

# Sham Peer Review: Navigating the National Practitioner Data Bank Dispute Process and Beyond

Lawrence R. Huntoon, M.D., Ph.D.

After being victimized by a sham peer review, the physician is victimized again when the reporting entity such as a hospital or medical board reports false and damaging information to the National Practitioner Data Bank (NPDB), which is then widely distributed to other authorized entities (e.g., hospitals, medical boards, insurance companies, and others), causing the physician irreparable harm.

The NPDB Dispute Process is complex, and it provides complete deference to the reporting entity with respect to accuracy and truthfulness of the Adverse Action. The NPDB accepts anything a hospital, for example, reports to the data bank as true and accurate as long as the hospital provides minimal documentation consisting of the hospital's own meeting minutes, findings of the hospital's hearing panel, findings of the hospital's appeals process, and similar documents.

The NPDB Dispute Process is often very disappointing for physicians who hope that they will be able to undo or mitigate

the irreparable harm done by an Adverse Action Report in the NPDB. Even in cases where the NPDB determines that a report should be voided, it has no power to force the reporting entity to void the report. And, in that circumstance it might take a number of months for the data bank itself to void the report. Meanwhile, the harm of the data bank report remains, and the damaging report can be distributed to other authorized entities.

The two procedures that are available to physicians include Dispute Status and Dispute Resolution. The process and procedures are available online and are delineated in Chapter F of the NPDB Guidebook.<sup>1</sup>

The entire process is diagrammed in Figures 1 and 2 below.<sup>1</sup>

## Dispute Status

The first step for the physician victim to contest a report in the NPDB is to enter the report into Dispute Status, challenging the factual accuracy of the report, or failure of the reporting

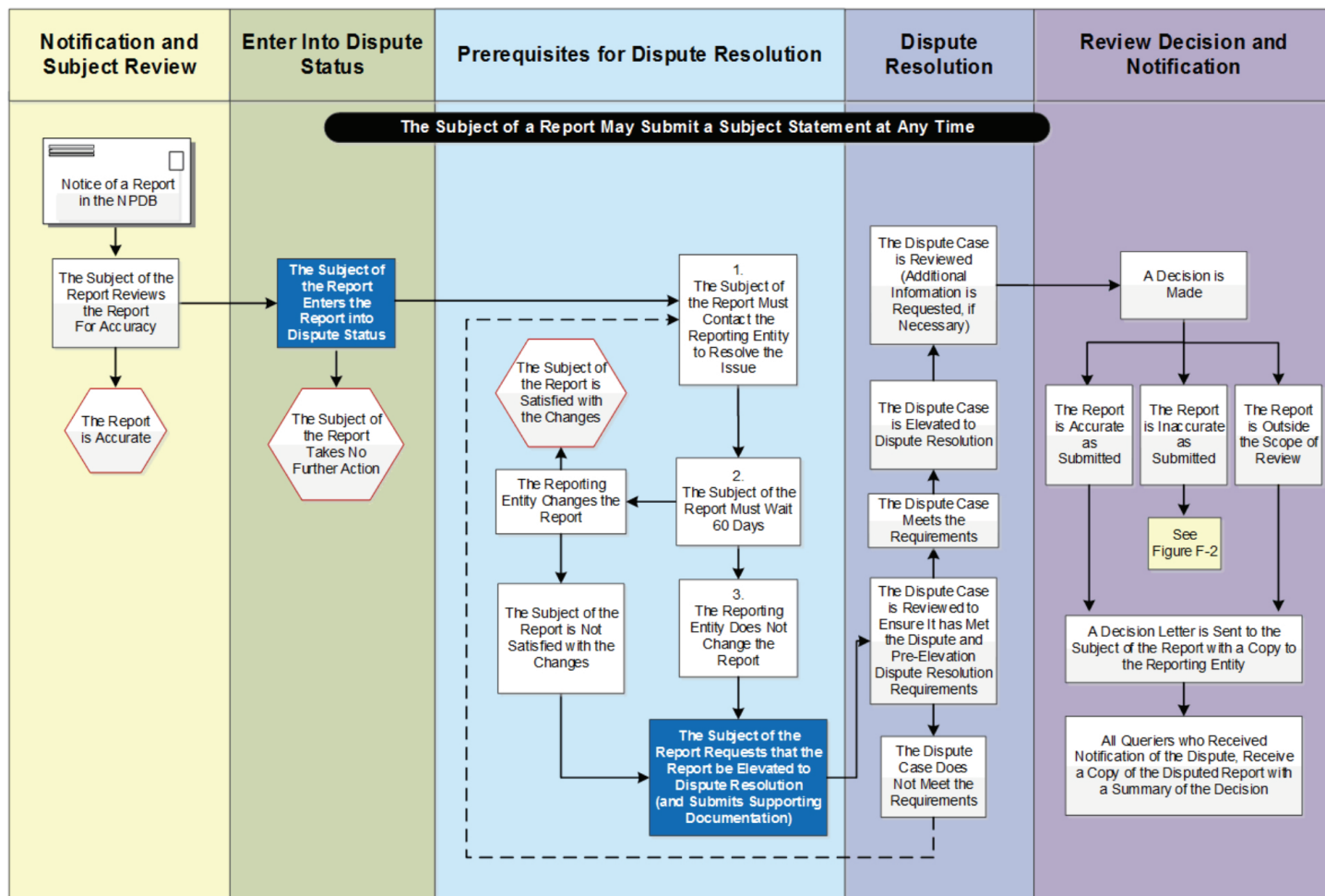
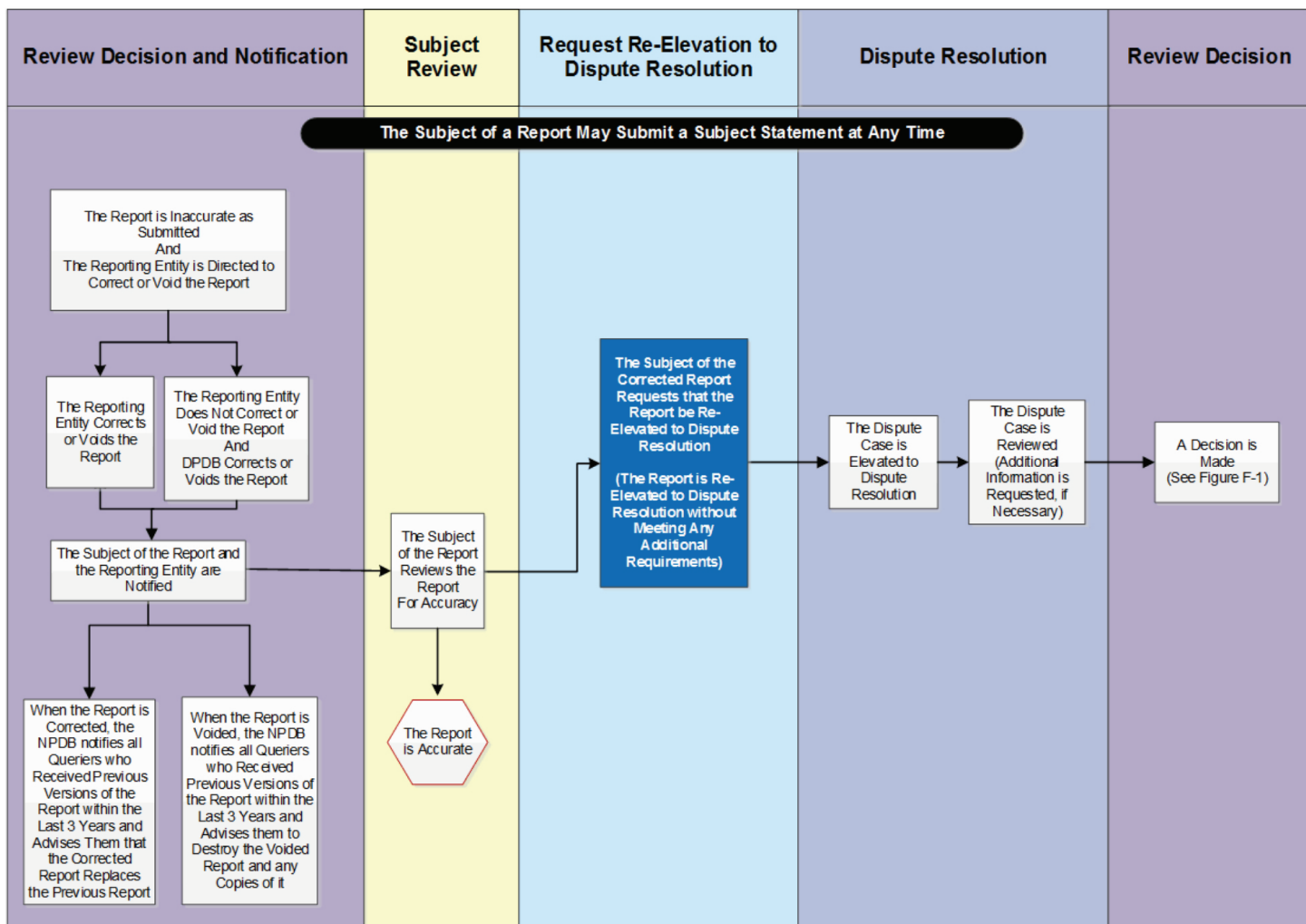


Figure 1. From the NPDB Guidebook, Chapter F



**Figure 2.** From the NPDB Guidebook, Chapter F

entity to comply with NPDB reporting guidelines, or lack of eligibility of the reporting entity to file a report with the data bank. The physician or physician's representative can enter the report into Dispute Status online at <https://www.npdb.hrsa.gov/pract/howToDisputeAReport.jsp>. The subject of the report can submit a rebuttal (Subject Statement) at any time in the Dispute Process.

Physician victims often hope that by submitting a rebuttal statement to be included in the data bank report, they will undo or mitigate the damage done by the report. However, an Adverse Action Report in the NPDB is a "red flag" for any entity that would consider employing the physician or putting the physician on medical staff, and the Subject Statement is like very fine illegible print on the "red flag." It is still a "red flag."

After the report is entered into Dispute Status, the data bank sends notification of the dispute to the reporting entity and to all other authorized entities that have queried the data bank within the past three years.

Following entry into Dispute Status, the physician can request that the report be elevated to Dispute Resolution. This will trigger the NPDB's review process. The NPDB reviews the report for accuracy, based solely on information provided by the reporting entity, and to make sure that the report met NPDB reporting requirements.

## Dispute Resolution

Prior to requesting that a report be elevated to Dispute Resolution, the physician must have entered the report into Dispute Status. And, incredibly, prior to elevating the Report to Dispute Resolution, the data bank also requires the physician to contact the reporting entity in an attempt to resolve the issue.

But, it seems quite unrealistic that a hospital that conducted a sham peer review on a physician, and further damaged the physician by reporting the action to the NPDB, would somehow suddenly develop moral character or remorse for what it had done.

The data bank requires that the physician wait 60 days while trying to resolve the issue with the reporting entity, and it requires that the physician provide documentation to support that he attempted to contact the reporting entity to resolve the issue. The physician must also include any response received from the reporting entity.

If the reporting entity informs the physician that it has no intention of correcting or voiding the report, the physician can ask the data bank to immediately elevate the report to Dispute Resolution without waiting 60 days. Documentation of the reporting entity's refusal to correct or void the report is necessary.

The entity that the Department of Health and Human Services (HHS) delegates to review the report is the Division of Practitioner Data Bank (DPDB) of the Health Resources and Services Administration (HRSA). The DPDB review looks at three things: (1) Was the report submitted in compliance with NPDB reporting requirements? (2) Does the report accurately report the Adverse Action taken as reflected in the written record of the reporting entity? (3) Was the basis for the Adverse Action reflected in the written record of the reporting entity? Note that the basis of the Adverse Action may be false, fabricated, or fraudulent charges against the physician, but that will not be considered in the DPDB review process. The DPDB simply accepts as true the hospital's report that the adverse action was based on legitimate, factually supported findings of a good-faith peer review process.

The review specifically does not evaluate the merits or lack thereof of the Adverse Action, and does not determine whether the physician received due process in the reporting entity's peer review and appeals process. The DPDB will not review documentation provided by the physician; only documentation provided by the reporting entity. It also will not evaluate any civil rights issues, such as those involving discrimination and harassment.

The DPDB may contact the reporting entity for further information and documents related to the accuracy of the report. If the reporting entity fails to respond to the request or provides an inadequate response, that may constitute failure to meet NPDB reporting requirements.

Following review, if the DPDB determines that the report was accurate and in compliance with NPDB reporting requirements, then it sends a decision letter to the physician, reporting entity, and a summary of the decision to all queriers of the NPDB in the past three years. Unfortunately, this often harms the physician further because some may interpret the decision to mean that the data bank conducted a thorough review of the matter and determined that the Adverse Action was warranted.

If the DPDB finds that the report is inaccurate or not in compliance with NPDB reporting requirements, "the reporting entity is asked to determine whether or not it agrees with the assessment, based on the record compiled during the Dispute Resolution, that the report is accurate."<sup>1</sup> That is a little like the police asking an arrested thief, who is caught in the act, whether the thief agrees that his arrest was warranted.

If a reporting entity agrees with the DPDB findings, which do not support the report filed by the hospital, then the reporting entity is encouraged to void or correct the report as applicable. If the reporting entity refuses to void or correct a report as indicated, then the NPDB can itself void or correct the report as applicable, and all queriers in the past three years will receive notice of the voided or corrected report. If the report is voided, queriers will be directed to destroy any copies of the initial report.

"Corrected reports are removed from Dispute Resolution unless additional Dispute Resolution review is sought by the subject of the report."<sup>1</sup> If the physician disagrees with the accuracy of the corrected report, the physician can request a re-review and can update his dispute rebuttal statement if desired. The physician thus becomes entangled in what can

be best described as a bureaucratic quagmire. The physician plods forward with the hope that a favorable outcome will be achieved only to sink further into the mire.

There are times when the NPDB determines that a report should be voided and instead of voiding the report as directed, the hospital will file a Corrected Report or Revision to Action Report instead. This is done to further damage the physician. The physician then has two reports in the data bank, and the initial adverse action remains in the data bank for queriers to see. Two Adverse Action Reports in the data bank are more damaging than one report, irrespective of content. They represent "red flags" for any entity considering the physician for an employment position, including a locum tenens or medical staff position.

If the report is voided by the reporting entity or by the data bank, then the report is removed from the disclosable record. The NPDB sends a confirmation to the reporting entity and to the physician and sends notification to all queriers of the NPDB during the past three years directing them to destroy copies of the Initial Action Report.

## **Outside the Scope of Dispute Resolution**

Nothing is more disheartening for the physician victim than to hear that the issue under review is outside the scope of NPDB's authority to review. Even if the physician has indisputable proof that the Adverse Action was the result of a bad-faith sham peer review having nothing to do with professional competence or conduct, the data bank will absolutely not look at the physician's evidence and will simply determine that the issue is outside the scope of its authority. Once the data bank makes that determination, it adds that finding to the report and the dispute notification is removed from the report. The data bank sends a summary of its decision to all queriers within the past three years.

## **Reconsideration of Dispute Resolution Decision**

The physician can submit a written request for reconsideration and can submit new information that was not available at the time of review. The physician may argue the issues were not properly considered during the review. The previous decision will then either be affirmed or revised. The chances of a physician prevailing in a reconsideration are slim to none.

## **Litigation**

Having completed the bureaucratic NPDB Dispute Process, the physician can file a lawsuit against the data bank in an attempt to get an inaccurate, wrongful report removed from the data bank. The physician must complete this bureaucratic process before filing a lawsuit; otherwise the physician risks the lawsuit being dismissed due to failure to exhaust administrative remedies.

## **Legal Arguments**

Information presented below is based on my study and observations. I am not an attorney and do not provide legal

advice or opinion. Physicians are encouraged to consult with their attorneys for legal advice and opinion.

Lawsuits filed against the NPDB typically allege violation of the Administrative Procedure Act. Chapter 7 of the Act deals specifically with judicial review of administrative decisions (5 USC §§ 701-706). Legal arguments are focused on the inaccuracy of the data bank report. A report that is based on a bad-faith sham peer review (fraud) is not accurate because the report is unrelated to professional competence or conduct and is thus based on a prohibited purpose (Health Care Quality Improvement Act of 1986, 42 USC Subchapter III Sec. 11151 (9, A-E)).

Federal courts have the jurisdiction and authority to make determinations about the accuracy of a data bank report.

In determining whether a report is accurate or not, a court has a duty to determine whether the events should have resulted in a data bank report (*Simpkins v. Shalala*, 999 F. Supp. 106, 111 (D.D.C. 1998)).

In one case, *Doe v. Thompson*, 332 F. Supp. 2d 124 (D.D.C. 2004), the court held that “prior to disseminating any record about any individual to any person other than an agency, the [government agency] must make reasonable efforts to assure that such records are accurate, complete, timely and relevant for agency purposes.”

The Administrative Procedure Act also requires that the decision by the agency (e.g., NPDB) not be arbitrary and capricious. The decision must be supported by substantial evidence (5 USC § 701(2)(A), (E)). Substantial evidence is evidence a reasonable person would accept as adequate to support a conclusion or decision (*Doe v. Rogers*, 139F. Supp. 3d 120, 149 (D.C. Cir. 2015)).

The NPDB must also consider relevant information and exercise reasoned decision-making in carefully determining the facts (*Simpkins v. Shalala*, 999 F. Supp. 106, 110-11 (D.D.C. 1998)). If the data bank’s decision is not based on reasoned decision-making, then the data bank’s decision is arbitrary and capricious and thus reversible by a court.

## The Great Deference Disaster

In the quest to get a wrongful report removed from the data bank, going through the data bank dispute process and subsequent litigation, at some point the physician recognizes that he is up against the Great Deference Disaster. The data bank totally defers to the hospital and accepts as accurate and truthful anything the hospital reports, and courts, unfortunately, tend to grant great deference to decisions made by government agencies such as the data bank. The physician victim is trapped in a “Twilight Zone” where truth and facts do not seem to matter.

We do not defer to prosecutors in criminal proceedings and convict people solely based on the prosecutor’s narrative without hearing from the defense. Considering evidence presented by only one side and not hearing from or dismissing evidence presented by the other side is not due process and is not fundamentally fair.

The deference that courts show to decisions made by government agencies is very similar to the Judicial Doctrine of Non-Review in lawsuits brought against hospitals by

physicians for the harm done by a sham peer review. The Judicial Doctrine of Non-Review in peer review matters, though widespread at one time, has since been rejected in most states.

One of the states that roundly rejected the Judicial Doctrine of Non-Review in peer review matters was Michigan. In 2006, the Michigan Supreme Court found:

...we are not persuaded by the argument that courts are incompetent to review hospital staffing decisions as a basis for adopting the judicial nonintervention doctrine. This claim overlooks the reality that courts routinely review complex claims of all kinds. Forgoing review of valid legal claims, simply because those claims arise from hospital staffing decisions, amounts to a grant of unfettered discretion to private hospitals to disregard the legal rights of those who are the subject of a staffing decision, even when such decisions are precluded by statute. (*Bruce B. Feyz, M.D. v. Mercy Memorial Hospital et al.*, 475 Mich. 663, 719 N.W.2d 1 (Supreme Court of Michigan No. 128059, June 24, 2006)).

There is no reason to believe that federal courts reviewing often career-ending decisions affirmed by the data bank are incapable of understanding the same type of peer-review evidence.

## Extra-Record Evidence May Assist the Trier of Fact and Accomplish Effective Judicial Review

In civil cases involving peer review matters, experts with specialized knowledge may be engaged to help the trier of fact understand the evidence in the case so they can determine the facts.

The NPDB does not consider any expert witness opinion in making its final decision in the NPDB Dispute Process. Thus, expert opinions are generally not part of the administrative record.

Although judicial review of agency decisions under the Administrative Procedure Act is generally limited to evidence already in the administrative record, there are exceptions to the rule that are well within the court’s discretion to allow. Information such as expert opinion is considered “extra-record evidence” in judicial review of an agency’s final decision.

The Court can allow the addition of extra-record evidence when the agency (e.g. NPDB) fails to consider all relevant factors in making its final decision; when the agency fails to adequately explain the grounds for its decision based on a logical and rational connection between the facts and its final decision; or when the agency acts improperly or in bad faith (*Safari Club, Int’l v. Jewell*, 111 F. Supp. 3d 1, 5 (D.D.C. 2015); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); *Esch v. Yeutter*, 876 F.2d 976, 991, 278 U.S. App. D.C. 98 (D.C. Cir. 1989); *Styrene Information & Research Center v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012); *Oceana, Inc. v. Locke*, 674 F. Supp. 2d, 39, 45 (D.C. Cir. 2009)).

Moreover, when there is a strong showing of bad faith, extra-record evidence can be admitted so as to provide for effective judicial review (*Theodore Roosevelt Conservation*



*Partnership v. Salazar*, 616 F. 3d, 497, 514 (D.C. Cir. 2010)). Sham peer review is bad-faith peer review.

The NPDB does not evaluate whether a peer review is legitimate or a bad-faith sham. In cases of sham peer review, it essentially passes the bad faith of peer reviewers through its agency dispute process unaltered. When the NPDB passes the bad faith through its dispute process, it results in an inaccurate report since actions based on sham peer review, not related to professional competence or conduct, are prohibited by HCQIA, and should not be reported to the data bank. While the data bank does not have the statutory authority to void reports based on sham peer review, the court does have the authority to do so in the interest of assuring an accurate record.

In deciding whether an agency's final decision is arbitrary and capricious, the Court must determine whether the agency reached its final decision based on a rational and logical connection between the facts and the decision, and whether the agency adequately documented the grounds for its decision (*Policy & Research, L.L.C.*, 313 F. Supp. 3d 62, 72 (D.D.C. 2018), *Michigan v. EPA*, 135 S. Ct. 2699, 2706, 192 L. Ed. 2d 674 (2015); *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *National Environmental Development Clean Air Project v. EPA*, 752 F. 3d 999, 1009 (D.C. Cir. 2004)).

Speculative and conclusory statements do not constitute an adequate explanation of the grounds for an agency's final decision.

## Conclusions

Physicians face a complex bureaucratic quagmire when they enter the NPDB Dispute Process. The Great Deference Disaster, whereby the data bank defers to hospitals, accepting everything the hospital says as truth and fact, and whereby courts tend to defer to decisions made by government agencies such as the data bank, results in an egregious violation of due process and fundamental fairness for the physician victim. The Great Deference Disaster also does not serve the public interest because good physicians' careers are ruined or ended by a wrongful data bank report. That deprives patients of the services of good physicians.

Federal courts should not abdicate or defer their duty to determine the accuracy of a data bank report. Careful review of the evidence, presented by the physician and by the NPDB, is needed so that inaccurate and damaging reports about a physician are not distributed by the data bank.

**Lawrence R. Huntoon, M.D., Ph.D.**, is editor-in-chief of the *Journal of American Physicians and Surgeons*. Contact: editor@jpands.org.

## REFERENCES

1. NPDB Dispute Process. Available at: <https://www.npdb.hrsa.gov/guidebook/FDisputeProcess.jsp>. Accessed Feb 5, 2021.

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