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May 20, 2022

By ECF
The Honorable Katherine Polk Failla
United States District Judge
United States District Court, Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10001

Re: *Foundation Against Intolerance & Racism v. The City of New York, et al,*
22-CV-00528 (SDNY) (KPF) (JW)

Your Honor:

I am Assistant Corporation Counsel in the Office of the Hon. Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York, attorney for defendants City of New York, the New York City Department of Health and Mental Hygiene ("DOHMH"), and David A. Chokshi,[1] as Commissioner of DOHMH (collectively "City Defendants") in the above-referenced matter. City Defendants write to respectfully request a stay of the above referenced case pending a decision from the Second Circuit in *Roberts v. Bassett*, Case 22-cv-622 (EDNY) and *Jacobson v. Bassett*, Case 22-cv-692 (NDNY), and alternatively, for permission to move to dismiss the First Amended Complaint ("complaint") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). Plaintiffs do not consent to either request.

Plaintiffs, an advocacy organization, Foundation Against Intolerance & Racism ("FAIR") and an individual, Benjamin Stewart, challenge guidance issued by the New York State Department of Health ("NYS DOH") and DOHMH on December 27, 2021. DOHMH's Health Advisory #39 ("Advisory") informed hospitals and medical care providers of newly authorized products for the treatment of COVID-19 ("Treatments"). Because supplies were severely limited at the time, the Advisory directed that providers follow the NYS DOH's guidance on prioritization of patients with the highest risk for hospitalization and death from COVID-19. The Advisory also provided that when assessing a patient's risk, providers may consider race and ethnicity, among other risk factors.

[1] The current Commissioner is Dr. Ashwan Visan, MD, PhD.

A Stay is in the Interest of Judicial and Municipal Resources

Roberts challenges the same Advisory that is challenged herein, and *Jacobson* challenges the NYS DOH guidance, that is also challenged herein. Both cases were dismissed for lack of standing, and are on expedited appeal before the Second Circuit. While the plaintiffs in each case are unique, a central issue to standing is whether City Defendants created a barrier that makes it more difficult for one group to access COVID-19 Treatments. That analysis is not dependent upon the characteristics of the plaintiffs, and is identical in each case. Additionally, the plaintiffs in *Roberts* are challenging the denial of the preliminary injunction, arguing that they are likely to succeed on the merits of their equal protection claim. Thus, the Second Circuit may also opine on the merits of the central claim in this case as well. As the City Defendants intend to move to dismiss on standing, a stay is in the interest of preserving judicial and municipal resources.

Plaintiffs Lack Standing

Pursuant to Rule 12(b)(1) of the FRCP, the complaint should be dismissed because Plaintiffs lack standing. It is a plaintiff's burden to establish that there is a "case or controversy" between himself and the named defendants in this case. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). In an equal protection case, "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group," the "injury in fact" is the "denial of equal treatment resulting from the imposition of the barrier." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Additionally, the plaintiff must demonstrate that it is "able and ready" to participate in the allegedly discriminatory process, but that the barrier "prevents it from doing so on an equal basis." *Gratz v Bollinger*, 539 U.S. 244, 262 (2003); *Ne. Fla. Chap*, 508 U.S. at 666–69; *Faculty Alumni, & Students Opposed to Racial Preferences v. New York Univ.*, 11 F.4th 68, 78 (2d Cir. 2021).

Plaintiffs lack standing because the Advisory does not create a barrier that makes it more difficult for members of one group to obtain a benefit. The Advisory is non-mandatory guidance for medical providers—and not a law, mandate or order. The Advisory was created for DOHMH"s Health Alert Network ("HAN"), which according to DOHMH's website, "contains public health information for medical providers, including: up-to-date health alert information delivered to your inbox and archived on the web, an online document library on public health topics, and an online community to exchange information and ideas with your colleagues. All medical providers in New York City may access the HAN."[2] Health Advisories are intended to provide important information to public health officials and clinicians, and contain recommendations and suggestions on how to handle any number of public health matters. Medical providers may choose to subscribe to HAN, but are not required to do so. There are no mechanisms in place to track whether providers are following the guidance, nor is there a mechanism, or intent to enforce Health Advisories.[3] The Health Advisories are not "rules" in accordance with the Citywide Administrative Procedure Act

[2] *Subscribe to Health Alert Network (HAN)*, NYC Health, https://www1.nyc.gov/site/doh/providers/resources/health-alert-network-subscribe.page (last visited May 13, 2022).

[3] City Defendants' reliance upon facts outside the pleadings is wholly appropriate in support of a motion to dismiss for lack of subject matter jurisdiction. *See State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007).

(NYC Charter Chapter 45), and are not Orders issued by DOHMH[4] in accordance with NYC Health Code §§ 3.01 or 3.05 or NYC Charter 22.

Finally, the subjective opinion about the mandatory nature of the Advisory made by a single medical provider (Plaintiff's declarant Dr. Mendoza) who is not licensed to practice medicine in New York does not undermine these facts. *See* Mendoza Decl. ¶¶1, 18 (ECF 27-5). Consequently, as the Advisory is merely guidance,[5] it does not serve as a barrier to equal treatment.

Further, even if, *arguendo*, the Advisory constitutes a barrier, Plaintiffs still lack standing as they are unable to show that the Advisory causes unequal treatment. It is the medical providers that prescribe the Treatments, not City Defendants. It will not be possible to discern whether it was the Advisory, or something else (including the State's guidance or CDC) that caused providers to choose to prescribe or not prescribe the Treatments to individuals. Indeed, we do not know whether and how medical providers are actually following the guidance in the Advisory.

Additionally, although a plaintiff need not show that he would necessarily obtain the benefit absent the discriminatory barrier, "[a] plaintiff association challenging an unlawfully discriminatory process needs to allege that its members are 'able and ready' to participate in the process." *Faculty Alumni, & Students Opposed to Racial Preferences v. New York Univ.*, 11 F.4th 68, 78 (2d Cir. 2021). Plaintiffs are not "ready and able" to take the Treatments as they may never test positive for COVID-19, and even if they do, they may not obtain medical treatment within the necessary time frame, may not have mild to moderate symptoms, and may not otherwise be eligible.[6]

Finally, Plaintiff FAIR lacks direct organizational standing to challenge the guidance because it has not plead facts to support a conclusion that it suffered an "involuntary and material burden on its established core activities." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 173–74 (2d Cir. 2021).

Plaintiffs Fail to State a Claim under 42 U.S.C. § 1981

Plaintiffs' claim under 42 U.S.C. § 1981 must be dismissed because Section 1981 does not apply to government actors. *See Duplan v. City of New York*, 888 F.3d 612, 616 (2d Cir. 2018) ("42 U.S.C. § 1983 provides the sole cause of action available against state actors alleged to have violated § 1981"); *Small v. Collins*, 10 F.4th 117, 144–45 (2d Cir. 2021).

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[4] *See Notices and Recent Orders*, NYC Health, https://www1.nyc.gov/site/doh/about/hearings-and-notices/official-notices.page (last visited May 16, 2022) for examples of Commissioner's Orders and compare with the link set forth in footnote 2.

[5] Even if, *arguendo*, this Court deems the Advisory's statement regarding considering race as mandatory, mandatory consideration of race does not create a barrier here. The Advisory does not dictate how risk factors ought to be assessed when deciding to prescribe Treatments, and by no means overrides medical providers' sound clinical judgment. In other words, how and to what extent a medical provider undertakes such purported "mandatory consideration" of race and ethnicity is left completely to their judgment.

[6] As Plaintiff Stewart lacks standing, Plaintiff FAIR likewise lacks association standing. *See Warth,* 422 U.S. at 511. FAIR also fails to establish associational standing on behalf of non-white and Hispanic members who Plaintiffs allege are injured by the Challenged Guidance by being made to assume the risk of long-term negative side effects from these therapies. *See* FAC at ¶ 25. The allegations regarding this claim are sparse, conclusory and lacking in detail sufficient to establish standing. *See Rodriquez v. Winski*, 444 F.Supp.3d 488 (S.D.N.Y. 2020) (cites omitted) (associational standing requires, at minimum "specific allegations establishing that at least one identified member had suffered or would suffer harm").

Respectfully submitted,

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