ISSN: 2754-4516

Journal of Medicine and Healthcare

SCIENTIFIC Research and Community

Review Article

Open Access

Constitutional Violations by the Health Care Quality Improvement Act (HCQIA) and the Reporting by the National Practitioner Databank (NPDB): Focusing on the Preservation of the Civil Rights of Physicians

Farid Gharagozloo[1]*, Robert Poston[2] and Rainer WG Gruessner[3]

[1]University of Central Florida College of Medicine, Orlando, Florida

[2]Mercy Health, Paducah, Kentucky

[3]State University of New York (SUNY), Brooklyn, New York

ABSTRACT

In 1986, the US Congress passed the Health Care Quality Improvement Act of 1986. (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 monitor the movement of incompetent or unprofessional physicians. 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 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. Therefore, in 2023, 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.

***Corresponding author**

Farid Gharagozloo, Institute for Advanced Thoracic Surgery, 6718 lake Nona Blvd., Orlando Florida 32827, USA.

Received: February 10, 2023; **Accepted:** February 16, 2023; **Published:** March 01, 2023

Keywords: Healthcare Quality Improvement Act, HCQIA, Constitutional Rights, Sham Peer Review, NPDB

The NPDB reporting provision of HCQIA violates 5th, 8th, 9th and 10th amendments of the Constitution.

In the 1980s 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. Surprisingly, 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 1986, in response to these concerns, the US Congress passed the Health Care Quality Improvement Act of 1986 (HCQIA) which was 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,

2) Providing a national repository for reported information regarding medical malpractice payments and adverse actions involving physicians, which among other things, would 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 section11112 (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.

Controversies Surrounding HCQIA

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.

A just, equitable, and credible peer review process is the cornerstone of a high quality and safe Health Care System. The importance of an unbiased and protected Peer Review System is codified in the Health Care Quality Improvement Act of 1986, HCQIA.(1) However, the peer review process may go wrong when in the new landscape of healthcare which is dominated by large hospital organizations and the big business of medicine, the peer review system may be misused for reasons other than to ensure compliance to the highest standards of professionalism in the interest of the public and the profession. In those instances, due to the immunity protection, which is afforded by HCQIA, contrived allegations of incompetence or disruptive behavior may be used to retaliate against physicians. Clearly such a potentially unbecoming application of peer review was never foreseen by the lawmakers who tried to preserve the sanctity of the Peer Review. Nonetheless, medicine has undergone significant change since 1986, and in 2022, the perception of "Sham Peer Review" is an unfortunate reality. Even if "Sham Peer Review" is just a perception, it presents a grave danger to an existential institution which has defined medicine for many decades. On the other hand, if "Sham Peer Review" is real, not only does it threaten the very foundation of Medicine, but it threatens the wellbeing of the public that HCQIA was designed to protect.

The exact frequency of sham peer review is uncertain, but according to NPDB records, hospital disciplinary actions including perceived sham peer review average 2.5 per year per hospital. This number does not include the rate of false allegations made against physicians in order to coerce settlements without a NPDB report, which putatively occurs at a rate that is at least 4 times higher [2,3]. This correlates with a 5-figure number and it is common enough to have a real impact on the growing epidemic of resignations, burnout, and poor morale of physicians.

Unlike 1986, in 2022, in most hospital organizations, peer review committee members are not always independent. Members are typically hospital-employed physicians that have signed an agreement to make decisions (including those about peer review) that comport with expectations, metrics, and targets of the administration of the healthcare system. At times, this requires physician members to accept the political or strategic goals of a hospital system that may want to exploit sham peer review for the hospital administration's purposes. A hospital administration that selects this route becomes immune under HCQIA from any lawsuits by a terminated physician merely by labeling those actions "peer review". Most hospital bylaws grant the hospital the right to remove MEC members that are unwilling to comply with such capricious decisions. While the original intent of immunity was to protect the judgments of physician reviewers about the medical competency of their peers, it has now been also coopted to protect political decisions such as in terminating "difficult" physicians.

In addition, most hospital-appointed peer review committee members lack specific training and are not experts in that specific field. Hospitals shy away from true and fair peer review by mutually agreed-upon national experts because they do not necessarily align with the goals of hospital administration. However, the judgments of hospital-appointed members are at significant risk of being biased by personal or professional ties and administrative expectations. These "unfair" issues add up to investigations that are often incompetently performed with tremendous adverse consequences to the practitioner.

The remedy for an accused physician facing grave professional consequences is to file a lawsuit against perceived "Sham peer Review". But the hospital has a very potent ace-in-the-hole. The legally guaranteed immunity allows hospitals to keep their actions confidential and information privileged from legal discovery. It also allows hospital administrators to officially distance themselves from the accused physician for several reasons and from a process they know was corrupt or fear of being blamed for a negative outcome [4-8].

A physician is most likely to succeed in court when there is evidence that the procedure that was used in the investigation and decision-making process was fundamentally flawed. Although, courts of law may be important game changers for the problem of sham peer review, primarily for financial reasons, most affected physicians do not take legal action. Suing a hospital is expensive, time-consuming and requires enormous mental resolve.

Constitutional Rights

Although Sham Peer Review, as outlined, remains a matter of interpretation and vigorous debate, it concerns the provisions in Part A of HCQIA. It is crucial to emphasize the unintended consequences of Part B of HCQIA which have resulted in the 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 the 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. Therefore, in 2023, 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.

The NPDB reporting provision of HCQIA violates 5th, 8th, 9th and 10th amendments of the Constitution.

1. 5th Amendment: Right to "Due Process" [9].
   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 [10].
   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 [11].
   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 [12].
   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.

References

1. Horner S (1990) The Health Care Quality Improvement Act of 1986: Its History, Provisions, Applications and Implications. American Journal of Law & Medicine 16: 453-498.
2. Kohatsu ND, Gould D, Ross LK, Fox PJ (2004) Characteristics Associated with Physician Discipline: A Case-Control Study. Arch Intern Med 164: 653-658.
3. Rate of physician discipline: https://www.acpjournals.org/doi/10.7326/0003-4819-144-2-200601170-00008#t3-8.
4. Ho PK (2014) HCQIA does not provide adequate due process protection, improve healthcare quality, and is outdated under "Obama care". Indiana Health law Review 11:1.
5. Poston R, Gharagozloo F, Gruessner RWG (2022) Sham Peer Review and its Consequences to Surgeons. World J Surg Surgical Res 5: 1431.
6. Gharagozloo F, Poston R, Gruessner RWG (2022) The Health Care Quality Improvement Act of 1986: What Every Surgeon Needs to Know. World J Surg Surgical Res 5: 1434.
7. Poston R, Gharagozloo F, Gruessner RWG (2022) Sham Peer Review, Consequences to Surgeons, and Remedies. Clin Surg 7: 3603.
8. Gruessner RWG, Poston R, Gharagozloo F (2023) Sham Peer Review: Consequences and Remedy. Mathews J Case Rep 8: 89.
9. "Fifth Amendment: Grand Jury, Double Jeopardy, Self Incrimination, Due Process, Takings". constitutioncenter.org. Philadelphia, Pennsylvania: National Constitution Center. https://constitutioncenter.org/the-constitution/amendments/amendment-v
10. "Eighth Amendment: Excessive Fines, Cruel and Unusual Punishment". constitutioncenter.org. Philadelphia, Pennsylvania: National Constitution Center. https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103#:~:text=The%20Eighth%20Amendment%20to%20the,as%20the%20price%20for%20obtaining
11. "Ninth Amendment: Non-Enumerated Rights Retained by People". constitutioncenter.org. Philadelphia, Pennsylvania: National Constitution Center. https://constitutioncenter.org/the-constitution/amendments/amendment-ix
12. "Tenth Amendment: Rights Reserved to States or People". constitutioncenter.org. Philadelphia, Pennsylvania: National Constitution Center. https://constitutioncenter.org/the-constitution/amendments/amendment-x