

The Health Care Quality Improvement Act and the National Practitioner Databank: Constitutional Violations and Preservation of Civil Rights for Physicians

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ABSTRACT

In 1986, the US Congress passed the Health Care Quality Improvement Act (HCQIA). This law was designed to protect the health and safety of the public by 1) enhancing the Peer Review process through protection for peer review members from lawsuits, and 2) providing a national repository (National Practitioner Data Bank, NPDB) for reported information regarding medical malpractice payments and adverse actions involving physicians. Since then, the NPDB also monitors information on physicians that are deemed incompetent or unprofessional by their employers, for both rightful and wrongful (“sham peer review”) reasons. The HCQIA framers in 1986 could not foresee that in 2023, hospitals and other healthcare employers would invariably deny employment and/or hospital privileges based on an NPDB report outlining the loss of hospital privileges or relinquishment of hospital privileges under investigation. Such an adverse report by NPDB results in the inability of the physician to obtain employment or practice in a hospital. Hence, the unintended consequence of reporting adverse peer review actions by NPDB, an agency of the Federal Government, violates the constitutional and civil rights of said physicians. The NPDB reporting provision of HCQIA appears to violate a number of amendments, specifically the 5th, 8th, 9th, and 10th amendments of the Constitution.

In the 1980’s an increasing number of lawsuits were brought against peer review groups by physicians whose privileges had been restricted by hospitals, medical societies, and state medical licensing boards. Peculiarly, the American Medical Association (AMA) argued that the lawsuits against peer review groups had a “chilling effect” on the existentially vital peer review process. In response to these concerns, the US Congress passed the Health Care Quality Improvement Act of 1986 (HCQIA), signed into effect on November 14, 1986 and became fully operational on September 1, 1990. HCQIA was designed to protect the health and safety of the public by 1) enhancing the Peer Review process through protection for peer review members from lawsuits, and 2) providing a national repository for reported information regarding medical malpractice payments and adverse actions involving physicians, which among other things, would

Vol No: 08, Issue: 03

Received Date: February 22, 2023

Published Date: March 07, 2023

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Citation: Gharagozloo F, et al. (2023). The Health Care Quality Improvement Act and the National Practitioner Databank: Constitutional Violations and Preservation of Civil Rights for Physicians. Mathews J Case Rep. 8(3):93.

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monitor the movement of incompetent or unprofessional physicians [1].

HCQIA

HCQIA is comprised of two parts:

Part A: Immunity for Professional Review Activity

HCQIA provides peer review members, and those individuals who provide information to the peer review committee, with qualified immunity from private suits under both state and federal laws. In order to provide immunity, HCQIA stipulates compliance with the Act's requirements which are outlined in section 11112 (a) and are:

1. Peer review action must have been undertaken in the reasonable belief that the action would further the quality of healthcare
2. Peer review action must have been undertaken after reasonable efforts to obtain the facts
3. Peer review action is in compliance with adequate due process requirements for Notice, and an Impartial Fair Hearing
4. Peer review action must have been undertaken with the "reasonable" belief that the facts warranted the action

It is important to emphasize that the intent of HCQIA was to encourage self-policing by the medical profession by protecting physicians who participated as members of the peer review committee, or as witnesses in such proceedings, from retaliatory lawsuits. As a result, the immunity protection provided by HCQIA is broad and only requires adherence to "fundamental fairness" for the process to satisfy the Act.

However, in order for a physician to challenge Peer Review, Congress adopted the "preponderance of evidence" standard for the peer review proceedings. This shifts the burden of proof to the physician and makes the physician demonstrate preponderance of the evidence.

HCQIA does not provide immunity to hospitals outside the peer review process in terms of being named as codefendants in a malpractice lawsuit, or liability for negligence in granting of staff privileges.

Part B: Reporting to the National Practitioner Data Bank

HCQIA stipulated that as of September 1, 1990, adverse actions taken against physicians in terms of professional review actions and curtailment of clinical privileges for greater than 30 days, and malpractice payments, were to be reported to the National Practitioner Data Bank (NPDB).

In order to further the goal of strengthening the confidential peer review process, HCQIA does not provide the public with access to NPDB. HCQIA grants access to information contained

in HCQIA to hospitals in the process of employment and credentialing. In addition, HCQIA grants attorneys access to information contained in NPDB after two elements are met: 1. A medical malpractice action or claim is filed against both hospital and the practitioner, and 2. Evidence is produced at the hospital failed to request in NPDB information on the practitioner as required by law.

Since its inception, HCQIA has been the subject of controversy. Many have voiced concerns about anticompetitive behavior by hospitals or physicians which can potentially engage in "Sham Peer Review" under the protection of HCQIA. The issue at hand is that "Sham Peer Review" often does not arise from adverse patient event(s) but sometimes from fabricated charges of "disruptive behavior" of "difficult" physicians that hospital administrators wish to terminate [2-6].

Although Sham Peer Review remains a matter of interpretation and vigorous debate, it concerns the provisions in Part A of HCQIA. This communication is intended to shine the light on the unintended consequences of Part B of HCQIA which have resulted in violation of the Constitutional Rights of physicians in the present healthcare environment.

Consequences of reporting of adverse actions to National Practitioner Databank (NPDB)

NPDB is an agency of the Federal Government under the jurisdiction of the Department of Health and Human Services. Peer review actions are reported to NPDB. NPDB publishes the reports but does not investigate the adverse reports by the reporting entities.

HCQIA became law as the medical system was undergoing a significant organizational change. In the years which preceded the Congressional hearings in 1986, most physicians were private practitioners who practiced in hospitals by virtue of holding "privileges" at that hospital. In the 1980's, there was effectively an organizational and administrative wall between Medical Staff Office Governance and the Hospital Administration. Fast forward to the drastic changes in the health care system since 1986. In 2023, healthcare has been consolidated into increasingly larger Hospital Organizations, payment for healthcare services has become consolidated under more powerful governmental and private insurance carriers, and the majority of physicians are now "employed".

The framers of HCQIA did not foresee that in 2023, hospitals and employers will invariably deny employment and/or hospital privileges based on an NPDB report outlining the loss of hospital privileges or relinquishment of hospital privileges under investigation. Such an adverse report by NPDB results in the inability of the physician to obtain employment or practice in a hospital. Hence, the unintended consequence of the reporting of adverse peer review actions

by NPDB, an agency of the Federal Government, can violate the constitutional and civil rights of the said physicians.

Specifically, the NPDB reporting provision of HCQIA violates 5th, 8th, 9th and 10th amendments of the Constitution for the following reason:

1. 5th Amendment: Right to “Due Process” [7].

Under HCQIA the Peer review proceedings are confidential. However, the reporting by an agency of the Federal Government without an independent investigation and due process is a violation of the 5th amendment.

2. 8th Amendment: Cruel and Unusual Punishment [8].

In 2023, adverse reports by NPDB which result in loss of employment, inability to obtain hospital privileges, and termination of a physician’s career, amount to cruel and unusual punishment and violate the 8th amendment.

3. 9th Amendment: Rights that were granted by state laws, cannot then be preempted by federal laws under the Supremacy Clause [9]

The Physician is licensed to practice medicine under the state law. Adverse reporting by NPDB, a Federal Agency, which prevents the physician from exercising his rights under the state license represents a violation of the 9th Amendment.

4. 10th Amendment: The powers not delegated to the Federal Government by the Constitution, nor prohibited by it to the States, are reserved to the States respectively [10]

As in the case of 9th Amendment, The Physician is licensed to practice medicine under the state law. Adverse reporting by NPDB, a Federal Agency, which prevents the physician from exercising his rights under the state license represents a violation of the 10th Amendment.

For all these reasons, the unverified reporting by the NPDB, and the dire consequences of such reporting for the subject physicians represent an egregious violation of their constitutional rights. It is time that the debate surrounding HCQIA shift from “Sham” Peer Review to the unforeseen, yet devastating, violations of the constitutional rights of physicians.

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