

# Wisconsin Institute for Law and Liberty: Urges midwest health system to suspend race discrimination in COVID treatment

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The News: Attorneys at the Wisconsin Institute for Law & Liberty (WILL) issued a letter to SSM Health warning the healthcare provider that it is illegal to distribute COVID-19 therapeutics on the basis of race. SSM Health is a large, Midwest healthcare system with 23 hospitals in four states, including Madison, Janesville, Baraboo, Fond du Lac, and Ripon, Wisconsin. In December, SSM Health sent an email to its Wisconsin physicians with a “risk scoring calculator” that includes preferential treatment based on race for the distribution of COVID-19 therapeutics. Federal and state law prohibits race discrimination in healthcare.

The Quote: WILL Deputy Counsel, Dan Lennington, said, “Race discrimination has no place in healthcare, especially when policies prevent the distribution of life-saving treatments to patients based on the color of their skin. A patient’s race is not a disease, co-morbidity, or a treatable symptom. SSM should reverse course immediately and comply with the law.”

WILL President and General Counsel, Rick Esenberg, said, “It would be ironic if, notwithstanding a long fight to see members of racial minority groups as individuals and not a reflection of stereotypes, we would now allow those stereotypes to substantially override individual characteristics.”

Background: On December 30, 2021, SSM Health sent an email to Wisconsin physicians concerning the distribution of monoclonal antibody products (“mAbs”), a therapeutic used to treat COVID-19. Due to the limited supply of monoclonal

antibody products, SSM is employing a new “risk scoring calculator” that assigns points for various risk factors.

To be eligible for monoclonal antibody products, patients must score a minimum of 20 points. But under SSM Health’s current risk scoring calculator, patients will receive a substantial preference based on race, with the color of a patient’s skin mattering more than medically recognized co-morbidities or symptoms. The risk scoring calculator (below) provides a 7-point bonus to all patients who are “nonwhite or Hispanic.” But having “non-white” skin color is not a medical condition, co-morbidity, or treatable symptom.

The approach taken by SSM Health’s calculator is not only profoundly unethical and immoral, it is illegal. Federal law forbids race discrimination. Under Section 1557 of the Affordable Care Act (42 U.S.C. § 18116), patients may not be discriminated against based on race in any health program or activity “a part of which is receiving Federal financial assistance.” Title VI of the Civil Rights Act of 1964 contains a similar prohibition. And in Wisconsin, state law prohibits “preferential treatment” or the denial of “full and equal enjoyment” based on race at any “clinic” or any other place where “services are available either for free or for a consideration.”

WILL is urging SSM Health to immediately suspend use of the risk scoring calculator and develop a new tool that evaluates patients based on their individual health history and symptoms, rather than their race.