

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Departmental Appeals Board
Civil Remedies Division

Secretary, U.S. Department of Health & Human
Services

v.

Donald B. Brockley, D.M.D.,
Respondent.

Docket No. C-21-761

SETTLEMENT AGREEMENT

The Parties to this Settlement Agreement (“Agreement”), the Office of Dr. Donald Brockley, D.M.D (“Dr. Brockley”), and United States Department of Health and Human Services, the Office for Civil Rights (“HHS”), (collectively, “the Parties”), acting through their duly authorized representatives, mutually desire to enter into this Agreement with the below terms and conditions:

1. Dr. Brockley is a covered entity at 45 C.F.R. § 160.103, and, as such, is required to comply with the requirements of the Federal standards that govern the privacy of individually identifiable health information (45 C.F.R. Part 160 and Subparts A and E of Part 164, the “Privacy Rule”), the Federal standards that govern the security of electronic individually identifiable health information (45 C.F.R. Part 160 and Subparts A and C of Part 164, the “Security Rule”), and the Federal standards for notification in the case of breach of unsecured protected health information (45 C.F.R. Part 160 and Subparts A and D of 45 C.F.R. Part 164, the “Breach Notification Rule”).

2. HHS has the authority to conduct compliance reviews and investigations of complaints alleging violations of the Privacy, Security, and Breach Notification Rules by covered entities, and covered entities must cooperate with HHS compliance reviews and investigations. *See* 45 C.F.R. §§ 160.306, 160.308, and 160.310.

3. By letter dated August 27, 2019, HHS notified Dr. Brockley of preliminary indications of noncompliance identified in Case Number 15-202368 and provided Dr. Brockley with an opportunity to submit written evidence of any mitigating factors (45 C.F.R. § 160.408) or affirmative defenses (45 C.F.R. § 160.410) for HHS’s consideration to determine whether a civil

money penalty (“CMPs”) should be imposed for the indications of noncompliance identified in Case Number 15-202368 in accordance with 45 C.F.R. § 160.420. Dr. Brockley also was permitted to submit evidence to support a waiver of a CMP pursuant to 45 C.F.R. § 160.412. Dr. Brockley did not respond to HHS’s August 27 letter.

4. By letter dated November 3, 2020, HHS notified Dr. Brockley that it was imposing a civil money penalty (“CMP”) against Dr. Brockley in the amount of \$104,000 for its failure to comply with the right of access provision at 45 C.F.R. § 164.524(a)(1).

5. On January 25, 2021, Dr. Brockley requested a hearing before an Administrative Law Judge (“ALJ”) to contest HHS’s imposition of the CMP and the matter was docketed before the Civil Remedies Division of the Departmental Appeals Board (“DAB”) of the United States Department of Health and Human Services as Docket No. C-21-761.

6. On October 8, 2021, the Parties filed a Joint Motion for Stay of Proceedings, which the ALJ granted on the same day, to stay any pending deadlines and further proceedings for sixty (60) days to provide time for the Parties to resolve their dispute and end the above-captioned administrative proceeding and any appeals stemming therefrom.

7. In consideration of the mutual understandings in the settlement of this matter and subject only to the conditions contained herein, the Parties agree as follows:

- A. HHS has agreed to accept, and Dr. Brockley has agreed to pay HHS, the amount of \$30,000 (“Settlement Amount”). Dr. Brockley agrees to pay the Resolution Amount on or before December 9, 2021, pursuant to written instructions to be provided by HHS.
- B. On or before December 9, 2021, Dr. Brockley agrees to implement and distribute its HIPAA policies and procedures, including the Privacy Rule’s requirements concerning an individual’s right of access to Protected Health Information (“PHI”), to all members of its workforce, train each workforce member on such policies and procedures, and provide the Complainant with her entire designated record set.
- C. Dr. Brockley agrees to provide a signed attestation that the policies and procedures have been distributed and implemented to all workforce members, provide a signed attestation that all workforce members have been trained on such policies and procedures, and provide a signed attestation that Dr. Brockley sent the Complainant her complete designated record set. Further, Dr. Brockley agrees to provide HHS with copies of all training materials used for the training required, a description of the training, including a summary of the topics covered, the length of the session(s)

and a schedule of when the training session(s) were held, and the name of the entity who conducted the training. Dr. Brockley agrees to provide proof, *e.g.*, a mailing receipt or electronic verification that the designated record set were delivered or that a delivery attempt was made.

- D. Dr. Brockley agrees that, by signing this Agreement, he withdraws the above-captioned petition before the DAB pursuant to 42 C.F.R. § 498.68 and will so notify the Board by withdrawing his request for hearing no later than December 9, 2021.
- E. If Dr. Brockley does not complete the above actions to HHS's satisfaction by December 9, 2021, litigation will proceed before the DAB, unless the Parties mutually agree to request a second stay of the proceedings.
- F. The Agreement shall become effective (*i.e.*, final and binding) upon the date of signing of this Agreement by the last signatory.
- G. The Parties are entering into this Agreement in the interest of avoiding the time and cost of litigation. Nothing in this Agreement should be construed as an admission of liability or concession of the positions taken by either party.
- H. The Parties understand and agree that, with the exception of the above provisions, executions of this Agreement do not constitute an acknowledgement or admission of error, liability, or wrongdoing by either party.
- I. This Agreement is exclusively intended to settle and dismiss the aforementioned petition before the DAB and this Agreement and does not constitute a waiver of any other rights or remedies available to the United States, HHS, or to Dr. Brockley that are not expressly stated in this Agreement.
- J. HHS does not release Dr. Brockley from, nor waive any rights, obligations, or causes of action other than those arising out of or related to this Agreement. This release does not extend to actions that may be brought under Section 1177 of the Social Security Act, 42 U.S.C. § 1320d-6.
- K. This Agreement is intended to be for the benefit of the Parties only and by this instrument the Parties do not release any claims against or by any other person or entity.
- L. The terms of this Agreement are contractual and shall be binding on the Parties, including their respective heirs, administrators, executors, successors, transferees,

designees, assigns, and agents or contractors.

- M. This Agreement constitutes a complete description of the settlement reached by the Parties. Any modification to this agreement must be made in writing and signed by the Parties or their duly authorized representatives.
- N. Each party will bear its own legal fees and costs incurred as a result of this consolidated matter.
- O. This Agreement may be executed in triple, identical counterparts, each of which shall be considered an original for all purposes.
- P. No restriction is placed on the publication of this Agreement.
- Q. Each person executing this Agreement in a representative capacity on behalf of a party hereto warrants and represents that he or she is duly authorized by each entity to execute this Agreement on its behalf, and to it under the terms and conditions hereof.

For Respondent, the Office of Dr. Donald Brockley, DMD

/s/

_____ DATE: 12/01/2021

Name
Title

For the Office for Civil Rights, DHHS

/s/

_____ DATE: 12/08/2021

Timothy Noonan
Deputy Director for Health Information Privacy