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March 15, 2011

Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Ave. SW
Washington, D.C. 20201

Dear Secretary Sebelius:

Attached is a Public Citizen report being published today, which found that 5,887 physicians who have one or more clinical privilege reports in the National Practitioner Data Bank (NPDB) — the majority of physicians with such clinical privilege reports — have never had any state medical board action. State medical board licensure action against a physician, if warranted, provides a greater assurance than a hospital privilege action alone that the 105 million patients whose medical care is partly funded by HHS (47 million Medicare, 58 million Medicaid enrollees) would be better protected from questionable physicians. For example, our study discovered that because 220 physicians were considered an "Immediate Threat to Health or Safety" of patients, hospitals ordered an emergency suspension of admitting privileges for 167 (or 75 percent) of these 220 physicians. Despite having been found by hospital peer review to be an immediate threat to the health or safety of patients, none of these physicians had a state licensure board action.

The purpose of this letter is to urge you to re-initiate previous, but currently non-existent Office of Inspector General (OIG) investigations concerning the dangerously lax disciplinary actions by so many state medical boards.

Further information from our study of these 5,887 physicians with serious actions taken against most of them by hospitals but no medical board disciplinary actions follows:

Clinical Privileging Actions — Cause and Duration of Action

In addition to the 220 physicians noted above, other reasons for the actions against these 5,887 physicians included:

- 1,149 physicians disciplined because of incompetence, negligence or malpractice;
- 605 physicians disciplined because of substandard care.

Other categories of serious deviations of physician behavior/performance that resulted in clinical privilege revocation or restrictions included sexual misconduct, unable to practice safely, fraud including insurance fraud, fraud obtaining a license, and fraud against health care programs and narcotics violations.

3,218 physicians in our study lost their clinical privileges permanently, and an additional 389 physicians lost privileges for more than one year.

Our report also presents specific examples of physicians who have been disciplined by hospitals but who have not a state medical board action. Many of these physicians have multiple medical malpractice payouts. The following example involves a physician whose last clinical privilege sanction was from a hospital in Texas.

> Physician # 91056 had a clinical privilege report in 2006. In addition, in 2009 the practitioner had his membership suspended by a professional medical association for unprofessional conduct; such a sanction is reportable to the NPDB. The physician had 22 medical malpractice payments totaling $2.6 million for the period 1996-2008. The malpractice claims included failure to order appropriate medication, operating on the wrong body part, improper management, delay in diagnosis (two cases), failure to diagnose, two cases improper performance (surgery related), failure to perform procedure, two cases failure to treat (surgery related), failure to recognize a complication, contraindicated procedure (surgery related) and one case of wrong dosage administered. Three patients incurred significant permanent injuries, one patient had a major temporary injury and two patients had minor permanent injuries.

During the 1980s and 1990s your Office of Inspector General acknowledged the importance of effective medical board oversight; during this time period they conducted 16 evaluations of state health professional licensing boards including nine specifically addressing inadequate medical boards' performance. One of the medical board studies, entitled "Federal Initiatives to Improve State Medical Boards' Performance" (OEI-01-93-00020) noted:

> State medical boards provide a vital front line of protection for millions of people who receive medical care including those in the Medicare and Medicaid Programs … the boards have not been at the forefront of quality assurance efforts.

Furthermore, in February 1997, June Gibbs Brown, the Inspector General at OIG, Department of Health and Human Services (HHS), testified before Congress, as follows:

> In February 1992, the OIG excluded a California oncologist for 10 years … because the OIG determined that he had rendered over 3,900 excessive, substandard, unnecessary, and potentially risky services to seven Medicare

> beneficiaries over a six year period of time … Once the exclusion was in place, the licensing board did revoke the doctor's license. Then it stayed the revocation and put the license on probation. The stay has been lifted but if the OIG had not devoted its investigative power … to excluding this physician, the Medicare/Medicaid patient population would have continued to be at grave risk during the four years that the licensing board took to get to an exclusionable point in its process.[1]

Because of highly questionable legal constraints imposed by OIG lawyers, the last OIG investigation of state medical boards was in 1993.

Notwithstanding continuing harm to Medicare and Medicaid patients from inadequately disciplined physicians, the OIG has taken the position, based on "guidance" from the Office of Council to the Inspector General (OCIG), that OIG has no authority to review the performance of state medical boards. For example, according to a former OIG employee, who is now a volunteer at Public Citizen, prior to his OIG retirement in January 2008, he requested approval to recommend a new OIG study of state medical boards. His recommendation was made after he learned from news reports that when the Department of Veterans Affairs (VA) queried the Massachusetts medical board about a physician, the board failed to inform the VA that the physician was under investigation in Massachusetts for substandard care. After the physician went to work for the VA, he had to resign from the hospital because of standard of care problems.

Although state medical board disclosure policies and other medical board oversight issues could affect millions of Medicare and Medicaid patients, the Office of Council to the Inspector General rejected the staff request for consideration of a medical board study based on the "lack of OIG authority." This decision reflected the above-mentioned long-standing questionable legal conditions imposed by OCIG on OIG studies.

Furthermore, such a constraint seems to contradict OIG testimony at a March 2, 2011 House Subcommittee on Oversight hearing during which the Chief Counsel to the IG noted: "Program exclusions bolster our fraud-fighting efforts by removing from the Federal Health Care Programs those who pose the greatest risk to programs and beneficiaries…There are a number of significant grounds for permissive exclusion, including actions taken by a state licensing authority…" (See: http://oig.hhs.gov/testimony/docs/2011/morris_testimony_03022011.pdf.)

If OIG discretionary sanction authority depends, to a certain extent, on referrals from state licensing boards, OIG's ability to assure the optimal number of medical board referrals by investigating board performance appears to be compromised by the questionable legal barriers established by OIG's own legal staff that prevent OIG studies of medical boards' performance.

Finally, recent stories in the media have continued to highlight concerns about medical boards' effectiveness in disciplining doctors:

[1] See http://www.hhs.gov/asl/testify/t960905a.html.

1. Illinois Medical Board Fails to Act on Sex Offenders - http://www.chicagotribune.com/health/ct-met-doctor-sex-charges-20100729,0,5520049.story

2. Medical Boards Discipline Doctors With Performance and Conduct Problems by Having Them Treat Indigent Patients and Prisoners - http://www.reportingonhealth.org/blogs/doctors-behaving-badly-maine-welcomes-psychiatrist-fraud-conviction-and-drug-abuse-concerns http://www.reportingonhealth.org/blogs/doctors-behaving-badly-mississippi-makes-public-pony-peek-doctor-histories

3. Missouri's Regulation of Doctors is Among the Nation's Most Lax - http://www.stltoday.com/lifestyles/health-med-fit/fitness/article_5cc342ba-dd6c-5428-b25e-99f8faeca638.html

4. Connecticut Often Takes No Action Against Doctors Disciplined in Nearby States - http://newhavenindependent.org/index.php/health/entry/connecticut_lax_on_doc_discipline/id_31659

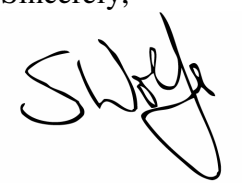
5. Wisconsin Medical Board Sued To Require Action - http://www.wisconsin-lawyers-blog.com/malpractice-leads-to-unusual-writ-of-mandamus/

6. Tennessee Medical Board Fails to Adequately Sanction Physician Who Left Surgery for 80 Minutes to Visit Daughter's School - http://www.newschannel5.com/story/12871850/why-patients-may-not-get-whole-truth-about-doctors

7. Sole Public Member of Medical Board is Attorney for Physicians - http://www.stltoday.com/lifestyles/health-med-fit/fitness/article_f64e5713-5f13-509e-9364-eb59402a09b3.html

Madame Secretary, because of OIG's significant historical oversight role involving state medical boards performance, and because of medical boards importance to Medicare and Medicaid patients' protection from questionable doctors, Public Citizen calls upon HHS to re-initiate OIG investigations of medical boards.

Sincerely,



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