DATE 8/6/97

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TOTAL PAGES (including cover) 18

REMARKS Attached is Senator Kohl's registry bill, The Patient Abuse Prevention Act, which he introduced last week. I've also attached a summary. Please feel free to contact me with any comments or suggestions at 224-1882. Thanks - Julie

**Background and Summary of the "Patient Abuse Prevention Act" -- 7/29/97**

## Background

OBRA '87 requires states to maintain a registry of nurse aides, but there have been numerous instances of workers with criminal backgrounds being listed as eligible nurse aides, gaining employment in nursing homes and abusing residents. Abuse of vulnerable patients by health workers is not confined to nursing homes nor limited to nurse aides. The vast majority of health care workers are caring, dedicated and professional, but it only takes a few abusive workers to affect the safety and peace-of-mind of patients and other workers.

Current safeguards have not prevented abuse for several reasons: many states do not require criminal background checks; content of state registries varies considerably; abuses are difficult to verify and posting of violators can be excessively delayed; abusive workers are often dismissed without a report being filed; workers can evade registries by moving from state to state or from a less regulated state or work environment to another; states hesitate to "document" problem workers due to the long process of appeals and the fact that a listing means barring a worker from nursing homes for life.

## Purpose

This proposal attempts to prevent abuse from taking place by establishing a criminal background check requirement for vulnerable care workers and setting up a national clearinghouse of those found to be abusive. The clearinghouse would cover all health care workers that care for vulnerable patients, not just nurse aides. In addition, the current law "lifetime ban" requirements for nurse aides would be altered to provide more comprehensive listings that include temporary exclusions. This change is necessary to document those worker's whose behavior warrants a listing on the registry, but who do not deserve to be banned from working in a health care setting for life.

"Patient Abuse Prevention Act"

**Section 1. Short Title:** "Patient Abuse Prevention Act"

**Section 2. Creation of National Registry of Abusive Workers**

- The National Registry will be established and maintained by the Department of Health and Human Services, Office of Inspector General. HHS is currently setting up a health care fraud and abuse data bank pursuant to the Health Insurance Portability and Accountability Act. This bill would increase the scope of that data bank and require active use of the registry. HHS will coordinate criminal findings and listings with the FBI

- Timeline -- Within six months after the bill is enacted, HHS will establish the National Abuse Registry and publish regulations regarding submission of information from state abuse registries to the National Registry. Abuse findings will be reported to the Registry no later than 30-days following confirmation.

**Contents/Use of Registry**

- States will submit current nurse aide abuse registries to HHS following issuance of regulations on standard formats for submission.

- States will expand nurse aide abuse registries to include other health care workers and personnel that have direct contact with vulnerable patients. Current state registries are limited to nurse aides, and in some states, home health aides.

- The National Registry will also include all health care workers who have been convicted of an abuse, who have been subject to an abuse finding or who have a criminal record that has a bearing on the care of vulnerable patients.

- Any provider hiring or employing a direct care worker would contact the state for a check on the state registry and a check of the National Registry. In addition, a criminal background check will be initiated (described below).

**Reports of Abuse**

- Current HHS regulations require long-term care facilities to investigate and report abuses for further investigations to the appropriate state agency. This codifies that requirement.

- Similarly, states must investigate patient abuse reports and contact the National Registry with any confirmed abuses.

- Any finding of abuse will be submitted to the National Registry along with a statement of the person subject to the finding. Any abuse disclosure shall be accompanied by the statement.

- States will also report known serious criminal convictions of health care workers outside of the health care setting to the national abuse registry. HHS will consult with the Department of Justice to address privacy concerns and to ensure coordination of the health care registry with national criminal data bank maintained by the FBI.

**Mandatory Criminal Background Checks**

- FBI criminal background checks will be required for those direct patient care workers who have not been subject to a criminal background check under state licensing requirements. This includes licensed practitioners who have not undergone a background check, nurse aides, home health aides and other workers that will have unsupervised contact with a vulnerable patient

- States will submit check requests to the FBI national criminal background check system (fingerprint checks). Because of the current backlog at FBI for fingerprint checks, the provision is delayed until no later than January 1, 1999. At that time, FBI should have the Integrated Automated Fingerprint Identification System fully operational. That system should operate within a two-day turn around and at less cost than the current manual system.

- Fees: States may charge fees to cover cost of FBI check, not to exceed their cost. Facilities may split the cost of the fees with the applicant.

Penalties for non-compliance

- If a provider fails to inquire with the state and hires a known abuser, the provider is subject to a fine of $2,000 for the first violation and $5,000 for subsequent violations. If there is willful disregard of the background check and reporting requirements, the fines increase up to $10,000.

**Section 3. Changes to Current law Exclusions and OBRA '87 Provisions**

- Current law requires that only nurse aides are listed on state registries. This requirement will be expanded to cover all direct care workers.

- Current law already mandates exclusion for those convicted of patient abuse or other crimes within the health care setting. This adds a prohibition on health care workers who have been convicted of the most serious crimes outside of the health care setting, including homicide, battery, sexual assault, and child, elder or spousal abuse.

- Varying degrees of abuse "findings" will be allowed on state and national registry. One of the main complaints of providers and state ombudsman programs is that a "finding" of abuse equates to a "death sentence" by banning an individual from working as a nurse aide for life. Due to the severity of the ban, facilities may avoid pursuing a case and States may hesitate to aggressively pursue abuse reports that may or may not lead to a "finding." Therefore, other health facilities may be unaware of instances of abuse or mistreatment. This bill will allow HHS to issue regulations on varying degree's of findings and exclusions so that those who have had problems will be listed, but not necessarily prohibited from working for life.

**Definitions**

- **Covered Care Workers** -- Patient care workers who have direct access to vulnerable patients.

- **Covered Health Care Facilities** -- those receiving Medicare or Medicaid reimbursement, such as: nursing homes, skilled nursing facilities, home health agencies, community-based residential facilities, board and care facilities, adult day care centers, adult family homes, assisted living facilities, hospice programs, and hospitals. Federal health care facilities are also subject to the requirements.

- **Abuse** -- Any finding of abuse, neglect, mistreatment of residents or misappropriation of their property as defined in current Federal regulations relating to nurse aides (CFR, Sect. 483.13 (c)(ii).

- **Crime** -- those that reflect a clear disregard for the health, well-being, safety and general welfare of other people must be prohibited from working in direct contact with vulnerable long term care residents or consumers. Current law already requires exclusion of those convicted of health care fraud and acts of abuse in the health care setting. Other crimes may be cause for exclusion under current law at the discretion of the Secretary of HHS. This bill adds a mandatory exclusion of those convicted of serious crimes that occur outside of the health care setting.

**Section 4. Abuse Prevention/Training Demonstration**

- Because the best way to combat patient abuse is to prevent it from occurring, a new demonstration program is created to compile information on best practices in abuse prevention training for managers and staff of health care facilities. The demonstration will focus on ways to improve collaboration between state health care survey and certification agencies, long-term care ombudsman programs, the long term care industry and community members. Current patient abuse prevention training programs will be studied for effectiveness and application to other health care settings.

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105TH CONGRESS
1ST SESSION

# S. 1122

IN THE SENATE OF THE UNITED STATES

Mr. KOHL introduced the following bill; which was read twice and referred to the Committee on _____

# A BILL

To establish a national registry of abusive and criminal patient care workers and to require criminal background checks of patient care workers.

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

**SECTION 1. SHORT TITLE.**

This Act may be cited as the "Patient Abuse Prevention Act".

**SEC. 2. ESTABLISHMENT OF NATIONAL REGISTRY OF ABUSIVE WORKERS.**

(a) IN GENERAL.—The Secretary shall establish, under the health care fraud and abuse data collection program established under section 1128E of the Social Secu-

rity Act (42 U.S.C. 1320a-7e), a registry to be known as the "National Registry of Abusive Workers" (hereafter referred to in this section as the "Registry") to collect and maintain data on covered health care workers (as defined in subsection (e)) who have been the subject of reports of patient abuse.

(b) SUBMISSION OF INFORMATION BY STATE REGISTRIES.—Each State registry under sections 1819(e)(2) and 1919(e)(2) of the Social Security Act (42 U.S.C. 1395i-3(e)(2) and 1396r(e)(2)) shall submit to the Registry any existing or newly acquired information contained in the State registry concerning covered health care workers who have been the subject of confirmed findings of patient abuse.

(c) SUBMISSION OF INFORMATION BY STATE.—Each State shall report to the Registry any existing or newly acquired information concerning the identity of any covered health care worker who has been found to have committed an abusive act involving a patient, including the identity of any such worker who has been convicted of a Federal or State crime as described in section 1128(a)(2)(A) of the Social Security Act (42 U.S.C. 1320a-7(a)(2)(A)). The State shall provide such workers with a right to issue a statement concerning the submission of information to the Registry under this subsection.

Any information disclosed concerning a finding of an abusive act shall also include disclosure of any statement submitted by a worker in the registry relating to the finding or a clear and accurate summary of such a statement.

(d) SUBMISSION OF INFORMATION BY FACILITIES.—Each covered health care facility shall report to the State concerning a covered health care worker who has been found to have engaged in an act of patient abuse. The State shall, in accordance with the procedures described in part 483 of title 42, Code of Federal Regulations (as in effect on July 1, 1995), conduct an investigation with respect to a report under this subsection to determine the validity of such a report.

(e) BACKGROUND CHECK.—

(1) REQUIREMENTS.—

(A) IN GENERAL.—Each covered health care facility (as defined in subsection (f)), prior to employing a covered health care worker, shall—

(i) in the case of a covered health care worker who has not otherwise undergone a criminal background check as part of the licensing requirements of a State, as determined under regulations promulgated by the Secretary, provide for the conduct by

the State of a criminal background check (through an existing State database (if any) and through the Integrated Automated Fingerprint Identification System) concerning such worker, and provide the worker with prior written notice of the requirement for such a background check;

(ii) obtain from a covered health care worker prior to employment a written certification that such worker does not have a criminal record, and that a finding of abuse has not been made relating to such worker, that would preclude such worker from carrying out duties that require direct patient care; and

(iii) in the case of all such workers, contact the State health care worker registries established under sections 1819(e)(2) and 1919(e)(2) which shall also contact the Registry for information concerning the worker.

(B) IMPOSITION OF FEES.—A State may assess a covered health care facility a fee for the conduct of a criminal background check under subparagraph (A)(i) in an amount that

does not exceed the actual cost of the conduct of the background check. Such a facility may recover from the covered health care worker involved a fee in an amount equal to not more than 50 percent of the amount of the fee assessed by the State for the criminal background check.

(C) EFFECTIVE DATE.—The requirement in subparagraph (A)(i) shall become applicable on January 1, 1999, or on such earlier date as the Director of the Federal Bureau of Investigation determines that the Integrated Automated Fingerprint Identification System has become operational.

(2) PROBATIONARY EMPLOYMENT.—Each covered health care facility shall provide a probationary period of employment for a covered health care worker pending the completion of the background checks required under paragraph (1)(A). Such facility shall maintain direct supervision of the covered health care worker during the worker's probationary period of employment.

(3) PENALTY.—

(A) IN GENERAL.—A covered health care facility that violates paragraph (1) or (2) shall

be subject to a civil penalty in an amount not to exceed—

(i) for the first such violation, $2,000; and

(ii) for the second and each subsequent violation within any 5-year period, $5,000.

(B) KNOWING RETENTION OF WORKER.—In addition to any civil penalty under subparagraph (A), a covered health care facility that—

(i) knowingly continues to employ a covered health care worker in violation of paragraph (1) or (2) in a position involving direct patient care; or

(ii) knowingly fails to report a covered health care worker who has been determined to have committed patient abuse;

shall be subject to a civil penalty in an amount not to exceed $5,000 for the first such violation, and $10,000 for the second and each subsequent violation within any 5-year period.

(f) DEFINITIONS.—In this section:

(1) COVERED HEALTH CARE FACILITY.—The term "covered health care facility" means—

(A) with respect to application under the medicare program under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.), a provider of services, as defined in section 1861(u) of such Act (other than a fund for purposes of sections 1814(g) and 1835(e));

(B) with respect to application under the medicaid program under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), any nursing facility, home health agency, community-based residential facility, adult day care center, adult family home, assisted living facility, hospice program, hospital, treatment facility, personal care worker agency, supportive home care worker agency, board and care facility, or any other entity that receives assistance or benefits under the medicaid program under that title;

(C) a facility of the National Institutes of Health;

(D) a facility of the Indian Health Service;

(F) a health center under section 330 of the Public Health Service Act (42 U.S.C. 254b);

(G) a hospital or other patient care facility owned or operated under the authority of the Department of Veterans Affairs or the Department of Defense.

(2) COVERED HEALTH CARE WORKER.—The term "covered health care worker" means any individual that has direct contact with a patient of a covered health care facility under an employment or other contract, or under a volunteer agreement, with such facility. Such term includes individuals who are licensed or certified by the State to provide such services, and non-licensed individuals providing such services as defined by the Secretary including nurse assistants, nurses aides, home health aides, and personal care workers and attendants.

(3) PATIENT ABUSE.—The term "patient abuse" means any incidence of abuse, neglect, mistreatment, or misappropriation of property of a patient of a covered health care facility. The terms "abuse", "neglect", "mistreatment", and "misappropriation of property" shall have the meanings given such terms in part 483 of title 42, Code of Federal Regulations.

(4) SECRETARY.—The term "Secretary" means the Secretary of Health and Human Services.

(g) CONSULTATION.—In carrying out this section the Secretary shall consult with the Director of the Federal Bureau of Investigation.

(h) REGULATIONS.—Not later than 6 months after the date of enactment of this Act, the Secretary shall promulgate regulations to carry out this section. With respect to subsections (b) and (c), the regulations shall call for the submission of information to the Registry not later than 30 days after the date of a conviction or on which a finding is made.

**SEC. 3. EXCLUSION OF CERTAIN INDIVIDUALS FROM PARTICIPATION IN PROGRAMS.**

(a) MANDATORY LIFETIME EXCLUSION.—Section 1128(a) of the Social Security Act (42 U.S.C. 1320a-7(a)) is amended by adding at the end the following:

"(5) CRIMINAL CONVICTION.—Any individual or entity that has been—

"(A) convicted, under Federal or State law, of a criminal offense involving a crime against bodily security, including homicide, battery, endangerment of safety, sexual assault, child or elder abuse, and spousal abuse; or

"(B) found to have—

"(i) knowingly continued to employ an individual described in subparagraph (A)

in a position involving direct patient care; or

"(ii) knowingly failed to report an individual who has been determined to have committed a crime described in subparagraph (A).".

(b) PERMISSIVE EXCLUSION.—

(1) IN GENERAL.—Section 1128(b) of the Social Security Act (42 U.S.C. 1320a-7(b)) is amended—

(A) in subsection (b), by adding at the end the following:

"(16) FINDING RELATING TO PATIENT ABUSE.—Any individual or entity that—

"(A) is or has been the subject of a specific documented finding of patient abuse by a State (as determined under procedures utilized by a State under section 1819(e)(2) or 1919(e)(2)); or

"(B) has been found to have—

"(i) knowingly continued to employ an individual described in subparagraph (A) in a position involving direct patient care; or

"(ii) knowingly failed to report an individual who has been determined to have committed patient abuse as described in subparagraph (A).''; and

(B) in subsection (c)(3), by adding at the end the following:

"(G) In the case of an exclusion of an individual or entity under subsection (b)(16), the period of exclusion shall be determined in accordance with regulations promulgated by the Secretary based on the severity of the conduct that is the subject of the exclusion.".

(2) REGULATIONS.—Not later than 6 months after the date of enactment of this Act, the Secretary of Health and Human Services shall promulgate regulations to establish periods of exclusion for purposes of section 1128(c)(3)(G) of the Social Security Act.

(c) EXCLUSIONS APPLY TO ANY ENTITY ELIGIBLE FOR FEDERAL REIMBURSEMENT.—Section 1128 of the Social Security Act (42 U.S.C. 1320a-7) is amended by adding at the end the following:

"(j) APPLICABILITY OF CERTAIN EXCLUSIONS.—The exclusion (or direction to exclude) an individual or entity under subsections (a)(2) and (b)(16) shall provide that

such individual or entity is excluded from working for or on behalf of any entity that is eligible for reimbursement under a Federal health care program, as defined in section 1128B(f).".

**SEC. 4. PREVENTION AND TRAINING DEMONSTRATION PROJECT.**

(a) ESTABLISHMENT.—The Secretary of Health and Human Services shall establish a demonstration program to provide grants to develop information on best practices in patient abuse prevention training (including behavior training and interventions) for managers and staff of hospital and health care facilities.

(b) ELIGIBILITY.—To be eligible to receive a grant under subsection (a), an entity shall be a public or private nonprofit entity and prepare and submit to the Secretary of Health and Human Services an application at such time, in such manner, and containing such information as the Secretary may require.

(c) USE OF FUNDS.—Amounts received under a grant under this section shall be used to—

(1) examine ways to improve collaboration between State health care survey and provider certification agencies, long-term care ombudsman programs, the long-term care industry, and local community members;

(2) examine patient care issues relating to regulatory oversight, community involvement, and facility staffing and management with a focus on staff training, staff stress management and staff supervision;

(3) examine the use of patient abuse prevention training programs by long-term care entities, including the training program developed by the National Association of Attorneys General, and the extent to which such programs are used; and

(4) identify and disseminate best practices for preventing and reducing patient abuse.

(d) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated such sums as may be necessary to carry out this section.