Amendment right of access); *Folgueras v. Hassle*, 331 *F.Supp.* 615, 620 (W.D.Michigan 1971) (First Amendment right of access; limitation of owner's property rights; tenant's rights); *People v. Rewald*, 318 *N.Y.S.* 2*d* 40, 45 (1971) (First Amendment right of access).

April 30, 1975

CHAIRMAN MALCOLM BORG
Health Care Administration Board
Department of Health
Health & Agriculture Building
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPIONION NO. 12–1975

Dear Chairman Borg:

You have requested an opinion as to whether the Commissioner of Health must submit the "1975 Hospital Rate Review Program, Guidelines" (hereinafter referred to as "guidelines"), dated February 1975, to the Health Care Administration Board (hereinafter referred to as HCAB) as regulations for its approval prior to their adoption under the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 *et seq*. (hereinafter referred to as HCFPA).

The guidelines, a joint effort by the Departments of Health and Insurance, provide analysts with an accounting mechanism to review proposed hospital budgets for 1975 and assess reasonable payment rates by hospital service corporations. While the guidelines provide an overview of the processes to be followed, schedules A through F in its appendix actually guide the analyst through the necessary computations, comparisons, and reviews required to evaluate a hospital's 1975 budget submission and allowable reimbursement rate. These guidelines have been distributed to all hospitals in the State of New Jersey by the Department of Health.

The underlying issue posed is whether these guidelines are in fact regulations of the Commissioner of Health under the HCFPA and thereby subject to HCAB approval under N.J.S.A. 26:2H-5(b), which provides:

> "The Commissioner, *with the approval of the board*, shall adopt and amend rules and regulations in accordance with the Administrative Procedure Act P.L.1968, c. 410 (C. 52:14B-1 *et seq*.) to effectuate the provisions and purposes of this act. . . ." (Emphasis supplied)

An analysis of the statutory procedure for the review and approval of hospital service corporation rates reveals a requirement for participation by both the Commissioners of Health and Insurance. The statutory mechanism for review and approval provides:

"The Commissioner of Health in consultation with the Commissioner of Insurance shall determine and certify the costs of providing health care services, as reported by health care facilities, which are derived in accordance with a uniform system of cost accounting approved by the Commissioner of Health. Said certificates shall specify the elements and details of costs taken into consideration." N.J.S.A. 26:2H-18(c).

"Rates of payment by such hospital service corporation pursuant to written contract with a hospital or institution for the services contracted thereunder may be in the form of a level per diem amount established for the particular hospital or institution for each day of health care services and prior to payment, shall be approved as to reasonableness by the Commissioner of Insurance following the certification made pursuant to section 18 of the Health Care Facilities Planning Act." N.J.S.A. 17:46-7.

"Payment by hospital service corporations, organized under the law of this State, for health care services provided by a health care facility shall be at rates approved as to reasonableness by the Commissioner of Insurance with the approval of the Commissioner of Health. In establishing such rates, the Commissioners shall take into consideration the total costs of the health care facility." N.J.S.A. 26:2H-18(d).

Thus, when N.J.S.A. 26:2H-18 is read in conjunction with N.J.S.A. 17:46-7, it appears that the Commissioner of Insurance has been assigned the initial responsibility for approving the reasonableness of these rates.

The Department of Insurance, in order to satisfactorily fulfill its statutory responsibilities, has requested the Department of Health to provide it with a mechanism for the review and evaluation of allowable 1975 hospital rates. This mechanism for assessing the reasonableness of rates has been encompassed in the 1975 guidelines, and the Commissioner of Insurance reviewed initial hospital rates based upon the application of these guidelines. In this respect, the guidelines have been tacitly accepted by the Commissioner of Insurance as the technique for the exercise of his authority pursuant to N.J.S.A. 17:46-7. They are therefore clearly regulations of the Department of Insurance.

There is, however, a corresponding responsibility of the Commissioner of Health under 26:2H-18(d) to also approve the reasonableness of reimbursement rates paid by hospital service corporations to health care facilities. The manner or the degree of the analysis conducted by the Commissioner of Health need not be the same as the review conducted by the Commissioner of Insurance. The Commissioner of Health may promulgate independent criteria which are different in content to those used by the Commissioner of Insurance. The Commissioner of Health's analysis of rates could conceivably be less demanding than the review conducted by the Commissioner of Insurance. Nevertheless, whatever the technique or manner of review conducted by the Commissioner of Health pursuant to Section 18, the established methodology must be promulgated as a regulation of the agency.

It is well established that rules and regulations of a State administrative agency must be promulgated to properly justify a change in the particular field of government regulation. The need for definite agency regulations was noted in *Boller Beverages v. Davis*, 38 N.J. 138, 151 (1962):

> "The object is not legislation ad hoc after the fact, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards administrative control lacks the essential quality of fairly predictable decisions. Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conceptions of what the public interest requires in the particular situation."

In the instant situation, the Appellate Division reviewed the 1975 guidelines in *Monmouth Medical Center, et al. v. State of New Jersey*, et al, Docket No. A-2147-74 etc., decided April 30, 1975 and opined:

> "We have no hesitancy in deciding that the guidelines issued were rules as that term is defined in *N.J.S.A.* 52:14B-2. The procedures are clearly established to implement the task of the Commissioners in carrying out their respective responsibilities under the provisions of *N.J.S.A.* 26:2H-18 (c) and (d) and *N.J.S.A.* 17:48-7.

The court, further, concluded that health care facilities should be sufficiently apprised in advance by proposed administrative regulations of the criteria used to determine the reasonableness of reimbursement rates.

You are accordingly advised that in the event the 1975 guidelines are used to determine the reasonableness of 1975 reimbursement rates, under N.J.S.A. 26:2H-18(d), these guidelines are administrative regulations subject to the approval of the HCAB and should be adopted in accordance with the Administrative Procedure Act.

Very truly yours,
WILLIAM F. HYLAND
Attorney General
BY: MURRAY J. KLEIN
Deputy Attorney General