



January 3, 2022

Mary T. Bassett
Acting Commissioner
New York State Department of Health
Corning Tower
Empire State Plaza
Albany, NY 12237

Dear Dr. Bassett:

This letter serves as notice of potential legal action related to the blatantly unconstitutional, immoral, and racist policies of the New York State Department of Health that direct the rationing of medicine based on race and self-selected ethnicity.

On December 27, 2021, your Department issued a [notification](#) to healthcare providers and healthcare facilities entitled “COVID-19 Oral Antiviral Treatments Authorized and Severe Shortage of Oral Antiviral and Monoclonal Antibody Treatment Products.” Its stated purpose is to “make [health care providers and facilities] aware of information about available COVID-19 outpatient therapeutics, including newly authorized oral antiviral treatments.”

That notification makes clear that your Department’s position is that, during periods of limited resources, oral antiviral treatments are authorized for patients who are a certain age, test positive for COVID-19, have mild-to-moderate symptoms, can start treatment within 5 days of the onset of symptoms, and “[h]ave a medical condition or other factors that increase their risk for severe illness.” Few could argue with those stated criteria. But the notification proceeds to state—astoundingly—that “[n]on-white race or Hispanic/Latino ethnicity should be considered a risk factor, as longstanding systemic health and social inequities have contributed to an increased risk of severe illness and death from COVID-19.”

Relatedly, on December 29, 2021, your Department issued a [document](#) entitled “Prioritization of Anti-SARS-CoV-2 Monoclonal Antibodies and Oral Antivirals for the Treatment of COVID-19 During Times of Resource Limitations.” The document establishes a prioritization scheme for treatment of patients with COVID-19 and repeats the shocking claim that “[n]on-white race or Hispanic/Latino ethnicity should be considered a risk factor, as longstanding systemic health and social inequities have contributed to an increased risk or severe illness and death from COVID-19.”

600 14th Street NW, Fifth Floor
Washington, DC 20005

You must immediately rescind these unconstitutional, unlawful, and un-American policies. They violate the Constitution and numerous federal statutes—including Title VI and section 1557 of the Affordable Care Act. If we discover that any New Yorker has been denied medicine or otherwise harmed because of your reprehensible policies, we will bring legal action to pursue all available remedies under the law.

Using a patient's skin color or ethnicity—rather than the unique and specific medical circumstances of an individual patient—as a basis for deciding who should obtain lifesaving medical treatment is appalling. The color of one's skin is not a medical condition akin to hypertension, heart disease, or obesity, which are known to aggravate the risk of death or severe illness among those infected with COVID-19. Directing medical professionals to provide or deny medical care based on immutable characteristics like skin color, without regard to the particular health conditions of the individual patients who are seeking these life-saving antiviral treatments, is nothing more than an attempt to establish a racial hierarchy in the provision of life-saving medicine.

Rescind these egregious policies now.

Sincerely,

A handwritten signature in black ink, appearing to read "Gene Hamilton".

Gene Hamilton
Vice-President and General Counsel
America First Legal Foundation

cc: New York State Department of Law
cc: U.S. Department of Health and Human Services
cc: U.S. Department of Justice