

VOLUNTARY RESOLUTION AGREEMENT

Between the

U.S. Department of Health and Human Services
Office for Civil Rights

And

The Brooklyn Hospital Center

Transaction Number: 12-147291

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I. Introduction

This Voluntary Resolution Agreement (“Agreement”) is entered into by the United States Department of Health and Human Services, Office for Civil Rights (“OCR”), and The Brooklyn Hospital Center (“TBHC”). TBHC is a 464-bed hospital located at 121 Dekalb Avenue, Brooklyn, New York, that offers and provides 24-hour emergency services, inpatient services, rehabilitation services, and respiratory care services, among other health programs and services.

This Agreement resolves OCR Transaction Number 12-147291, a discrimination complaint alleging, *inter alia*, that TBHC discriminated against the complainant, a transgender female who presented as a female at the hospital, by assigning her to a double occupancy patient room with a male occupant.

A. Parties to the Agreement

1. United States Department of Health and Human Services, Office for Civil Rights; and
2. The Brooklyn Hospital Center.

B. Jurisdiction

OCR initiated the complaint investigation pursuant to its authority to enforce Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (“Section 1557”). As a recipient of Federal financial assistance (“FFA”) under Title XVIII (Medicare) and XIX (Medicaid) of the Social Security Act of 1965, TBHC is obligated to comply with Section 1557.

C. Purpose of the Agreement

The purpose of this Agreement is to ensure TBHC’s compliance with Section 1557 and to resolve and settle OCR Transaction Number 12-147291 without further burden on either party or the expense of additional review or enforcement proceedings.

TBHC agrees to the terms stipulated in the Agreement and affirms its continued compliance with Section 1557.

The promises, obligations or other terms and conditions set forth in this Agreement constitute the exchange of valuable consideration between TBHC and OCR.

The actions described in this Agreement fully address OCR Transaction Number: 12-147291. TBHC’s completion of these actions will ensure that TBHC is in compliance with Section 1557, as it pertains to the allegations raised in OCR Transaction Number 12-147291.

It is understood and agreed by OCR that TBHC's agreement to take the steps outlined herein was reached prior to issuance of findings by OCR, and that no findings of unlawful or non-compliant conduct by TBHC have been made.

This Agreement shall not be deemed or construed to be an admission or evidence of any violation of any law or regulation or of any liability or wrongdoing on the part of TBHC or its staff, which liability and wrongdoing TBHC specifically denies.

II. Definitions

For the purpose of this Agreement, the terms listed below shall have the following meaning:

- A. "Gender-based discrimination"** is a form of sex discrimination, and refers to harassment or unlawful differential treatment of an individual based on an individual's sex, including gender identify, gender expression, and nonconformity with gender stereotypes. Gender-based discrimination also may refer to unlawful disparate impact on the basis of sex as a result of a facially neutral policy or procedure. Conduct may constitute gender-based discrimination regardless of the actual or perceived sex, gender identify, or sexual orientation of the persons experiencing or engaging in the conduct.
- B. "Sex assigned at birth" and "assigned sex"** refers to the gender designation listed on one's original birth certificate.
- C. "Gender expression"** refers to external cues that one uses to represent or communicate one's gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms or body characteristics.
- D. "Gender identity"** refers to ones' internal sense of gender, which may be different from one's assigned sex, which consistently and uniformly asserted, or for which there is other evidence that the gender identity is sincerely held as part of the individual's core identity.
- E. "Transgender"** describes an individual whose gender identify is different from the individual's assigned sex. An individual can express or assert a transgender identity in variety of ways, which may but do not always include undergoing specific medical treatments or procedures. Medical treatment or procedures are not considered a prerequisite for one's recognition as transgender. For purposes of this Agreement, a "transgender individual" is an individual who consistently and uniformly maintains a gender identity different from the individual's assigned sex, or for which there is other evidence that the gender identity is sincerely held as part of the individual's core identity.

- F. **“Gender stereotypes”** refers to stereotypical notions of masculinity and femininity, including expectations of how males or females represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice mannerisms, or body characteristics.
- G. **“Gender nonconformity”** refers to one’s gender expression, gender characteristics, or gender identity that does not conform to gender stereotypes.
- H. **“Staff member”** means all TBHC employees, physicians with staff privileges, contactors and sub-recipients who work for TBHC, including, without limitation, nurses, physicians, social workers, technicians, admitting personnel, orderlies, security staff, counselors, therapists, and volunteers, who have or are likely to have direct contact with Patients as defined herein.
- I. **“Patient”** is broadly construed to mean any individual who is seeking or receiving health care services from TBHC.

III. General Provisions

- A. **Facilities Covered by the Agreement.** This Agreement covers TBHC, located at 121 Dekalb Avenue, Brooklyn, New York.
- B. **Suspension of Administrative Actions.** Subject to the continued performance by TBHC of the stated obligations and required actions contained in this Agreement and in conformity with Section III-E (“Failure to Comply with the Agreement”), OCR shall suspend administrative action on OCR Transaction Number 12-147291.
- C. **TBHC’s Continuing Obligation.** TBHC acknowledges its obligation to comply with the provisions of Section 1557 and any other applicable nondiscrimination statutes and their implementing regulations, for as long as it continues to receive FFA that subjects it to coverage under Section 1557 or those other statutes.
- D. **Effective Date and Term of the Agreement.** This Agreement shall become effective on the date it is signed by all parties (the “Effective Date”) and will remain in effect for twenty-four (24) months after the Effective Date (the “Term”), at which point if OCR determines that TBHC has complied with the Agreement, OCR’s review and monitoring of the Agreement shall terminate.
- E. **Failure to Comply with the Agreement.** If OCR determines that TBHC has failed to comply with any provision of this Agreement, the parties will confer and attempt to reach agreement as to what steps may be necessary to resolve the compliance issues to both parties’ satisfaction. If agreement is not reached, OCR may terminate the Agreement with thirty (30) calendar days’ notice and take appropriate measures to effectuate TBHC’s compliance with Section 1557. OCR may incorporate into its reopened investigation any relevant evidence of

noncompliance with the Agreement and any relevant evidence obtained by OCR prior to the signing of the Agreement. OCR also may exercise all rights available under Section 1557, including but not limited to issuing noncompliance findings and initiating necessary enforcement proceedings.

- F. Effect on Other Compliance Matters.** Nothing in this Agreement will be construed to limit or restrict OCR's statutory and regulatory authority to conduct future complaint investigations and compliance reviews related to TBHC and the subject matter of the Agreement. The Agreement does not address or resolve issues involved in any other complaint investigation, compliance review, or administrative action under Federal laws by OCR or other Federal Agencies, including any other action or investigation under Section 1557.
- G. Prohibition against Retaliation and Intimidation.** TBHC shall not retaliate, intimidate, threaten, coerce or discriminate against any person who has filed a complaint or who has assisted or participated in the investigation of any matter addressed in this Agreement.
- H. OCR's Review of TBHC's Compliance with the Agreement.** OCR may review TBHC's compliance with this Agreement at any time while the Agreement is in effect. As part of such review, OCR may require written reports, access to witnesses, copies of documents, and/or inspection of TBHC's facilities. Throughout the duration of the Agreement, TBHC agrees to retain the records required by OCR to assess its compliance. OCR will maintain the confidentiality of all documents, files and records received from TBHC and will not disclose their contents except where necessary in formal enforcement proceedings or where otherwise required by law.
- I. Non-Waiver Provision.** Failure by OCR to enforce this entire Agreement or any provision thereof with respect to any deadline or any other provision shall not be construed as a waiver of OCR's right to enforce other deadlines or provisions of the Agreement.
- J. Entire Agreement.** This Agreement constitutes the entire understanding between TBHC and OCR in resolution of OCR Transaction Number 12-147921. Any statement, promise or agreement not contained herein shall not be enforceable through the Agreement.
- K. Modification of Agreement.** This Agreement may be modified by mutual agreement of the parties in writing.
- L. Effect of TBHC Program Changes.** TBHC reserves the right to change or modify its programs, so long as TBHC ensures compliance with Section 1557 and other applicable Federal statutes and the provisions of this Agreement.

M. Publication or Release of Agreement. OCR places no restrictions on the publication of this Agreement or its terms. In addition, OCR may be required to release related case materials to any person upon request, consistent with the requirements of the Freedom of Information Act, 5 U.S.C. § 522, and its implementing regulation, 45 C.F.R. Part 5.

N. Severability. In the event that a court of competent jurisdiction determines that any provision of this Agreement is unenforceable, such provision shall be severed from the Agreement and all other provisions shall remain valid and enforceable; provided, however, that if the severance of any such provision materially alters the rights or obligations of the Parties, they shall, through reasonable, good faith negotiations, agree upon such other amendments hereto as may be necessary to restore the Parties as closely as possible to the relative rights and obligations initially intended to them hereunder.

O. Third Party Rights. This Agreement shall be unenforceable by third parties and shall not be construed to create third party beneficiary rights.

P. Successor in Interest. This Agreement is binding on the Parties and their successors in interest, and TBHC shall have a duty to so notify all such successors in interest of the existence and terms of this Agreement.

Q. Technical Assistance. OCR will provide TBHC appropriate technical assistance regarding compliance with this Agreement, as requested and as reasonably necessary.

R. Miscellaneous. When OCR verifies that TBHC has completed all actions contained in this Agreement, OCR shall consider all matters related to OCR's investigation of Transaction 12-147291 resolved and closed and so notify TBHC in writing.

IV. General Obligations and Revision, Development and Implementation of Policies and Procedures

A. Nondiscrimination

TBHC shall provide all individuals with the full and equal enjoyment of the services, privileges, facilities, advantages, and accommodations of TBHC without discrimination, as required by Section 1557. TBHC shall not discriminate on the basis of sex, which includes gender-based discrimination.

B. Nondiscrimination by Association

TBHC shall not deny equal services, accommodations, or other opportunities to any individual because of the known relationship of the individual with a person based on the person's sex, including gender identity, gender expression, and nonconformity with gender stereotypes.

C. Notice of Nondiscrimination

Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall revise its proposed Notice of Nondiscrimination. The revised notice shall state that TBHC does not discriminate on any ground prohibited by Federal law, including gender-based discrimination; provide the process for filing and resolving grievances about discrimination; and provide the title, telephone number, email address, functions and office location of the responsible employee designated by TBHC pursuant to section V.E.2 of this Agreement.

Within sixty (60) calendar days of approval by OCR, as provided in Section IV.J., TBHC shall take steps to notify Patients, Staff Members and Contractors of the information contained in the Notice of Nondiscrimination. This information shall be communicated by:

1. Posting signs in visible locations in TBHC facilities and on TBHC's website and intranet system;
2. Including it in materials routinely given to patients at admitting/registration or at other times;
3. Including it in TBHC materials routinely available for take-away in patient waiting areas;
4. Including it in materials routinely given to employees at orientation.

D. Nondiscrimination Statement

Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall develop a proposed Nondiscrimination Statement that states that TBHC does not discriminate on any ground prohibited by Federal law for inclusion in major publications and brochures not covered in IV.C.

Within thirty (30) calendar days of approval by OCR, as provided in Section IV.J., TBHC shall publish the Nondiscrimination Statement in its major publications and brochures.

E. Policies and Procedures for Ensuring Non-Discrimination

Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall revise all of its policies, procedures, regulations, and related documents and materials related to discrimination to:

1. Specifically include gender-based discrimination as a form of discrimination based on sex;
2. State that gender-based discrimination includes discrimination based on gender identity, gender expression, and nonconformity with sex stereotypes.
3. State that every patient has the right to competent, considerate and respectful care that fosters their dignity and comfort and is free from all forms of discrimination; and

4. State that every patient has the right to privacy and confidentiality during medical treatment or other rendering of care within TBHC.

F. Admissions Policy and Procedure

Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall revise its Admissions Policy and Procedure to ensure that all individuals, including transgender individuals and other individuals who do not conform to sex stereotypes, are provided equal access to and equal opportunity to participate in all programs, benefits, services offered by TBHC in a manner that does not discriminate based on sex.

The Admissions Policy and Procedures shall include a process at intake that affords an opportunity for a Patient to provide both a legal and a preferred name, as well as the opportunity for an individual to identify their sex and/or gender, including transgender status (e.g. “Transgender Female/Male-to-Female (MTF)” or “Transgender Male/Female-to-Male (FTM)”).

TBHC shall record a patient’s gender and/or transgender status, if the Patient has identified that status and agrees that it should be recorded.

G. Room Placement Policy and Procedure

Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall revise its Room Placement Policy and Procedures to ensure the safe, ethical, appropriate, and nondiscriminatory assignment of rooms for transgender patients.

H. Zero Tolerance Policy for Ensuring Non-Discrimination

Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall develop a “Zero Tolerance” Policy. The Zero Tolerance Policy will make it clear to Staff Members, that harassment, including derogatory statements about or adverse treatment of transgender individuals, by staff is prohibited.

I. Grievance Procedure and Designation of Responsible Employee

- a. Development of Grievance Procedure: Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall make clear in its grievance procedure, that said procedure provides for the prompt and equitable resolution of complaints alleging discrimination on the protected bases covered by Section 1557, including complaints regarding discrimination on the basis of sex, including gender-based discrimination.
- b. Designation of Responsible Employee: Within ninety (90) calendar days after the Effective Date of this Agreement, TBHC shall designate at least one person to coordinate its efforts to comply with or carry out its responsibilities under Section 1557 and investigate any complaint received pursuant to the aforementioned grievance procedure.

J. Review and Approval

TBHC shall submit the aforementioned policies and procedures required by Section IV. C. – I. to OCR for review upon its completion of the revisions. OCR shall review said policies and procedures within twenty-one (21) calendar days of receipt. If OCR believes that modifications need to be made to the aforementioned policies and procedures, OCR shall notify TBHC and arrange for a conference to resolve the differences. TBHC shall provide such revisions to OCR within fifteen (15) calendar days of the conference. The policies and procedures shall not be implemented by TBHC without the approval of OCR.

V. Implementation and Distribution of Policies and Procedures

Within sixty (60) calendar days after receiving OCR approval, TBHC shall implement and publicize copies of the policies and procedures referenced in Section IV. E. - I. of this agreement to all Staff Members. TBHC shall also notify Patients and other interested persons of the Grievance Procedure by posting a notice of its availability in visible locations in its facilities and on its website and intranet.

VI. Training

A. Training of Staff Members.

Within one hundred eighty (180) calendar days after receiving OCR approval of the policies and procedures referenced in Section V, TBHC shall revise its existing Staff Orientation and “Key Safety” training to be provided to all staff members, to cover the topics specified below. TBHC shall provide OCR with a copy of all materials and documents covering the topics specific below to be used for this training for approval. OCR shall review the staff training materials within twenty-one (21) calendar days of receipt. If OCR believes that modifications need to be made to the aforementioned policies and procedures, OCR shall notify TBHC and arrange for a conference to resolve the differences. TBHC shall provide such revisions to OCR within fifteen (15) calendar days of the conference. TBHC shall initiate the staff training within ninety (90) calendar days after receiving OCR’s approval of the training and require all Staff Members to attend the training. Thereafter, TBHC shall incorporate such training into its annual training for Staff Members and at orientation for new employees.

The training shall be of sufficient content and duration to cover the following:

1. The requirements of Section 1557, including the prohibition on discriminating against Patients because of their sex, including gender-based discrimination, and the prohibition against retaliation for objecting to such discrimination;
2. The policies and procedures discussed in this Agreement;
3. Effective methods that Staff Members may use to appropriately treat and serve transgender individuals and other individuals who do not conform to sex stereotypes;
4. Appropriate terminology to use when referring to transgender individuals.

VII. Reporting

A. Compliance Reports.

TBHC shall provide OCR with the following:

1. Within two hundred seventy calendar (270) calendar days after the Effective Date of this Agreement, documentation and a letter certifying that it has carried out the requirements specified in Sections IV C - I of this agreement. The letter shall specify the date(s) compliance with these provisions was achieved, the method utilized to achieve compliance, and the persons to whom the information was provided; and
2. Within three hundred sixty-five (365) calendar days after the Effective Date of this Agreement, documentation and a letter certifying that the training of TBHC Staff Members described in Section VI has been completed. The letter shall specify the date(s), time(s) and location(s) of the training, the person(s) conducting the training, the content of the training, and the names and titles of those who participated in the training.
3. At six (6), twelve (12), and eighteen (18) months after the Effective Date of this Agreement, a report listing all grievances and complaints filed pursuant to the Grievance Procedure outlined above by Patients alleging discrimination on the basis of sex, including gender-based discrimination. For each grievance and complaint identified in the report, TBHC shall provide a brief description of the grievance, the date on which it was filed and a description of the steps taken to resolve the grievance or complaint. Each report shall cover the months not previously covered by the preceding report.
4. Within twenty-three (23) months after the Effective Date of this Agreement, documentation and a letter certifying that TBHC has completed all the actions required by the Agreement.

B. Maintenance of Records.

Throughout the Term of this Agreement, TBHC shall maintain and retain appropriate records to document the information required by this Agreement and shall make them available, upon request, to OCR.

VIII. Signatures

The individuals signing represent that they are authorized to execute this Agreement and legally bind the parties to the Agreement.

Jonathan Weld
Interim Chief Executive Officer
The Brooklyn Hospital Center

Date

Linda C. Colón
Regional Manager, Region II
U.S. Department of Health and Human Services
Office for Civil Rights

Date