

BOYDEN GRAY & ASSOCIATES PLLC
801 17TH STREET, NW, SUITE 350
WASHINGTON, DC 20006
(202) 955-0620

ETHICS
AND
PUBLIC
POLICY
CENTER

September 28, 2021

Pamela Barron
Deputy Director
Civil Rights Division
Office for Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201

Via email: Pamela.Barron@hhs.gov; OCRComplaint@hhs.gov

Re: Complaint for Race, Color, and National Origin Discrimination in Violation of Section 1557 and Title VI by New Hampshire *et al.* in COVID-19 Vaccine Distribution

Contact attorneys for complainant:

Michael Buschbacher
BOYDEN GRAY & ASSOCIATES PLLC
801 17th St NW, #350
Washington, DC 20006
202.955.0620
buschbacher@boydengrayassociates.com

Rachel N. Morrison, Esq.
Ethics & Public Policy Center
1730 M Street, N.W., Suite 910
Washington, D.C. 20036-4548
202.682.1200
RMorrison@eppc.org

Person/Agency/Organization(s) committing discrimination:

State of New Hampshire
107 North Main Street
Concord, NH 03301
603.271.2121

New Hampshire Department of Health and
Human Services
129 Pleasant Street
Concord, NH 03301-3852
603.271.9200

Public Health Council of the Upper Valley
One Court Street, #378
Lebanon, NH 03766
603.523.7100

Dear Ms. Barron:

We are filing this civil rights complaint on behalf of complainant, [REDACTED], because the state of New Hampshire and its public health authorities have discriminated by denying him access to the COVID-19 vaccine on the basis of his race, color, and national origin in violation of Section 1557 of the Patient Protection and Affordable Care Act (the ACA) and

Title VI of the Civil Rights Act of 1964. Please note that we request you keep [REDACTED]'s identity and surrounding facts of the case strictly confidential according to the Privacy Act and all applicable laws and policies protecting confidentiality.¹

The State of New Hampshire and its Department of Health and Human Services are Bound by ACA Section 1557 and Title VI.

New Hampshire has received substantial funds from the federal government generally and HHS in particular to administer its health programs. As part of COVID-19 relief efforts, New Hampshire has received over \$500 million through HHS² and \$43 million to support vaccination specifically.³ The New Hampshire Department of Health and Human Services (NH-HHS), a leading recipient of these funds, has led the state's vaccination effort.⁴

Using these funds in a discriminatory manner is a violation of federal law, as New Hampshire is well aware. The state's official COVID-19 resource website linked to HHS's March 2020 Bulletin which states that civil rights laws are not suspended during the pandemic and that "our civil rights laws protect the equal dignity of *every* human life."⁵ The bulletin specifically references Section 1557 of the Affordable Care Act, which guarantees that no individual can "be excluded from participation in, denied benefits of, or be subject to discrimination under" any federally administered or funded health program or activity because of membership in various categories including race, color, and national origin that are protected under civil rights laws including Title VI of the Civil Rights Act of 1964.⁶ HHS's website further explains: "Programs that receive Federal funds cannot distinguish among individuals on the basis of race, color or national origin, either directly or indirectly, in the types, quantity, quality or timeliness of program services, aids or benefits that they provide or the manner in which they provide them. This prohibition applies to intentional discrimination as well as to procedures, criteria, or methods of administration that appear neutral but have a discriminatory effect on individuals because of their race, color, or national origin."⁷

¹ Any public statements [REDACTED] may choose to make about his ill-treatment by respondents should not be interpreted in any way as permission to your office to reveal any confidential information about this matter whatsoever.

² Taking Accountability in Government Grant Services, *HHS COVID-19 Funding*, <https://taggs.hhs.gov/coronavirus> (last visited Sept. 27, 2021).

³ Associated Press, *NH Getting Nearly \$30.7M in Additional Federal Vaccine Aid* (Mar. 30, 2021), <https://www.usnews.com/news/best-states/new-hampshire/articles/2021-03-30/nh-getting-nearly-307m-in-additional-federal-vaccine-aid>.

⁴ See Press Release, State Clarifies Vaccine FAQs, N.H. Dep't Health & Hum. Servs. (Jan. 25, 2021), <https://www.dhhs.nh.gov/media/pr/2021/01262021-vaccine-faqs.htm>; *Welcome*, N.H. COVID-19 RESPONSE, <https://www.covid19.nh.gov/> (last visited Sept. 27, 2021).

⁵ BULLETIN: CIVIL RIGHTS, HIPAA, AND THE CORONAVIRUS DISEASE 2019 (COVID-19), HHS OFFICE FOR CIVIL RIGHTS IN ACTION 1 (Mar. 28, 2020), <https://www.hhs.gov/sites/default/files/ocr-bulletin-3-28-20.pdf> (emphasis added).

⁶ 42 U.S.C. § 18116.

⁷ *Civil Rights Requirements- A. Title VI of the Civil Rights Act of 1964*, 42 U.S.C. 2000d et seq. ("Title VI"), U.S. DEP'T HEALTH & HUM. SERVS. (last reviewed July 26, 2013), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html>.

According to HHS’s Title VI regulations, recipients of HHS funds may not engage in any of the above prohibited conduct either “directly or through contractual or other arrangements.”⁸ Under Title VI, a state’s federally-funded “program or activity” includes “all the operations” of state agencies, departments, or any “other instrumentality of a State.”⁹ Because New Hampshire receives substantial funds from HHS, including for its COVID-19 response, it is covered by Title VI and Section 1557.

Discriminating on the basis of race, color, or national origin is also a violation of New Hampshire law. The Bill of Rights of the New Hampshire Constitution states: “Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”¹⁰ In a 2016 Executive Order, the Governor of New Hampshire elaborated on this requirement, ordering that “[n]o state agency shall discriminate in the administration of any state program” and that “all executive branch contracts and grants shall ... prohibit[] any party to the contract or sub-contractors from engaging in discriminatory practices” on the “basis of ... race, color, ...[or] national origin.”¹¹

New Hampshire’s COVID Vaccination Program has Unlawfully Discriminated on the Basis of Race, Color, and National Origin.

People of certain races, skin colors, or national origins should not be given priority access to the COVID-19 vaccine, because such actions would be flatly unlawful.¹² But New Hampshire did exactly that.

As part of its vaccine rollout, New Hampshire established five phases of eligibility: 1a, 1b, 2a, 2b, and 3.¹³ Phase 1a was for high-risk health workers, first responders, and older adults living in residential care settings. Phase 1b was for people 65 and older, certain medically vulnerable people who are at significantly higher risk, certain persons who work with medically vulnerable persons and persons with intellectual and developmental disabilities, persons who work in correctional facilities, and any remaining first responders and health workers. Phase 2a was for K–12 school and childcare staff and Phase 2b was for people 50–64 years old. Under Phase 3, people 40–49 years old were eligible March 29, people 30–39 years old were eligible March 31, and everyone 16 years and older was eligible April 2.

In addition to the above criteria, New Hampshire established the use of racial and ethnic considerations in determining eligibility to receive COVID-19 vaccinations.¹⁴ During phases 1b and 2, it allocated 10% of available vaccine doses for “disproportionately impacted populations”

⁸ 45 C.F.R. 80.3(b)(2).

⁹ 42 U.S.C. § 2000d–4a.

¹⁰ N.H. Const., Bill of Rights, art. 2.

¹¹ State of New Hampshire, Exec. Order No. 2016-04 (June 13, 2016).

¹² See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹³ *Vaccine Phases: Phases for the New Hampshire COVID-19 Vaccine Rollout*, N.H. COVID-19 VACCINE, <https://web.archive.org/web/20210401031514/https://www.vaccines.nh.gov/vaccine-phases>.

¹⁴ See N.H. DEP’T HEALTH & HUM. SERVS., NEW HAMPSHIRE CORONAVIRUS DISEASE 2019 VACCINATION PLAN 18 (Mar. 15, 2021) (“In order to mitigate inequities in health care access and health outcomes, NH is identifying and prioritizing populations that are at a high risk of experiencing health disparities tied to race and ethnicity.”), <https://www.dhhs.nh.gov/dphs/cdcs/covid19/documents/covid19-vac-plan.pdf>.

as identified by the COVID-19 Community Vulnerability Index (CCVI).¹⁵ The state was to coordinate this set-aside distribution through the NH Regional Public Health Networks at sites “familiar and accessible to the target population.”¹⁶ What is this target population? The state was to “[i]nitially provide vaccine to NH’s racial and/or ethnic minority community *then* include other vulnerable populations, such as those that are geographically isolated or those living in economic hardship.”¹⁷ The state also was to hold a supply of vaccines in reserve for use in targeted response in racial minority census tract if needed.¹⁸ New Hampshire relied upon the CCVI, produced by a privately funded think tank, to determine which races, skin colors, and ethnicities would receive the vaccine ahead of others. The CCVI identified “minority status” as “all persons except white, non-Hispanic.”¹⁹ New Hampshire relied upon the CCVI’s patently racist stereotype that non-whites are inherently “less resilient” than whites in order to justify de-prioritizing whites, and only whites, for vaccines.²⁰

New Hampshire Governor Chris Sununu and his top health official were not shy about prioritizing racial and ethnic minority groups for early access. Elizabeth R. Daly, chief of the Bureau of Infectious Disease Control at the NH-HHS was quoted as saying the state is “meeting the needs of those people who’ve been disproportionately impacted by COVID-19. This includes people who are in racial and ethnic minority groups.”²¹

Inexplicably, New Hampshire rushed to implement its race-based vaccine distribution scheme despite being ranked the third *least* vulnerable state in America according to the CCVI itself.²² On a scale of zero to one, with zero being the least vulnerable, New Hampshire scored 0.04 compared to, for example, Texas, which scored a 0.98 on the CCVI rankings.²³ Indeed, the

¹⁵ BUREAU OF INFECTIOUS DISEASE CONTROL, NH DIV. OF PUB. HEALTH SERVS. DEP’T HEALTH & HUM. SERVS., NH COVID-19 VACCINATION ALLOCATION GUIDELINES FOR PHASE 1B 1 (Feb. 5, 2021), <https://www.dhhs.nh.gov/dphs/cdcs/covid19/documents/phase-1b-technical-assistance.pdf>; BUREAU OF INFECTIOUS DISEASE CONTROL, NH DIV. OF PUB. HEALTH SERVS. DEP’T HEALTH & HUM. SERVS., NH COVID-19 VACCINATION ALLOCATION GUIDELINES FOR PHASE 2 1 (Mar. 3, 2021), <https://www.dhhs.nh.gov/dphs/cdcs/covid19/documents/phase-2-technical-assistance.pdf>.

¹⁶ BUREAU OF INFECTIOUS DISEASE CONTROL, NH DIV. OF PUB. HEALTH SERVS. DEP’T HEALTH & HUM. SERVS., NH COVID-19 VACCINATION ALLOCATION GUIDELINES FOR PHASE 1B 6 (Feb. 5, 2021), <https://www.dhhs.nh.gov/dphs/cdcs/covid19/documents/phase-1b-technical-assistance.pdf>.

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*

¹⁹ SURGO VENTURES, COVID-19 COMMUNITY VULNERABILITY INDEX (CCVI) METHODOLOGY 14 (updated Dec. 2020) [https://covid-static-assets.s3.amazonaws.com/US-CCVI/COVID-19+Community+Vulnerability+Index+\(CCVI\)+Methodology.pdf](https://covid-static-assets.s3.amazonaws.com/US-CCVI/COVID-19+Community+Vulnerability+Index+(CCVI)+Methodology.pdf); *see also* SURGO VENTURES, VULNERABLE COMMUNITIES AND COVID-19: THE DAMAGE DONE, AND THE WAY FORWARD 7 (Jan. 2021), <https://surgoventures.org/resource-library/report-vulnerable-communities-and-covid-19>.

²⁰ *Id.* To the extent the CCVI relied upon the CDC’s Social Vulnerability Index’s use of minority status as a relevant marker in the allocation of federally funded resources, the CDC is likewise in violation of Section 1557 of the ACA for discrimination on the basis of race, color, and national origin in a covered health program administered by HHS.

²¹ Michael Graham InsideSources.com, *NH Using Race-Based ‘Equity’ Metric in Distributing Early Doses of COVID Vaccine*, N.H. UNION LEADER (Jan. 7, 2021), https://www.unionleader.com/news/health/coronavirus/nh-using-race-based-equity-metric-in-distributing-early-doses-of-covid-vaccine/article_f0e8c27c-4639-56cb-a94e-3e5c0041076e.html (quoting Elizabeth R. Daly, Chief of the Bureau of Infectious Disease Control at the N.H. Department of Health and Human Services).

²² *See Community Vulnerability to COVID-19: Explore the U.S. Data*, SURGO VENTURES PRECISION FOR COVID, <https://www.precisionforcoviddata.org/>.

²³ *Id.*

CCVI did not identify a single census tract within the state with minorities at high or very high “vulnerability.”²⁴ If race-based allocation of vaccines were legitimate, which it never is, New Hampshire would be the least likely candidate because the race-correlated disproportional impact of COVID is among the lowest of all the states. One is therefore left to conclude that the state and its health authorities acted to send a politically correct, and politically corrosive, message about whites being disfavored and non-whites preferred during the pandemic, and in this respect it succeeded.

New Hampshire’s COVID Vaccination Program Discriminated Against Complainant on the Basis of Race, Color, and National Origin

New Hampshire cannot deny that it distributed COVID-19 vaccines to non-white residents ahead of white residents, including [REDACTED], based solely on race, color, or national origin. Per New Hampshire’s Vaccine eligibility phases, only persons 50 and older were eligible on March 27, and those under age 30 were not eligible until April 2 to receive the vaccine.²⁵ However, by March 27, New Hampshire had already implemented its 10% racial set-aside for vaccine distribution that bypassed the age cut-offs applicable to the general population.²⁶

According to the *Valley News*, on Saturday, March 27, 2021, the Public Health Council of the Upper Valley held a COVID-19 vaccination clinic in Lebanon for New Hampshire residents 18 and older who identify as “Black, Indigenous or people of color” (“BIPOC”) according to the council’s director Alice Ely.²⁷ *The Dartmouth* college newspaper reported that on March 27, 2021, the “BIPOC clinic” made 400 vaccine appointments available for BIPOC state residents only through the state’s “equity allocation”²⁸ *The Dartmouth* interviewed two Dartmouth students who received vaccinations through the racial set asides at the Lebanon clinic: Elizabeth Frey and Russell Chai.²⁹ According to their LinkedIn profiles, both Ms. Frey and Mr. Chai are Asian and were approximately 19 years old at the time.³⁰ According to Mr. Chai, “Now that I’ve gotten vaccinated, I feel like a weight has been lifted off of my shoulders,” and “I’m clearly less nervous about getting the virus because the virus definitely ruins lives.”³¹

²⁴ *Id.*

²⁵ *Vaccine Phases: Phases for the New Hampshire COVID-19 Vaccine Rollout*, N.H. COVID-19 VACCINE, <https://web.archive.org/web/20210401031514/https://www.vaccines.nh.gov/vaccine-phases>.

²⁶ BUREAU OF INFECTIOUS DISEASE CONTROL, NH DIV. OF PUB. HEALTH SERVS. DEP’T HEALTH & HUM. SERVS., NH COVID-19 VACCINATION ALLOCATION GUIDELINES FOR PHASE 1B 1 (Feb. 5, 2021), <https://www.dhhs.nh.gov/dphs/cdcs/covid19/documents/phase-1b-technical-assistance.pdf>; BUREAU OF INFECTIOUS DISEASE CONTROL, NH DIV. OF PUB. HEALTH SERVS. DEP’T HEALTH & HUM. SERVS., NH COVID-19 VACCINATION ALLOCATION GUIDELINES FOR PHASE 2 1 (Mar. 3, 2021), <https://www.dhhs.nh.gov/dphs/cdcs/covid19/documents/phase-2-technical-assistance.pdf>.

²⁷ Staff & Wire Reports, *COVID-19: NH Announces Vaccine Sign-Up Dates for All Adults*, VALLEY NEWS (modified Mar. 26, 2021, 8:08 AM), <https://www.vnews.com/Upper-Valley-COVID-19-vaccine-clinic-scheduled-for-Granite-Staters-of-color-39638665>.

²⁸ Sydney Wu, *College Implements Vaccine Partnership with NH, Upper Valley Residents Attend BIPOC Vaccine Clinic*, DARTMOUTH (Apr. 1, 2021, 3:00 AM), <https://www.thedartmouth.com/article/2021/04/college-announces-vaccine-partnership-with-new-hampshire-upper-valley-residents-attend-bipoc-vaccine-clinic>.

²⁹ *Id.*

³⁰ See Elizabeth F., LINKEDIN, [REDACTED] (listing 2020 high school graduation date); Russell Chai, LINKEDIN, [REDACTED] (same).

³¹ *Id.*

Public Health Council Director Alice Ely stated she was “thrilled” to be able to vaccinate “so many of our neighbors who identify as Black, Indigenous or a person of color.” This was an insult to the many people, especially those at elevated medical risk, who were forced to wait behind younger healthy college students simply because of their race, skin color, and national origin.

██████████ is a 28-year-old white (non-Hispanic) male resident of New Hampshire who is diabetic and thus at elevated medical risk to COVID-19.³² On April 2, 2021, he called the Public Health Council of the Upper Valley to request a COVID-19 vaccination appointment. He was told through a recorded message that appointments were “fully subscribed for people of color.” ██████████ was denied the ability to get a vaccine solely because of his race, color, and national origin. ██████████ was eventually able to receive the COVID vaccine in New Hampshire on May 2, 2021.

The state of New Hampshire, NH-HHS, and the Public Health Council of the Upper Valley discriminated against ██████████ on the basis of race, color, and national origin directly and indirectly in a HHS funded COVID-19 vaccination program.³³ Although it is unclear if the state continued or continues to discriminate on the basis of race, color, or national origin, at least as late as June 27, 2021, the state’s main COVID vaccine website continued to state that “appointments are limited” and “dependent on [vaccine] supply,” which left open the door to the state discriminating against whites.³⁴

New Hampshire Should Be Held Accountable for its Blatant Discrimination on the Basis of Race, Color, and National Origin

Ms. Barron, this is not a close case. Federal funds may not be used to discriminate on the basis of race, color, or national origin yet New Hampshire, NH-HHS, and the Public Health Council of the Upper Valley blatantly denied white persons vital health treatments in the middle of a pandemic solely because of their race, color, and national origin. The Supreme Court long ago rejected the notion that so-called “benign” racial discrimination was subjected to a lower standard of review than any other type of racial discrimination.³⁵ To the contrary, “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”³⁶

³² *People with Certain Medical Conditions*, Ctrs. for Disease Control & Prevention, U.S. Dep’t Health & Hum. Servs. (last updated Aug. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (“Having either type 1 or type 2 diabetes **can make you more likely** to get severely ill from COVID-19.” (emphasis in original)).

³³ *See NH Getting Nearly \$30.7M in Additional Federal Vaccine Aid*, AP (Mar. 30, 2021), <https://apnews.com/article/jeanne-shaheen-new-hampshire-maggie-hassan-coronavirus-pandemic-05fa56694601a96ae7dfaccf15806b3f>.

³⁴ *COVID-19 Vaccine Schedule for NH Residents*, N.H. COVID-19 VACCINE, <https://web.archive.org/web/20210627065033/https://www.vaccines.nh.gov/covid-19-vaccine-schedule-nh-residents>.

³⁵ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). *See also id.* at 229–30 (“[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”).

³⁶ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

Justice demands that you immediately open a compliance review of New Hampshire, NH-HHS, and the Public Health Council of the Upper Valley and that you seek a binding voluntary resolution agreement with all the guilty parties. This agreement should include appropriate remedial action, training, and ongoing monitoring of respondents by your office. HHS should interview all persons of authority over vaccine allocation in the New Hampshire government, NH-HHS, and the Public Health Council of the Upper Valley to find out exactly who thought blatantly illegal racial discrimination in vaccine allocation was a good idea. When a public health director brags to the media about how “thrilled” she is about having successfully engaged in racial discrimination, we suspect your investigation will find a culture of systemic institutional racism that respondents not only tolerated but encouraged. Most importantly, New Hampshire and its public health authorities should not get another penny of HHS funds until they commit, in writing, and under penalty of 18 U.S.C. § 1001, to never illegally discriminate in the allocation of health care resources in *any* HHS funded program in the future.

We suspect that once you initiate your review (which you cannot fail to do given the facts and nature of this case), respondents will at first deny that they engaged in unlawful actions and alternatively say that, even if they did, they have ended the racial set aside program so your office should close its investigation. Be advised: if your office merely provides “technical assistance” to respondents and closes the case, it will constitute a grossly unjustified departure from normal procedures that will subject your office to oversight from Congress or GAO, or to investigation by the HHS Inspector General for dereliction of duty or improper political interference.³⁷

We anxiously await your reply.

Michael Buschbacher
BOYDEN GRAY & ASSOCIATES PLLC
801 17th St NW, #350
Washington, DC 20006
202.955.0620
buschbacher@boydengrayassociates.com

Rachel N. Morrison, Esq.
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1730 M Street, N.W., Suite 910
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202.682.1200
RMorrison@eppc.org

³⁷ This advisement is not directed specifically at any career civil servants charged with neutrally enforcing the law, but at the political actors at HHS who may have their own agendas. We sincerely hope they will allow you do what your job requires and not improperly influence your office’s independent law enforcement function. Know that career civil servants can and should confidentially report misconduct or undue political interference to Members of Congress with oversight jurisdiction and can do so with protection against retaliation under federal whistleblower laws.