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By Email:

Montgomery County Department of Health and Human Services

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Re: Reported Intent to Discriminate on the Basis of Race and Ethnicity in Prioritizing Access to Covid Vaccines

Dear Friends,

I understand that Montgomery County, like localities everywhere, is working through the complicated legal, ethical, and logistical concerns related to its distribution of Covid-19 vaccinations. I understand that Montgomery County has largely completed inoculating its Tier 1a, front-line workers, and is intending to begin distributing vaccines to its Tier 1b of recipients (constituted of residents older than 75 years of age).

According to WTOP,¹ on February 3, 2021, Dr. Crowel announced that the County will prioritize vaccination to those within this age group “from the ZIP codes most ravaged by the virus, based on coronavirus case rates over the past 90 days and death rates since the start of the pandemic.” While the reported priority ZIP codes seem to poorly overlay with the most affected regions (entirely omitting the Damascus area that has seen the most intensive infection rates over the referenced period), the more troubling detail was that which followed. WTOP also quoted Dr. Crowel as having stated that “Within those top-priority ZIP codes, the county doses will be allocated based on case rate and death rates by race and ethnicity for folks living in the ZIP codes that have been disproportionately impacted.” Indeed, the County website currently indicates the same policy, quoting Dr. Travis Gayles as saying that “We are

¹ <https://wtop.com/coronavirus/2021/02/montgomery-county-to-prioritize-covid-19-vaccine-doses-by-zip-code/>.

working diligently to ensure our populations who have been hit hardest by COVID-19, both in terms of cases and fatalities, including home zip code, race, ethnicity and age, are all factored into the vaccine distribution process.”²

I write now to express my concern with this stated intention. Allocating life-saving treatment on the basis of race and ethnicity raises serious legal and Constitutional concerns. I know you know that the 14th Amendment to the U.S. Constitution requires every locality to afford “the equal protection of the law” to “every person within its jurisdiction.” Should Montgomery County act on Dr. Crowel’s stated intention, it might violate this clear federal law. Prioritizing groups of people within the County’s jurisdiction for potentially life-saving treatment on the basis of their race and ethnicity would definitionally de-prioritize the access of others to the same potentially life-saving treatment on the basis of their race and ethnicity.

No matter how well-intentioned, any such policy facially discriminating on the basis of race and ethnicity, if adopted, would have to survive the “strict scrutiny” of the Federal courts.³ Strict scrutiny allows governmental discrimination on these bases only where such discrimination: (a) fulfills a compelling purpose; and (b) is narrowly tailored to that purpose.

Respectfully, to the extent that the reported policy is rooted in purported concerns with the net access of some races and ethnicities to health resources and/or the internet, the existence of such factors demonstrates why the proposal could almost surely not survive strict scrutiny. If the County has gathered from existing data that there are groups who disproportionately lack these resources and tend to suffer worse group-health results than other residents as a result, it clearly could prioritize on the basis of those underlying factors, rather than on the basis of race and ethnicity. The availability of those non-racial, non-ethnic alternatives calls into question both whether there is a compelling purpose for the County to instead focus on the race and ethnicity of residents and whether that proposed focus could be scored as narrowly tailored. To this end, it may be worth referencing the recent experience of the Oregon Health Authority’s Vaccine Advisory Committee, which briefly considered a parallel policy, before conceding that using race, ethnicity, and national origin was forbidden and unnecessary.⁴

I hope that you will bear in mind these considerations, will voluntarily *not* go forward with a clearly discriminatory policy that ignores them, and that no Court will need to be involved in assuring that Montgomery County’s vaccine rollout is both successful and compliant with governing law.

Respectfully Yours,



Daniel I. Morenoff

² https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail.aspx?Item_ID=33617.

³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁴ <https://katu.com/news/local/equity-concerns-remain-in-oregons-vaccine-distribution-plan>.