Editorial

The National Practitioner Data Bank Guidebook

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Title IV (Public Law 99-660) of the Health Care Quality Improvement Act of 1986 (HCQIA) created the National Practitioner Data Bank (NPDB). The NPDB serves as a national clearinghouse and repository of information on medical malpractice payments and adverse actions taken against physicians and dentists by licensure boards, clinical privileging entities (e.g. hospitals), professional societies of physicians and dentists, and in some cases other practitioners.

The NPDB also includes certain adverse actions ("any negative action or finding") taken by state licensing and certification authorities, state law enforcement, Medicaid fraud control units, state healthcare programs, peer review organizations, and private accreditation organizations (Section 1921 of the Social Security Act as amended by the Omnibus Budget Reconciliation Act of 1990, Public Law 101-508). The subject of reports can include practitioners, entities, providers, and suppliers.

The Healthcare Integrity and Protection Data Bank (HIPDB) was created by Section 221(a) of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 (Section 1128E of the Social Security Act, Public Law 104-191). This data bank collected and disclosed final adverse actions taken by federal and state agencies and health plans, including healthcare-related criminal convictions, against practitioners, providers, and suppliers. In 2010, the NPDB and HIPDB were merged into the NPDB as per Section 6403 of the Patient Protection and Affordable Care Act (Public Law 111-148).

All information in the NPDB is permanently maintained unless it is voided by the NPDB or the reporting entity. Reporting entities are solely responsible for the accuracy of the information in NPDB reports. NPDB does not make determinations regarding the accuracy of reported information, validity, merit or lack thereof of reported adverse actions.

The NPDB Guidebook serves as a policy manual that implements laws governing the NPDB. Implementing regulations are found at 45 CFR Part 60. The NPDB Guidebook was revised in April 2015 and again in October 2018. Certain changes in the two most recent revisions of the NPDB Guidebook favor hospitals.

It is important for physicians to understand what is in the NPDB Guidebook, as it determines whether an adverse privileging action taken by a hospital is reportable or not, and thus, whether the physician's career is ruined or ended.

Parentheses with letters and numbers below (e.g. E-1) reference the section and page number of the NPDB Guidebook from which information derives.

NPDB Disclaimer on Interpretation of Information in the NPDB

The NPDB Guidebook claims that the NPDB is "primarily a flagging system that may serve to alert users that a more comprehensive review of the qualifications and background of a health care practitioner, entity, provider or supplier may be prudent…. NPDB information should *not* be used as the sole source of verification of professional credentials. The information in the NPDB should serve only to alert eligible entities that there *may* be a problem with the performance of a particular health care practitioner, entity, provider, or supplier." (A-7)

The reality is that an adverse action report (AAR) in the NPDB is often the controlling factor in decisions of licensure and medical privileging. Hospitals rarely look past the "scarlet letter" (*Jesse A. Cole, M.D. vs. St. James Healthcare*, Montana Second Judicial District Court, No. DV-07-44, Memorandum and Order, June 1, 2007) of an adverse action report on a physician in deciding whether to grant or renew hospital privileges.

Reporting Entities

Entities required to report to the NPDB include medical malpractice payers, state medical and dental boards, hospitals and other entities with formal peer review, professional societies with formal peer review, health plans, peer review organizations, private accreditation organizations, federal government agencies, state law enforcement agencies, state Medicaid fraud control units, state agencies administering or supervising the administration of state healthcare programs, and state licensing and certification authorities. (C-1, C-7, C-8)

Who Gets Reported?

Physicians and dentists are the subject of adverse action reports in the NPDB by hospitals and state licensing boards. Nurse practitioners and other nonphysician practitioners may be reported for adverse privileging actions by hospitals, based on professional conduct or professional conduct deficiencies, but a reporting entity is not *required* to report them, even though their competence or conduct issues adversely affect or could adversely affect patient safety and welfare. Reporting of these "other practitioners" is considered optional. (C-7)

Adverse Action

An adverse action is an action which harms a physician or dentist. However, not all adverse actions are reportable to the NPDB. Section 11151(1) of HCQIA provides the following definition regarding actions adversely affecting privileges: "The term 'adversely affecting' includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity." One example of an adverse action that harms a physician but is not reportable to the NPDB is a summary suspension that lasts less than 30 days.

30-Day Rule

An adverse action lasting longer than 30 days is reportable to the NPDB. An adverse action lasting 30 days or less is not reportable to the NPDB. (E-31, E-34, E-48)

Investigations

Neither HCQIA nor the NPDB Guidebook provides a clear definition of the term "investigation." The new "expansive" method of determining when an investigation exists, in the April 2015 and October 2018 revised versions, seriously erodes medical staff self-governance. In the new revision, the determination of what constitutes an investigation in hospital peer review is no longer controlled by medical staff bylaws and policies. NPDB indicates it may review a hospital's medical staff bylaws in making a determination of when an investigation exists, but the NPDB will now be the "ultimate authority to determine whether an investigation exists." (E-36) According to this new "expansive" interpretation, "[I] f a formal, targeted process is used when issues related to a *specific practitioner's* professional competence or conduct are identified, this is considered an investigation for the purposes of reporting to the NPDB." (E-37)

The reporting entity is expected to produce evidence that an investigation exists, which "may include minutes or excerpts from committee meetings, orders from hospital officials directing an investigation, or notices to practitioners of an investigation (although there is no requirement that the health care practitioner be notified or be aware of the investigation)." (E-37) The NPDB's more "expansive" interpretation of when an investigation exists and its acceptance of "evidence" under the control of the hospital as being truthful and factual virtually assure that a hospital's claim that an investigation exists will be affirmed. The October 2018 revised Guidebook provides the following Guidelines for Investigations: (E-37)

- For NPDB reporting purposes, the term "investigation" is not controlled by how that term may be defined in a healthcare entity's bylaws or policies and procedures.
- The investigation must be focused on the practitioner in question.
- The investigation must concern the professional competence and/or professional conduct of the practitioner in question.
- To be considered an investigation for purposes of determining whether an activity is reportable, the activity generally should be the precursor to a professional review action.
- An investigation is considered ongoing until the healthcare entity's decision-making authority takes a final action or formally closes the investigation.
- A routine or general review of cases is not an investigation.
- A routine review of a particular practitioner is *not* an investigation.

Unless a physician's privileges are restricted while under investigation, or the physician surrenders or fails to renew privileges while under or to avoid an investigation, investigations that do not reach a conclusion should not be reported to the NPDB. (E-49)

Secret Investigations Allowed

Although secret investigations are an affront to legal due process, NPDB allows secret investigations in determining whether an occurrence/action is reportable. (E-37) Secret investigations pose great risks to the targeted physician, because if a physician resigns, surrenders privileges, reduces privileges, chooses not to renew privileges, takes a leave of absence longer than 30 days, or lets privileges expire while under secret investigation, it is reportable to the NPDB.

Some hospitals have taken advantage of this secret investigation provision and have misled a physician about reportability if the physician resigns from the hospital or reduces privileges. Hospital administrators/leaders frequently tell a physician that if the physician "voluntarily" reduces privileges or resigns, it will not be reported to the NPDB. Physicians are frequently told that it will go better for them and they can avoid all of the unpleasantness of having to go through a peer review hearing and having a formal action taken against their privileges by simply "voluntarily" resigning or reducing privileges. Hospitals favor this deception, because if the physician takes the bait, then the hospital can end the physician's career by reporting the physician to the NPDB, and having resigned from the medical staff, the physician is generally not entitled to any due-process hearing or appeal. If a physician reduces privileges while a secret investigation is ongoing, the physician may or may not be entitled to a peer-review hearing and appeal procedures, depending on provisions in medical staff bylaws.

Physicians should take action to ensure that their medical staff bylaws require physicians to be notified in a timely manner any time an investigation focused on a specific physician is initiated. Secret investigations should be prohibited in medical staff bylaws.

Summary Suspension – Name of Adverse Action Does Not Matter

Summary suspensions are typically imposed "for the purpose of protecting patients from imminent danger." (E-38) Summary suspensions that last longer than 30 days are reportable to the NPDB. In addition, if a summary suspension has been in effect for fewer than 30 days but is expected to last longer than 30 days, it may be reported to the NPDB. If the summary suspension ultimately lasts less than 30 days, then the reporting entity must void the initial databank report. Notably, in the latter scenario the physician is still harmed by having to self-report a summary suspension even though there is no report in the NPDB. The revised Guidebook makes it clear that if the action meets its reportability requirements, the actual name of the action does not matter. Thus, summary suspensions, precautionary suspensions, emergency suspensions, "voluntary" abeyances (under threat of summary suspension if physician does not act "voluntarily" to restrict privileges), lasting longer than 30 days, are all reportable to the NPDB. (E-38, E-39)

Physicians in Training

Residents and interns are generally not subject to adverse action reports in the NPDB. They do not have hospital privileges within the meaning of NPDB regulations but are authorized by the sponsoring hospital to perform clinical duties as per their graduate training program. However, if the resident is involved in moonlighting activity and has an adverse action taken against him by the moonlighting hospital, then the action is reportable to the NPDB. (E-40)

Employment Termination

Termination of a physician's contract with a hospital is not reportable to the NPDB provided that the action was taken outside of a professional review process. However, if termination of employment was done as a result of a professional review process, then it would be reportable to the databank. (E-44)

Termination of Insurance Contracts and First Hospital and Second Hospital Reportability

Termination of a contract to participate in an insurance because of poor patient care, following an investigation conducted by the

insurer, is reportable to the NPDB. Likewise, if a physician resigns insurance panel membership while under, or to avoid investigation, it is reportable to the NPDB, even if the physician was not aware of the investigation. (E-47)

If an insurer terminates a contract or panel membership solely due to another entity such as a hospital taking an adverse action against a physician's privileges, it is an administrative action, and the insurer should not file a separate report with the NPDB. Likewise, a second hospital that automatically terminates a physician's privileges because the first hospital took an adverse action against the physician should not file a separate report to the NPDB. Automatic administrative actions based on an entity's policies or bylaws, which are not the result of a focused professional review process, are not reportable to the NPDB. (E-47, E-48)

Withdrawal of Applications and Non-Renewal of Medical Staff Privileges

Withdrawal of an initial application for medical staff privileges prior to a final decision by the hospital's governing body is not reportable to the NPDB. However, if the withdrawal of an application for renewal of privileges occurs during an investigation based on professional competence/conduct or to avoid an investigation, it is reportable. (E-44) Likewise, the withdrawal of an application for license renewal or failure to renew while a medical board is conducting an investigation based on professional competence/conduct concerns, is reportable. Initial licensure applications are treated differently: "In addition, an applicant's withdrawal, for any reason, of an initial application for licensure or certification is not reportable, even if the applicant is under investigation." (E-68)

Eligibility Issues Not Reportable

Eligibility issues include a hospital's requiring board-certification, maintenance of certification, minimum professional liability coverage, a certain number of procedures to be performed for privileging for a specific procedure, geographic proximity to the hospital, a hospital's determination it has too many specialists in the practitioner's discipline, and others. If privileges are denied because the physician does not meet a hospital's eligibility requirements, it is not reportable to the NPDB. (E-35)

Surrender of Privileges for Personal Reasons, Retirement, Infirmity, or Leave of Absence

Surrender of privileges for personal reasons, retirement, or infirmity is not reportable, provided that there is no open investigation at the time of surrender. If there is an open investigation at the time of surrender of privileges, even though the physician may not be aware of the investigation, it is reportable to the NPDB. The specific reason for surrender of privileges is irrelevant with respect to reportability. (E-46) Physicians who are contemplating taking a leave of absence for more than 30 days or surrendering privileges for personal reasons, infirmity, or retirement, should obtain a written statement from the hospital affirming that there is no open investigation prior to surrendering privileges.

Expiration of Privileges

Expiration of privileges is not reportable to the NPDB provided that there is no open investigation at the time of expiration. If renewable privileges are allowed to expire while there is an open investigation, even though the physician is not aware of the investigation, it is reportable to the databank. (E-49) Again, before allowing renewable privileges to expire, physicians would be wise to obtain a written statement from the hospital that there is no open investigation.

Adverse Action Taken Based on Inappropriate Cutting and Pasting in Electronic Health Records

Inappropriate cutting and pasting of information in one patient's record to the record of another patient can result in a hospital taking an adverse action against a physician's privileges. That type of activity can be viewed as professional misconduct that could potentially cause harm to patients. If a hospital restricts or suspends a physician's privileges for more than 30 days based on a physician's cutting and pasting inappropriately from one patient record to another, then the action is reportable to the NPDB. (E-54)

Failure to Complete Medical Records in a Timely Manner

Automatic, administrative actions based on failure to complete medical records timely, are not reportable to the NPDB. However, a hospital may take an adverse action (e.g. suspension of privileges) following a focused professional review and determination that the physician's failure to complete medical records timely constitutes professional misconduct that adversely affects or could adversely affect patient health or welfare. If the adverse action lasts more than 30 days, it is reportable to the databank. (E-48)

Actions Based on Physician's Fees or Advertising

Actions taken by a hospital against a physician based on the physician's fees or fee structure are not reportable to the NPDB. The Guidebook provides the following:

> Matters *not* related to the professional competence or professional conduct of a physician or dentist should not be reported to the NPDB. For example, adverse actions against a practitioner based primarily on his or her advertising practices, fee structure, salary arrangement, affiliation with other associations or health care professionals, or other competitive acts intended to solicit or retain business are excluded from NPDB reporting requirements. (E-59)

Lapse of Professional Society Membership While Under Formal Peer Review

Professional societies that have a formal peer review process for the purpose of furthering quality care are required to report to the databank adverse actions affecting membership related to professional competence/conduct lasting more than 30 days. (B-4, B-5, B-9, C-7, E-1, E-3) If a physician resigns or allows his membership in the professional society to lapse while a focused investigation/formal peer review process is ongoing, it is reportable to the NPDB. However, if the physician resigns or allows his membership to lapse before a final decision is rendered, it is not reportable to the NPDB. (E-60)

Additional Questions about Reportability

The latest version of the NPDB Guidebook (October 2018) contains an extensive question and answer section, which is available at https://www.npdb.hrsa.gov/resources/NPDBGuidebook.pdf.

The NPDB also has a Customer Service Center available to answer questions: help@npdb.hrsa.gov, 1-800-767-6732.

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