STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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May 20, 2022

Via ECF
The Honorable Katherine Polk Failla
United States District Court for the Southern District of New York
40 Foley Square, Room 618
New York, New York 10007

Re: *Foundation Against Intolerance & Racism, Inc. v. City of N.Y.*, No. 22-CV-528 (S.D.N.Y.)

Dear Judge Failla:

This Office represents Defendant Mary T. Bassett, Commissioner of the New York State Department of Health ("DOH"), sued in her official and personal capacities ("Commissioner Bassett"). As a threshold matter, Commissioner Bassett requests in the interest of judicial economy that this case be stayed pending decisions by the Second Circuit in the expedited appeals of *Roberts v. Bassett*, Case 22-622 and *Jacobson v. Bassett*, Case 22-692, which challenge the Guidance on essentially the same grounds as Plaintiffs here. Plaintiffs do not consent to this stay request. If the Court declines to stay this case, pursuant to Your Honor's Individual Rule 4(A), this letter outlines the arguments that Commissioner Bassett would raise in her motion to dismiss Plaintiffs' Amended Complaint (ECF. No. 21) and to request a pre-motion conference. Plaintiffs do not consent to the motion to dismiss.

Factual Background and Allegations

Plaintiffs challenge certain guidance provided by DOH to medical providers and hospitals regarding COVID-19 drug therapies ("Therapies") that reduce the risk of hospitalization and death in high-risk patients ("Guidance"). Specifically, in December of 2021 – when the Therapies were new, doses were limited, and Omicron was causing a significant spike in cases – DOH provided non-mandatory guidance to providers about how doses of the Therapies should be prioritized among patients most at risk during a shortage. The guidance tracks recommendations from the Centers of Disease Control and Prevention ("CDC") by stating that providers should consider non-white race or Hispanic/Latino ethnicity as a risk factor, among a number of others. This suggestion stems from the well-documented finding that non-white race and Hispanic/Latino ethnicity are risk factors for developing severe illness, even when controlling for other comorbidities.

There is no longer any shortage of the Therapies in New York, there is no risk of a shortage in New York, and no one will be turned away from treatment if their practitioners find such treatment is appropriate. Further, at no point did the Guidance replace doctors' clinical judgment or prevent any patient from receiving necessary treatment. In addition, Plaintiffs do not claim that Plaintiff Stewart or any of FAIR's members have sought or been denied the Therapies.

Plaintiffs nevertheless continue to challenge the Guidance under federal and State law. However, Plaintiffs' claims must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6).

I. Plaintiffs Lack Standing to Pursue Their Claims

Plaintiffs cannot demonstrate any of the three factors necessary to establish standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Initially, there is no injury in fact because the Guidance does not erect a barrier for Plaintiff Stewart or FAIR's members to obtain the Therapies. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Commissioner Bassett will submit further proof in support of her Rule 12(b)(1) motion to demonstrate that the Guidance is advisory, rather than mandatory. This will include evidence that the Guidance was disseminated to providers in a manner that made it clear that it was not a mandate, that no enforcement actions have been taken for the Guidance, and that enforcement actions were not taken for similar, historical guidance.

Plaintiffs also cannot demonstrate that their alleged injury is traceable to DOH. *See Spokeo*, 578 U.S. at 338. Indeed, Plaintiff Stewart and FAIR's members would only be injured by DOH's guidance if they contracted COVID-19, if they sought Therapies, and then only if they were denied access to the Therapies based on the Guidance where their doctor would have independently concluded that such treatments were clinically appropriate, given their own unique medical history, risk factors, and circumstances.

Finally, Plaintiffs' alleged injury is not redressable by the judicial decision they seek. The Guidance mirrors guidance issued by the CDC on race and ethnicity. Since the CDC guidance would remain in effect in the absence of the Guidance, and providers typically follow CDC guidance as well as other available scientific and medical research about risk factors, then even if Plaintiffs alleged an injury in fact, it would not be redressable by a judicial decision. *See Roberts v. Bassett*, 22-cv-710, 2022 WL 785167, at *10 (E.D.N.Y. Mar. 15, 2022).

II. Plaintiffs' Claims Are Moot

A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). The Guidance was issued when the Therapies had just been authorized, and during the unprecedented Omicron wave of COVID-19 cases. The risk of a future shortage is entirely speculative, especially since the only shortage of oral antiviral treatments occurred immediately after their production first began, and the initial production delay cannot be repeated.[1] Further, the monoclonal antibody treatment sotrovimab is no longer authorized in New York, so the Guidance has no relevance to whether the treatment is prescribed.

III. Certain of Plaintiffs' Claims Are Barred by the Eleventh Amendment

Plaintiffs' fifth cause of action, which seeks to enjoin the Guidance by alleging that it violates the New York State Constitution, is barred from consideration in this Court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103-06 (1984) (Eleventh Amendment prevents suit requiring state official to follow state law); *Kelly v. N.Y. Civil Serv. Comm'n*, 632 F. App'x 17, 18

[1] Indeed, earlier this year, the U.S. Department of Health and Human Services ("HHS") announced the purchase of 600,000 treatment courses of a monoclonal antibody for distribution to the states in the spring of 2022. HHS, Press Release, 2/10/22, *available at* https://www.hhs.gov/about/news/2022/02/10/secretary-becerra-announces-hhs-purchase-600000-treatment-courses-new-monoclonal-antibody-that-works-against-omicron.html

(2d Cir. 2016) (the *Ex parte Young* exception "does not allow a federal court to issue an injunction for a violation of *state* law") (emphasis added) (summary order). The Eleventh Amendment also bars claims for money damages against state officials who act on behalf of a state. *See Pennhurst*, 465 U.S. at 100-01; *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Because Plaintiffs allege that Commissioner Bassett was acting within the course and scope of her duties as Commissioner at all relevant times (Am. Compl. ¶¶ 34-37), their claims for nominal damages are also barred.

IV. Plaintiffs Fail to State a Claim under Rule 12(b)(6)

First, Plaintiffs fail to allege a § 1981 claim. Initially, Plaintiffs do not identify which "of the statute's enumerated activities" the alleged discrimination concerns. *Weiss v. City Univ. of N.Y.*, 17-cv-3557, 2019 WL 1244508, at *10 (S.D.N.Y. Mar. 18, 2019). The Guidance does not concern the right to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings, and there are no allegations that the Guidance "is sufficiently contractual in nature" to otherwise fall within § 1981. *See id*. Further, the Guidance was not issued with discriminatory intent, and it does not exclude anyone from receiving the Therapies on the basis of race.

Second, Plaintiffs fail to state a claim under Title VI or ACA because they do not plausibly allege that the Therapies at issue in the Guidance are associated with any federal source of funding received by DOH. *See* 42 U.S.C. § 2000d; 42 U.S.C. § 18116. These claims also fail because the Guidance does not exclude anyone from obtaining the Therapies.

Third, Plaintiffs fail to state a claim under the Equal Protection Clause. Initially, the Guidance does not create a racial classification that confers a benefit requiring strict scrutiny because it only provides accurate information about multiple known risk factors for severe illness and death due to COVID-19 that may make a patient an appropriate candidate for treatment with the Therapies. *See Hayden v. Cty. of Nassau*, 180 F.3d 42, 49 (2d Cir. 1999). Further, the Guidance is rationally related to the legitimate government interest in preventing severe illness and death from COVID-19, and in giving medical providers accurate, comprehensive information about known risk factors so that they can make informed treatment decisions.

Fourth, Plaintiffs fail to state an individual capacity claim. An individual may only be held liable under 42 U.S.C. § 1983 if she was "personally involved in the alleged deprivation" of the plaintiff's constitutional rights. *See Littlejohn v. City of N.Y.*, 795 F.3d 297, 314 (2d Cir. 2015). Plaintiffs have not alleged any personal involvement by Dr. Bassett, and even if they had she would be protected by qualified immunity due to the novel circumstances presented by this case.

Thank you for Your Honor's consideration of this matter.

Respectfully submitted,

_____/S/_____
Erin R. McAlister
Assistant Attorney General
Attorney for Commissioner Bassett

cc: All counsel of record (via ECF)