

Sent via electronic mail

March 8, 2021

Robin Frohboese
Acting Director, Office for Civil Rights
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Unlawful Racial and Disability Discrimination Concerning Allocation and Distribution of COVID-19 Vaccine in Connecticut

Dear Director Frohboese:

This is a Complaint against the State of Connecticut and its Governor Ned Lamont, for its discrimination against nonwhite Connecticut residents over the age of 16 in its development and implementation of policies and procedures with respect to the allocation and distribution of the novel Coronavirus (COVID-19) vaccine. This Complaint is filed by Connecticut Legal Services, Inc., New Haven Legal Assistance Association, and Greater Hartford Legal Aid Association on behalf of their low-income clients who are people who are Black, Latinx, Indigenous, Asian, and all other nonwhite racial identities in Connecticut, including those with disabilities. This Complaint is made under Title VI of Civil Rights Act of 1964, Section 1557 of the Affordable Care Act, Title II of the Americans with Disabilities Act (Title II), Section 504 of the Rehabilitation Act of 1973 (Section 504), and their respective implementing regulations.

A New Vaccination Allocation and Distribution Policy Based Entirely On Age

On February 22, 2021, the State of Connecticut and Governor Lamont announced a change in Connecticut's vaccination allocation and distribution policy to prioritize allocation and distribution based almost exclusively on age.¹ The initial policy, which had yet to be implemented, reflected the recommendations of the Centers for Disease Control and Prevention (CDC) and followed the recommendations of CT's own COVID-19 Vaccine Advisory Group's Vaccine Allocation Subcommittee, which prioritized people with underlying medical conditions and certain types of essential workers, such as grocery store and agricultural field workers slightly earlier than the CDC.²

¹Beginning March 1st ages 55 and older were eligible, as well as educators and childcare providers. On March 22nd ages 45 and older would be eligible for the vaccine. The group would expand to include those as young as 35 on April 12 and then finally on May 3, ages 16-34. Health care providers and first responders remain a priority for vaccinations.

<https://portal.ct.gov/vaccine-portal/COVID-19-Vaccination-Phases>

² <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2021/01-2021/Governor-Lamont-Announces-Tiered-Approach-To-Phase-1b-Vaccine-Appointments>

The new policy³ ignores those recommendations⁴ by eliminating the previous inclusion of those with disabilities and comorbidities, and those working on the front lines, such as grocery personnel, in the earliest phases of allocation and distribution. The Governor did not cite a scientific basis for the change that might ensure all residents would be vaccinated equitably. He did later offer that he would allocate 25% of the vaccine to priority zip codes, utilizing the CDC's Social Vulnerability Index⁵, but to date there has been no public plan explaining how this will be accomplished beyond periodic data reporting without specific dates and a contract for community outreach.

The Governor prioritized simplicity in the plan, and he put aside the guidance of all the experts.⁶ The new policy makes no exception for people with demonstrably increased incidence of COVID-19 infection or demonstrably higher mortality rates upon infection, and who have been vaccinated to date at a substantially disproportionate lower rate compared to their fellow white residents.⁷ This disparity deepens with such individuals who, in addition to being nonwhite, live with disabilities with underlying medical conditions identified by the CDC as leading to higher incidence of death. This new policy, adopted over the weekend of February 20-21 by the Governor and his top aides,⁸ exclusively promotes simplicity and ease of administration over equity concerns founded on well-established data showing that Connecticut's Black and brown residents are disproportionately negatively impacted by COVID-19 and more likely to contract the virus and to die from the virus.⁹

Connecticut's Black and Brown Residents Are Disproportionately Harmed by the New Allocation and Distribution Policy

As a result of this changed policy, nonwhite Connecticut residents, particularly younger individuals, have been deprioritized for vaccination. Many of these individuals were previously prioritized as essential workers who are at increased risk of contracting COVID-19. In addition, these individuals are more likely to die if infected because of pre-existing co-morbidities. Black and brown people have higher incidence than white people of the pre-existing conditions and co-morbidities, which put them at greater risk of serious disease and death if they do contract the virus. They will be forced to wait considerably longer before actually receiving¹⁰ the vaccine despite their heightened risk of becoming seriously ill or even dying from this virus.

The evidence shows us that, by an overwhelming margin, more people of color than white people in the United States contract COVID-19. This is due to more often working in essential jobs which regularly expose them to the virus, as well as, due to lower incomes and discrimination, living in

³ <https://portal.ct.gov/vaccine-portal/COVID-19-Vaccination-Phases>

⁴ <https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-12/slides-12-20/02-COVID-Dooling.pdf> and <https://www.cdc.gov/vaccines/imzmanagers/downloads/COVID-19-Vaccination-Program-Interim-Playbook.pdf>

⁵ <https://www.atsdr.cdc.gov/placeandhealth/svi/index.html>

⁶ <https://www.wsj.com/articles/connecticuts-covid-vaccine-lesson-11614124012>

⁷ The only exceptions to the new policy's age-based restriction are for healthcare providers, medical first responders, and teachers.

See also <https://ctmirror.org/2021/02/25/black-and-hispanic-residents-continue-to-be-vaccinated-against-covid-at-lower-rates-than-white-residents/>

⁸ <https://ctmirror.org/2021/02/24/members-of-cts-vaccine-advisory-group-surprised-by-lamonts-new-vaccine-rollout-plan-contemplate-path-forward/>

⁹ <https://datawrapper.dwcdn.net/gFQZq/5/>

¹⁰ Additional delay is attributed to the change in the priority list, coupled with the many barriers to accessing the vaccine that disproportionately affect this population, such as lack of access to the internet based appointment system, a lack of transportation to mass vaccination sites, and jobs that do not allow for flexibility to spend the time necessary on the phone to secure an appointment

more tightly cramped housing and having to regularly use public transportation¹¹, public transportation that does not travel to a large number of the vaccination sites identified in the new plan.

The Inequities Resulting from the New Allocation and Distribution Policy Can Be Traced to Structuralized Racism

The most recent data shows that Black and brown Americans are 2.9-3.7 times more likely to be hospitalized than white Americans and 1.9-2.4 times more likely to die of COVID-19.¹² Here in Connecticut, the disparity is even greater. More importantly, brown and Black people are dying younger when they contract COVID-19, making it more critical that the allocation and distribution of the vaccine not be done simply by age. It must also take into account other factors that make our fellow nonwhite residents vulnerable, just as the CDC plan does, and as the state's previous plan did. The CDC guidance includes a list of conditions that put individuals at high risk for COVID-19 infection and complications;¹³ the Connecticut plan no longer includes such a list.

The New Policy is Contrary to CDC Guidance that Factored in the Need for Racial Equity

Black and brown communities have experienced discrimination and marginalization in the delivery of health care, issues which continue in various forms today.¹⁴ These same communities are more likely to experience co-morbid medical conditions like asthma, diabetes, hypertension, and heart conditions,¹⁵ as a result of structuralized racism, environmental factors, occupational safety and health, and lack of access to healthcare.¹⁶ So, it should not be surprising that 50% of the conditions identified on the CDC's guidance impact Black and brown communities at disproportionately higher rates.

The New Policy is Contrary to CDC Guidance Which Factored in the Need for Racial Equity.

The CDC Guidance lists the following conditions as at high risk for COVID-19 complications.¹⁷ The conditions disparately impacting Black and brown communities have been marked with an asterisk.

- Cancer
- Chronic kidney disease*¹⁸
- COPD (chronic obstructive pulmonary disease)

¹¹ <https://www.nytimes.com/interactive/2021/03/05/us/vaccine-racial-disparities.html?action=click&module=Top%20Stories&pgtype=Homepage>

¹² <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>

¹³ Id,

¹⁴ For instance, African American women are three to four times more likely to die during or after child birth than are white women. Amy Roeder, America is Failing its Black Mothers, Harvard Public Health Magazine (Winter 2019) available at https://www.hsph.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers/.

¹⁵ U.S. Dep't Health & Human Services, Office of Minority Health, Profile Black/African American ("The death rate for African Americans is generally higher than whites for heart diseases, stroke, cancer, asthma, influenza and pneumonia, diabetes, HIV/AIDS, and homicide.") available at <https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61>.

¹⁶ Jamila Taylor, Racism, Inequity and Health Care for African Americans, (The Century Foundation 2019) available at <https://tcf.org/content/report/racism-inequality-health-care-african-americans/?agreed=1>.

¹⁷ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

¹⁸ <https://nccd.cdc.gov/ckd/DisparityExplorerV2.aspx>

- Down Syndrome
- Heart condition, such as heart failure, coronary artery disease, or cardiomyopathies*¹⁹
- Immunocompromised state (weakened immune system) from solid organ transplant
- Obesity (body mass index [BMI] of 30 kg/m² or higher but < 40 kg/m²) *²⁰
- Severe Obesity (BMI > 40 kg/m²)*²¹
- Pregnancy
- Sickle cell disease*²²
- Smoking
- Type 2 diabetes mellitus*²³

Research shows that people of color are more likely to have co-morbid medical conditions and shorter life expectancies due to historical inequities in access to health care and exposure to environmental and social conditions that compromise health. These communities are already disproportionately impacted by COVID-19 in Connecticut.²⁴ It is critical that they not be placed at further risk, or deprioritized for the vaccine based on factors attributable to systemic discrimination which could impact their ability to survive the immediate pandemic.²⁵

The Policy is Contrary to Applicable Law

Connecticut's Vaccine Policy discriminates against Black, Latinx, Indigenous, Asian, and people of all other nonwhite racial identities in Connecticut, in Violation of Title VI of the Civil Rights Act of 1964.

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, providing that: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Under federal regulations implementing this statute, not only express discrimination, but the application of a seemingly neutral rule which has a substantially disparate impact on the basis of race, also is prohibited. See 42 C.F.R. § 18116.

Section 1557 of the Affordable Care Act provides that no health program or activity that receives federal funds may exclude from participation, deny the benefits of their programs, services or activities, or otherwise discriminate against a person protected under the above law. See 42 U.S.C. § 18116. This includes an obligation to make reasonable modifications in policies, practices, and procedures necessary to avoid discrimination on the basis of a pre-existing condition and race. See 45 C.F.R. § 92.205.B.

¹⁹ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>

²⁰ https://www.cdc.gov/pcd/issues/2019/18_0579.htm

²¹ Id.

²² <https://www.cdc.gov/ncbddd/sicklecell/features/keyfinding-trait.html>

²³ <https://www.cdc.gov/diabetes/disparities.html>

²⁴ <https://datawrapper.dwcdn.net/gFQZq/5/>

²⁵ People of color are more likely to experience bad health outcomes than white people due to the effects of structural racism in our society. If left unrevised, the vaccine allocation standards will compound the effects of structural and intentional racism. <https://www.nytimes.com/interactive/2020/06/04/opinion/coronavirus-health-race-inequality.html>

In addition, we acknowledge the Complaint filed with your agency by Disability Rights Connecticut (DRCT) on February 24, 2021 on behalf of disabled residents of our state against the state and the Governor regarding discrimination against people with disabilities in its COVID-19 vaccine allocation and distribution plan. We similarly include these disability discrimination claims under Title II and Section 504, as well as Section 1557, because Black and brown residents are disabled at a disparate rate compared to their fellow nonwhite residents, and suffer from certain underlying conditions at a disparate rate compared to their nonwhite fellow residents increasing their risk of infection and complications once infected.²⁶ We also share the concern of DRCT with disability discrimination generally resulting from underlying conditions. That risk is increased under the state's new plan adopted on February 22, 2021.

Title II of the Americans with Disabilities Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Title II “incorporates the ‘non-discrimination principles’ of [S]ection 504 of the Rehabilitation Act and extends them to state and local governments,” whether or not they receive federal funding. *Helen L. v. DiDario*, 46 F.3d at 331 (footnote omitted) (quoting *Easley v. Snider*, 36 F.3d 297, 300 (3d Cir. 1994)); see also 42 U.S.C. § 12131. The State of Connecticut is a “public entity” within the meaning of Title II of the ADA and, therefore, is subject to the ADA's provisions and obligations. 42 U.S.C. § 12131(1)(A).

Unlawful discrimination under Title II includes, inter alia: using eligibility criteria that screen out or tend to screen out individuals with disabilities, failing to make reasonable modifications to policies and practices necessary to avoid discrimination, engaging in methods of administration “[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination,” 28 C.F.R. § 35.130(b)(3), and perpetuating discrimination. 28 C.F.R. §§ 35.130(b)(1)-(3); 35.130(b)(7)-(8). Connecticut, in adopting its new vaccine policy, has violated and continues to violate Title II.

Similar to Title II, Section 504 also prohibits disability discrimination by covered recipients of federal funds, such as Connecticut and its state agencies. 29 U.S.C. § 794(a). Section 504's provisions are read co-extensively with those of the ADA, including failing to make reasonable modifications to policies, practices, or procedures in order to avoid discrimination. See *Southeastern Community College v. Davis*, 442 U.S. 397 (1997); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273-76 (2d Cir. 2003). For the reasons described above, Connecticut's adoption of its COVID-19 policy and practice also violates Section 504.

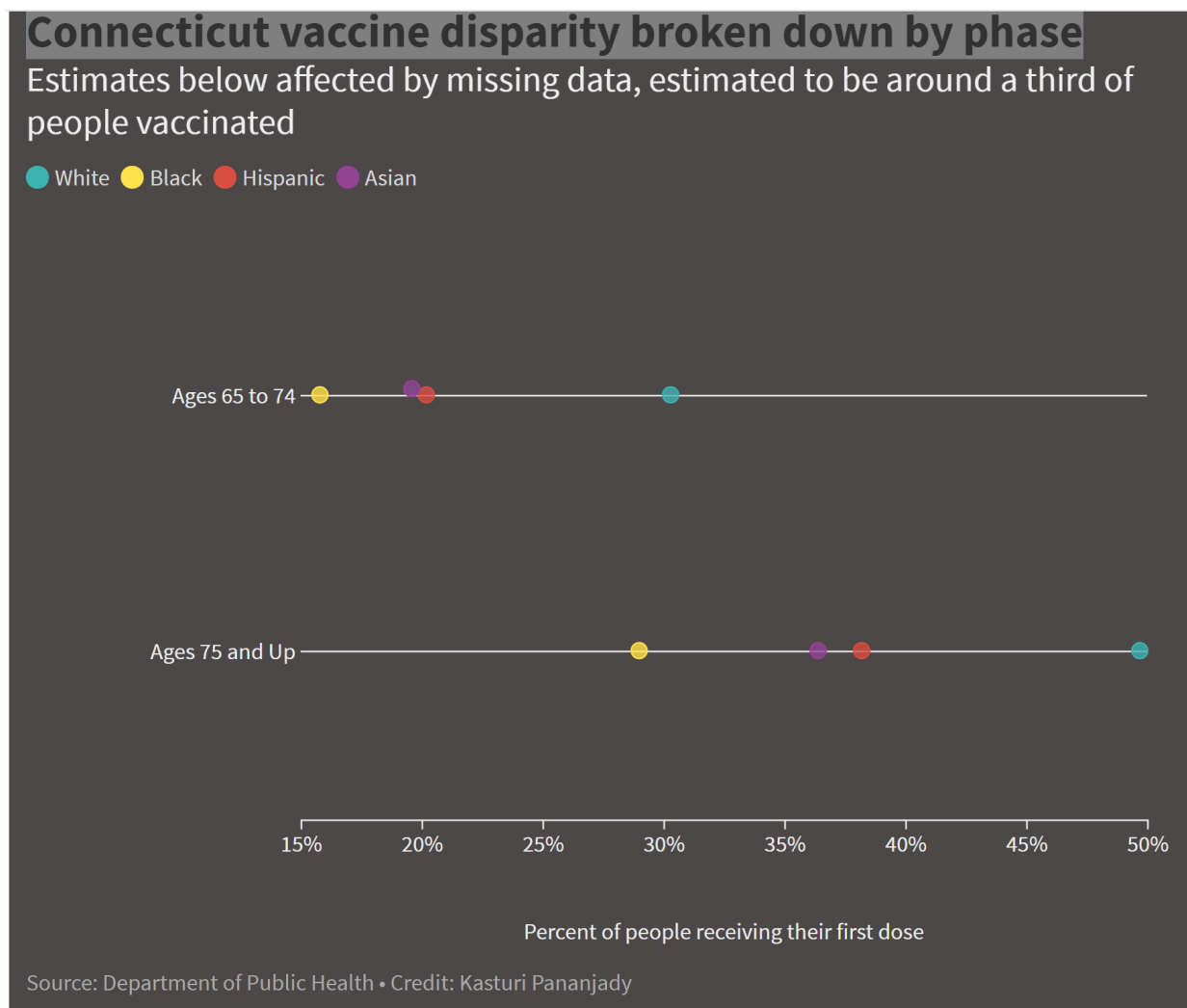
Age-based Eligibility Criteria in the New Vaccine Policy Discriminate Against Nonwhite Residents

As a result of these various medical conditions, people of color also statistically have substantially lower life expectancies than white people, independent of COVID-19. While white Americans have an average life expectancy of 79.12 years, Black Americans have an average life expectancy of 75.54. The greatest contrast is seen when considering race and gender. The average life

²⁶ <https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html>

expectancy of a white female in the U.S. is currently 81.2 years, while the average life expectancy of a Black man is only 71.9, nearly a 10-year difference.²⁷

Accordingly, on top of all of the reasons why a person of color has a lower life expectancy than a white person, this will now be *exacerbated* by this age-based allocation and distribution of the vaccine, which favors an older population that is underrepresented in Black and brown communities in Connecticut, while ignoring the disparate rate at which the Black and brown communities are contracting COVID-19 and dying from it in Connecticut. The impact to date can be seen on the chart below:



✿ A Flourish scatter chart

Connecticut, in adopting and implementing its vaccine policy, has violated, and continues to violate, Section 1557, Title VI, Title II, and Section 504 by:

1. imposing eligibility criteria for the COVID-19 vaccine that discriminate against and unfairly burden nonwhite individuals protected by law;

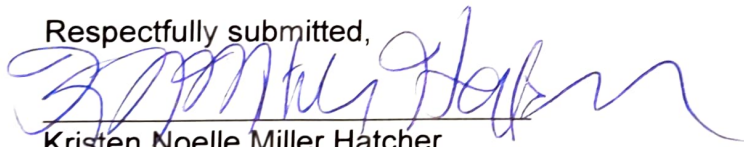
²⁷JSI Research and Training Institute <https://www.jsi.com/racial-disparities-in-aging/>

1. imposing eligibility criteria for the COVID-19 vaccine that discriminate against and unfairly burden nonwhite individuals protected by law;
2. refusing to reasonably modify its COVID-19 vaccine policy so that it no longer discriminates against nonwhite individuals;
3. perpetuating discrimination against nonwhite people by restricting eligibility for the COVID-19 vaccine with discriminatory criteria which unfairly burden individuals with disabilities;
4. refusing to reasonably modify its COVID-19 vaccine policy to not discriminate against those with disabilities;
5. perpetuating discrimination against people with disabilities.

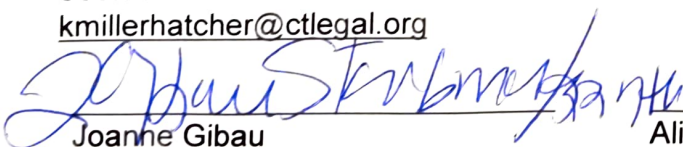
The Office of Civil Rights Must Address This Discriminatory Policy

We respectfully request that the Office for Civil Rights immediately investigate and issue findings on an expedited basis that the actions of Governor Lamont, his administration, and the State of Connecticut, in promulgating and implementing their new COVID-19 vaccine policy, constitute discrimination on the basis of race in violation of Title VI of Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act, and on the basis of disability in violation of Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, Section 1557 of the Affordable Care Act, and their respective implementing regulations. We further request that OCR direct Connecticut to immediately revise its COVID-19 vaccine policy to include (1) individuals with underlying medical conditions, regardless of their age, who are at increased risk of COVID-19 infection, and (2) individuals who are in the categories of workers subject to heightened risk of contracting COVID-19, as already identified by the CDC and the Governor's COVID-19 Advisory Group's Vaccine Allocation Subcommittee, for priority in receiving the COVID-19 vaccine.

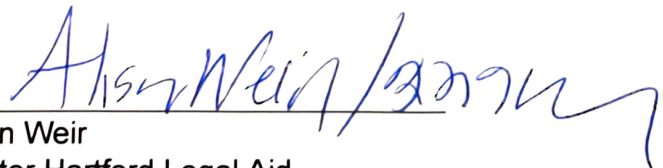
Respectfully submitted,



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