

**PART 46—POLICY REGARDING
PARTICIPATION IN NATIONAL
PRACTITIONER DATA BANK**

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AUTHORITY: 38 U.S.C. 501; 42 U.S.C. 11101–11152.

SOURCE: 67 FR 19679, Apr. 23, 2002, unless otherwise noted.

Subpart A—General Provisions

§ 46.1 Definitions.

(a) *Act* means The Health Care Quality Improvement Act of 1986, as amended (42 U.S.C. 11101–11152).

(b) *Claim of medical malpractice* means a written claim or demand for payment based on an act or omission of a physician, dentist, or other health care practitioner in furnishing (or failing to furnish) health care services, and includes the filing of a complaint or administrative tort claim under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671–2680.

(c) *Clinical privileges* means privileges granted by a health care entity to individuals to furnish health care.

(d) *Dentist* means a doctor of dental surgery or dental medicine legally authorized to practice dental surgery or dentistry by a State (or any individual who holds himself or herself out to be so authorized).

(e) *Director* means the duly appointed director of a Department of Veterans Affairs health care facility or any indi-

vidual with authorization to act for that person in the director's absence.

(f) *Gross negligence* is materially worse than substandard care, and consists of an entire absence of care, or an absence of even slight care or diligence; it implies a thoughtless disregard of consequences or indifference to the rights of others.

(g) *Health care facility* means a hospital, domiciliary, outpatient clinic, or any other entity that provides health care services.

(h) *Other health care practitioner* means an individual other than a physician or dentist who is licensed or otherwise authorized by a State to provide health care services.

(i) *Physician* means a doctor of medicine or osteopathy authorized to practice medicine or surgery by a State (or any individual who holds himself or herself out to be so authorized).

(j) *Professional review action* means a recommendation by a professional review panel (with at least a majority vote) to affect adversely the clinical privileges of a physician or dentist taken as a result of a professional review activity based on the competence or professional conduct of an individual physician or dentist in cases in which such conduct affects or could affect adversely the health or welfare of a patient, or patients. An action is not considered to be based on the competence or professional conduct of a physician or dentist, if the action is primarily based on:

(1) A physician's or dentist's association with, administrative supervision of, delegation of authority to, support for, or training of, a member or members of a particular class of health care practitioner or professional, or

(2) Any other matter that does not relate to the competence or professional conduct of a physician or dentist in his/her practice at a Department of Veterans Affairs health care facility.

(k) *Professional review activity* means an activity with respect to an individual physician or dentist to establish a recommendation regarding:

(1) Whether the physician or dentist may have clinical privileges with respect to the medical staff of the facility;

(2) The scope or conditions of such privileges or appointment; or

(3) Change or modification of such privileges.

(l) *State* means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and any other territories or possessions of the United States.

(m) *State Licensing Board* means, with respect to a physician, dentist, or other health care practitioner in a State, the agency of the State, which is primarily responsible for the licensing of the physician, dentist, or practitioner to furnish health care services.

(n) *Willful professional misconduct* means worse than mere substandard care, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries or in reckless disregard of its probable consequences.

§ 46.2 Purpose.

The National Practitioner Data Bank, authorized by the Act and administered by the Department of Health and Human Services, was established for the purpose of collecting and releasing certain information concerning physicians, dentists, and other health care practitioners. The Act mandates that the Department of Health and Human Services seek to enter into a Memorandum of Understanding with the Department of Veterans Affairs (VA) for the purpose of having VA participate in the National Practitioner Data Bank. Such a Memorandum of Understanding has been established. Pursuant to the Memorandum of Understanding, VA will obtain information from the Data Bank concerning physicians, dentists, and other health care practitioners who provide or seek to provide health care services at VA facilities and also report information regarding malpractice payments and adverse clinical privileges actions to the Data Bank. This part essentially restates or interprets provisions of that Memorandum of Understanding and constitutes the policy of VA for participation in the National Practitioner Data Bank.

Subpart B—National Practitioner Data Bank Reporting

§ 46.3 Malpractice payment reporting.

(a) VA will file a report with the National Practitioner Data Bank, in accordance with regulations at 45 CFR part 60, subpart B, as applicable, regarding any payment for the benefit of a physician, dentist, or other licensed health care practitioner which was made as the result of a settlement or judgment of a claim of medical malpractice. The report will identify the physician, dentist, or other licensed health care practitioner for whose benefit the payment is made. It is intended that the report be filed within 30 days of the date payment is made. This may not be possible in all cases; e.g., sometimes notification of payment is delayed, and sometimes the malpractice payment review process cannot be completed within the timeframe. The report will provide the following information:

(1) With respect to the physician, dentist, or other licensed health care practitioner for whose benefit the payment is made—

- (i) Name;
- (ii) Work address;
- (iii) Home address, if known;
- (iv) Social Security number, if known, and if obtained in accordance with section 7 of the Privacy Act of 1974;
- (v) Date of birth;
- (vi) Name of each professional school attended and year of graduation;
- (vii) For each professional license: the license number, the field of licensure, and the State in which the license is held;
- (viii) Drug Enforcement Administration registration number, if applicable and known;
- (ix) Name of each health care entity with which affiliated, if known.

(2) With respect to the reporting VA entity—

- (i) Name and address of the reporting entity;
- (ii) Name, title and telephone number of the responsible official submitting the report on behalf of the Federal government; and

(iii) Relationship of the entity to the physician, dentist, or other health care practitioner being reported.

(3) With respect to the judgment or settlement resulting in the payment—

(i) Where an action or claim has been filed with an adjudicative body, identification of the adjudicative body and the case number;

(ii) Date or dates on which the act(s) or omission(s), which gave rise to the action or claim occurred;

(iii) Date of judgment or settlement;

(iv) Amount paid, date of payment, and whether payment is for a judgment or a settlement;

(v) Description and amount of judgment or settlement and any conditions attached thereto, including terms of payment;

(vi) A description of the acts or omissions and injuries or illnesses upon which the action or claim was based; and

(vii) Classification of the acts or omissions in accordance with a reporting code adopted by the Secretary of Health and Human Services.

(b) Payment will be considered to have been made for the benefit of a physician, dentist, or other licensed health care practitioner only if (at least a majority of) a malpractice payment review panel concludes that payment was related to substandard care, professional incompetence, or professional misconduct on the part of the physician, dentist, or other licensed health care practitioner. For purposes of this part, a panel shall have a minimum of three individuals appointed by the Director, Medical-Legal Affairs (including at least one member of the profession/occupation of the practitioner(s) whose actions are under review). The conclusions of the panel shall, at a minimum, be based on review of documents pertinent to the care that led to the claim. These documents include the medical records of the patient whose care led to the claim, any report of an administrative investigation board appointed to investigate the care, and the opinion of any consultant which the panel may request in its discretion. These documents do not include those generated primarily for consideration or litigation of the claim of malpractice. In ad-

dition, to the extent practicable, the documents shall include written statements of the individual(s) involved in the care which led to the claim. The practitioner(s) whose actions are under review will receive a written notice, hand-delivered or sent to the practitioner's last known address (return receipt requested), from the VA facility director at the time the VA facility director receives the Notice of Payment. That notice from the VA facility director will indicate that VA is considering whether to report the practitioner to the National Practitioner Data Bank because of a specified malpractice payment made, and provide the practitioner the opportunity, within 60 days of receipt, to submit a written statement concerning the care that led to the claim. Inability to notify or non-response from the identified practitioner(s) will not preclude completion of the review and reporting process. The panel, at its discretion, may request additional information from the practitioner or the VA facility where the incident occurred. The review panel's notification to the VA facility Director shall include the acts or omissions considered, the reporting conclusion, and the rationale for the conclusion.

(c) Attending staff (including contract employees, such as scarce medical specialists providing care pursuant to a contract under 38 U.S.C. 7409) are responsible for actions of licensed trainees assigned under their supervision. Notwithstanding the provisions of paragraph (b) of this section, actions of a licensed trainee (intern or resident) acting within the scope of his or her training program that otherwise would warrant reporting for substandard care, professional incompetence, or professional misconduct under the provisions of paragraph (b) of this section, will be reported only if the panel, by at least a majority, concludes that such actions constitute gross negligence or willful professional misconduct. For purposes of paragraph (b) of this section, payment will be considered to be made for the benefit of a physician, dentist, or other health care practitioner, in their supervisory capacity, if the panel concludes, by at least a majority, that the physician,

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dentist or other health care practitioner was acting in a supervisory capacity; that the payment was related to substandard care, professional incompetence, or professional misconduct of the trainee and not the supervisor; and that the trainee did not commit gross negligence or willful professional misconduct. Such report will note that the physician, dentist, or other health care practitioner is being reported in a supervisory capacity.

NOTE TO PARAGRAPH (C): Licensed trainees acting outside the scope of their training program (e.g. acting as admitting officer of the day) will be reported under the provisions of paragraph (b) of this section.

(d) The Director of the facility at which the claim arose has the primary responsibility for submitting the report to the National Practitioner Data Bank and for providing a copy to the practitioner, to the State Licensing Board in each State where the practitioner holds a license, and to the State Licensing Board in which the facility is located. However, the Chief Patient Care Services Officer is also authorized to submit the report to the National Practitioner Data Bank and provide copies to the practitioner and State Licensing Boards in cases where the Chief Patient Care Services Officer deems it appropriate to do so. The Director of the facility also shall provide to the practitioner a copy of the review panel's notification to the Director.

(The Office of Management and Budget has approved the information collection requirements in this section under control number 2900-0621.)

§ 46.4 Clinical privileges actions reporting.

(a) VA will file an adverse action report with the National Practitioner Data Bank in accordance with regulations at 45 CFR part 60, subpart B, as applicable, regarding any of the following actions:

(1) An action of a Director after consideration of a professional review action that, for a period longer than 30 days, adversely affects (by reducing, restricting, suspending, revoking, or failing to renew) the clinical privileges of a physician or dentist relating to possible incompetence or improper professional conduct.

(2) Acceptance of the surrender of clinical privileges, including the surrender of clinical privileges inherent in resignation or retirement, or any restriction of such privileges by a physician or dentist either while under investigation by the health care entity relating to possible incompetence or improper professional conduct, or in return for not conducting such an investigation or proceeding whether or not the individual remains in VA service.

(b) The report specified in paragraph (a) of this section will provide the following information—

(1) With respect to the physician or dentist:

- (i) Name;
- (ii) Work address;
- (iii) Home address, if known;
- (iv) Social Security number, if known (and if obtained in accordance with section 7 of the Privacy Act of 1974);
- (v) Date of birth;
- (vi) Name of each professional school attended and year of graduation;
- (vii) For each professional license: the license number, the field of licensure, and the name of the State in which the license is held;
- (viii) Drug Enforcement Administration registration number, if applicable and known;
- (ix) A description of the acts or omissions or other reasons for privilege loss, or, if known, for surrender; and
- (x) Action taken, date action was made final, length of action and effective date of the action.

(2) With respect to the VA facility—

- (i) Name and address of the reporting facility; and
- (ii) Name, title, and telephone number of the responsible official submitting the report.

(c) A copy of the report referred to in paragraph (a) of this section will also be filed with the State Licensing Board in the State(s) in which the practitioner is licensed and in which the facility is located. It is intended that the report be filed within 15 days of the date the action is made final, that is, subsequent to any internal (to the facility) appeal.

(d) As soon as practicable after it is determined that a report shall be filed with the National Practitioner Data

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Bank and State Licensing Boards under paragraphs (a)(2) and (c) of this section, VA shall provide written notice to the practitioner that a report will be filed with the National Practitioner Data Bank with a copy to the State Licensing Board in each State in which the practitioner is licensed and in the State in which the facility is located.

Subpart C—National Practitioner Data Bank Inquiries

§ 46.5 National Practitioner Data Bank inquiries.

VA will request information from the National Practitioner Data Bank, in accordance with the regulations published at 45 CFR part 60, subpart C, as applicable, concerning a physician, dentist, or other licensed health care practitioner as follows:

(a) At the time a physician, dentist, or other health care practitioner applies for a position at VA Central Office, any of its regional offices, or on the medical staff, or for clinical privileges at a VA hospital or other health care entity operated under the auspice of VA;

(b) No less often than every 2 years concerning any physician, dentist, or other health care practitioner who is on the medical staff or who has clinical privileges at a VA hospital or other health care entity operated under the auspice of VA; and

(c) At other times pursuant to VA policy and needs and consistent with the Act and Department of Health and Human Services Regulations (45 CFR part 60).

Subpart D—Miscellaneous

§ 46.6 Medical quality assurance records confidentiality.

Note that medical quality assurance records that are confidential and privileged under the provisions of 38 U.S.C. 5705 may not be used as evidence for reporting individuals to the National Practitioner Data Bank.

§ 46.7 Prohibitions concerning negotiations.

Reporting under this part (including the submission of copies) may not be

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the subject of negotiation in any settlement agreement, employee action, legal proceedings, or any other negotiated settlement.

§ 46.8 Independent contractors.

Independent contractors acting on behalf of the Department of Veterans Affairs are subject to the National Practitioner Data Bank reporting provisions of this part. In the following circumstances, VA will provide the contractor with notice that a report of a clinical privileges action will be filed with the National Practitioner Data Bank with a copy with the State Licensing Board in the State(s) in which the contractor is licensed and in which the facility is located: where VA terminates a contract for possible incompetence or improper professional conduct, thereby automatically revoking the contractor's clinical privileges, or where the contractor terminates the contract, thereby surrendering clinical privileges, either while under investigation relating to possible incompetence or improper professional conduct or in return for not conducting such an investigation or proceeding.

(Authority: 38 U.S.C. 5705)

PART 47—POLICY REGARDING REPORTING HEALTH CARE PROFESSIONALS TO STATE LICENSING BOARDS

Sec.

47.1 Definitions.

47.2 Reporting to State Licensing Boards.

AUTHORITY: Pub. L. 99-166, 99 Stat. 941; 38 U.S.C. 501.

SOURCE: 58 FR 48455, Sept. 16, 1993, unless otherwise noted.

47.1 Definitions.

(a) *Dentist* means a doctor of dental surgery or dental medicine legally authorized to practice dental surgery or medical dentistry by a State (or any individual who, without authority, holds himself or herself out to be so authorized).

(b) *Other health care professional* means an individual other than a physician or dentist who is licensed or otherwise authorized by a State to provide health care services (or any individual