

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	Pamela Scott Kendall to Chris Jennings Re: FDA Commisioner Appointment (3 pages)	9/12/97	P2
002. resume	Andrew G. Bonar (3 pages)	nd	P2
003. list	Candidates- FDA Commissioner (6 pages)	nd	P2
004. memo	Bob Nash to POTUS re: FDA Commissioner Search Update (2 pages)	6/10/97	P2
005. memo	Bob Nash to POTUS re: FDA Commissioner Search Update (2 pages)	5/28/97	P2
006. list	List of Questions for FDA Commissioner Nominees (8 pages)	nd	P2
007. list	List of Food and Drug Commissioner Candidates (7 pages)	nd	P2
008. briefing paper	Jane Henney (1 page)	nd	P2
009. memo	Bob Nash to POTUS re: Commissioner, Food and Drug Adminsitration (4 pages)	2/9/98	P2

COLLECTION:

Clinton Presidential Records
 Domestic Policy Council
 Chris Jennings (Subject File)
 OA/Box Number: 23757 Box 11

FOLDER TITLE:

Henney Confirmation [4]

gf25

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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CONGRESSIONAL CONTACT LIST
FOR THE FDA COMMISSIONER ROLL-OUT

A LIST:

Senate

Republicans

- * Jeffords (R-VT)
- * Domenici (R-NM)
- ? Hatch (R-UT)
- ? Frist (R-TN)
- * Collins (R-ME)
- * Snowe (R-ME)
- ? Mack (R-FL)
- ? Lugar (R-IN)

Ellie Lohy First Lady

Democrats

- Daschle (D-ND)
- Kennedy (D-MA)
- Mikulski (D-MD)
- Dodd (D-CT)
- Harkin (D-IA)
- Bingaman (D-NM)
- Murray (D-WA)
- Bumpers (D-AR) - Orator - veccing

House

Republicans

- Skeen (R-NM)

Democrats

- Dingell (D-MI)
- S. Brown (D-OH)
- Obey (D-WI)

B LIST

A List Plus

Senate Leadership

Trent Lott (R-MS)

Senate Labor Committee

Coats (R-IN)

Gregg (R-NH)

DeWine (R-OH)

Enzi (R-WY)

Hutchinson (R-AR)

Warner (R-VA)

McConnell (R-KY)

Wellstone (D-MN)

Reed (D-RI)

Senate Appropriations Subcommittee on Agriculture

Cochran (R-MS)

Specter (R-PA)

Bond (R-MO)

Gorton (R-WA)

Burns (R-MT)

Stevens (R-AK)

Kohl (D-WI)

Byrd (D-WV)

Leahy (D-VT)

Women Senators

Hutchison (R-TX)

Boxer (D-CA)

Feinstein (D-CA)

Landrieu (D-LA)

Moseley-Braun (D-IL)

Other Senators

Chafee (R-RI)

House Leadership

Gingrich (R-GA)
Gephardt (D-MO)

House Commerce Subcommittee on Health and the Environment

Michael Bilirakis, (R-FL)
J. Dennis Hastert, (R-IL)
Joe Barton, (R-TX)
Fred Upton, (R-MI)
Scott L. Klug, (R-WI)
James C. Greenwood, (R-PA)
Nathan Deal, (R-GA)
Richard Burr, (R-NC)
Brian P. Bilbray, (R-CA)
Ed Whitfield, (R-KY)
Greg Ganske, (R-IA)
Charlie Norwood, (R-GA)
Tom A. Coburn, (R-OK)
Rick Lazio, (R-NY)
Barbara Cubin, (R-WY)
Henry A. Waxman, (D-CA)
Edolphus Towns, (D-NY)
Frank Pallone, Jr., (D-NJ)
Peter Deutsch, (D-FL)
Anna G. Eshoo, (D-CA)
Bart Stupak, (D-MI)
Gene Green, (D-TX)
Ted Strickland, (D-OH)
Diana DeGette, (D-CO)
Ralph M. Hall, (D-TX)
Elizabeth Furse, (D-OR)

House Appropriations Subcommittee on Agriculture

James T. Walsh, (R-NY)
Jay Dickey, (R-AR)
Jack Kingston, (R-GA)
George Nethercutt, Jr., (R-WA)
Henry Bonilla, (R-TX)
Tom Latham, (R-IA)
Marcy Kaptur, (D-OH)
Vic Fazio, (D-CA)
José E. Serrano, (D-NY)
Rosa DeLauro, (D-CT)

House Women's Caucus

Johnson, Nancy (R-CT)
Norton, Eleanor Holmes (D-DC)
Kelly, Sue (R-NY)
Maloney, Carolyn (D-NY)
Bono, Mary (R-CA)
Brown, Corrine, (D-FL)
Capps, Lois (D-CA)
Carson, Julia (D-IN)
Christian-Green, Donna (D-VI)
Clayton, Eva (D-NC)
Danner, Pat (D-MO)
Dunn, Jennifer (R-WA)
Chenoworth, Helen (R-ID)
Fowler, Tillie (R-FL)
Granger, Kay (R-TX)
Harman, Jane (D-CA)
Hooley, Darlene (D-OR)
Jackson Lee, Sheila (D-TX)
Johnson, Eddie Bernice (D-TX)
Kennelly, Barbara (D-CT)
Kilpatrick, Carolyn (D-MI)
Lee, Barbara (D-CA)
Lofgren, Zoe (D-CA)
Lowey, Nita (D-NY)
McCarthy, Carolyn (D-NY)
McCarthy, Karen (D-MO)
MoKinney, Cynthia (D-GA)
Meek, Carrie (D-FL)
Millender-McDonald, Juanita (D-CA)
Mink, Patsy (D-HI)
Morella, Constance (R-MD)
Myrick, Sue (R-NC)
Pelosi, Nancy (D-CA)
Pryce, Deborah (R-OH)
Rivers, Lynn (D-MI)
Ros-Lehtinen, Ileana (R-FL)
Roukema, Marge (R-NJ)
Roybal-Allard, Lucille (D-CA)
Sanchez, Loretta (D-CA)
Slaughter, Louise (D-NY)
Smith, Linda (R-WA)
Stabenow, Deborah (D-NU)
Tauscher, Ellen (D-CA)
Thurman, Karen (D-FL)

Velazquez, Nydia (D-NY)
Waters, Maxine (D-CA)
Woolsey, Lynn (D-CA)

New Mexico Delegation

Bill Redmond (R)

Indiana Delegation

Peter J. Visclosky (D)
David M. McIntosh (R)
Tim Roemer (D)
Mark Souder (R)
Steve Buyer (R)
Dan Burton (R)
Ed Pease (R)
John Hostettler (R)
Lee H. Hamilton (D)

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STATEMENT BY THE PRESIDENT NOMINATING DR. JANE HENNEY AS COMMISSIONER FOR THE FOOD AND DRUG ADMINISTRATION

June 23, 1998

Today, I am nominating Dr. Jane E. Henney to serve as the next Commissioner of the Food and Drug Administration. Dr. Henney is a nationally-recognized cancer specialist who has served four Presidents and helped guide some of America's finest academic health centers.

Dr. Henney brings to this post strong management skills and a commitment to the highest clinical research standards. Her expertise in science and technology and her lifelong dedication to individual patients will enable her to strike the delicate balance between the imperative to the timely approval of prescription drugs and medical devices and the importance of ensuring these products are safe and effective.

One of Dr. Henney's greatest challenges will be implementing the historic bipartisan legislation we enacted last year to modernize the FDA. These reforms build on the Administration's long standing commitment to streamlining, conserving resources and ensuring consumers and industry are treated fairly.

At the same time, Dr. Henney will build on these reforms and address the new public health challenges facing this important agency and the nation. She has a particular interest in renewing efforts to improve food safety, an issue of concern to all Americans.

From Deputy Director of the National Cancer Institute to Deputy Commissioner for Operations at FDA to her current role as vice president for health sciences at the University of New Mexico, Dr. Henney's medical and academic credentials make her uniquely qualified to be the first woman Commissioner to lead the FDA into the 21st century.

America needs an FDA Commissioner who is committed to assuring that Americans have timely access to safe and effective drugs and medical devices, improved food safety, and good public health. As a leading oncologist who has a breadth of experience and blazed many trails, no doctor is more qualified to lead this important challenge.

I urge the Senate to move to hold hearings on Dr. Henney and to confirm this well qualified candidate for the FDA Commissioner. The mission of the FDA and its mandate to implement the FDA Modernization Act most effectively requires a full-time and confirmed Commissioner.

I am confident that the Senate Labor and Human Resources Committee, whose Members worked so long and hard on the FDA Modernization Act, will give Dr. Henney a full, fair and expeditious hearing. I am certain they will conclude that she is extremely well qualified to serve as Commissioner as the agency prepares itself to meet the challenges of the 21st century.

Jane Henney FR
~~FDA Commissioner~~
 File

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

June 23, 1998

**PRESIDENT CLINTON NAMES JANE E. HENNEY AS COMMISSIONER
OF THE FOOD AND DRUG ADMINISTRATION AT THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES**

The President today announced his intent to nominate Dr. Jane E. Henney to serve as Commissioner of the Food and Drug Administration at the Department of Health and Human Services.

Dr. Jane E. Henney is a physician, a cancer specialist and a nationally recognized academic leader and public health administrator who has served in the Carter, Reagan, Bush and Clinton administrations. If confirmed by the Senate, Dr. Henney would become the first woman to serve as Commissioner of the Food and Drug Administration. During her distinguished career, she has championed modern management strategies and maintained the highest clinical and research standards at two federal public health agencies, and has fashioned innovative health care strategies with a focus on individual patient care at two major university medical centers.

Since 1994, Dr. Henney has been the Vice President for Health Sciences at the University of New Mexico where she presided over a major consolidation of the university's hospitals, schools of medicine, nursing and pharmacy, and specialized facilities for mental health, cancer and pediatrics. From January 1992 to March 1994, Dr. Henney served as Deputy Commissioner for Operations at the Food and Drug Administration where she managed the agency's daily activities, revitalized FDA's six science centers and implemented key legislation, including the Prescription Drug User Fee Act of 1992. From 1985 until joining FDA, Dr. Henney served as Interim Dean of the University of Kansas School of Medicine, as Vice Chancellor for Health Programs and Policy, and as Acting Director of the Mid America Cancer Center at the University of Kansas. Between 1976 and 1985, Dr. Henney served at the National Cancer Institute, rising to the position of Deputy Director, where she was instrumental in the development of two innovative programs which engaged community-based oncologists in research and provided physicians and patients with up-to-date information on state-of-the-art therapy and investigational research protocols.

Born in Woodburn, Indiana, she received a B.S. in biology from Manchester College, North Manchester, Indiana, in 1969. At a time when relatively few women were admitted to medical school, Dr. Henney graduated from the Indiana University School of Medicine in 1973, and took an internship at St. Vincent's Hospital in Indianapolis, a medical residency in Atlanta, and a fellowship in oncology at M.D. Anderson Hospital and Tumor Institute in Houston. She is the author or co-author of some 40 academic articles and book chapters and has received numerous awards, including the Public Health Service Commendation Medal.

The Commissioner is the head of the Food and Drug Administration, a critical consumer protection agency that assures the safety and efficacy of pharmaceutical and biological therapeutics, medical devices, blood products, generic drugs, food safety, food additives and cosmetics.

President Tentatively Settles On a Choice to Head F.D.A.

By ROBERT PEAR

WASHINGTON, May 18 — The White House has tentatively chosen a cancer specialist who is vice president of the University of New Mexico to be head of the Food and Drug Administration, a position that has been vacant more than 14 months, Clinton Administration officials said today.

The prospective nominee, Dr. Jane E. Henney, was Deputy Commissioner of Food and Drugs under Dr. David A. Kessler from 1992 to 1994. Dr. Kessler headed the agency for six stormy years, until he left in February 1997 to become dean of the Yale School of Medicine.

The Federal Bureau of Investigation is checking Dr. Henney's background, and Administration officials said President Clinton hoped to announce her selection by the end of the month.

Dr. Henney, 51, has extensive experience in government and academia. As vice president for health sciences at the University of New Mexico, she supervises a medical school, a college of pharmacy and several teaching hospitals. She worked at the National Cancer Institute from 1976 to 1985, serving as deputy director for five years, and she was vice chancellor of the University of Kansas before working at the F.D.A. She is also president of the United States Pharmacopeia, a private nonprofit organization that sets legally enforceable standards for the purity and quality of medicines.

Makers of drugs and medical devices and many Republicans in Congress said they wanted to be sure that Dr. Henney, or whoever succeeds Dr. Kessler, took a less confrontational approach than he had.

"We want a more cooperative approach, in which the F.D.A. works with industry to see that patients gain timely access to new treatments and technologies," said Stephen J. Northrup, executive director of the Medical Device Manufacturers Association.

One of the biggest tasks for the next commissioner is to carry out a new law, signed by Mr. Clinton in November, that is intended to speed the approval of prescription drugs and improve the regulation of medical devices and food products.

The next commissioner will also have a big role in one of the most

important public health initiatives ever undertaken by the Government, as it steps up efforts to curb smoking and regulate tobacco. Bills moving through Congress would enhance the F.D.A.'s authority over the sale and advertising of tobacco products.

Mr. Clinton has often moved slowly in filling vacancies, and the Senate has often been slow to approve his nominees, so it is not clear whether Dr. Henney can win Senate confirmation before Congress adjourns this fall. Anyone chosen to run the F.D.A. is sure to be scrutinized closely. It is virtually impossible for any candidate to please both the drug industry and consumer advocates like Ralph Nader.

On paper, Dr. Henney's qualifications appear to be as strong as those of recent F.D.A. commissioners. In the drug and biotechnology industries, several companies support her, some express apprehension, and many want to know more about her.

Dr. Henney (pronounced HAY-nee) is the candidate favored by Senator Edward M. Kennedy, the Massachusetts Democrat who for more than two decades has taken a keen

Front-runner for the drug-agency: a doctor with Federal experience.

interest in F.D.A. operations.

Aides to Senator Kennedy said he had strongly recommended Dr. Henney for the F.D.A. job, having been impressed with her work at the food and drug agency and at the cancer institute. In addition, they noted, she is married to a former Kennedy aide, Dr. Robert Graham, who is now executive vice president of the American Academy of Family Physicians.

In an interview, Senator Pete V. Domenici, Republican of New Mexico, said: "I will be pleased to support Dr. Henney. I'll do what I can to see that she clears the Senate. Her activities at the University of New Mexico have been very good."

Executives of Pfizer Inc., one of the nation's biggest drug companies, said they also supported Dr. Henney for the F.D.A. job.

Marc J. Scheineson, a moderate Republican who worked with Dr. Henney as Associate Commissioner of Food and Drugs in the Bush Ad-



University of New Mexico

Dr. Jane E. Henney, the President's prospective nominee for Commissioner of Food and Drugs.

ministration, said: "She is an independent, open-minded individual. She takes a pragmatic, science-based approach to major policy decisions."

But Mr. Northrup, of the Medical Device Manufacturers Association, said his members had "some grave concerns about Dr. Henney, based on her track record."

Dr. Henney was co-chairman of the Public Health Service Task Force on Breast Implants in 1992, when she was at the F.D.A. Some doctors have criticized the Government's effort to regulate silicone-gel implants, saying it was based on inadequate scientific evidence. But friends of Dr. Henney said major decisions on the issue had been made by Dr. Kessler before she arrived.

Senator James M. Jeffords, Republican of Vermont, said the next commissioner should foster collaboration with industry and "redirect F.D.A. from its recent past tendency toward unreasonable product approval requirements and delays." Mr. Jeffords was the main author of the 1997 law revamping the F.D.A., and he is chairman of the committee that would hold a confirmation hearing for the President's nominee.

Dr. Michael A. Friedman, Deputy Commissioner of Food and Drugs, has been running the agency since Dr. Kessler left. The Secretary of Health and Human Services, Donna E. Shalala, has expressed full confidence in Dr. Friedman, and several drug company lobbyists said they would be pleased to see him appointed to the top job on a permanent basis.

Commodities:
Tuesday through Saturday,
in Business Day
The New York Times

The New York Times

TUESDAY, MAY 19, 1998

A Prosecutor Goes on the Defensive

By WALTER GOODMAN

If the name Donald Smaltz doesn't ring a bell, blame the competition. He is an independent counsel, but not that independent counsel. While Kenneth W. Starr has been reveling in the likes of Monica Lewinsky and Susan H. McDougal, Mr. Smaltz has been dogging Mike Espy, the former Agriculture Secretary, who has been indicted on charges of taking a few thousand dollars' worth of airplane trips, tickets to sports events and other "gratuities" from companies under his regulation.

Like Mr. Starr, Mr. Smaltz has been accused of being "out of control," and he responds tonight in "Secrets of an Independent Counsel," which should make him less of a secret to "Frontline" viewers. Peter J. Boyer, the evening's reporter, gives Mr. Smaltz plenty of time to make his case on behalf of himself and of the unpopular institution that is likely to be allowed to expire next year.

The Smaltz-Espy connection began in 1994 when Mr. Smaltz, a Los Angeles lawyer, was called on by Attorney General Janet Reno to look into allegations that Mr. Espy had enjoyed the favors of Tyson Foods of Arkansas, the country's biggest chicken supplier. Soon Mr. Smaltz was being accused of investigating matters beyond his appointed scope and promoting unconfirmable allegations, like one from a disgruntled former pilot for Tyson that he delivered envelopes stuffed with cash to the Governor of Arkansas, then Bill Clinton.

Tonight Mr. Smaltz countercharges that he has been stonewalled, blindsided and maligned by



Associated Press

David Smaltz, independent counsel in the Espy case.

the powerful Tyson interests in cahoots with the Department of Justice and Clinton Administration spinners. But as Mr. Smaltz tells it, he did not chicken out. He turned his attentions to the activities of Ronald H. Blackley, Mr. Espy's chief of staff, who had a reputation as a "fixer" for farmers in quest of Government subsidies.

Mr. Blackley wound up facing a prison sentence, which Mr. Smaltz hopes will turn him into a prosecution witness in the pending case against his former boss. Mr. Smaltz notes that soon after Mr. Espy took over the Agriculture Department, new regulations that would have cost Tyson millions of dollars were shelved.

It's an instructive hour that should

FRONTLINE

Secrets of an Independent Counsel

PBS; tonight
(Channel 13, New York, at 9)

Produced by Michael Kirk, Kenneth Levis and Rick Young; written by Peter J. Boyer and Mr. Kirk; edited by Mr. Levis; Mr. Boyer, correspondent. A Frontline co-production with the Kirk Documentary Group Ltd. For Frontline: Michael Sullivan, executive producer; David Fanning, senior executive producer.

leave viewers more appreciative of Mr. Smaltz for drawing attention to the sometimes cozy relations between public officials and the business interests they are entrusted with overseeing. It may also stir some disquiet over the power of a zealous prosecutor to make a big deal out of small matters.

Mr. Boyer, though sympathetic to Mr. Smaltz's image of himself as a model of independence, grants that tactics like putting pressure on relatives of witnesses have not endeared these prosecutors to the public. We hear from critics who dismiss Mr. Smaltz, in the words of James Carville, the Clinton loyalist, as "a nickel-and-dime guy with nickel-and-dime charges."

But the final word is given to Mr. Smaltz and his supporters, who say that although the alleged gifts may not be large, the principle of keeping public officials under outside scrutiny justifies the time, money and tactics that he has brought to his pursuit of Mr. Espy. Given the dim prospects for the office's survival in its present free-swinging form, the program's title might better have been "Requiem for an Independent Prosecutor."

The New York Times

TUESDAY, MAY 19, 1998

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RR. Document will be reviewed upon request.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. memo	Bob Nash to POTUS re: FDA Commissioner Search Update (2 pages)	5/28/97	P2

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Domestic Policy Council
Chris Jennings (Subject File)
OA/Box Number: 23757 Box 11

FOLDER TITLE:

Henney Confirmation [4]

gf25

RESTRICTION CODES

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. list	List of Questions for FDA Commissioner Nominees (8 pages)	nd	P2

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- Tell us who (OK)
Mike Friedman
should be called
called!

**TIMELINE BEGINNING
THREE WEEKS BEFORE ANNOUNCEMENT**

The following is a proposed timeline that begins three weeks prior to the announcement of the nomination.

ANNOUNCEMENT DAY (A = DAY)

A DAY - THREE WEEKS

- Finalize Congressional "contact" lists. Begin contact with those on the "A list".
 - A List - Potential Key supporters/validators
 - B List - Priority contact list for roll-out, etc.
 - C List - General target list for Senate vote

- Finalize list of outside validators. Begin contact with those on "A List".
 - A List - Key groups, trade associations, and companies that may actively support nominee.
 - B List - Groups, associations, and companies that may write letters, etc.

- Begin developing Indiana strategy. - Barry study

- Conduct intensive review of nominee's writings, speeches, hearings, press articles, etc.

- Establish and begin process of engaging with nominee on message, tone, problem areas, etc.

- Begin drafting materials for validators package (biography; talking points; *Why Nominee is Best for the Job* document; list of accomplishments, questions and answers on key issues).

A DAY - TWO WEEKS

- Continue discussions with "A List" Congressional offices. Provide them with information package as available.
- Continue discussions with "A List" key potential outside validators. Provide them with information package as available.
- Identify "anchors" among Congressional supporters and outside validators.

A DAY - TWO WEEKS CONT.

- Vice President and Secretary to make calls to key Senators and outside validators as appropriate. Secretary may do office visits as well.
- Complete review of nominee's writings, speeches, hearings, etc.
- Complete discussions with nominee regarding tone, message, problem areas, etc.
- Circulate draft materials for validators package.

A DAY - ONE WEEK

- Establish the date and format of the announcement of nomination.
- Finalize materials for validators package.
- Begin discussions with "B List" Congressional offices. Provide them with information package.
- Work with Congressional supporters on statements of support.
- Identify members who can be interviewed or hold press conferences in relation to the announcement.
- Continue discussions with "A list" key outside validators. Provide them with information package.
- Begin contact with "B list" of outside validators.
- Vice President and Secretary to make additional calls as necessary.
- Request that key validators draft statements of support.
- Determine press strategy for key outside validators.
- Contact Congressional sponsors of candidates not selected.
- Conduct final briefings for nominee with murder board, etc.

DRAFT -Updated 5/11/98

A DAY - ONE WEEK CONT.

- Draft announcement statements for POTUS(?), VPOTUS, Secretary, and nominee.
- Brief principals (including nominee) on upcoming announcement and issues.
- Execute roll-out strategy for Congress and groups/industry.

**TIMELINE BEGINNING THE
DAY OF THE NOMINATION**

The following is a proposed timeline that begins the day of the nomination..

ANNOUNCEMENT DAY (A = DAY)

WH Announcement (?)

- Press Statements from key outside validators.
- Press conferences held by key Congressional supporters.
- Press statements from key members of Congress - leadership, A list members, Senate Labor Committee members, home state Congressional delegation members.

Begin Senate Process

- Send questionnaire to the Hill
- Nominee sends courtesy visit letters to the Hill
- Schedule office visits

A DAY + 1

- Senate Floor - arrange supportive statements during morning business
- House floor - arrange one minute supportive statements
- Courtesy Visits - with Leadership, Jeffords, Kennedy, others as appropriate.
- Press Conference with key outside validators.

A DAY + 2

- Nominee meet with home Congressional Delegation - Press availability
- Courtesy visits continue

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. list	List of Food and Drug Commissioner Candidates (7 pages)	nd	P2

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008. briefing paper	Jane Henney (1 page)	nd	P2

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State of New Hampshire Governor's Office

New Hampshire
Medicaid file

State House
Concord, N.H. 03301

Tel. (603)271-2121

FAX (603)271-6998

FAX

Date: Feb 18, 1998
 Number of pages including cover sheet: 6

To: Don Gips
Chief Domestic Policy Advisor
Office of the Vice President

Phone: 202-456-6222
 Fax phone: 456-6231
 CC:

From: Karen Hicks
Special Assistant for Policy

Phone: (603) 271-2121
 Fax phone: (603) 271-6998

REMARKS: Urgent For your review Reply ASAP Please comment

Hi Don. Hope you're well. Governor Shaheen
asked that I send this to you as a follow
up to her conversation with the Vice
President. Thanks for your continued support
on this. I'll probably be in D.C. next
week + would love to see you.
Take care.

P.S. This letter went to: Karen

FJI:

Nancy Ann Min DeParte
Secretary Shalala
Harriet Rabb

Confidentiality Note

+ Sally Richardson

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**ATTORNEY GENERAL
STATE OF NEW HAMPSHIRE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

PHILIP T. MCLAUGHLIN
ATTORNEY GENERAL



STEVEN M. HOURAN
DEPUTY ATTORNEY GENERAL

February 18, 1998

The Honorable Donna E. Shalala
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
Room 615F, South West
200 Independence Avenue
Washington, D.C. 20201-0001

Re: State of New Hampshire/Title XXI Program

Dear Secretary Shalala:

This letter is being submitted in connection with the proposal by the state of New Hampshire for use of funds held by a newly created charitable foundation as the State's match under the Federal Title XXI Program. This letter sets forth the factual and legal background to the 1997 sale of Matthew Thornton Health Plan, Inc. ("MTHP") to Blue Cross Blue Shield of New Hampshire ("BCBS") and discusses the nature of the proceeds from that sale which were and are being conveyed to this new independent charitable healthcare foundation (the "Foundation").

This sale and use of proceeds is unique in New Hampshire; and the Foundation produced by the sale has no counterpart in New Hampshire history. The discussion below also focuses upon the independent nature of the governing board of trustees and the accountability of that governing board under the strict ethical and legal codes governing independent foundations. The Foundation is independent both of the state of New Hampshire and any healthcare provider operating in this state.

1. Factual Background

(a). The Transaction. MTHP was a charitable nonprofit HMO organized in New Hampshire in 1971 and served the New Hampshire public until its merger with and into BCBS in November, 1997. BCBS is also a nonprofit entity organized and headquartered in New Hampshire. Both entities are subject to the laws of the state of New Hampshire; and the proposed merger of the two entities was subject to a Probate Court Cy Pres proceeding pursuant to New Hampshire statutes (RSA 498).

The proposed transaction was reviewed by two state agencies, the New Hampshire Attorney General's Office and the New Hampshire Insurance Department; and a number of complex factual and legal issues were raised by the two state agencies during their review, including the legal issues involving the nature of "membership," the affiliation of MTHP with a larger organization in 1989, and the nature of interaffiliate transfers, among others. In connection with the review, the state agencies retained expert counsel and expert financial advisors to assist with the legal issues raised. The parties to the proposed merger, MTHP and BCBS, each retained their own respective legal counsel and outside financial advisors.

As part of the transaction, a Petition for Cy Pres was filed in Probate Court in Hillsborough County by MTHP, the Plaintiff, and the New Hampshire Attorney General's Office, the Defendant. In a pretrial conference, the parties identified issues of concern and discussed the processes to be followed. After legal notice was published in a newspaper of general circulation, a hearing on the proposed merger was held before the Probate Court. Public hearings were also held before the State of New Hampshire Insurance Department. Both the Probate Court and the Insurance Department approved the proposed merger; and the Probate Court approval required that a portion of the total purchase price being paid for the assets of MTHP be conveyed to a newly-created, independent charitable foundation specifically created to receive those designated proceeds.

(b). The Foundation. The new Foundation was organized and established in connection with the court proceedings; and its charitable purpose is dedicated to meeting the healthcare needs of New Hampshire citizens. The Foundation's Articles of Agreement define its purpose as:

"through the Healthy Kids Corporation, a 501(c)(3) charitable corporation organized under RSA 126-H or through any other corporation of entity organized for a similar purpose, the acquisition of health care insurance for residents of the state of New Hampshire who, because of medical condition, income, or resource limitations are unable to obtain or afford adequate health care insurance...."

More specifically, the Petition for Cy Pres required that approximately \$12.5 million dollars of the purchase price for MTHP be conveyed to the new Foundation at the closing of the

transaction, with additional amounts (up to a maximum of approximately \$10,000,000) to be conveyed during a seven year period following the closing of the transaction.

The governing board of the Foundation consists of nine independent directors who are not accountable, either directly or indirectly, to any healthcare provider involved in the transaction nor to any other healthcare provider in this state. Nor are these independent directors accountable to, or under the control of, the State itself nor to any other entity for its decisions or its operations. No healthcare provider has control of the Foundation in any other way, either directly or indirectly, and the governing board is accountable for its decisions and actions under state and federal laws which govern charitable nonprofit foundations generally. With respect to "control," the governing board represents a cross-section of New Hampshire geographically and in terms of the skills which each director brings to the governing board. In addition, when successive members of the governing board are to be chosen, no healthcare provider or outside entity has any role to play, directly or indirectly, in the selection of the new directors. The directors are shielded from any such potential control or influence. In addition, because of New Hampshire's strict conflict of interest laws enacted in 1996 (RSA 7:19-a and 292:6-e), directors of this Foundation are bound by rigorous ethical standards in awarding contracts and in determining where the income from the assets of the Foundation will be directed.

(c). **The Nature of the Funds.** As discussed in Part 2 ("Impermissible Voluntary Donations") below, the moneys which have been and will be conveyed to the new Foundation are not "voluntary contributions" made by either of the two nonprofit organizations which were party to the transaction. On the contrary, the amounts being conveyed were the result of negotiations between the state agencies, on the one hand, and MTHP, on the other. If the state agencies had not been involved in reviewing the proposed transaction, no voluntary donation would have been made to a newly created foundation. The moneys being conveyed to the Foundation are intended to be used to provide a community healthcare benefit to the public.

2. Impermissible Voluntary Donations

The Health Care Financing Administration ("HCFA") has taken the position that the funds conveyed to the new Foundation by MTHP may not be used for the State match under the Title XXI Program because they are "voluntary" donations made by a health care provider. It is our legal conclusion that the funds at issue do not fall into the impermissible category of voluntary provider-related donations for reasons set forth below.

(a). **Not a Voluntary Donation.** Section 2 of the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991 (the "Act") speaks clearly and

unambiguously of "voluntary donations" in defining what donations are "impermissible" under that statute:

"Provider-related donations are any donations or other voluntary payments (in cash or in kind) made directly or indirectly to a State or unit of local government by a healthcare provider by or on behalf of a health care provider...." [emphasis added]

The Foundation's funds are neither "donations" nor "voluntary." The critical word and concept in this definition is "voluntary." Based upon the facts surrounding the merger of MTHP as described above, the Foundation's funds at issue do not represent in any sense "voluntary donations" by a provider.

Black's Law Dictionary (Fifth Edition) defines voluntary in an unambiguous manner and uses "gratuitous" as a synonym. Other definitions of "voluntary" found in Black's Law Dictionary include the following: "Proceeding from the free and unrestrained will of the person...Resulting from free choice..." Based upon the facts surrounding the sale of MTHP, the scrutiny to which the transaction was subjected, the negotiations which occurred and the court proceeding which was required, the funds were not given as a result of "free choice," nor were they the result of a "free and unconstrained" act of MTHP or its agents. In brief, had the Attorney General's Office not scrutinized the proposed transaction, the Foundation would not have been created nor would the funds at issue be available to use for this purpose.

(b). **The Regulations.** The regulations issued in connection with the Act (CFR42S94) repeat the definition found in the Act. Pursuant to section 433.52 (General Definitions), provider-related donations means:

"a donation or other voluntary payment (in cash or in kind) made directly or indirectly to a State or unit of local government by or on behalf of a health care provider, an entity related to such a health care provider, or an entity providing goods or services to the State for administration of the State's Medicaid plan." [emphasis added]

Again, the critical word or concept in the definition in the regulations is the word "voluntary" and the same analysis which applied to the statute also applies to the regulations.

Based upon the unique factual circumstances presented in the MTHP merger and based upon the clear and unambiguous words contained in the statutory and regulatory definitions, it is our legal conclusion that the funds at issue here do not fall within the scope of

the "impermissible" category and, thus, may be included in the State match under the Title XXI program.

Very truly yours,
Michael DeLucia
Michael DeLucia, Esquire
Director of Charitable Trusts

enclosures

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009. memo	Bob Nash to POTUS re: Commissioner, Food and Drug Adminsitration (4 pages)	2/9/98	P2

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