

New Mexico Court Affirms Ruling in ACA Risk Adjustment Case

November 06, 2018 | Blog | By [Xavier G. Hardy](#)

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On October 19, 2018, a New Mexico district judge [rejected a request](#) from HHS to reconsider a February decision that had briefly led to the suspension of the ACA's risk adjustment program. In February, District Judge James Browning ruled that HHS's use of statewide average premium to calculate risk adjustment payments, and the fact that the program was administered as budget-neutral, were arbitrary and capricious. We wrote about the risk adjustment program, New Mexico decision, as well as a decision out of Massachusetts that came to the opposite conclusion, [here](#).

As a reminder, the ACA's risk adjustment program is designed to transfer funds from plans with lower-risk enrollees to plans with higher-risk enrollees. HHS created a methodology to estimate the financial risk of a plan's enrollees, known as an **individual risk score**, using demographic data, claims for medical diagnoses, and other factors. A plan's individual risk scores are averaged across all its enrollees to calculate an **average risk score**. Plans with lower average risk scores pay into the program while plans with higher average risk scores receive payments from the program. The calculation of transfer payments to and from plans is calculated by comparing a plan's average risk score to the **statewide average premium**, which is the calculation of the average premium in the applicable exchange marketplaces. Several of the ACA's CO-OP plans have argued that the use of a statewide average premium penalizes plans that keep premiums low through smaller payments to providers, management of enrollees' medical care, and reduced administrative costs.

The plaintiffs in the New Mexico case, *New Mexico Health Connections et al. v. U.S. Department of Health and Human Services et al.*, had argued that the use of statewide average premium to calculate transfer payments violated the plain wording of the ACA. Further, the plaintiffs charged that the use of statewide average premiums was arbitrary and capricious because HHS had justified the use of statewide average premium based on the program's budget-neutrality even though there was nothing in the ACA requiring the program to be budget-neutral in the first place. The court had agreed with the second prong of the argument, concluding that HHS had failed to provide any justification for why the program had to be budget-neutral in the first place.

As discussed in that earlier post, HHS asked the court reconsider the decision in March, but then subsequently suspended the risk adjustment program in June. After facing an outcry from ACA plans, however, HHS reinstated the program a few weeks later by releasing a [final rule for 2017](#) (and later, a [proposed rule for 2018](#)) providing justification for budget neutrality.

Judge Browning's recent ruling primarily affirms his earlier conclusion, rejecting HHS's arguments that the risk adjustment program's budget-neutrality was justified by appropriations restrictions and that, in the alternative, HHS was not required to justify budget-neutrality because commenters had not raised the issue in the payments rules from 2014 to 2017. The ruling does not opine on whether the 2017 final rule and 2018 proposed rule (which provide analogous justifications for budget neutrality) provided a sufficient justification. As such, the court's ruling does not halt HHS from making risk adjustment payments for 2017 and going forward.

The Plaintiff brought a separate challenge against the 2017 final rule in August. Although it remains to be seen how the court will rule on that case, Judge Browning has already rejected some of the justifications for budget neutrality that HHS included in rulemaking, such as HHS's assertion that it had no choice but to adopt budget neutrality due to Congress's decision to never appropriate funds for risk adjustment transfers. It is also unclear how the courts will ultimately reconcile the ruling in New Mexico with the district court's ruling in the Massachusetts case – which found that HHS's use of budget neutrality was not arbitrary and capricious. For now, the only thing one can say about the risk adjustment program is that the litigation surrounding it is far from over.

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