HHS Releases Revisions to National Practitioner Data Bank Guidebook

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On October 26, 2018, the U.S. Department of Health and Human Services (HHS), Health Resources and Services Administration released an update to the National Practitioner Data Bank (NPDB) Guidebook, a manual that provides guidance on the requirements established by the laws governing the NPDB. The Guidebook is not updated on any set schedule – the previous amendments to the Guidebook occurred in April 2015 and were the first updates since 2001. While most of the 2018 revisions can be categorized as minor changes, the 2018 NPDB Guidebook does contains a number of new sections and clarifications that Medical Staffs and other peer review bodies should be aware of. We will be following up on the effect of the revisions on an on-going basis, but want to give clients and friends a preliminary summary of some of the key revisions affecting peer review bodies.

Length of Restriction

One of the key revisions is the addition of a new section entitled "Length of Restriction." Whether a report will be required depends in part on the length of time a restriction is in place. This section is aimed at assisting with the applicable analysis for calculating the length of time the restriction has been in place. The Guidebook now specifically states that "a restriction begins at the time a physician cannot practice the full scope of his or her privileges." It further reaffirms that the "inability to practice the full scope of privileges without a proctor's presence or approval is a restriction." This update makes clear that, from the NPDB's perspective, the number of cases or the intended length is irrelevant in determining whether a report is required. "The reportability of a proctoring restriction hinges on whether the restriction, in fact, is in effect for a period longer than 30 days." The new section also explains that if an entity files a report regarding a summary suspension or restriction which ultimately does not last more than 30 days, the reporting entity must void that report.

Proctors

The Guidebook makes a slight revision to the existing section on "Proctors." It explains that a report is required if, for more than 30 days, a proctor is required in order for a physician or dentist "to proceed in freely exercising clinical privileges." As noted in the above regarding the "Length of Restriction," these edits appear aimed at clarifying the confusion that sometimes existed when attempting to calculate the length of a restriction in connection with reporting requirements. The guidance continues to explain that "[i]f a proctor is not required to be present for or approve procedures, the action should not be reported to the NPDB."

Voluntary Agreements

The 2018 NPDB Guidebook adds several new Q&As to Chapter E: Reports. One of these questions addresses the reportability of a voluntary agreement by the practitioner not to exercise privileges during an investigation. The Guidebook now states that "[a]n agreement not to exercise privileges is a restriction of privileges. Any restriction of privileges while under investigation, temporary or otherwise, is considered a resignation and must be reported." From a semantics perspective, there is potential for confusion as a "resignation of privileges" is often analyzed differently than a "temporary restriction" in most contexts. However, it is clear that the Guidebook has taken the position that a practitioner cannot voluntarily agree to restrict his or her own privileges to avoid reporting requirements.

Credentialing Committee

Unlike the bright-line analysis for voluntary agreements, the NPDB added a Q&A regarding reporting in the context of credentialing processes that is more variable. The Guidebook takes the position that whether a review of an application for reappointment can become an investigation "depends" on whether "the reappointing hospital had specific concerns" about the applicant's competence. The Guidebook acknowledges that credentialing processes can include follow up inquiries to applicants without creating an "investigation" but that there are circumstances where a report could be triggered. Should an applicant resign prior to a final action on the application, the reportability of that resignation would be dependent on the underlying facts.

Court Ordered Changes

The 2018 NPDB Guidebook also added a Q&A regarding court orders and addressed some of the concerns that can arise when adverse actions are reviewed by courts. Specifically, the revision makes clear that if a court changes an adverse action, the reporting entity must file a Revision-to-Action Report. However, should the court overturn the decision by the reporting entity, the Initial Report should be voided.

Impaired Practitioners

Of note, the Guidebook added a new section that relates to when licensing boards, not entities, must file an Adverse Action Report against an impaired physician. Similar to the discussion regarding "Voluntary Agreements," the revision asserts that voluntary agreements not to practice may be reportable. Here, the Guidebook explains that "an enforceable agreement not to practice, signed by the board, is reportable." Should the board take an adverse action and the impaired practitioner enter a treatment or rehabilitation program as a result, the adverse action is still reportable but the report should not include reference to the treatment program.

While the addition is not directly applicable to peer review bodies, it is important to understand that interactions with impaired practitioners may have ramifications outside of the peer review process. The revision explains that where a practitioner voluntarily enters a treatment or rehabilitation program and agrees with the program not to practice, and there is no separate agreement between the practitioner and the board, no report is required.

Sanctions for Failing to Report to the NPDB

While the 2015 and 2018 NPDB Guidebooks still include monetary sanctions for health plans for failing to report adverse actions to the NPDB, the 2018 revision removes references to specific dollar amounts. Instead, the Guidebook clarifies and includes general statements that a failure to report is subject to a civil monetary penalty for each action not reported. The Guidebook continues to assert that a hospital or other health care entity which "substantially failed to submit adverse clinical privileges reports" can lose its immunity protections for three years, without reference to any civil penalties for these entities.

Dispute Resolution Limitations

The 2015 NPDB Guidebook maintained that the dispute resolution process was limited to (1) whether a report was submitted in accordance with NPDB reporting requirements and (2) the factual accuracy of the information. It further had explained that the dispute resolution process did not include a review of the merits of the underlying reasons for the report or any consideration of due process challenges. The 2018 NPDB Guidebook has now confirmed that approach by adding a new paragraph that outlines the NPDB's jurisdiction for reviewing disputed reports. It makes clear that NPDB's authority is limited to obtaining and publishing that report. It has no authority to examine the substance of a report, or the circumstances in how the report was drafted.

Additional Changes

The 2018 revisions include a number of other changes not discussed here but are identified by HHS at https://www.npdb.hrsa.gov/guidebook/changeHistory.jsp.

Effect of NPDB Guidebook

The revisions to the 2018 NPDB Guidebook are not as substantive as those made in 2015 but they do merit some consideration. The Guidebook is not law itself but serves as a guide relating to the three significant laws governing the NPDB, and codified at 45 CFR Part 60: Title IV of the Health Care Quality Improvement Act of 1986 (HCQIA), Section 5 of the Medicare and Medicaid Patient and Program Protection Act of 1987, and Section 221(a) of the Health Insurance Portability and Accountability Act of 1996. However, it is an important tool for understanding and engaging in communications with the NPDB.

Hooper, Lundy & Bookman, P.C. has experience in representing Medical Staffs and Health Care Entities for purposes of reporting to the NPDB and to the Medical Board of California under Section 805. For questions relating to these issues, please contact Harry Shulman, Ross Campbell, or Ruby Wood in San Francisco at (415) 875-8500; Jennifer Hansen or Matthew Lahana in San Diego at (619) 744-7300; Larry Getzoff or Katherine Dru in Los Angeles at (310) 551-8111, or your regular Hooper, Lundy & Bookman contact.

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