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3 **REPORT 5**
4 **BOARD OF TRUSTEES**
5 **Referred to Reference Committee D**
6

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

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

22 Resolved Statement 1 calls on PAMED to adopt a position on and defend physicians against
23 those who use the National Practitioner Data Bank to ruin their reputations in an effort to
24 manipulate and dissuade them from application and/or participation on their medical staffs.
25

26 An NPDB report can have detrimental consequences for the subject physician. As a result of an
27 NPDB report, a physician might find their employment opportunities diminished and ability to
28 obtain malpractice insurance hindered. Regardless of whether the report adequately reflects their
29 competence, it is difficult for a physician’s career and reputation to ever fully recover from a
30 negative report. Considering the serious ramifications, it is imperative that only reports related to
31 physician competence or conduct, which have adverse patient care outcomes, are promulgated to
32 the NPDB.
33

34 Although PAMED cannot offer financial assistance or legal defense to physicians challenging
35 NPDB reports, PAMED can provide physicians with pertinent information and resources to
36 assist with their defense. PAMED can also refer physicians to organizations that specialize in
37 peer review and NPDB appeal.
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40 RESOLVED STATEMENT 2

41 Resolved Statement 2 calls on PAMED to take action through its delegation to the AMA to
42 address and petition CMS and legislators to allow for a process of appeal to negative statements
43 and reports to the data bank.
44

45 The AMA has recently adopted policy, advanced by the Medical Society of New Jersey that
46 opposes medical staff appointment denial for any other purpose besides competency or conduct

1 issues. The AMA is finalizing the official language of this policy, which should be published
2 shortly. This policy is as follows:

3
4 “RESOLVED that our AMA ~~formally~~ request that the Health Resources and
5 Services Administration (HRSA) clarify that reports of medical staff appointment
6 denial ~~by~~ of physicians be ~~are~~ (1) contingent upon competency or conduct issues
7 related to the physicians’ provision of or failure to provide healthcare services
8 that adversely affect the health or welfare of a result in patient harm and (2) only
9 based on a professional review action and not for administrative or eligibility
10 reasons; and be it further

11
12 RESOLVED that our AMA advocate that ~~formally petition the Secretary of HHS~~
13 ~~to direct the HRSA to~~ remove the name of any physician from the NPDB reported
14 for reasons not related to competence or conduct ~~patient care~~ that adversely
15 affected the health or welfare of a resulted in patient harm. (Directive to Take
16 Action).”

17
18 First, although the AMA policy does not specifically direct the AMA to address and petition for
19 a NPDB appeals process, it does identify a remedy that gets at the heart of what Resolution 16-
20 408 seeks to accomplish: it advocates for (1) the proper use of the NPDB and (2) a mechanism
21 for removing names/reports when the report is not related to competence or conduct that has
22 adverse patient care outcomes.

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

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

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

41
42 Secretarial review of NPDB information is limited in scope. The Secretary will only review a
43 report for factual accuracy or to determine whether the report was submitted in accordance with
44 NPDB reporting requirements. Dispute Resolution is not the proper venue for a physician to

1 appeal the underlying reasons of an adverse action. Secretarial review is not a mechanism for
2 physicians to protest malpractice payments, challenge the allegations concerning their conduct,
3 or question the merit of the underlying action.

4
5 Upon review of the dispute, the Secretary will issue one of the following decisions.

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

15
16 There is no formal process to appeal a Dispute Resolution decision. However, reconsideration of
17 the decision may be requested by the subject. When reconsidering a Dispute Resolution decision,
18 the Secretary will either affirm the previous decision or issue a revised final decision. Subjects of
19 reports may also challenge Dispute Resolutions in federal courts. The Administrative Process
20 Act (APA) provides a remedy for individuals who have suffered a legal wrong because of an
21 agency action. Under the APA, individuals who have suffered such a wrong are entitled to
22 judicial review of the agency's action. The wronged party must demonstrate that the agency
23 action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

24
25 In addition to the dispute process, subjects may also add Subject Statements. Subject Statements
26 do not void, correct, amend, or otherwise alter NPDB reports. Unless removed or edited by the
27 subject, Subject Statements become permanent parts of the report. Reports need not be in the
28 dispute process for a subject to add a Subject Statement. Subject Statements provide an
29 opportunity for subjects to rebut reports by explaining their conduct, listing relevant external
30 factors, and offering clarifications. Subject Statements are left to the discretion of the subject and
31 may be added at any time.

32
33 The existence of an appeals process at the reporting entity level and a regulatory process to
34 challenge NPDB information would significantly minimize the efficacy of any effort initiated by
35 PAMED. The aforementioned AMA policy is also relevant to this discussion as it provides a
36 mechanism to remove reports not related to competence or conduct that has adverse patient care
37 outcomes.

38
39 PAMED will provide members with education on the NPDB. This education will involve
40 developing a module and primer on the NPDB. PAMED will instruct members on: what actions
41 are reportable to the NPDB, due process, who can disseminate information to the NPDB, who
42 can query the NPDB, and the NPDB dispute process. Additionally, PAMED will also educate
43 members on how to ensure and utilize due process procedures during peer review proceedings
44 and steps that can be taken to mitigate the damage of an NPDB report.

1 RESOLVED STATEMENT 3

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

4
5 As briefly mentioned above, many of the disciplinary actions that culminate in NPDB reports
6 include inherent guarantees of due process and procedural fairness. Reporting entities—
7 hospitals, health plans, professional organizations, and licensing authorities, to name a few—
8 generally accord physicians due process protections in peer review, credentialing, and
9 disciplinary actions.

10
11 The AMA has enacted a number of policies concerning the protection of due process in peer
12 review. Although universal guidelines for due process have not been promulgated, the AMA has
13 issued general guidelines to be adopted as necessary to suit the circumstances and conditions of
14 health care organizations. These guidelines include provisions to ensure a fair, objective,
15 expeditious and independent hearing.

16
17 PAMED has also adopted numerous policies concerning the due process protection for
18 physicians interacting with health care plans and hospitals. For example:

19
20 PAMED Policy No. 225.992(h) on medical staff development states: “Staff privileges for
21 physicians should be based only on training, experience, demonstrated competence, and
22 adherence to medical staff bylaws...there shall be a requirement in hospital bylaws for an
23 appropriate appeal and due process mechanism.”

24
25 PAMED Policy No. 225.997 states: “The Society holds...that appropriate due process
26 rights be assured to a physician who has received an adverse recommendation regarding
27 medical staff membership or privileges.” Policy No. 225.997 further clarifies that these
28 due process rights shall include an appeal conducted by an impartial body consisting of
29 physicians who did not participate in the previous recommendation, and if a negative
30 action is taken by the physician hearing committee, a hearing be held by a committee of
31 the hospital governing body.

32
33 PAMED Policy No, 285.992(4) states: “[PAMED] will advocate in those cases in which
34 economic issues may be used for consideration of sanction or dismissal, the physician
35 participating in the plan should have the right to receive profile information and
36 education, in a due process manner, before action of any kind is taken”

37
38 PAMED’s existing policies demonstrate PAMED’s commitment to guaranteeing and protecting
39 due process for physicians.

40
41 As a result of the existing due process measures and the extensive number of policies from
42 PAMED and other physician organizations concerning the protection of due process rights, it is
43 recommended that this third resolved statement not be approved. As resolved above, PAMED is
44 also committed to protecting physicians from those who abuse the NPDB for purposes of
45 manipulation and dissuasion.

1 **Conclusion**

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

- 6
- 7 1. Oppose the use of the National Practitioner Data Bank to manipulate or dissuade
8 physicians from application and participation on medical staffs; and
 - 9 2. Provide members with education on the National Practitioner Data Bank and the
10 National Practitioner Data Bank's dispute process.

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13 **Recommendation**

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