

WRITTEN TESTIMONY TO THE NATIONAL KIDNEY FOUNDATION

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Re: Removing Race from the eGFR Equation for Determining Kidney Health

I am an attorney at Eisenberg & Baum LLP in New York City. My legal practice focuses on detecting and combatting discrimination, specifically stemming from algorithmic decision-making. I support the removal of race from the eGFR equation. My testimony includes a survey of legal and business risks that hospitals must consider in knowingly using the racially-biased eGFR test.

Health institutions that use race-based clinical algorithms may be held liable under a wide range of federal, state, and local laws and regulations. Federal laws including Title VI and Section 1557 of the Affordable Care Act prohibit race-based discrimination and applies to a health program which receives federal financial assistance including hospitals and insitutions that receive Medicare or Medicaid reimbursements. Laws of states and municipalities often provide an even stronger legal protection against race discrimination. For example, under New York City Human Rights Laws, a hospital using the race-based eGFR test is exposed to liability where a patient can show he or she was treated “less well” than others based on race, even if other grounds exist for using the test. Further, the Patients’ Bill of Rights set forth by the U.S. Department of Health and Human Services and state regulations underscores the importance of informed consent for medical decision-making, which is violated where a hospital uses race-based formulas to dictate a patient’s medical care options. Additionally, the continued use of the eGFR test may be found to breach the material terms of contract between patients and hospitals, and may constitute professional negligence.

Moreover, in recent months, lawmakers and government agencies have been motivated to address systemic racism built into healthcare algorithms. Members of Congress and the Senate have urged healthcare companies to develop internal safeguards to mitigate disproportionate racial impact stemming from their use of clinical algorithms. (WIRED). Ignoring the legal risks faced by institutions would be an unwise business decision; ignoring the risks faced by patients would be a clear disregard to life.

The brightest minds have testified earnestly in this forum: race correction in eGFR equals racism. That a perfect clinical alternative is forthcoming is not a valid defense for the institutions’ inaction and continued use of a racist clinical equation. Here are some ways hospitals can be proactive to avoid legal liability: conduct an interdisciplinary impact study of race-based eGFR equations engaging a diverse team experts, IT departments and vendors; inform patients about the race-adjusted equations and/or its alternatives before making clinical decisions; and update knowledge about race-based medicine in education and training.

Understanding that unintended consequences may arise from the removal of race correction in eGFR, this taskforce should recommend steps beyond the eGFR equation. Recommendations should include creating more opportunities for underserved communities to be eligible for higher quality medical care, pushing vendors and pharma companies to commit to health equity, and more. This would serve the definition of race consciousness contemplated by laws built to protect patients against systemic racism.

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***This written testimony was developed with input and insight from various members of the Institute for Healing and Justice*