

ATTORNEY GENERAL OF THE STATE OF NEW YORK
HEALTH CARE BUREAU

In the Matter of

Assurance No.17-184

**Investigation by ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York, of**

The Brooklyn Hospital Center,

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 Brooklyn Hospital Center (“Brooklyn Hospital”) relating to improper billing of sexual assault victims 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 Brooklyn Hospital, whether acting through its respective directors, officers, employees, representatives, agents, affiliates, or subsidiaries (collectively, the “Parties”).

OAG 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.

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 ... furnishes services to any sexual assault survivor, including but not limited [to an FRE], such hospital ... 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). That provision goes on to state that “[a] sexual assault survivor may voluntarily assign any private insurance benefits to which she or he is entitled” for the FRE and related services. *Id.*

3. The purpose of the program is to (1) ease payment of FREs by providing for submission of bills by providers to the OVS for payment; (2) provide quality exams; and (3) give victims of sexual assault the ability to choose a means of payment for the FRE, either through the OVS program or their own insurance.

4. Executive Law Section 631(13) ensures the privacy and confidentiality of sexual assault victims by allowing sexual assault patients at hospitals and health clinics the choice of having OVS directly pay for services of the care related to the assault, thereby eliminating the potential disclosure of the crime to employers or other family members. By allowing privacy and confidentiality, a victim may be more likely to submit to the forensic exam, which in turn may increase the ability of law enforcement agencies to identify the offender.

5. Brooklyn Hospital is an Article 28 licensed acute general hospital, handling more than 60,000 emergency cases every year. It is a 464 bed, full-service community teaching hospital, with a New York State Department of Health issued operating certificate pursuant to Chapter 45, Article 28, § 2805 of the Public Health Law and Title 10, part 405 of the New York Codes of Rules and Regulations (“NYCRR”). Brooklyn Hospital is located at 121 DeKalb Avenue, Brooklyn, New York.

II. THE OAG'S INVESTIGATION

6. In January of 2017, the OAG received a complaint regarding a victim of sexual assault who reported that she had been repeatedly billed by Brooklyn Hospital for an FRE in Brooklyn Hospital's Emergency Room in 2015. The sexual assault victim was billed seven (7) times between 2015 through 2016.

7. Rather than submitting the claim to OVS pursuant to Executive Law Section 631(13), approximately one month after the FRE, Brooklyn Hospital sent the patient a bill for \$308, and another bill approximately one month later for \$449, both collectively covering the cost of the FRE and physician services.

8. When the patient received the bills, she contacted a victim assistance organization, which then contacted OVS on the patient's behalf. OVS then contacted Brooklyn Hospital, and Brooklyn Hospital assured OVS that the patient would not be billed again.

9. Nevertheless, approximately one month later the patient received yet another bill from Brooklyn Hospital for \$449, followed several weeks later by a bill from a collection agency for \$308. The victim assistance organization again contacted OVS on the patient's behalf, and Brooklyn Hospital again assured OVS that it would bill OVS for the visit.

10. Yet approximately two months later, the patient received another bill from a collection agency in the amount of \$308. Following that bill, again Brooklyn Hospital assured OVS that the bill was void and the patient would not be responsible for the bill and that it would be removed from its system.

11. That notwithstanding, just one month later, the patient received yet another bill covering the cost of the physician services for the FRE from a collection agency. Finally, over a year after the patient's FRE and first improper bill, an affiliate of Brooklyn Hospital contacted

the patient through an automated message indicating that she owed \$308 and directing her to a website to pay the bill.¹

12. Between January of 2015 and February 9, 2017 Brooklyn Hospital conducted 86 FREs, all but one of which it either improperly billed to the patient directly or billed to the patient's insurance plan without advising the patient as to his or her payment options to either bill insurance or bill OVS directly. Specifically, Brooklyn Hospital improperly billed 37 patients more than \$15,500 for FREs. Ultimately, Brooklyn Hospital sent at least seven of these improper bills to collection. There is no evidence that Brooklyn Hospital advised any sexual assault victims with private insurance of the option to bill private insurance or OVS.

13. Even though Executive Law Section 631(13) was passed in 2005, prior to May of 2016, Brooklyn Hospital did not maintain any written policy regarding billing sexual assault victims for FREs. On May 7, 2016, Brooklyn Hospital implemented a policy governing FRE billing ("May 7, 2016 Policy"). While the May 7, 2016 Policy provided that Brooklyn Hospital should not bill sexual assault victims for FREs, it failed to include the statutory requirement that the hospital inform patients with private insurance of their option to direct the hospital to bill private insurance or OVS.

14. Brooklyn Hospital represents that it has ceased billing sexual assault victims for FREs, and that all matters sent to collection have been recalled, and that it has adjusted patient accounts with outstanding balances for FREs to reflect zero balances.

15. As a result of the OAG's investigation, Brooklyn Hospital has modified its policy regarding victims of sexual assault to now require, *inter alia*, that:

¹ Billing for the \$449 amount ceased after OVS contacted Brooklyn Hospital the second time regarding the improper bills.

- a. Brooklyn Hospital not bill patients for FRE services in any circumstances, regardless of whether the patient chooses to have the claim submitted to OVS or private insurance;
- b. Brooklyn Hospital staff verbally inform patients of their rights related to the billing of FRE services and provide these patients with a newly developed form entitled, “Forensic Rape Examination Billing Authorization Form,” which describes the patients’ right to have the hospital submit the bill to private insurance or to OVS for FRE charges and documents their selection;
- c. Brooklyn Hospital categorize victims of sexual assault in such a way so that the patient will have no financial responsibility for the FRE after insurance payment;²
- d. Brooklyn Hospital use an automated “bill, hold, edit” in its claims processing system to suspend the billing of all claims to any patients where their services are coded with any of the sexual assault/abuse diagnostic codes. This procedure is for the purpose of preventing any billing other than as specifically requested by the patient; and
- e. Brooklyn Hospital notify its billing vendors not to bill patients for FRE services.

III. RELEVANT NEW YORK STATE LAW

16. 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).

²Sexual assault victims are now classified as Financial Class VOC (Victim of Crime). If a victim of sexual assault elects to submit claims for FRE services to private insurance, the secondary financial class is listed as “Secondary VOC,” to insure no

17. 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).

18. 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.*

19. The OAG finds that Brooklyn Hospital’s actions in (1) billing sexual assault victims for FREs and related services; (2) failing to advise sexual assault victims who have private insurance of the option to bill OVS; (3) failing to advise sexual assault victims 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 victims of the option to bill OVS are in violation of Executive Law Sections 63(12) and 631(13).

20. Brooklyn Hospital neither admits nor denies the OAG’s findings that its actions violated the statutory provisions cited above.

21. 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

22. General Injunction:

Brooklyn Hospital shall not engage in violations of 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 Brooklyn Hospital has so violated Executive Law Section 631(13), the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 21, *supra*, in addition to any other appropriate investigation, action, or proceeding.

23. Programmatic Relief:

- a. Brooklyn Hospital shall maintain the changes to its Sexual Assault Victim Policy as described above in paragraph 15. For a period of three years following the Effective Date of this Assurance, Brooklyn Hospital shall notify the OAG of any proposed material changes to its Sexual Assault Victim Policy at least 30 days in advance of implementing proposed changes.
- b. Brooklyn Hospital 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. Brooklyn Hospital 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 Brooklyn Hospital's practices, policies or procedures, and Brooklyn Hospital shall make no representation to the contrary.
 - d. Brooklyn Hospital expressly agrees and acknowledges that a default in the performance of any obligation under this paragraph is a violation of the Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 21 *supra*, 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 19, *supra*, pursuant to Executive Law § 63(15).
24. Oversight/Monitoring:
- a. *Periodic Compliance Reports:* Brooklyn Hospital shall provide the OAG with a report detailing its compliance with the requirements set forth in this Assurance, paragraph 23 (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 Brooklyn Hospital.
 - b. *Record Keeping Requirements:* Brooklyn Hospital shall retain all records relating to its obligations hereunder, including but not limited to billing records, patient notification forms and training information. Brooklyn Hospital 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.

- c. Brooklyn Hospital expressly agrees and acknowledges that a default in the performance of any obligation under this paragraph is a violation of the Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 21, *supra*, 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 19, *supra*, pursuant to Executive Law § 63(15).
25. Monetary Relief:
- a. Restitution: Within 30 days of the Effective Date of this Assurance the Brooklyn Hospital shall review billing records governing FREs conducted during the period dating six (6) years prior to the Effective Date of the Assurance (“Relevant Period”) and provide restitution to all patients of Brooklyn Hospital who paid individually for FREs during that period (“Affected Patients”). Within 60 days of the Effective Date of this Assurance Brooklyn Hospital shall issue restitution checks to Affected Patients identified.
 - b. Full restitution shall include all costs and fees paid to Brooklyn Hospital by Affected Patients for FREs, as well as 12 percent interest per annum from the date Brooklyn Hospital received the payment to the date of refund. Brooklyn Hospital shall send the restitution checks by regular mail to the last known address of the identified patient. Brooklyn Hospital 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 Brooklyn Hospital. 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, Brooklyn Hospital shall adjust the accounts of all patients who have an outstanding balance for FREs conducted during the Relevant Period such that their accounts reflect a zero balance for any FRE performed; and Brooklyn Hospital shall further review 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, Brooklyn Hospital shall submit to the OAG the name and address of an independent auditor 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 Brooklyn Hospital 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 Brooklyn Hospital 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. Brooklyn Hospital shall submit to the OAG the full report of the Auditor within seven (7) days of receipt.

- e. Within thirty (30) days of receipt of the Auditor's report, Brooklyn Hospital shall provide restitution to all additional Affected Patients identified in the Audit, or shall supplement restitution provided, consistent with Audit results.
- f. Within forty-five (45) days after receipt of the Auditor's report, Brooklyn Hospital shall submit to the OAG letters, with supporting documentation, certifying its compliance with paragraph 25, and shall further provide a detailed accounting of restitution amounts paid.
- g. Brooklyn Hospital shall pay \$15,000 in costs to the New York State Department of Law within twenty (20) 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. 17-184; payments shall be addressed to the attention of Adrienne L. Lawston, State of New York, Office of the Attorney General, Health Care Bureau, 146 State Street, Albany, NY, 12207.
- h. Brooklyn Hospital expressly agrees and acknowledges that a default in the performance of any obligation under this paragraph is a violation of the

Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 21, *supra*, 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 19, *supra*, pursuant to Executive Law § 63(15).

26. Affidavit of Compliance:

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

MISCELLANEOUS

Subsequent Proceedings

27. 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 34, Brooklyn Hospital expressly agrees and acknowledges:

- a. that any statute of limitations or other time-related defenses related to the claims herein 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 Brooklyn Hospital prior to or after the Effective Date of this Assurance; and

- c. that any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Brooklyn Hospital irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue.

28. If a court of competent jurisdiction determines that Brooklyn Hospital has violated the Assurance, Brooklyn Hospital 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

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

30. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of Brooklyn Hospital. Brooklyn Hospital 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.

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

32. Any failure by the Attorney General to insist upon the strict performance by Brooklyn Hospital 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 Brooklyn Hospital.

Communications:

33. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 17-184, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to Brooklyn Hospital, to: Stacy Friedman, or in her absence, to the person holding the title of General Counsel.

If to the OAG, to: Adrienne L. Lawston, or in her absence, to the person holding the title of Bureau Chief, Health Care Bureau.

Representations and Warranties

34. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by Brooklyn Hospital and its counsel and the OAG's own factual investigation as set forth in Findings, paragraphs six through fifteen, *supra*. Brooklyn Hospital 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 Brooklyn Hospital or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

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

36. Brooklyn Hospital 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:

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

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

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

40. 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.

41. Brooklyn Hospital acknowledges that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

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

43. 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.

