

ATTORNEY GENERAL OF THE STATE OF NEW YORK
HEALTH CARE BUREAU

In the Matter of

Assurance No.18-110

**Investigation by LETITIA JAMES,
Attorney General of the State of New York, of**

BronxCare Health System

Respondent.

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation pursuant to Executive Law Section 63(12) into certain business practices of the BronxCare Health System (“BronxCare”) relating to improper billing of sexual assault survivors for forensic rape examinations. This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation and the relief agreed to by the OAG and Respondent BronxCare, whether acting through its respective directors, officers, employees, representatives, agents, affiliates, or subsidiaries (collectively, the “Parties”).

OAG’s FINDINGS

I. BACKGROUND

1. A forensic rape examination (“FRE”) is an examination performed by trained medical personnel for the purpose of gathering evidence of a sexual assault in a manner suitable for use in a court of law.

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2. In 2005, the Medical Provider Forensic Rape Examination Direct Reimbursement Program was established pursuant to newly enacted Executive Law Section 631(13). Specifically, the law provides that “when any New York state accredited hospital, accredited sexual assault examiner program or licensed health care provider (collectively referred to herein as “licensed provider”) furnishes services to any sexual assault survivor, including but not limited [to an FRE], such [licensed provider] shall provide such services to the person without charge and shall bill [the New York State Office of Victim Services (“OVS”)] directly.” N.Y. Exec. Law § 631(13).

3. Executive Law Section 631(13) ensures the privacy and confidentiality of sexual assault survivors by having OVS directly pay for services related to the assault, thereby eliminating the potential disclosure of the crime to employers or other family members. By allowing privacy and confidentiality, a survivor may be more likely to submit to the FRE, which in turn may increase the ability of law enforcement agencies to identify the offender.

4. Executive Law Section 631(13) also requires that the licensed provider request that the survivor assign any private health insurance benefits to which the survivor is entitled. However, survivors must be advised “orally and in writing that he or she may decline to provide such information regarding private health insurance benefits if he or she believes that the provision of such information would substantially interfere with his or her personal privacy or safety[.]” See N.Y. Exec. Law § 631(13). On the other hand, “[survivors] may voluntarily assign any private insurance benefits to which she or he is entitled for the [FRE], in which case [licensed provider] may not charge [OVS][.]” Id.¹

¹ If the survivor assigns any private health insurance benefit for FRE services, survivor shall not be subject to an “annual deductible[] or co-insurance or balance billing by [licensed provider].” Id.

5. The OVS payment of the forensic rape examination (“OVS FRE Payment”) covers the following: forensic examiner² and facility services, laboratory tests and pharmaceuticals.³ The OVS FRE Payment does not cover medical services such as suturing, broken limbs, inpatient services, post-exposure counseling services and post-exposure HIV prophylaxis beyond the initial 7-day supply (“Additional FRE Services”). Patients may apply to OVS or use their private insurance to cover Additional FRE Services. See N.Y. Exec. Law § 631(13); 9 NYCRR § 525.12 (h)(iv)(5)(v).

6. BronxCare’s Concourse division⁴ is a 415-bed hospital handling approximately 130,000 emergency visits per year. BronxCare is located at 1650 Grand Concourse, Bronx, NY 10457.

II. THE OAG’S INVESTIGATION

7. Between January 10, 2016 and December 26, 2017 (the “Relevant Period”), BronxCare conducted 111 FREs for which it improperly billed 17 patients for its hospital services. Of the 17 improperly billed patients, BronxCare *also* billed the insurers of 10 of these patients and sent 12 bills to collection. BronxCare sent bills to patients that ranged from \$35 to \$1,957. The emergency room physicians (“ER physicians”)⁵ separately sent bills to 13 of these

² Forensic examiner “shall mean any New York State accredited hospital or licensed physician, nurse practitioner, registered nurse or physician assistant practicing within the State of New York whose performance of a sexual assault forensic examination is within the scope of practice of the discipline in which he or she holds a license or any other sexual assault forensic examiner certified by the Department of Health to conduct a sexual assault forensic examination.” 9 NYCRR § 525.12 (h)(i).

³ The OVS FRE Payment is the amount of itemized charges, not exceeding the statutory cap of \$800.00. See N.Y. Exec. Law § 631(13).

⁴ BronxCare comprises two major hospital divisions. The Fulton division has a comprehensive psychiatric emergency program and inpatient psychiatric beds. The Fulton division does not have a regular emergency department. Patients with medical/surgical emergencies receive treatment at the Concourse Division. All FREs discussed herein were conducted at the Concourse Division.

⁵ The ER physicians are employed by BronxCare.

patients and to the insurers of two of these patients. These ER physicians' bills ranged from \$181 to \$506. The ER physicians sent 12 bills to collection.

8. The OAG noted that BronxCare did not file a single claim with OVS during the Relevant Period. Moreover, there is no evidence that BronxCare advised any of the sexual assault survivors with private insurance of their option to direct billing to their insurance or OVS, as required by law.

9. BronxCare represents that: it has ceased billing sexual assault survivors for FRE hospital services as of November 30, 2017, and for ER physician services as of December 6, 2017; all BronxCare matters sent to collection in the Relevant Period were recalled and such collection accounts closed; and all patient accounts for FREs reflect zero balances.

10. As a result of the OAG's investigation, BronxCare has modified its "Domestic Violence and Sexual Assault Policy" to now require, *inter alia*, that BronxCare:

- a. not bill patients under any circumstance for FRE services; regardless of whether the patient chooses to have the claim submitted to OVS or private insurance;
- b. apply an automated edit in its claims processing system to void the billing of patients for FRE services;
- c. notify its billing vendors not to bill patients for FRE services; and
- d. provide verbal and written information to patients as to the following:
 - i. New York law provides that patients are not to be billed for FRE services;
 - ii. Patients are to contact the office of Patient Financial Services at BronxCare if they receive a bill for FRE services;
 - iii. Patients have the right to have the hospital submit the bill to private insurance or to OVS for FRE charges;
 - iv. Procedures for accessing coverage for Additional FRE Services; and
 - v. Services available through OVS.

III. RELEVANT NEW YORK STATE LAW

11. The New York State Executive Law prohibits “repeated fraudulent or illegal acts” in the conduct of any business, trade or commerce, and allows the OAG to institute a special proceeding for restitution, damages, and/or injunctive relief against any party which has committed such acts. N.Y. Exec. Law § 63(12).

12. The New York State Executive Law provides that “when any New York state accredited hospital, accredited sexual assault examiner program, or licensed health care provider furnishes services to any sexual assault survivor, including but not limited to a health care forensic examination in accordance with the sex offense evidence collection protocol and standards established by the department of health, such hospital, sexual assault examiner program, or licensed healthcare provider shall provide such services to the person without charge and shall bill [OVS] directly.” N.Y. Exec. Law § 631(13).

13. New York State Law further provides that “[a] sexual assault survivor may voluntarily assign any private insurance benefits to which she or he is entitled for the [FRE], in which case the hospital or healthcare provider may not charge [OVS].” *Id.*

14. The OAG finds that BronxCare’s actions in (1) billing sexual assault survivors for FREs and related services; (2) failing to advise sexual assault survivors who have private insurance of the option to bill OVS; (3) failing to advise sexual assault survivors that they may decline to provide private health insurance information if they believe it would substantially interfere with their personal privacy or safety; and (4) billing private health insurers without informing sexual assault survivors of the option to bill OVS are in violation of Executive Law Sections 63(12) and 631(13).

15. BronxCare neither admits or denies the OAG's assertion that its actions violated the statutory provisions cited above.

16. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding for violations of Executive Law § 631(13) based on the conduct described above during the past six years from the effective date of this Assurance.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

17. General Injunction:

BronxCare shall not engage in violations of any applicable laws, including but not limited to Executive Law Section 631(13) and any related regulation thereunder, and expressly agrees and acknowledges that any such conduct is a violation of the Assurance, and that should the OAG determine that BronxCare has so violated Executive Law Section 631(13), the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 16 in addition to any other appropriate investigation, action, or proceeding.

18. Programmatic Relief:

- a. BronxCare shall maintain the changes to its Sexual Assault Treatment Policy and Procedure as described in paragraph 10. For a period of three years following the Effective Date of this Assurance BronxCare shall notify the OAG of any proposed material changes to its Sexual Assault Treatment Policy at least 30 days in advance of implementing proposed changes.

- b. BronxCare shall provide educational training to all relevant employees and agents within 30 days of the Effective Date and then annually thereafter on the requirements of Executive Law Section 631(13), and agrees to modify its practices, procedures, and policies in accordance with the provisions of this Assurance. BronxCare shall provide copies of all training materials to the OAG, including employee attendance lists, with employee name and title, and evidence of their attendance at training sessions.
 - c. Acceptance of this Assurance by the OAG is not an approval or endorsement by the OAG of any of BronxCare's practices, policies or procedures, and BronxCare shall make no representation to the contrary.
19. Oversight/Monitoring:
- a. *Periodic Compliance Reports:* BronxCare shall provide the OAG with a report detailing its compliance with the requirements set forth in this Assurance, paragraph 18 (Programmatic Relief), to be submitted to the OAG within sixty (60) days of the effective date of this Assurance. This report shall be in writing and shall set forth in detail the manner and form of compliance with this Assurance. This report shall be signed by BronxCare.
 - b. *Record Keeping Requirements:* BronxCare shall retain all records relating to its obligations hereunder, including but not limited to billing records, patient notification forms and training information. BronxCare shall, upon thirty (30) days written notice from the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance.

20. Monetary Relief:

- a. Restitution: Within 30 days of the Effective Date of this Assurance BronxCare shall review its billing records governing FREs conducted during the period dating six (6) years prior to the Effective Date of the Assurance (“Restitution Period”) and provide restitution to all patients who paid for FREs during that period (“Affected Patients”). Within 60 days of the Effective Date of this Assurance BronxCare shall issue restitution checks to Affected Patients identified.
- b. Full restitution shall include all costs and fees paid to BronxCare by Affected Patients for FREs, as well as 12 percent interest per annum from the date BronxCare received the payment to the date of refund. BronxCare shall send the restitution checks by regular mail to the last known address of the identified patient. BronxCare shall make reasonable efforts to ensure the restitution checks are received, which shall include but not be limited to contacting the United States Post Office for a possible forwarding address. Restitution checks shall be mailed compliant with all existing privacy procedures of BronxCare. Checks and, if any, accompanying notices issued pursuant to this Assurance shall only state the date of the hospital visit related to the claim, and shall not reference the services rendered, nor shall it reference any other personal health information.
- c. Within 60 days of the Effective Date of this Assurance, BronxCare shall adjust the accounts of all patients who have an outstanding balance for FREs conducted during the Restitution Period such that their accounts reflect a zero balance for any FRE performed; and shall further review BronxCare records to determine if collection activity has been initiated as to any of the identified patient accounts,

and ensure that any identified bills sent to collection are recalled, any outstanding judgments shall be vacated, and that accounts are adjusted to reflect a zero balance.

- d. Within 30 days of the Effective Date of this Assurance, BronxCare shall submit to the OAG the names and addresses of three independent auditors with appropriate experience to conduct an audit of medical and billing records sufficient to determine the universe of Affected Patients. Within 45 days of the Effective Date BronxCare agrees to engage the services of the independent auditor subject to approval by the OAG (“Auditor”). The audit shall include a review of records to determine the universe of Affected Patients described above for (1) restitution purposes, as well as a review of patients with outstanding balances to ensure that BronxCare has provided appropriate restitution; (2) adjusted patient accounts with outstanding balances for FREs to reflect zero balances and that all matters sent to collection have been recalled. The Auditor’s report must be completed within 90 days of the Auditor’s appointment. BronxCare shall submit to the OAG the full report of the Auditor within seven (7) days of receipt.
- e. BronxCare shall pay \$15,000 to the New York State Department of Law within ten (10) days of the Effective Date of the Assurance. This payment shall be made by attorney check, corporate or certified check, or bank draft, which shall be made payable to the “State of New York”, and shall reference Assurance No. 18-110; payments shall be addressed to the attention of Dorothea Caldwell-Brown, Assistant Attorney General, State of New York, Office of the Attorney General, Health Care Bureau, 28 Liberty Street, New York, NY, 10005.

21. Affidavit of Compliance:

BronxCare shall submit to the OAG, within 12 months after the Effective Date of this Assurance, an affidavit subscribed by the officer of BronxCare authorized to bind BronxCare, setting forth BronxCare's compliance with the provisions of this Assurance.

22. BronxCare expressly agrees and acknowledges that a default in the performance of any obligation under this Assurance is a violation of the entire Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 16 in addition to any other appropriate investigation, action, or proceeding, and that evidence that the Assurance has been violated shall constitute *prima facie* proof of the statutory violations described in paragraph 14 pursuant to Executive Law § 63(15).

MISCELLANEOUS

Subsequent Proceedings.

23. In any subsequent investigation, civil action, or proceeding by the OAG to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 30, BronxCare expressly agrees and acknowledges:

- a. that any statute of limitations or other time-related defenses are tolled from and after the Effective Date of this Assurance;
- b. that the OAG may use statements, documents or other materials produced or provided by BronxCare prior to or after the Effective Date of this Assurance;
- c. that any civil action or proceeding must be adjudicated by the courts of the State of New York, and that BronxCare irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue.

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24. If a court of competent jurisdiction determines that BronxCare has violated the Assurance, BronxCare shall pay to the OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

Effects of Assurance:

25. This Assurance is not intended for use by any third party in any other proceeding.

26. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of BronxCare. BronxCare shall cause this Assurance to be adopted in any such transfer agreement. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

27. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

28. Any failure by the Attorney General to insist upon the strict performance by BronxCare of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the Attorney General, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by BronxCare.

Communications:

29. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 18-110, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic

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mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to BronxCare, to: Victor DeMarco,
Chief Financial Officer
BronxCare Health System
1650 Grand Concourse
Bronx, NY 10457

If to the OAG, to: Dorothea Caldwell-Brown,
Assistant Attorney General
Office of the Attorney General
28 Liberty Street
New York, New York 10005, or in her absence, to the person holding the title of
Bureau Chief, Health Care Bureau.

Representations and Warranties:

30. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by BronxCare and its counsel and the OAG's own factual investigation as set forth in Findings, paragraphs seven through ten. BronxCare represents and warrants that neither it nor its counsel has made any material representations to the OAG that are inaccurate or misleading. If any material representations by BronxCare or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

31. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by BronxCare in agreeing to this Assurance.

32. BronxCare represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized.

General Principles:

33. Unless a term limit for compliance is otherwise specified within this Assurance, BronxCare's obligations under this Assurance are enduring. Nothing in this Agreement shall relieve BronxCare of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

34. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that BronxCare violates the Assurance after its Effective Date.

35. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

36. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

37. BronxCare acknowledges that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

38. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

39. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

40. This Assurance may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

41. The effective date of this Assurance shall be the date this Assurance is signed by all parties ("Effective Date").

