

AUG 3 1993

Joseph N. Onak
JoAnn E. MacBeth
Mail and Moring
Pennsylvania Ave., N.W.
Washington, D.C. 20004

Re: National Practitioner Data Bank--Reporting
of Physician Who Resigns From Professional
Society While Under Investigation

Mr. Onak and Ms. MacBeth:

This is in response to your letter of July 14, 1992, in which you
discuss "voluntary" reporting to the National Practitioner Data
Bank (Data Bank) by the American Psychiatric Association (APA) of
physicians who resign from your organization while under
investigation. A discussion of this issue follows.

Section 423(a) of the Health Care Quality Improvement Act of 1986
(Data Bank statute), 42 U.S.C. § 11133(a), requires adverse
action reporting on physicians as follows:

(a) REPORTING BY HEALTH CARE ENTITIES.--

(1) On physicians.--Each health care entity
which--

(A) takes a professional review action
that adversely affects the clinical
privileges of a physician for a
period longer than 30 days;

(B) accepts the surrender of clinical
privileges of a physician--

(i) while the physician is under an
investigation by the entity
relating to possible incompetence
or improper professional conduct,
or

(ii) in return for not conducting such
an investigation or proceeding; or

(C) in the case of such an entity which
is a professional society, takes a
professional review action which
adversely affects the membership of
a physician in the society...
(Emphasis added).

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OFFICE	SURNAME	DATE	OFFICE	SURNAME	DATE	OFFICE	SURNAME	DATE
G-11	Onak	7/14/92						
G-11	MacBeth	7/14/92						

Page 2 - Mr. Joseph N. Onak and Ms. JoAnn E. MacBeth

As you can see, although the Act explicitly provides for the reporting of the surrender of clinical privileges by a physician while under investigation or in return for not conducting an investigation or taking a professional action, the Act does not provide for the reporting of the surrender of membership in a professional society under these circumstances.

Your letter refers to "voluntary" reporting of surrenders by the APA. Section 423(a)(2) refers to "permissive" reporting, not only on licensed health care practitioners other than physicians, and then only under the circumstances set forth in section 423(a), quoted above. "Permissive" or "voluntary" reporting is not indicated for any other events.

The authority of the Secretary of Health and Human Services (the Secretary) to establish and operate the Data Bank is derived entirely from the Health Care Quality Improvement Act of 1986. Therefore, the Secretary is limited to collecting information on the Data Bank as is authorized by this statute, as implemented through regulations at 45 CFR Part 60.

The statute is clear and unambiguous in what must be reported to the Data Bank, and also in what may be reported. Professional societies report only a "professional review action which adversely affects the membership of a physician in the society." Although health care entities must report the surrender of clinical privileges under certain circumstances, the statute does not authorize similar reporting for professional societies.

In summary, while your letter makes cogent arguments as to why the surrender of a physician while under investigation by a professional society should be in the Data Bank, the Secretary does not have the authority to accept and enter into the Data Bank reports from professional societies on surrenders by their members while under investigation. To permit the Secretary to place such reports in the Data Bank would require a statutory amendment.

We appreciate your interest in the Data Bank and hope that this information has been helpful.

Sincerely,

/s/ General Counsel

Harriet S. Rabb
General Counsel

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24-2903

July 14, 1993

Harriet Rabb, Esq.
General Counsel
Department of Health and
Human Services
Room 722A
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D. C. 20201

Dear Harriet:

I am writing in the hope that you can resolve a bizarre and unnecessary dispute between the American Psychiatric Association (APA) and the DHHS Office of General Counsel.

The APA has adopted a strict ethical code and conducts investigations and hearings into alleged violations of this code. If a member is ultimately expelled or suspended for ethical misconduct the APA duly reports this decision to the National Practitioner Data Bank, as required by the Health Care Quality Improvement Act (HCQIA). This enables state licensing boards and other authorities to take appropriate further action to protect the public.

On occasion a member will resign from the APA before the Association has been able to complete its investigation of alleged ethical misconduct. Under the HCQIA, a professional society such as the APA, unlike hospital staffs and other organizations that provide health care services, is not required to file a report with the data bank whenever a physician resigns during the course of an investigation. Nevertheless, the APA has filed such reports on a voluntary basis in the belief that they may be helpful in protecting the public from unethical conduct by physicians. And, in fact, in several cases, state licensing boards have used these voluntary APA reports to commence investigations which have resulted in disciplinary action.

Harriet Rabb, Esq.
July 14, 1993
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Not surprisingly, counsel for APA members who have resigned during an investigation have taken the position that the APA should not report these resignations to the data bank. Recently, HHS lawyers have agreed with this position and have even threatened to remove from the data bank all the voluntary reports previously filed by the APA (see Attachment A). The APA believes that the public and the Congressional sponsors of HCQIA would be astonished to learn that HHS is denying professional associations the right to make voluntary reports regarding potential ethical misconduct by physicians. This position seems utterly inconsistent with the American people's demand for, and the Administration's commitment to, improved quality of care.

The APA hopes that you will take prompt action to resolve this dispute.

Sincerely,

Joseph N. Onek

Joseph N. Onek
John E. Macbeth

Counsel to the American
Psychiatric Association

Enclosures

Public Health Division
Room 4A-63 Parklawn Bldg.
5800 Fishers Lane
Rockville, Maryland 20857
(301) 443-2644

June 3, 1993

Ms. Joanna MacBeth
Crowell and Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Re: National Practitioner Data Bank--Reporting of
physician who resigns from professional soci-
ety while under investigation

Dear Ms. MacBeth:

For your information, we are enclosing a copy of the advice given to you discussed in our telephone conversation yesterday. You should understand that we are discussing this matter with you with respect to general reporting to the Data Bank by the American Psychiatric Association, and not on behalf of Mr. Erens or his client. The Department of Health and Human Services will be examining the prior reports filed by the Association with the Data Bank for compliance with the Health Care Quality Improvement Act.

Sincerely,



Brenda J. Frank
Senior Attorney
Public Health Division

Enclosure

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Public Health Division
Room 4A-53 Perle Dawn Bldg.
5600 Fishers Lane
Rockville, Maryland 20857
(301) 443-2644

June 3, 1993

Re: National Practitioner Data Bank--Reporting of
physician who resigns from professional soci-
ety while under investigation

Dear Mr. [REDACTED]

We are writing to confirm our telephone conversation of yesterday on the above subject. This was in further detail of the conversation with Don Young, of our office, who also wrote to you on April 1, 1993 (enclosed). In our discussion, I advised as follows:

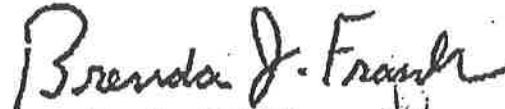
In accordance with the advice given to you by Mr. Young, the resignation of a physician from a professional society while he or she is under investigation by that society for possible incompetence or improper professional conduct is not reportable to the National Practitioner Data Bank. In the case of a professional society, only a professional review action that adversely affects the membership of a physician in the society is reportable (section 423(a)(1)(C)). A professional society, such as the American Psychiatric Association (APA) (the society at issue), has no discretion to report the resignation of a physician from its society while the physician is under investigation by the APA because the Health Care Quality Improvement Act (the Act) does not authorize or permit such reporting. If reported, this event would be subject to being voided by the Department of Health and Human Services upon investigation or through the dispute process.

The Act does specifically provide for certain "permissive" reporting. Thus, section 423(a)(2)(42 U.S.C. 81133(a)(2)), states that health care entities "may report" information with respect to health care practitioners other than physicians and dentists. The Act does not, however, provide a professional society (or any other health care entity) with general discretion to report events to the Data Bank that are not explicitly provided for.

A professional society or any other reporting entity may only report to the Data Bank what is authorized to be reported under the Act. The Data Bank has no authority to accept reports which are not required or authorized to be filed under the terms of the Act. Any reports which are filed with the Data Bank which are not authorized to be filed are subject to being voided by the Department of Health and Human Services and are subject to challenge through dispute by the named practitioner.

In short, the Act, not the American Psychiatric Association, determines what may be filed in the Data Bank. The Association has no discretion in this matter.

Sincerely,



Brenda J. Frank
Senior Attorney
Public Health Division

cc: Ms. JoAnn MacBeth
Crowell and Moring

Mr. Melvin Sabhin, M.D.
Medical Director
American Psychiatric Association

Mr. Jerry Anderson
Associate Director (Operations)
Division of Quality Assurance
DHHS

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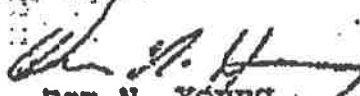
April 1, 1993

Re: National Practitioner Data Bank--Reporting of physician
who resigns from professional society while under
investigation

Dear Mr.

This will confirm our telephone conversation of today on the
above subject, in which I advised as follows:

The resignation of a physician from a professional society while
he or she is under investigation by that society for possible
incompetence or improper professional conduct is not reportable
to the National Practitioner Data Bank. Section 423(a) of the
Health Care Quality Improvement Act of 1986, 42 U.S.C. §
11133(a), makes a clear distinction in this regard between
professional societies and other health care entities, such as
hospitals: in the case of the latter entities, any professional
review action that adversely affects the clinical privileges of a
physician for longer than 30 days or the surrender of clinical
privileges by a physician while he or she is under investigation,
or in return for not conducting an investigation, is specifically
reportable (see section 423(a)(1)(B)); while in the case of a
professional society, only a professional review action that
adversely affects the membership of the physician in the society
is reportable (section 423(a)(1)(C)).


Don N. Young
Chief, Health Resources
and Services Branch

cc: Tom Nelson