S. 631

To provide for nationwide expansion of the pilot program for national and State background checks on direct patient access employees of long-term care facilities or providers.

IN THE SENATE OF THE UNITED STATES

MARCH 18, 2009

Mr. KOHL (for himself, Ms. COLLINS, Mr. COCHRAN, Mr. KERRY, Mr. WHITEHOUSE, Mr. BINGAMAN, Mr. LEVIN, Mr. CASEY, Mrs. LINCOLN, Ms. KLOBUCHAR, Ms. STABENOW, and Mr. BAYH) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To provide for nationwide expansion of the pilot program for national and State background checks on direct patient access employees of long-term care facilities or providers.

1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

2 SECTION 1. SHORT TITLE.

3 This Act may be cited as the “Patient Safety and Abuse Prevention Act”.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress makes the following findings:

(1) Frail elders are a highly vulnerable population who often lack the ability to give consent or defend themselves. Since the best predictor of future behavior is past behavior, individuals with histories of abuse pose a definite risk to patients and residents of long-term care facilities.

(2) Every month, there are stories in the media of health care employees who commit criminal misconduct on the job and are later found, through a background check conducted after the fact, to have a history of convictions for similar crimes.

(3) A 2006 study conducted by the Department of Health and Human Services determined that—

(A) criminal background checks are a valuable tool for employers during the hiring process;

(B) the use of criminal background checks during the hiring process does not limit the pool of potential job applicants;

(C) a correlation exists between criminal history and incidences of abuse; and

(D) the long-term care industry supports the practice of conducting background checks.
on potential employees in order to reduce the
likelihood of hiring someone who has the poten-
tial to harm residents of long-term care facili-
ties.

(4) A national survey of State Adult Protective
Services agencies identified more than 500,000 re-
ports of elder and vulnerable adult abuse in 2004,
and a national report concluded that more than
15,000 nursing home complaints involved abuse, in-
cluding nearly 4,000 complaints of physical abuse,
more than 800 complaints of sexual abuse, and
nearly 1,000 complaints of financial exploitation.

(5) The Department of Health and Human
Services has determined that, while 41 States now
require criminal background checks on certified
nurse aides prior to employment, only half of those
(22) require criminal background checks at the Fed-
eral level.

(b) PURPOSES.—The purposes of this Act are to—

(1) lay the foundation for a coordinated, nation-
wide system of comprehensive State registry and
criminal background checks that would greatly en-
hance the chances of identifying individuals with
problematic backgrounds who change jobs frequently
and move across State lines to avoid detection;
(2) stop individuals who have a record of substantiated abuse, or a serious criminal record, from preying on helpless elders and individuals with disabilities; and

(3) provide assurance to long-term care employers and the residents they care for that abusive workers will not be hired into positions that give them access to extremely vulnerable individuals receiving long-term care services in health care settings across the United States.

SEC. 3. NATIONWIDE PROGRAM FOR NATIONAL AND STATE BACKGROUND CHECKS ON DIRECT PATIENT ACCESS EMPLOYEES OF LONG-TERM CARE FACILITIES AND PROVIDERS.

(a) IN GENERAL.—The Secretary of Health and Human Services (in this section referred to as the “Secretary”), shall establish a program to identify efficient, effective, and economical procedures for long term care facilities or providers to conduct background checks on prospective direct patient access employees on a nationwide basis (in this subsection, such program shall be referred to as the “nationwide program”). Except for the following modifications, the Secretary shall carry out the nationwide program under similar terms and conditions as the pilot program under section 307 of the Medicare Prescription
Drug, Improvement, and Modernization Act of 2003 (Public Law 108–173; 117 Stat. 2257), including the prohibition on hiring abusive workers and the authorization of the imposition of penalties by a participating State under subsection (b)(3)(A) and (b)(6), respectively, of such section 307:

(1) AGREEMENTS.—

(A) NEWLY PARTICIPATING STATES.—The Secretary shall enter into agreements with each State—

(i) that the Secretary has not entered into an agreement with under subsection (c)(1) of such section 307;

(ii) that agrees to conduct background checks under the nationwide program on a Statewide basis; and

(iii) that submits an application to the Secretary containing such information and at such time as the Secretary may specify.

(B) CERTAIN PREVIOUSLY PARTICIPATING STATES.—The Secretary shall enter into agreements with each State—

(i) that the Secretary has entered into an agreement with under such subsection (c)(1), but only in the case where such
agreement did not require the State to
conduct background checks under the pro-
gram established under subsection (a) of
such section 307 on a Statewide basis;

(ii) that agrees to conduct background
checks under the nationwide program on a
Statewide basis; and

(iii) that submits an application to the
Secretary containing such information and
at such time as the Secretary may specify.

(2) Nonapplication of Selection Cri-
teria.—The selection criteria required under sub-
section (c)(3)(B) of such section 307 shall not apply.

(3) Required Fingerprint Check as Part
of Criminal History Background Check.—The
procedures established under subsection (b)(1) of
such section 307 shall—

(A) require that the long-term care facility
or provider (or the designated agent of the
long-term care facility or provider) obtain State
and national criminal history background
departments, investigating

and neglect registries and databases, including
the abuse and neglect registries of another
State in the case where a prospective employee
previously resided in that State, State criminal
history records, the records of any proceedings
in the State that may contain disqualifying in-
formation about prospective employees (such as
proceedings conducted by State professional li-
censing and disciplinary boards and State Med-
icaid Fraud Control Units), and Federal crimi-

nal history records, including a fingerprint
check using the Integrated Automated Finger-
print Identification System of the Federal Bu-
reau of Investigation; and

(B) require States to describe and test
methods that reduce duplicative fingerprinting,
including providing for the development of “rap
back” capability by the State such that, if a di-
rect patient access employee of a long-term care
facility or provider is convicted of a crime fol-
lowing the initial criminal history background
check conducted with respect to such employee,
and the employee’s fingerprints match the
prints on file with the State law enforcement
department, the department will immediately
inform the State and the State will immediately
inform the long-term care facility or provider
which employs the direct patient access em-
ployee of such conviction.

(4) STATE REQUIREMENTS.—An agreement en-
tered into under paragraph (1) shall require that a
participating State—

(A) be responsible for monitoring compli-
ance with the requirements of the nationwide
program;

(B) have procedures in place to—

(i) conduct screening and criminal his-
tory background checks under the nation-
wide program in accordance with the re-
quirements of this section;

(ii) monitor compliance by long-term
care facilities and providers with the proce-
dures and requirements of the nationwide
program;

(iii) as appropriate, provide for a pro-
visional period of employment by a long-
term care facility or provider of a direct
patient access employee, not to exceed 30
days, pending completion of the required
criminal history background check and, in
the case where the employee has appealed
the results of such background check, pending completion of the appeals process, during which the employee shall be subject to direct on-site supervision (in accordance with procedures established by the State to ensure that a long-term care facility or provider furnishes such direct on-site supervision);

(iv) provide an independent process by which a provisional employee or an employee may appeal or dispute the accuracy of the information obtained in a background check performed under the nationwide program, including the specification of criteria for appeals for direct patient access employees found to have disqualifying information which shall include consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual;

(v) provide for the designation of a single State agency as responsible for—
(I) overseeing the coordination of any State and national criminal history background checks requested by a long-term care facility or provider (or the designated agent of the long-term care facility or provider) utilizing a search of State and Federal criminal history records, including a fingerprint check of such records;

(II) overseeing the design of appropriate privacy and security safeguards for use in the review of the results of any State or national criminal history background checks conducted regarding a prospective direct patient access employee to determine whether the employee has any conviction for a relevant crime;

(III) immediately reporting to the long-term care facility or provider that requested the criminal history background check the results of such review; and

(IV) in the case of an employee with a conviction for a relevant crime
that is subject to reporting under section 1128E of the Social Security Act (42 U.S.C. 1320a–7e), reporting the existence of such conviction to the database established under that section;

(vi) determine which individuals are direct patient access employees (as defined in paragraph (6)(B)) for purposes of the nationwide program;

(vii) as appropriate, specify offenses, including convictions for violent crimes, for purposes of the nationwide program; and

(viii) describe and test methods that reduce duplicative fingerprinting, including providing for the development of “rap back” capability such that, if a direct patient access employee of a long-term care facility or provider is convicted of a crime following the initial criminal history background check conducted with respect to such employee, and the employee’s fingerprints match the prints on file with the State law enforcement department—
(I) the department will immediately inform the State agency designated under clause (v) and such agency will immediately inform the facility or provider which employs the direct patient access employee of such conviction; and

(II) the State will provide, or will require the facility to provide, to the employee a copy of the results of the criminal history background check conducted with respect to the employee at no charge in the case where the individual requests such a copy.

(5) PAYMENTS.—

(A) NEWLY PARTICIPATING STATES.—

(i) IN GENERAL.—As part of the application submitted by a State under paragraph (1)(A)(iii), the State shall guarantee, with respect to the costs to be incurred by the State in carrying out the nationwide program, that the State will make available (directly or through donations from public or private entities) a particular amount of non-Federal contributions, as a
condition of receiving the Federal match under clause (ii).

(ii) **FEDERAL MATCH.**—The payment amount to each State that the Secretary enters into an agreement with under paragraph (1)(A) shall be 3 times the amount that the State guarantees to make available under clause (i), except that in no case may the payment amount exceed $3,000,000.

(B) **PREVIOUSLY PARTICIPATING STATES.**—

(i) **IN GENERAL.**—As part of the application submitted by a State under paragraph (1)(B)(iii), the State shall guarantee, with respect to the costs to be incurred by the State in carrying out the nationwide program, that the State will make available (directly or through donations from public or private entities) a particular amount of non-Federal contributions, as a condition of receiving the Federal match under clause (ii).

(ii) **FEDERAL MATCH.**—The payment amount to each State that the Secretary
enters into an agreement with under paragraph (1)(B) shall be 3 times the amount that the State guarantees to make available under clause (i), except that in no case may the payment amount exceed $1,500,000.

(6) DEFINITIONS.—Under the nationwide program:

(A) LONG-TERM CARE FACILITY OR PROVIDER.—The term "long-term care facility or provider" means the following facilities or providers which receive payment for services under title XVIII or XIX of the Social Security Act:

(i) A skilled nursing facility (as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i–3(a))).

(ii) A nursing facility (as defined in section 1919(a) of such Act (42 U.S.C. 1396r(a))).

(iii) A home health agency.

(iv) A provider of hospice care (as defined in section 1861(dd)(1) of such Act (42 U.S.C. 1395x(dd)(1))).

(v) A long-term care hospital (as described in section 1886(d)(1)(B)(iv) of
such Act (42 U.S.C. 1395ww(d)(1)(B)(iv))).

(vi) A provider of personal care services.

(vii) A provider of adult day care.

(viii) A residential care provider that arranges for, or directly provides, long-term care services, including an assisted living facility that provides a level of care established by the Secretary.

(ix) An intermediate care facility for the mentally retarded (as defined in section 1905(d) of such Act (42 U.S.C. 1396d(d))).

(x) Any other facility or provider of long-term care services under such titles as the participating State determines appropriate.

(B) DIRECT PATIENT ACCESS EMPLOYEE.—The term “direct patient access employee” means any individual who has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider and has duties that involve (or may involve) one-on-one
contact with a patient or resident of the facility or provider, as determined by the State for purposes of the nationwide program. Such term does not include a volunteer unless the volunteer has duties that are equivalent to the duties of a direct patient access employee and those duties involve (or may involve) one-on-one contact with a patient or resident of the long-term care facility or provider.

(7) EVALUATION AND REPORT.—

(A) EVALUATION.—The Inspector General of the Department of Health and Human Services shall conduct an evaluation of the nationwide program.

(B) REPORT.—Not later than 180 days after the completion of the nationwide program, the Inspector General of the Department of Health and Human Services shall submit a report to Congress containing the results of the evaluation conducted under subparagraph (A).

(b) FUNDING.—

(1) NOTIFICATION.—The Secretary of Health and Human Services shall notify the Secretary of the Treasury of the amount necessary to carry out the nationwide program under this section for the
period of fiscal years 2010 through 2012, except that in no case shall such amount exceed $160,000,000.

(2) Transfer of funds.—Out of any funds in the Treasury not otherwise appropriated, the Secretary of the Treasury shall provide for the transfer to the Secretary of Health and Human Services of the amount specified as necessary to carry out the nationwide program under paragraph (1). Such amount shall remain available until expended.

SEC. 4. MANDATORY STATE USE OF NATIONAL CORRECT CODING INITIATIVE.

(a) In general.—Section 1903(r) of the Social Security Act (42 U.S.C. 1396b(r)), as amended by section 3(a) of the QI Program Supplemental Funding Act of 2008 (Public Law 110–379), is amended—

(1) in paragraph (1)(B)—

(A) in clause (ii), by striking “and” at the end;

(B) in clause (iii), by adding “and” after the semi-colon; and

(C) by adding at the end the following new clause:

“(iv) effective for claims filed on or after October 1, 2010, incorporate compat-
ible methodologies of the National Correct Coding Initiative administered by the Secretary (or any successor initiative to promote correct coding and to control improper coding leading to inappropriate payment) and such other methodologies of that Initiative (or such other national correct coding methodologies) as the Secretary identifies in accordance with paragraph (4);”; and

(2) by adding at the end the following new paragraph:

“(4) Not later than September 1, 2010, the Secretary shall do the following:

“(A) Identify those methodologies of the National Correct Coding Initiative administered by the Secretary (or any successor initiative to promote correct coding and to control improper coding leading to inappropriate payment) which are compatible to claims filed under this title.

“(B) Identify those methodologies of such Initiative (or such other national correct coding methodologies) that should be incorporated into claims filed under this title with respect to items or services for which States provide medical assistance under
this title and no national correct coding methodologies have been established under such Initiative with respect to title XVIII.

“(C) Notify States of—

“(i) the methodologies identified under subparagraphs (A) and (B) (and of any other national correct coding methodologies identified under subparagraph (B)); and

“(ii) how States are to incorporate such methodologies into claims filed under this title.

“(D) Submit a report to Congress that includes the notice to States under subparagraph (C) and an analysis supporting the identification of the methodologies made under subparagraphs (A) and (B).”.

(b) EXTENSION FOR STATE LAW AMENDMENT.—In the case of a State plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) which the Secretary of Health and Human Services determines requires State legislation in order for the plan to meet the additional requirements imposed by the amendment made by subsection (a)(1)(C), the State plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the
State legislature that begins after the date of enactment of this Act. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of the session is considered to be a separate regular session of the State legislature.