

111TH CONGRESS
1ST SESSION

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 Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

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

1 **SEC. 2. FINDINGS AND PURPOSES.**

2 (a) FINDINGS.—Congress makes the following find-
3 ings:

4 (1) Frail elders are a highly vulnerable popu-
5 lation who often lack the ability to give consent or
6 defend themselves. Since the best predictor of future
7 behavior is past behavior, individuals with histories
8 of abuse pose a definite risk to patients and resi-
9 dents of long-term care facilities.

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

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

17 (A) criminal background checks are a valu-
18 able tool for employers during the hiring proc-
19 ess;

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

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

25 (D) the long-term care industry supports
26 the practice of conducting background checks

1 on potential employees in order to reduce the
2 likelihood of hiring someone who has the poten-
3 tial to harm residents of long-term care facili-
4 ties.

5 (4) A national survey of State Adult Protective
6 Services agencies identified more than 500,000 re-
7 ports of elder and vulnerable adult abuse in 2004,
8 and a national report concluded that more than
9 15,000 nursing home complaints involved abuse, in-
10 cluding nearly 4,000 complaints of physical abuse,
11 more than 800 complaints of sexual abuse, and
12 nearly 1,000 complaints of financial exploitation.

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

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

20 (1) lay the foundation for a coordinated, nation-
21 wide system of comprehensive State registry and
22 criminal background checks that would greatly en-
23 hance the chances of identifying individuals with
24 problematic backgrounds who change jobs frequently
25 and move across State lines to avoid detection;

1 (2) stop individuals who have a record of sub-
 2 stantiated abuse, or a serious criminal record, from
 3 preying on helpless elders and individuals with dis-
 4 abilities; and

5 (3) provide assurance to long-term care employ-
 6 ers and the residents they care for that abusive
 7 workers will not be hired into positions that give
 8 them access to extremely vulnerable individuals re-
 9 ceiving long-term care services in health care set-
 10 tings across the United States.

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

15 (a) IN GENERAL.—The Secretary of Health and
 16 Human Services (in this section referred to as the “Sec-
 17 retary”), shall establish a program to identify efficient, ef-
 18 fective, and economical procedures for long term care fa-
 19 cilities or providers to conduct background checks on pro-
 20 spective direct patient access employees on a nationwide
 21 basis (in this subsection, such program shall be referred
 22 to as the “nationwide program”). Except for the following
 23 modifications, the Secretary shall carry out the nationwide
 24 program under similar terms and conditions as the pilot
 25 program under section 307 of the Medicare Prescription

1 Drug, Improvement, and Modernization Act of 2003 (Pub-
 2 lic Law 108–173; 117 Stat. 2257), including the prohibi-
 3 tion on hiring abusive workers and the authorization of
 4 the imposition of penalties by a participating State under
 5 subsection (b)(3)(A) and (b)(6), respectively, of such sec-
 6 tion 307:

7 (1) AGREEMENTS.—

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

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

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

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

20 (B) CERTAIN PREVIOUSLY PARTICIPATING
 21 STATES.—The Secretary shall enter into agree-
 22 ments with each State—

23 (i) that the Secretary has entered into
 24 an agreement with under such subsection
 25 (c)(1), but only in the case where such

1 agreement did not require the State to
 2 conduct background checks under the pro-
 3 gram established under subsection (a) of
 4 such section 307 on a Statewide basis;

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

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

11 (2) NONAPPLICATION OF SELECTION CRI-
 12 TERIA.—The selection criteria required under sub-
 13 section (c)(3)(B) of such section 307 shall not apply.

14 (3) REQUIRED FINGERPRINT CHECK AS PART
 15 OF CRIMINAL HISTORY BACKGROUND CHECK.—The
 16 procedures established under subsection (b)(1) of
 17 such section 307 shall—

18 (A) require that the long-term care facility
 19 or provider (or the designated agent of the
 20 long-term care facility or provider) obtain State
 21 and national criminal history background
 22 checks on the prospective employee through
 23 such means as the Secretary determines appro-
 24 priate that utilize a search of State-based abuse
 25 and neglect registries and databases, including

1 the abuse and neglect registries of another
2 State in the case where a prospective employee
3 previously resided in that State, State criminal
4 history records, the records of any proceedings
5 in the State that may contain disqualifying in-
6 formation about prospective employees (such as
7 proceedings conducted by State professional li-
8 censing and disciplinary boards and State Med-
9 icaid Fraud Control Units), and Federal crimi-
10 nal history records, including a fingerprint
11 check using the Integrated Automated Finger-
12 print Identification System of the Federal Bu-
13 reau of Investigation; and

14 (B) require States to describe and test
15 methods that reduce duplicative fingerprinting,
16 including providing for the development of “rap
17 back” capability by the State such that, if a di-
18 rect patient access employee of a long-term care
19 facility or provider is convicted of a crime fol-
20 lowing the initial criminal history background
21 check conducted with respect to such employee,
22 and the employee’s fingerprints match the
23 prints on file with the State law enforcement
24 department, the department will immediately
25 inform the State and the State will immediately

1 inform the long-term care facility or provider
2 which employs the direct patient access em-
3 ployee of such conviction.

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

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

10 (B) have procedures in place to—

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

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

19 (iii) as appropriate, provide for a pro-
20 visional period of employment by a long-
21 term care facility or provider of a direct
22 patient access employee, not to exceed 30
23 days, pending completion of the required
24 criminal history background check and, in
25 the case where the employee has appealed

1 the results of such background check,
2 pending completion of the appeals process,
3 during which the employee shall be subject
4 to direct on-site supervision (in accordance
5 with procedures established by the State to
6 ensure that a long-term care facility or
7 provider furnishes such direct on-site su-
8 pervision);

9 (iv) provide an independent process by
10 which a provisional employee or an em-
11 ployee may appeal or dispute the accuracy
12 of the information obtained in a back-
13 ground check performed under the nation-
14 wide program, including the specification
15 of criteria for appeals for direct patient ac-
16 cess employees found to have disqualifying
17 information which shall include consider-
18 ation of the passage of time, extenuating
19 circumstances, demonstration of rehabilita-
20 tion, and relevancy of the particular dis-
21 qualifying information with respect to the
22 current employment of the individual;

23 (v) provide for the designation of a
24 single State agency as responsible for—

1 (I) overseeing the coordination of
2 any State and national criminal his-
3 tory background checks requested by
4 a long-term care facility or provider
5 (or the designated agent of the long-
6 term care facility or provider) utilizing
7 a search of State and Federal crimi-
8 nal history records, including a finger-
9 print check of such records;

10 (II) overseeing the design of ap-
11 propriate privacy and security safe-
12 guards for use in the review of the re-
13 sults of any State or national criminal
14 history background checks conducted
15 regarding a prospective direct patient
16 access employee to determine whether
17 the employee has any conviction for a
18 relevant crime;

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

24 (IV) in the case of an employee
25 with a conviction for a relevant crime

1 that is subject to reporting under sec-
2 tion 1128E of the Social Security Act
3 (42 U.S.C. 1320a–7e), reporting the
4 existence of such conviction to the
5 database established under that sec-
6 tion;

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

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

14 (viii) describe and test methods that
15 reduce duplicative fingerprinting, including
16 providing for the development of “rap
17 back” capability such that, if a direct pa-
18 tient access employee of a long-term care
19 facility or provider is convicted of a crime
20 following the initial criminal history back-
21 ground check conducted with respect to
22 such employee, and the employee’s finger-
23 prints match the prints on file with the
24 State law enforcement department—

1 (I) the department will imme-
 2 diately inform the State agency des-
 3 ignated under clause (v) and such
 4 agency will immediately inform the fa-
 5 cility or provider which employs the
 6 direct patient access employee of such
 7 conviction; and

8 (II) the State will provide, or will
 9 require the facility to provide, to the
 10 employee a copy of the results of the
 11 criminal history background check
 12 conducted with respect to the em-
 13 ployee at no charge in the case where
 14 the individual requests such a copy.

15 (5) PAYMENTS.—

16 (A) NEWLY PARTICIPATING STATES.—

17 (i) IN GENERAL.—As part of the ap-
 18 plication submitted by a State under para-
 19 graph (1)(A)(iii), the State shall guar-
 20 antee, with respect to the costs to be in-
 21 curred by the State in carrying out the na-
 22 tionwide program, that the State will make
 23 available (directly or through donations
 24 from public or private entities) a particular
 25 amount of non-Federal contributions, as a

1 condition of receiving the Federal match
2 under clause (ii).

3 (ii) FEDERAL MATCH.—The payment
4 amount to each State that the Secretary
5 enters into an agreement with under para-
6 graph (1)(A) shall be 3 times the amount
7 that the State guarantees to make avail-
8 able under clause (i), except that in no
9 case may the payment amount exceed
10 \$3,000,000.

11 (B) PREVIOUSLY PARTICIPATING
12 STATES.—

13 (i) IN GENERAL.—As part of the ap-
14 plication submitted by a State under para-
15 graph (1)(B)(iii), the State shall guar-
16 antee, with respect to the costs to be in-
17 curred by the State in carrying out the na-
18 tionwide program, that the State will make
19 available (directly or through donations
20 from public or private entities) a particular
21 amount of non-Federal contributions, as a
22 condition of receiving the Federal match
23 under clause (ii).

24 (ii) FEDERAL MATCH.—The payment
25 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

1 such Act (42 U.S.C.
2 1395ww(d)(1)(B)(iv))).

3 (vi) A provider of personal care serv-
4 ices.

5 (vii) A provider of adult day care.

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

11 (ix) An intermediate care facility for
12 the mentally retarded (as defined in sec-
13 tion 1905(d) of such Act (42 U.S.C.
14 1396d(d))).

15 (x) Any other facility or provider of
16 long-term care services under such titles as
17 the participating State determines appro-
18 priate.

19 (B) DIRECT PATIENT ACCESS EM-
20 PLOYEE.—The term “direct patient access em-
21 ployee” means any individual who has access to
22 a patient or resident of a long-term care facility
23 or provider through employment or through a
24 contract with such facility or provider and has
25 duties that involve (or may involve) one-on-one

1 contact with a patient or resident of the facility
2 or provider, as determined by the State for pur-
3 poses of the nationwide program. Such term
4 does not include a volunteer unless the volun-
5 teer has duties that are equivalent to the duties
6 of a direct patient access employee and those
7 duties involve (or may involve) one-on-one con-
8 tact with a patient or resident of the long-term
9 care facility or provider.

10 (7) EVALUATION AND REPORT.—

11 (A) EVALUATION.—The Inspector General
12 of the Department of Health and Human Serv-
13 ices shall conduct an evaluation of the nation-
14 wide program.

15 (B) REPORT.—Not later than 180 days
16 after the completion of the nationwide program,
17 the Inspector General of the Department of
18 Health and Human Services shall submit a re-
19 port to Congress containing the results of the
20 evaluation conducted under subparagraph (A).

21 (b) FUNDING.—

22 (1) NOTIFICATION.—The Secretary of Health
23 and Human Services shall notify the Secretary of
24 the Treasury of the amount necessary to carry out
25 the nationwide program under this section for the

1 period of fiscal years 2010 through 2012, except
 2 that in no case shall such amount exceed
 3 \$160,000,000.

4 (2) TRANSFER OF FUNDS.—Out of any funds
 5 in the Treasury not otherwise appropriated, the Sec-
 6 retary of the Treasury shall provide for the transfer
 7 to the Secretary of Health and Human Services of
 8 the amount specified as necessary to carry out the
 9 nationwide program under paragraph (1). Such
 10 amount shall remain available until expended.

11 **SEC. 4. MANDATORY STATE USE OF NATIONAL CORRECT**
 12 **CODING INITIATIVE.**

13 (a) IN GENERAL.—Section 1903(r) of the Social Se-
 14 curity Act (42 U.S.C. 1396b(r)), as amended by section
 15 3(a) of the QI Program Supplemental Funding Act of
 16 2008 (Public Law 110–379), is amended—

17 (1) in paragraph (1)(B)—

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

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

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

24 “(iv) effective for claims filed on or
 25 after October 1, 2010, incorporate compat-

1 ible methodologies of the National Correct
2 Coding Initiative administered by the Sec-
3 retary (or any successor initiative to pro-
4 mote correct coding and to control im-
5 proper coding leading to inappropriate pay-
6 ment) and such other methodologies of
7 that Initiative (or such other national cor-
8 rect coding methodologies) as the Sec-
9 retary identifies in accordance with para-
10 graph (4);” and

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

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

15 “(A) Identify those methodologies of the Na-
16 tional Correct Coding Initiative administered by the
17 Secretary (or any successor initiative to promote cor-
18 rect coding and to control improper coding leading
19 to inappropriate payment) which are compatible to
20 claims filed under this title.

21 “(B) Identify those methodologies of such Ini-
22 tiative (or such other national correct coding meth-
23 odologies) that should be incorporated into claims
24 filed under this title with respect to items or services
25 for which States provide medical assistance under

1 this title and no national correct coding methodolo-
 2 gies have been established under such Initiative with
 3 respect to title XVIII.

4 “(C) Notify States of—

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

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

11 “(D) Submit a report to Congress that includes
 12 the notice to States under subparagraph (C) and an
 13 analysis supporting the identification of the meth-
 14 odologies made under subparagraphs (A) and (B).”.

15 (b) EXTENSION FOR STATE LAW AMENDMENT.—In
 16 the case of a State plan under title XIX of the Social Se-
 17 curity Act (42 U.S.C. 1396 et seq.) which the Secretary
 18 of Health and Human Services determines requires State
 19 legislation in order for the plan to meet the additional re-
 20 quirements imposed by the amendment made by sub-
 21 section (a)(1)(C), the State plan shall not be regarded as
 22 failing to comply with the requirements of such title solely
 23 on the basis of its failure to meet these additional require-
 24 ments before the first day of the first calendar quarter
 25 beginning after the close of the first regular session of the

1 State legislature that begins after the date of enactment
2 of this Act. For purposes of the previous sentence, in the
3 case of a State that has a 2-year legislative session, each
4 year of the session is considered to be a separate regular
5 session of the State legislature.

