

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

NEW MEXICO HEALTH)	
CONNECTIONS,)	
)	
Plaintiff,)	
)	
v.)	No. 1:16-cv-00878 JB/JHR
)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
<i>et. al.</i> ,)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ RESPONSE TO
PLAINTIFF’S NOTICE OF SUPPLEMENTAL AUTHORITY**

New Mexico Health Connections (“NMHC”) has filed a notice of supplemental authority attaching a district court decision it believes helps its case. It does not. Pursuant to Local Rule 7.8(c), Defendants file this brief response.

The principles discussed and applied in *American College of Emergency Physicians v. Price*, No. 16-913 (CKK), 2017 WL 3836045 (D.D.C. Aug. 31, 2017) are no different from those the parties have been briefing for months. At issue in that case was the promulgation of a regulation regarding payments by insurance companies for emergency services performed by out-of-network providers. While emphasizing the narrowness of its holding, the court remanded the regulation to the agencies for further explanation after concluding that the agencies (1) did not “seriously respond” to concerns about the transparency of one of the three methods to be used and (2) “ignored altogether” a specific alternative proposed to address the transparency concern. *Id.* at *4.

The court's narrow holding in *American College of Emergency Physicians* does not help NMHC. As set forth in detail in the Department's opening and closing briefs, the Department seriously considered every methodological issue raised in this case, based on the information before it at the time, and it has never "ignored" any alternative urged by NMHC. Rather, the Department's reasons for rejecting those alternatives are firmly discernable in the record, often supported by pages of analysis and explanation that NMHC simply ignores or mischaracterizes. Moreover, the court in *American College of Emergency Physicians* acknowledged that an agency's obligation to respond to comments is not "particularly demanding," *id.* at *4, and it declined to vacate the regulation at issue, thereby rejecting the precise relief NMHC seeks in this case. *Id.* at *5. Thus, to the extent *American College of Emergency Physicians* is relevant, it is merely in reaffirming the core principles that require rejection of NMHC's claims.¹

Dated: September 22, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

JOEL McELVAIN
Assistant Branch Director

/s/ James Powers
JAMES R. POWERS (TX Bar No. 24092989)
SERENA M. ORLOFF
Trial Attorneys
U.S. Department of Justice,
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 353-0543
james.r.powers@usdoj.gov

¹ In accord with Local Rule 7.8(c), this response is less than 350 words.

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2017, I caused the foregoing document to be served on counsel for plaintiff by filing with the court's electronic case filing system.

/s/ James Powers
James R. Powers