Resolution 16-408: Address and Petition CMS and Legislators to Allow for a Process of Appeal to Negative Statements and Reports to the National Practitioner Data Bank – Resolution 16-408, introduced at the 2016 annual meeting and referred for study to the Board of Trustees, called on the Society to:

1. Adopt a position on and defend physicians against those who use the National Practitioner Data Bank to ruin their reputations in an effort to manipulate and dissuade them from application and/or participation on their medical staffs.
2. Take action through its delegation to the AMA to address and petition CMS and legislators to allow for a process of appeal to negative statements and reports to the data bank.
3. Pursue avenues legal and political to guarantee due process and to protect physicians from abuse of the NPDB.

RESOLVED STATEMENT 1
Resolved Statement 1 calls on PAMED to adopt a position on and defend physicians against those who use the National Practitioner Data Bank to ruin their reputations in an effort to manipulate and dissuade them from application and/or participation on their medical staffs.

An NPDB report can have detrimental consequences for the subject physician. As a result of an NPDB report, a physician might find their employment opportunities diminished and ability to obtain malpractice insurance hindered. Regardless of whether the report adequately reflects their competence, it is difficult for a physician’s career and reputation to ever fully recover from a negative report. Considering the serious ramifications, it is imperative that only reports related to physician competence or conduct, which have adverse patient care outcomes, are promulgated to the NPDB.

Although PAMED cannot offer financial assistance or legal defense to physicians challenging NPDB reports, PAMED can provide physicians with pertinent information and resources to assist with their defense. PAMED can also refer physicians to organizations that specialize in peer review and NPDB appeal.

RESOLVED STATEMENT 2
Resolved Statement 2 calls on PAMED to take action through its delegation to the AMA to address and petition CMS and legislators to allow for a process of appeal to negative statements and reports to the data bank.

The AMA has recently adopted policy, advanced by the Medical Society of New Jersey that opposes medical staff appointment denial for any other purpose besides competency or conduct.
issues. The AMA is finalizing the official language of this policy, which should be published shortly. This policy is as follows:

“RESOLVED that our AMA formally request that the Health Resources and Services Administration (HRSA) clarify that reports of medical staff appointment denial by of physicians be (1) contingent upon competency or conduct issues related to the physicians’ provision of or failure to provide healthcare services that adversely affect the health or welfare of a patient, harm and (2) only based on a professional review action and not for administrative or eligibility reasons; and be it further

RESOLVED that our AMA advocate that formally petition the Secretary of HHS to direct the HRSA to remove the name of any physician from the NPDB reported for reasons not related to competence or conduct patient care that adversely affected the health or welfare of a resulted in patient harm. (Directive to Take Action).”

First, although the AMA policy does not specifically direct the AMA to address and petition for a NPDB appeals process, it does identify a remedy that gets at the heart of what Resolution 16-408 seeks to accomplish: it advocates for (1) the proper use of the NPDB and (2) a mechanism for removing names/reports when the report is not related to competence or conduct that has adverse patient care outcomes.

Second, it appears that the author of the resolution believes that an appeals process for the NPDB does not currently exist. Contrary to this belief, the subject of an NPDB report may appeal a decision of the reporting entity, which was subsequently reported to the NPDB. The reporting entity’s appeals process should be part of the due process rights afforded the subject of the report.

Although the NPDB does not have an “appeals process” per se, it does have a dispute resolution process. This process allows a subject to dispute (1) whether a report was submitted in accordance with NPDB reporting requirement or (2) the factual accuracy of the information. It is the expectation of the NPDB that all appeals are handled at the level of the reporting entity.

Entering a report into Dispute Status does not trigger an automatic review by the NPDB. Once entered into Dispute Status, the subject must attempt to resolve their issue(s) with the report with the reporting entity. There is no formal process for how reporting entities are to handle report disputes with physicians. Unless modified or removed by the reporting entity, NPDB reports are permanent. Confronted with a dispute, the reporting entity may choose to: void, revise, or correct the report. The reporting entity may also choose to keep the report as is. If the subject has not received a response from the reporting entity in 60 days, or is unsatisfied with the response they received, the subject can elevate the dispute to Dispute Resolution. Dispute Resolution triggers a review of the report by the Secretary of HHS.

Secretarial review of NPDB information is limited in scope. The Secretary will only review a report for factual accuracy or to determine whether the report was submitted in accordance with NPDB reporting requirements. Dispute Resolution is not the proper venue for a physician to
appeal the underlying reasons of an adverse action. Secretarial review is not a mechanism for
physicians to protest malpractice payments, challenge the allegations concerning their conduct,
or question the merit of the underlying action.

Upon review of the dispute, the Secretary will issue one of the following decisions.

1. Conclude that the report is accurate. The Secretary will remove the report from
   disputed status and the report will stay the same in the NPDB. Subject may
   request reconsideration.
2. Conclude that the report is inaccurate. The Secretary will direct the reporting
   entity to either void the report or submit a corrected report.
3. Conclude that the action was not reportable. Report is voided.
4. Conclude that the disputed issue is outside the scope of departmental review. The
   Secretary will remove the report from disputed status and the report will stay the
   same in the NPDB.

There is no formal process to appeal a Dispute Resolution decision. However, reconsideration of
the decision may be requested by the subject. When reconsidering a Dispute Resolution decision,
the Secretary will either affirm the previous decision or issue a revised final decision. Subjects of
reports may also challenge Dispute Resolutions in federal courts. The Administrative Process
Act (APA) provides a remedy for individuals who have suffered a legal wrong because of an
agency action. Under the APA, individuals who have suffered such a wrong are entitled to
judicial review of the agency’s action. The wronged party must demonstrate that the agency
action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

In addition to the dispute process, subjects may also add Subject Statements. Subject Statements
do not void, correct, amend, or otherwise alter NPDB reports. Unless removed or edited by the
subject, Subject Statements become permanent parts of the report. Reports need not be in the
dispute process for a subject to add a Subject Statement. Subject Statements provide an
opportunity for subjects to rebut reports by explaining their conduct, listing relevant external
factors, and offering clarifications. Subject Statements are left to the discretion of the subject and
may be added at any time.

The existence of an appeals process at the reporting entity level and a regulatory process to
challenge NPDB information would significantly minimize the efficacy of any effort initiated by
PAMED. The aforementioned AMA policy is also relevant to this discussion as it provides a
mechanism to remove reports not related to competence or conduct that has adverse patient care
outcomes.

PAMED will provide members with education on the NPDB. This education will involve
developing a module and primer on the NPDB. PAMED will instruct members on: what actions
are reportable to the NPDB, due process, who can disseminate information to the NPDB, who
can query the NPDB, and the NPDB dispute process. Additionally, PAMED will also educate
members on how to ensure and utilize due process procedures during peer review proceedings
and steps that can be taken to mitigate the damage of an NPDB report.
RESOLVED STATEMENT 3

Resolved Statement 3 calls on PAMED pursue legal and political avenues to guarantee due process and to protect physicians from abuses of the NPDB.

As briefly mentioned above, many of the disciplinary actions that culminate in NPDB reports include inherent guarantees of due process and procedural fairness. Reporting entities—hospitals, health plans, professional organizations, and licensing authorities, to name a few—generally accord physicians due process protections in peer review, credentialing, and disciplinary actions.

The AMA has enacted a number of policies concerning the protection of due process in peer review. Although universal guidelines for due process have not been promulgated, the AMA has issued general guidelines to be adopted as necessary to suit the circumstances and conditions of health care organizations. These guidelines include provisions to ensure a fair, objective, expeditious and independent hearing.

PAMED has also adopted numerous policies concerning the due process protection for physicians interacting with health care plans and hospitals. For example:

PAMED Policy No. 225.992(h) on medical staff development states: “Staff privileges for physicians should be based only on training, experience, demonstrated competence, and adherence to medical staff bylaws…there shall be a requirement in hospital bylaws for an appropriate appeal and due process mechanism.”

PAMED Policy No. 225.997 states: “The Society holds…that appropriate due process rights be assured to a physician who has received an adverse recommendation regarding medical staff membership or privileges.” Policy No. 225.997 further clarifies that these due process rights shall include an appeal conducted by an impartial body consisting of physicians who did not participate in the previous recommendation, and if a negative action is taken by the physician hearing committee, a hearing be held by a committee of the hospital governing body.

PAMED Policy No, 285.992(4) states: “[PAMED] will advocate in those cases in which economic issues may be used for consideration of sanction or dismissal, the physician participating in the plan should have the right to receive profile information and education, in a due process manner, before action of any kind is taken”

PAMED’s existing policies demonstrate PAMED’s commitment to guaranteeing and protecting due process for physicians.

As a result of the existing due process measures and the extensive number of policies from PAMED and other physician organizations concerning the protection of due process rights, it is recommended that this third resolved statement not be approved. As resolved above, PAMED is also committed to protecting physicians from those who abuse the NPDB for purposes of manipulation and dissuasion.
Conclusion

Given the potential harm of a NPDB report on a subject physician’s reputation, PAMED vehemently opposes any use of the NPDB to ruin a physician’s reputation in an attempt to manipulate or dissuade said physician from application and participation on a medical staff. Accordingly, The Board of Trustees recommends that the Society:

1. Oppose the use of the National Practitioner Data Bank to manipulate or dissuade physicians from application and participation on medical staffs; and
2. Provide members with education on the National Practitioner Data Bank and the National Practitioner Data Bank’s dispute process.

Recommendation

1. The Board of Trustees recommends that this report be adopted in lieu of Resolution 16-408.