for increased Medicaid reimbursement. In short, the DMAHS argues that petitioner has failed to meet its burden of proof to show that the minimum standards for nursing services at Preakness Hospital should be something other than the statewide minimum which is the basis for Medicaid reimbursement.

**CREDIBILITY**

This court has reconsidered and reviewed the testimony of all the witnesses, and finds Mr. Houston's testimony not only credible but most objective and lucid. It further finds Ms. Kinney a credible witness, who was "on the spot," but testified truthfully. The court further finds, to her credit, that Ms. Hudak's primary and foremost interest was to keep the standard of nursing care at Preakness Hospital as high as possible. The expert testimony of Linda Janelli was not
truly relevant on the issues of general reasonableness of present rates of reimbursement, and this judge does not accept her opinion that the denial of reimbursement for hours set forth in the Kinney report is unreasonable. Testimony of the other witnesses was basically factual, and supported the concession of the Deputy Attorney General that the Department of Health erred in many of the actions which its employees took, including "rubber-stamping" Ms. Kinney's report and failing to check out the obvious departure from normal procedure of Preakness Hospital when it directly wrote to the analyst I, asking for a revision in its rates, and submitting the Kinney report as the sole support for its request.

**FINDINGS OF FACT**

After reviewing and considering the testimony and evidence introduced in this matter, and after considering the demeanor and credibility of all the witnesses, and after reviewing the cogent letter memoranda filed by counsel and considering the arguments therein and after reviewing the applicable law, the court makes the following findings of fact:

1. Preakness Hospital is a long-term care facility in Passaic County, New Jersey, run and partially funded by the county, which has two units, which are a mile apart.

2. On January 25, 1980 Ms. Hudak, administrator at Preakness Hospital, wrote to Mr. Hub, director of Health Economics Services, New Jersey Department of Health, which is responsible for rating setting for LTCFs, including setting of rates for nursing hours, asking him to have the Department of Health review staffing patterns to help Preakness in determining a minimal standard of care for the facility. In January 1980, Passaic County was experiencing a severe fiscal crisis and Preakness Hospital was anticipating budgetary and staffing problems as a result.

3. The reasons for this request were threefold: (a) the severe fiscal problem in Passaic County which would cause serious cutbacks in the nursing staff at Preakness Hospital; (b) the physical layout of units at Preakness Hospital is not comparable to that of a private nursing home; and (c) the type of patient admitted to this county facility is usually more sick than a patient in a private facility who is at the same level of care.

4. As a result of that letter and a telephone conversation with Ms. Hudak, Mr. Hub conferenced the matter with Mr. Lydon, the
coordinator for LTCF rate setting. The discussion with Mr. Lydon centered on Passaic County's financial problems and their potential impact on Preakness Hospital.

5. Ms. Hudak then wrote to Dr. Solomon Goldberg, director, Licensing Certification and Standards, New Jersey Department of Health, formally asking for a review of staffing levels and the establishment of new nursing staffing requirements necessary to provide quality patient care, and asking him to take into consideration the severe economic situation in Passaic County as well as the type of patient and the physical layout of the facility.

6. As a result of the correspondence and conversations, Ms. Kinney, supervising health care facilities evaluator, Department of Health, was directed to survey Preakness Hospital while performing her annual evaluation. The result of her survey was the Kinney report, which set forth minimum staffing patterns to provide the type of care Preakness wanted and had been providing. The primary purpose of that survey was to prevent budget cutbacks by the Passaic County freeholders and to support a request for the staffing suggested therein. The survey took into consideration the physical layout and type of patient at Preakness Hospital. It was not a survey designed to support an upward revision of rates by which Medicaid would reimburse Preakness for hours of nursing care. The director of Health Facilities Inspection "signed off" on the Kinney report knowing its primary purpose.

7. Preakness Hospital utilized the Kinney report in a direct appeal for a revision of rates to the Nursing Home Rate Setting Unit of Health Economics Services, New Jersey Department of Health. The utilization of this report in such a fashion for such an appeal was outside normal procedures, and has never occurred before or since.

8. Despite the fact that the appeal was initiated outside normal procedures, the Nursing Home Rate Setting Unit of Health Economics Services recommended a revision of reimbursement based on the Kinney report. The recommendation was forwarded to the DMAHS which reviewed the report and denied the recommended hours because of the fact that they were far above not only the required hours of nursing care as per census calculation, but above the required hours per unit staffing.

9. The Department of Health Facilities Evaluation as well as
Health Economics Services, Department of Health, erred in relying solely on the Kinney report, when it recommended revised rates of reimbursement. The entire recommended revision for rates for reimbursement made by the Health Facilities Inspection Unit was based on the Kinney report and no member of that unit ever checked with the Health Care Facilities Unit or with the DMAHS to determine if it was to be used in fact for reimbursement purposes.

10. Medicaid's reimbursement of nursing care hours at Preakness Hospital is presently based on the unit staffing method and provides annual reimbursement for 359,000 hours. This is in excess of the hours which would be reimbursed if the actual patient census were used in calculating nursing hours. Reimbursement for 359,000 hours is the maximum that can be provided pursuant to regulation.

11. The patient mix at Preakness is not so different or unique, when compared with Medicaid patients in similar facilities throughout the State of New Jersey, as to require a higher per diem rate. While county homes do get more difficult patients than proprietary facilities, the number of more difficult patients at Preakness Hospital and their degree of difficulty has not been substantiated to such a degree which would require more hours per day of nursing care and thus higher per diem rates for reimbursement. The staffing pattern at Preakness Hospital is not so different from what it has been in the past to require reimbursement at a higher rate. Preakness Hospital has never been reimbursed by Medicaid for 100 percent of nursing care hours.

12. Minimum care is that care which is equal to basic care and which meets federal and State requirements. It is reasonable given all the above circumstances. Preakness provides minimal care to its patients.

13. Failure to comply with the "minimum staffing requirements" set forth in the Kinney report will not result in the loss of license or loss of certification of Preakness Hospital. The "requirements" of the report are in the nature of a recommendation of optimal minimal hours of nursing care.

14. If the revised rates for reimbursement, based on the Kinney report were to be adopted, the cost to the Medicaid program would be an additional $400,000. Medicaid is already reimbursing at the higher of the two permissible calculations, the "unit
staffing” calculation, which costs $430,000 more than the census method.

CONCLUSIONS OF LAW

The issues in this case revolve around the specific reasonableness of the denial of reimbursement to Preakness Hospital for nursing hours calculated pursuant to the Kinney report and the general reasonableness of applying the present system of calculating reimbursement for nursing hours for long-term care facilities to this specific hospital taking its patient population and physical layout into consideration. The reimbursements in question come from the Medicaid program which is designed to aid those persons whose economic resources are insufficient to meet the cost of medical care, with the federal government providing matching funds to participating states. See Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq. Although the state must comply with certain federal requirements, the actual administration of the Medicaid program is placed in the hands of the state agency which transmits payments to the providers of services. Before a state Medicaid program is implemented, the state submits its plan to the Department of Health and Human Services for its approval and substantial deference has been accorded the states in devising methods for administering its program. See District of Columbia Podiatry Society v. District of Columbia, 407 F. Supp. 1259, 1263 (D.D.C. 1975); Briarcliff Haven, Inc. v. Department of Human Resources, 403 F. Supp. 1355, 1361 (N. D. Ga. 1975). The state is not required to reimburse a provider for every allowable cost, as the statute merely provides that payments be made on a reasonable cost-related basis which is established by the state plan. 42 U.S.C. 1396(a)(13)(E). The only condition is that the state may not set the rates so low that reasonable costs would not be covered. The cost-related rates may be calculated on several different bases, including class or type of facility, depending on the state plan, see Unicare Health Facilities, Inc. v. Miller, 481 F. Supp. 496 (N. D. Ill. 1979), even though the method used in a particular state may result in under-payments to some providers.

Pursuant to N.J.S.A. 30:4D-1 et seq. the State of New Jersey participates in the Medicaid program. The program is administered by the State, subject to the federal guidelines just described. New Jersey is required to include coverage for the categorically needy for payment of “part of or all of the cost of” skilled nursing facilities, 42 U.S.C. §1396(a)(13)(b) and 1396d(a)(4)(A), as well as maintaining the optional
service of providing reimbursement for intermediate care facility services rendered to the eligible Medicaid population. Id. §1396a(a)(13)(b) and 1396d(a)(15); Monmouth Medical Center v. State, 80 N.J. 299, 303, n. 2 (1979), cert. den. 444 U.S. 942 (1979). These services are provided to Medicaid eligible persons via skilled nursing facilities (SNF) and intermediate nursing facilities (ICF), which are collectively identified as long-term care facilities (LTCF). In New Jersey, the method of reimbursement to LTCFs for Medicaid costs is governed by the CARE guidelines which were developed jointly by the Departments of Human Services and Health and adopted by the Commissioner of Human Services. N.J.A.C. 10:63-3 et seq. The computations and initial processing of rates are performed by the Department of Health, see Id. 3.1 and .20, but final authority to establish reasonable rates of reimbursement for Medicaid services rests solely with the Department of Human Services. N.J.S.A. 30:4D-7(b), Att'y Gen. Form. Op. 1976—No. 8.

Under the CARE guidelines the per diem rate for services provided by the LTCFs is based on actual costs reported by a facility to the Department of Health for a fiscal year. The rates are calculated on a dual track, either actual historical costs per day plus a return of net equity for proprietary facilities, known as the “historical rate,” or actual costs that have been screened for reasonableness according to standards set forth in the regulations, the “screened rate.” Rates are established at the lower of either the “historical” or “screened” costs, N.J.A.C. 10:63-3.2(a), and are established for patients requiring and receiving three different levels of care. The most intensive level of care is given to the skilled nursing patient (SNF or Level III), who receives the highest per diem rate. Intermediate care patients are divided according to their medical condition into levels IV-A and IV-B, with payment at a higher rate for services rendered to Level IV-A patients.

Pursuant to federal regulations any LTCF wishing to participate in the Medicaid program must meet state licensing standards. 42 C.F.R. §442.201 and 442.251. In addition, the DMAHS must designate a state authority to establish and maintain health standards for the providers participating in the program, 42 C.F.R. §431.610, and providers will not receive Medicaid reimbursement unless the survey agency has certified that the facility complies with all the federal health and safety requirements. 42 C.F.R. §442.12. The Department of Health has been designated as the survey agency in New Jersey and pursuant to N.J.A.C. 10:63-1.2, all LTCFs must be licensed or approved by the
Department of Health. As part of the licensing procedure those LTCFs participating in the Medicaid program must provide nursing services for the three levels above discussed of long-term care "in accordance with the minimum standards set forth by the New Jersey Department of Health." N.J.A.C. 10:63-1.3(d)(i), (2)(i) and (3)(i). At the present time, the Department of Health requires the following minimum standards for direct nursing care for each Level III (SNF) patient -2.75 hours; for each Level IV-A patient 2.5 hours; for each Level IV-B patient 1.25 hours during each 24-hour period. N.J.A.C. 8:39-1.16(d). In addition, LTCFs are required to have one professional nurse assigned to each nursing unit (really a ward) 24 hours a day, seven days a week. N.J.A.C. 8:39-1.16(e). This requirement conforms to the federal guidelines for a "charge nurse" system which has been referred to throughout this case as unit staffing, where the federal requirement mandates that a skilled nursing facility must have a registered nurse or a licensed practical nurse designated as a charge nurse for up to 60 patients for each tour of duty, 42 C.F.R. §442.202(c) and 405.1124(b).

The current CARE guidelines delineate that the number of nursing hours which are to be reimbursed for Medicaid funds be the higher of either the hours required to serve the existing patient census or the hours required to comply with the charge nurse requirement. By utilizing the actual patient census method, Preakness Hospital would only be entitled to reimbursement for 308,018 hours, while the charge nurse or actual unit staffing method described by Mr. Houston and Ms. Siroy would provide Preakness with an annual reimbursement for the period beginning July 1, 1980, of 359,947 hours of nursing care.

This judge must first determine whether the DMAHS was unreasonable and arbitrary in applying the above-described system for calculating reimbursement for nursing hours for LTCFs to Preakness Hospital, without considering its physical layout and patient population when determining rates of reimbursement. The brief answer is that rates of reimbursement for LTCFs, which are formulated pursuant to N.J.A.C. 10:63-3.1 et seq., should be accorded a "presumption of reasonableness" and accorded deference by an administrative law judge, and therefore the DMAHS was not unreasonable in its actions herein. The forward to N.J.A.C. 10:63-3.1 et seq. indicates "these regulations describe the methodology ('guidelines') to be used by the State of New Jersey to establish prospective per diem rates for the providing of routine care to patients under the State's Medicaid program. . ." "(T)he strict application of these guidelines will gener-
ally produce equitable rates for the payment of long term care facilities (LTCFs) of the reasonable cost of providing routine patient care services.” The Supreme Court of New Jersey has indicated that regulations promulgated by State agencies should be granted the presumption of validity regularly afforded to all administrative regulations. See, Motyka v. McCorkal, 58 N.J. 165 (1971), which involved a challenge to §615a of the Categorical Assistance Budget Manual of the Division of Public Welfare, which pertained to income eligibility for segment N of AFDC grants, and set ceilings on the number of family members and formulae for the calculation of total available adjusted income. In Motyka, the Supreme Court noted that the regulation promulgated by the Commissioner, "... is entitled to the benefit of the customary rebuttable presumption of validity and regularity afforded to administrative regulations generally." (Citations omitted) Id. at 181.

In reaching this conclusion, this judge is also guided by the holding of New Jersey Pharmaceutical Association v. Klein, 140 N.J. Super. 16 (App. Div. 1976), where Medicaid recipients and pharmacists challenged a regulation which required recipients to pay $0.25 per prescription, said fee to be collected by the pharmacist. The Appellate Division found no support for plaintiff's claim that the regulation was unreasonable as, "The burden of establishing that the regulation is unreasonable is on appellants. The regulations entitled to the 'customary rebuttable presumption of validity and regularity afforded to administrative regulations generally.'" Id. at 22. The proofs presented by the instant petitioner in attempting to show unreasonableness rest mainly on Ms. Kinney's report re minimum hours, as well as on a description of its patient population and physical layout. There was expert testimony that because of the type of circumstances in which Preakness finds itself, the hospital cannot operate with less than 408,800 hours of nursing care and therefore it is unreasonable to expect it to be reimbursed pursuant to the unit staffing method.

This evidence is not sufficient to overturn the presumption of regularity and reasonableness afforded to the above regulations setting rates of reimbursement. Mr. Houston, a credible and cogent witness, testified, contrary to Ms. Hudak's assertion, that the patient mix at Preakness does not differ markedly from that of other long-term care facilities throughout the State of New Jersey. Ms. Kinney testified that her report setting forth minimum nursing hours, was not written and sent to the hospital for the purpose of revising reimbursement rates, but was prepared primarily for the purpose of supporting Preakness’s
request to the Passaic County freeholders for sufficient funds to support adequate staffing. Furthermore, Ms. Kinney, an expert evaluator, found, as a result of her review of an average week in 1980 at Preakness Hospital, that the hospital could get along with 303,108 hours of nursing care annually. The actual patient census at Preakness would generate many less hours of nursing care, than that which Medicaid is obviously willing to reimburse. Accordingly, this judge concludes that the regulations providing for minimum standards for direct nursing care to SNF patients, Level IV-A patients and Level IV-B patients are reasonable and the method of calculating reimbursement, which is based on these standards, and is also pursuant to regulation, see N.J.A.C. 10:63-3 et seq., as well as N.J.A.C. 8:39-1.16 et seq., is also reasonable. In addition, no alternative method of calculation has been proposed, except for the request that Medicaid apply the regulations rates to a higher number of hours, which hours have not been calculated according to any fixed formula, a statistical review, but are an ad hoc determination of a one-time report.

A more difficult issue to decide is whether DMAHS was unreasonable and arbitrary when it rejected the hospital's request for reimbursement for 417,560 hours of nursing care, which request was based on the report of a health care evaluator for the Department of Health, which has the contractual duty to devise rates for reimbursement after reviewing and evaluating a particular hospital. Upon review of the evidence in this matter the court has found as fact that Ms. Kinney's letter of August 5, 1980, also described herein as the Kinney report, was never intended to provide the sole basis for the establishment of revised rates for reimbursement for nursing care hours from Medicaid to this petitioner. From the very outset, January 1980, Ms. Hudak's requests for a review of minimum staffing patterns at Preakness Hospital included references to the budgetary crisis in Passaic County. This is not to say that the hospital was satisfied with the amount of reimbursement it was receiving from Medicaid, as it is clear that the hospital has consistently urged that it was entitled to higher reimbursement because of the nature of its patient population and its physical layout. This is to say that the request made in January to Mr. Hub, as well as the requests in the hospital's follow-up letters for a survey of staffing patterns, which culminated in the visit of Ms. Kinney on June 17, 18 and 19, 1980, consistently referred to the budgetary and financial problems in Passaic County.

Although Ms. Kinney's visit was the annual survey for certification and licensure which must be made in order to determine that the
facility is meeting standards for licensure and reimbursement from Medicaid, the visit was also made as a result of a direction to Ms. Kinney to assist the facility in supporting and presenting a request to the freeholders for additional funds. While at first blush the language in the Kinney report, which talks about "minimum staffing patterns . . . which would increase or decrease depending upon the level of patient care" may be interpreted to mean minimum staffing requirements for State licensure certification, this is not the case. Whatever anomalies and confusion those words presented has been corrected and clarified by the testimony of Ms. Kinney herself, as well as that of other members of the Department of Health and of the DMAHS when it was unequivocally stated that even if Preakness Hospital did not meet the "minimum staffing patterns" there was no possibility that Preakness would lose its license or certification. The court further finds that the "minimum staffing requirements" which Preakness argues are the minimum for licensure and certification, are far higher than the existing minimum staffing requirements mandated by N.J.A.C. 10:63-1.3(d)(I)(ii).

The court must consider whether the DMHAS should be bound by the determination of the Department of Health to recommend revised rates of reimbursement to Preakness Hospital based on the hours generated by the staffing patterns of the Kinney report. The court concludes that the DMAHS, which was established pursuant to N.J.S.A. 30:4D-4 to perform the administrative and operational functions of the Medicaid Assistance Program, should not be bound by rate determinations of the Department of Health. The functions of the Department of Health and the DMAHS with respect to the Medicaid Program have already been discussed. The DMAHS is statutorily charged with the duty to administer the day-to-day operations of the New Jersey Medicaid Program, including the reimbursement of service providers. The role of the Department of Health is limited to assisting the Department of Human Services by developing rates of reimbursement for long-term care facilities participating in the Medicaid program. The authority to render a final agency decision on challenges to the validity of Medicaid rates of reimbursement or rate review guidelines, etc., rests solely with the DMAHS. See, In the Matter of Waterview Nursing Home and In the Matter of Twin Oaks Nursing Home, OAL DKTS. HLT 5925-79 and HLT 445-80 respectively, reversed and modified, final agency decision, March 4, 1981. In the instant matter, petitioner seeks to tie and bind the DMAHS determination of rate reimbursement to the recommendations of the
Department of Health, even in the face of an admission by the Attorney General that the Department of Health erred in recommending the revised rates, and erred in relying on the Kinney report as the sole basis for its recommended revision of rates.

The DMAHS should not be bound to an erroneous determination as it has the authority, not only to render the final decision, but to challenge any aspect of the rate establishment process on the grounds of reasonableness. 42 U.S.C. §1396(a)(13)(e) mandates that state Medicaid programs provide "... for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the state on the basis of cost finding methods approved and verified by the secretary, ..." N.J.S.A. 30:4D-7(b) enforces the reasonableness standard in New Jersey's Medicaid program through the provision that the Commissioner is "... to determine the amount and scope of services to be covered, that the amounts to be paid are reasonable. ..." The CARE guidelines are the mechanism utilized by the DMAHS for the establishment of the federally mandated reasonable rates of reimbursement. There is no provision within these guidelines which indicates that a determination made by the Department of Health, acting on a request for reimbursement submitted in a procedurally deficient fashion, as here, is conclusive and binding upon the DMAHS. N.J.S.A. 30:4D-4, which creates the DMAHS, merely indicates a consultation relationship with other state agencies. "The division shall consult with and coordinate programs related to medical assistance and health care services being furnished by other State agencies to avoid duplication of effort." The Division of Health Economics Services of the Department of Health is contractually bound to develop rules of reimbursement for submission to and ultimate determination by DMAHS.

Although petitioner argues that N.J.A.C. 10:63-1.3 in fact binds the DMAHS to the determination of the Department of Health regarding required nursing services, that regulation only says, in pertinent part, "The SNF provides 24 hour nursing services in accordance with the minimum standards set forth by the New Jersey Department of Health." This regulation only binds the DMAHS to a consultation pursuant to N.J.A.C. 8:39-1.16, which sets forth the nursing services required for the licensure of a long-term care facility and which contains minimum standards of nursing care. Petitioner also argues that the minimum standards of nursing at Preakness Hospital alone
were increased as a result of the survey conducted by Ms. Kinney, but since the reason and purpose for this survey have been determined to be inapposite to that conclusion, that argument is not controlling. The primary purpose for the Kinney survey was to establish staffing patterns which would assist the hospital in challenging envisioned cutbacks in funding for staff by the county freeholders. No authority has been presented by petitioner which would allow Ms. Kinney to establish "minimum staffing patterns" which would exceed the minimum standards set forth in N.J.A.C. 8:39-1.16. Therefore, the DMAHS, in applying CARE guidelines, cannot be required to accept as "minimum nursing requirements" the results of a survey which ignore minimum standards duly promulgated by regulations.

The DMAHS, in its calculation of routine patient care expenses pursuant to N.J.A.C. 10:63-3.8, utilizes several criteria to establish reasonable limits for "nursing services." "The minimum nursing requirements in terms of hours worked will be calculated for each LTCF based on the patient mix and standards in effect during the base period." N.J.A.C. 10:63-3.8(b)(1). Although the DMAHS may utilize the assistance of the Department of Health to calculate reimbursement of expenses, it is inconceivable that it would not have the authority to reject this assistance when a recommendation is based on erroneous information and standards. Respondent presented testimony it utilized the minimum standards contained in the above-captioned regulations when calculating the minimum standards of nursing care for which this LTCF should be reimbursed. It also presented strong evidence supporting the conclusion that there is an absence of factors peculiar to Preakness Hospital which would require a different standard to be applied to it which would then be considered reasonable. This court is aware of the fact that other states have chosen different methods of reimbursement than New Jersey has selected. For example, Illinois' rates are based, in part, on a specific class of LTCFs which is governmentally funded and run, and which receives a higher rate of reimbursement than private LTCFs. This is not the current method of reimbursement in New Jersey and the promulgation of such a rule is a matter of policy which would require a full hearing by this administrative agency trying to determine whether or not to impose a contemplated standard upon the LTCFs it regulates. See N.J.A.C. 1:1-1.7(a)(5). See generally, Cunningham v. Dept. of Civil Service, 69 N.J. 13, 19-26 (1975).

This court concludes that petitioner has not met its burden of demonstrating that the utilization of promulgated standards is un-
reasonable. Its reliance on the Kinney report, which was not intended to support revisions of reimbursement rates, cannot support its claim. Petitioner went outside normal channels in its request in order to utilize the report. Petitioner's reliance on the actions and recommendations of the Department of Health was misplaced because the Department of Health admittedly erred in using the Kinney report as the basis for recommended revisions and because the DMAHS cannot be bound by these recommendations. This court concludes that the DMAHS was not unreasonable and arbitrary in rejecting the report as a basis for revision of reimbursement rates because the primary purpose of the report was to support the request of Preakness Hospital to the Passaic County freeholders for additional funding to prevent staffing cutbacks, and because petitioner did not follow the normal procedure when it utilized the report in its request to the Division of Health Economics Service to revise its rates.

Accordingly, based on the foregoing conclusions, it is hereby ORDERED that the appeal by Preakness Hospital of the denial of the Division of Medical Assistance and Health Services of its requested reimbursement for 417,560 nursing hours be and is hereby DENIED; and

It is further ORDERED that the petition by Preakness Hospital that the present system of rate reimbursement, as applied to the instant petitioner, be declared unreasonable, be and is hereby DENIED.

This recommended decision may be affirmed, modified or rejected by the DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, THOMAS M. RUSSO, the designee of the Commissioner of the Department of Human Services, George J. Albanese, who by law is empowered to make a final decision in this matter.

FINAL DECISION BY THE DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, THOMAS M. RUSSO:

The Director, Division of Medical Assistance and Health Services has reviewed and considered the entire record in this matter.

Procedurally, the Director notes that the attorney for the petitioner requested and was granted a ten-day extension of the time period for the filing of exceptions.

Initially, the time period for the filing of exceptions expired on
March 29, 1982. However, this time period was subsequently extended to April 8, 1982.

Likewise, the time period for the final decision was extended until May 10, 1982. Although the time period for the filing of exceptions was extended, the Director notes that neither party submitted exceptions to the initial decision.

Based upon his full review of the record, the Director affirms the decision of the administrative law judge and hereby adopts the findings and conclusions of the administrative law judge in their entirety and incorporates the same herein by reference.

Therefore, it is on this 10th day of May, 1982

**ORDERED:**

That the petitioner's request for reimbursement based on 417,560 nursing hours is denied; and

It is further **ORDERED:**

That the petitioner's request that the Division's present system of reimbursement be declared unreasonable is also denied.

**You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey Courts.**