

112<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 6043

To amend the Public Health Service Act and the Social Security Act to extend health information technology assistance eligibility to behavioral health, mental health, and substance abuse professionals and facilities, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 27, 2012

Mr. MURPHY of Pennsylvania (for himself, Mr. RYAN of Ohio, Mr. MARINO, Mr. SULLIVAN, Mrs. BLACKBURN, and Mr. TIBERI) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To amend the Public Health Service Act and the Social Security Act to extend health information technology assistance eligibility to behavioral health, mental health, and substance abuse professionals and facilities, and for other purposes.

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 “Behavioral Health In-  
5 formation Technology Act of 2012”.

1 **SEC. 2. EXTENSION OF HEALTH INFORMATION TECH-**  
2 **NOLOGY ASSISTANCE FOR BEHAVIORAL AND**  
3 **MENTAL HEALTH AND SUBSTANCE ABUSE.**

4 Section 3000(3) of the Public Health Service Act (42  
5 U.S.C. 300jj(3)) is amended by inserting before “and any  
6 other category” the following: “behavioral and mental  
7 health professionals (as defined in section  
8 331(a)(3)(E)(i)), a substance abuse professional, a psy-  
9 chiatric hospital (as defined in section 1861(f) of the So-  
10 cial Security Act (42 U.S.C. 1395x(f))), a community  
11 mental health center meeting the criteria specified in sec-  
12 tion 1913(c), a residential or outpatient mental health or  
13 substance abuse treatment facility,”.

14 **SEC. 3. EXTENSION OF ELIGIBILITY FOR MEDICARE AND**  
15 **MEDICAID HEALTH INFORMATION TECH-**  
16 **NOLOGY IMPLEMENTATION ASSISTANCE.**

17 (a) PAYMENT INCENTIVES FOR ELIGIBLE PROFES-  
18 SIONALS UNDER MEDICARE.—Section 1848 of the Social  
19 Security Act (42 U.S.C. 1395w-4) is amended—

20 (1) by amending clause (iii) of subsection  
21 (a)(7)(E) to read as follows:

22 “(iii) ELIGIBLE PROFESSIONAL.—The  
23 term ‘eligible professional’ means any of  
24 the following:

25 “(I) A physician (as defined in  
26 section 1861(r)).

1                   “(II) A clinical psychologist pro-  
2                   viding qualified psychologist services  
3                   (as defined in section 1861(ii)).”; and  
4                   (2) by amending subparagraph (C) of sub-  
5                   section (o)(5) to read as follows:

6                   “(C) ELIGIBLE PROFESSIONAL.—The term  
7                   ‘eligible professional’ means any of the fol-  
8                   lowing:

9                   “(i) A physician (as defined in section  
10                   1861(r)).

11                   “(ii) A clinical psychologist providing  
12                   qualified psychologist services (as defined  
13                   in section 1861(ii)).”.

14                   (b) ELIGIBLE HOSPITALS.—Section 1886(n)(6)(B)  
15                   of the Social Security Act (42 U.S.C. 1395ww(n)(6)(B))  
16                   is amended by inserting before the period at the end the  
17                   following: “or an inpatient hospital that is a psychiatric  
18                   hospital (as defined in section 1861(f))”.

19                   (c) MEDICAID PROVIDERS.—Section 1903(t) of the  
20                   Social Security Act (42 U.S.C. 1396b(t)) is amended as  
21                   follows:

22                   (1) Paragraph (2)(B) is amended—

23                   (A) in clause (i), by striking “, or” and in-  
24                   serting a semicolon;

1 (B) in clause (ii), by striking the period  
2 and inserting a semicolon; and

3 (C) by adding after clause (ii) the following  
4 new clauses:

5 “(iii) a public hospital that is prin-  
6 cipally a psychiatric hospital (as defined in  
7 section 1861(f));

8 “(iv) a private hospital that is prin-  
9 cipally a psychiatric hospital (as defined in  
10 section 1861(f)) and that has at least 10  
11 percent of its patient volume (as estimated  
12 in accordance with a methodology estab-  
13 lished by the Secretary) attributable to in-  
14 dividuals receiving medical assistance  
15 under this title;

16 “(v) a community mental health cen-  
17 ter meeting the criteria specified in section  
18 1913(e) of the Public Health Service Act;  
19 or

20 “(vi) a residential or outpatient men-  
21 tal health or substance abuse treatment fa-  
22 cility that—

23 “(I) is accredited by the Joint  
24 Commission on Accreditation of  
25 Healthcare Organizations, the Com-

1 mission on Accreditation of Rehabili-  
2 tation Facilities, the Council on Ac-  
3 creditation, or any other national ac-  
4 crediting agency recognized by the  
5 Secretary; and

6 “(II) has at least 10 percent of  
7 its patient volume (as estimated in ac-  
8 cordance with a methodology estab-  
9 lished by the Secretary) attributable  
10 to individuals receiving medical assist-  
11 ance under this title.”.

12 (2) Paragraph (3)(B) is amended—

13 (A) in clause (iv), by striking “and” after  
14 the semicolon;

15 (B) in clause (v), by striking the period  
16 and inserting “; and”; and

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

19 “(vi) clinical psychologist providing  
20 qualified psychologist services (as defined  
21 in section 1861(ii)), if such clinical psy-  
22 chologist is practicing in an outpatient  
23 clinic that—

24 “(I) is led by a clinical psycholo-  
25 gist; and

1                   “(II) is not otherwise receiving  
2                   payment under paragraph (1) as a  
3                   Medicaid provider described in para-  
4                   graph (2)(B).”.

5 **SEC. 4. PROVIDING PROTECTIONS FOR CERTAIN PRO-**  
6                   **VIDERS, VENDORS, AND USERS OF CERTIFIED**  
7                   **EHR TECHNOLOGY.**

8                   (a) COVERED ENTITIES.—

9                   (1) COVERED ENTITIES.—For purposes of this  
10                  subsection, a covered entity means, with respect to  
11                  certified EHR technology (as defined in section  
12                  1848(o)(4) of the Social Security Act) and a year,  
13                  any of the following:

14                  (A) MEANINGFUL EHR USERS.—Any of the  
15                  following, with respect to such year:

16                  (i) An eligible professional (as defined  
17                  in paragraph (5)(C) of section 1848(o) of  
18                  the Social Security Act) determined to be  
19                  a meaningful EHR user under paragraph  
20                  (2) of such section for the EHR reporting  
21                  period (as defined in paragraph (5)(B) of  
22                  such section) during such year.

23                  (ii) In the case of a qualifying MA or-  
24                  ganization (as defined in paragraph (5) of  
25                  section 1853(l) of such Act), an eligible

1 professional described in paragraph (2) of  
2 such section of the organization who the  
3 organization attests under paragraph (6)  
4 of such section to be a meaningful EHR  
5 user for such year.

6 (iii) In the case of a qualifying MA  
7 organization (as defined in paragraph (5)  
8 of section 1853(l) of such Act), an eligible  
9 hospital described in section 1853(m)(2) of  
10 such Act of the organization which attests  
11 under section 1853(l)(6) of such Act to be  
12 a meaningful EHR user for the applicable  
13 period with respect to such year.

14 (iv) An eligible hospital (as defined in  
15 paragraph (6)(B) of section 1886(n) of  
16 such Act) determined to be a meaningful  
17 EHR user under paragraph (3) of such  
18 section for the EHR reporting period (as  
19 defined in paragraph (6)(A) of such sec-  
20 tion) with respect to such year.

21 (v) A critical access hospital deter-  
22 mined pursuant to section 1814(l)(3) of  
23 such Act to be a meaningful EHR user (as  
24 would be determined under paragraph (3)  
25 of section 1886(n) of such Act) for an

1 EHR reporting period (as defined in para-  
2 graph (6)(A) of such section) for a cost re-  
3 porting period beginning during such year.

4 (vi) A Medicaid provider (as defined  
5 in paragraph (2) of section 1903(t) of such  
6 Act) eligible for payments described in  
7 paragraph (1) of such section for such  
8 year.

9 (B) HEALTH INFORMATION EXCHANGE  
10 ENTITIES.—Individuals and entities (other than  
11 States or State designated entities) which dur-  
12 ing such year are health information exchange  
13 contractors (consisting of technology providers),  
14 health information exchange participants (con-  
15 sisting of organizations providing supportive  
16 technology to a health information exchange),  
17 and other users of health information exchanges  
18 (consisting of other entities that may be ex-  
19 changing clinical or administrative data). Man-  
20 ufacturers of EHR Software and other health  
21 information technologies who participate in the  
22 reporting of adverse events or who otherwise  
23 contribute relevant patient safety work product  
24 under subsection (c)(1) of this Act.



1           (C) CERTAIN OTHER EHR USERS.—A  
2 health care professional who, during such  
3 year—

4           (i) is a user of such certified EHR  
5 technology;

6           (ii) is not eligible for incentive pay-  
7 ments based on meaningful use of such  
8 technology under title XVIII or XIX of the  
9 Social Security Act solely because the pro-  
10 fessional is not—

11           (I) an eligible professional (as de-  
12 fined in paragraph (5)(C) of section  
13 1848(o) of such Act);

14           (II) an eligible professional de-  
15 scribed in paragraph (2) of section  
16 1853(l) of such Act, with respect to a  
17 qualifying MA organization (as de-  
18 fined in paragraph (5) of such sec-  
19 tion);

20           (III) an eligible hospital de-  
21 scribed in section 1853(m)(2) of such  
22 Act, with respect to such a qualifying  
23 MA organization;

1 (IV) an eligible hospital (as de-  
2 fined in paragraph (6)(B) of section  
3 1886(n) of such Act);

4 (V) a critical access hospital; or

5 (VI) a Medicaid provider (as de-  
6 fined in paragraph (2) of section  
7 1903(t) of such Act); and

8 (iii) attests, to the satisfaction of the  
9 Secretary, that but for the reason de-  
10 scribed in clause (ii), the professional  
11 would otherwise satisfy criteria to be eligi-  
12 ble for such incentive payments during  
13 such year.

14 (b) IMPROVING PATIENT SAFETY THROUGH ERROR  
15 REPORTING AND REMEDIATION, AND CLARIFICATION OF  
16 AUTHORITY.—

17 (1) IN GENERAL.—A covered entity may submit  
18 to a Patient Safety Organization as defined in sec-  
19 tion 921. Title IX of the Public Health Service Act  
20 (42 U.S.C. 299 et seq.) information on EHR-related  
21 adverse events with respect to certified EHR tech-  
22 nology as defined in section 3001 of the Public  
23 Health Service Act (42 U.S.C. 300jj–11) used or  
24 provided by such entity, as applicable. The utiliza-  
25 tion of patient safety work product shall be for the

1 purpose of providing direct feedback and assistance  
2 to covered entities to effectively minimize patient  
3 risk. Patient Safety Organizations may furnish the  
4 Office of the National Coordinator de-identified re-  
5 ports of their findings for the purposes of tracking  
6 the number and nature of such adverse events.

7 (2) APPLICATION OF SAFETY ORGANIZATION  
8 PRIVILEGE AND CONFIDENTIALITY PROTECTIONS.—

9 In the case of a covered entity that submits to such  
10 a body information on such an adverse event and in  
11 the case of the collection and maintenance of such  
12 information by such a body, the provisions of section  
13 922 of the Public Health Service Act shall apply to  
14 such information and to the body and the entity in  
15 the same manner such provisions apply to patient  
16 safety work product and a patient safety organiza-  
17 tion and provider under part C of title IX of such  
18 Act.

19 (3) CLARIFICATION OF AUTHORITY.—Certified  
20 EHR's shall not be considered a device for purposes  
21 of the Federal Food, Drug, and Cosmetic Act (21  
22 U.S.C. 301 et seq.).

23 (c) RULES RELATING TO E-DISCOVERY.—In any  
24 health care lawsuit against a covered entity that is related  
25 to an EHR-related adverse event, with respect to certified

1 EHR technology used or provided by the covered entity,  
2 electronic discovery shall be limited to—

3 (1) information that is related to such EHR-re-  
4 lated adverse event; and

5 (2) information from the period in which such  
6 EHR-related adverse event occurred.

7 (d) LEGAL PROTECTIONS FOR COVERED ENTI-  
8 TIES.—

9 (1) GENERAL.—For a covered entity described  
10 in subsection (b), the following protections apply:

11 (A) ENCOURAGING SPEEDY RESOLUTION  
12 OF CLAIMS.—

13 (i) GENERAL.—A claimant may not  
14 commence a health care lawsuit against a  
15 covered entity on any date that is 3 years  
16 after the date of manifestation of injury or  
17 1 year after the claimant discovers, or  
18 through the use of reasonable diligence  
19 should have discovered, the injury, which-  
20 ever occurs first. This limitation shall be  
21 tolled to the extent that the claimant is  
22 able to prove—

23 (I) fraud;

24 (II) intentional concealment; or

1 (III) the presence of a foreign  
2 body, which has no therapeutic or di-  
3 agnostic purpose or effect, in the per-  
4 son of the injured person.

5 (ii) TREATMENT OF A MINOR.—A  
6 health care lawsuit by or on behalf of a  
7 claimant under the age of 17 years at the  
8 time the injury was suffered may not be  
9 commenced after the date that is not later  
10 than 3 years after the date of the alleged  
11 manifestation of injury except that actions  
12 by a claimant under the full age of 6 years  
13 shall be commenced not later than 3 years  
14 after the date of manifestation of injury or  
15 prior to the claimant’s 8th birthday, which-  
16 ever provides a longer period. In addition  
17 to subparagraph (A)(i)(I)–(III), this limi-  
18 tation shall be tolled for claimants under  
19 the age of 17 years for any period during  
20 which a parent or guardian and a health  
21 care provider or health care organization  
22 have committed fraud or collusion in the  
23 failure to bring an action on behalf of the  
24 claimant.

1 (B) EQUITABLE ASSIGNMENT OF RESPON-  
2 SIBILITY.—In any health care lawsuit against a  
3 covered entity—

4 (i) each party to the lawsuit other  
5 than the claimant that is such a covered  
6 entity shall be liable for that party's sev-  
7 eral share of any damages only and not for  
8 the share of any other person and such  
9 several share shall be in direct proportion  
10 to that party's proportion of responsibility  
11 for the injury, as determined under clause  
12 (iii);

13 (ii) whenever a judgment of liability is  
14 rendered as to any such party, a separate  
15 judgment shall be rendered against each  
16 such party for the amount allocated to  
17 such party; and

18 (iii) for purposes of this subpara-  
19 graph, the trier of fact shall determine the  
20 proportion of responsibility of each such  
21 party for the claimant's harm.

22 (C) SUBSEQUENT REMEDIAL MEASURES.—  
23 Evidence of subsequent remedial measures to  
24 an EHR-related adverse event with respect to  
25 certified EHR technology used or provided by

1 the covered entity (including changes to the cer-  
2 tified EHR system, additional training require-  
3 ments, or changes to standard operating proce-  
4 dures) by a covered entity shall not be admis-  
5 sible in health care lawsuits.

6 (D) INCREASED BURDEN OF PROOF PRO-  
7 TECTION FOR COVERED ENTITIES.—Punitive  
8 damages may, if otherwise permitted by appli-  
9 cable State or Federal law, be awarded against  
10 any covered entity in a health care lawsuit only  
11 if it is proven by clear and convincing evidence  
12 that such entity acted with reckless disregard  
13 for the health or safety of the claimant. In any  
14 such health care lawsuit where no judgment for  
15 compensatory damages is rendered against such  
16 entity, no punitive damages may be awarded  
17 with respect to the claim in such lawsuit.

18 (E) PROTECTION FROM LIBEL OR SLAN-  
19 DER.—Covered entities and employees, agents  
20 and representatives of covered entities are im-  
21 mune from civil action for libel or slander aris-  
22 ing from information or entries made in cer-  
23 tified EHR technology and for the transfer of  
24 such information to another eligible provider,  
25 hospital or health information exchange, if the

1 information, transfer of information, or entries  
2 were made in good faith and without malice.

3 (e) DEFINITIONS.—

4 (1) CLAIMANT.—The term “claimant” means  
5 any person who brings a health care lawsuit, includ-  
6 ing a person who asserts or claims a right to legal  
7 or equitable contribution, indemnity, or subrogation,  
8 arising out of a health care liability claim or action,  
9 and any person on whose behalf such a claim is as-  
10 serted or such an action is brought, whether de-  
11 ceased, incompetent, or a minor.

12 (2) COMPENSATORY DAMAGES.—The term  
13 “compensatory damages” means objectively verifi-  
14 able monetary losses incurred as a result of the pro-  
15 visions of, use of, or payment for (or failure to pro-  
16 vide, use, or pay for) health care services or medical  
17 products, such as past and future medical expenses,  
18 loss of past and future earnings, cost of obtaining  
19 domestic services, loss of employment, and loss of  
20 business or employment opportunities, damages for  
21 physical and emotional pain, suffering, inconven-  
22 ience, physical impairment, mental anguish, dis-  
23 figurement, loss of enjoyment in life, loss of society  
24 and companionship, loss of consortium (other than  
25 loss of domestic service), hedonic damages, injury to



1 reputation, and all other nonpecuniary losses of any  
2 kind or nature. Such term includes economic dam-  
3 ages and noneconomic damages, as such terms as  
4 defined in this subsection.

5 (3) ECONOMIC DAMAGES.—The term “economic  
6 damages” means objectively verifiable monetary  
7 losses incurred as a result of the provisions of, use  
8 of, or payment for (or failure to provide, use, or pay  
9 for) health care services or medical products, such as  
10 past and future medical expenses, loss of past and  
11 future earnings, cost of obtaining domestic services,  
12 loss of employment, and loss of business or employ-  
13 ment opportunities.

14 (4) CERTIFIED EHR TECHNOLOGY.—The term  
15 “certified EHR technology” has the meaning given  
16 such term in section 1848(o)(4) of the Social Secu-  
17 rity Act.

18 (5) EHR-RELATED ADVERSE EVENT.—The  
19 term “EHR-related adverse event” means, with re-  
20 spect to a provider, a defect, malfunction, or error  
21 in the certified health information technology or  
22 electronic health record used by the provider, or in  
23 the input or output of data maintained through such  
24 technology or record, that results or could reason-  
25 ably result in harm to a patient.

1           (6) HEALTH CARE LAWSUIT.—The term  
2           “health care lawsuit” means any health care liability  
3           claim concerning the provision of health care items  
4           or services or any medical product affecting inter-  
5           state commerce, or any health care liability action  
6           concerning the provision of health care items or  
7           services or any medical product affecting interstate  
8           commerce, brought in a State or Federal court or  
9           pursuant to an alternative dispute resolution system,  
10          against a health care provider, a health care organi-  
11          zation, or the manufacturer, distributor, supplier,  
12          marketer, promoter, or seller of a medical product,  
13          regardless of the theory of liability on which the  
14          claim is based, or the number of claimants, plain-  
15          tiffs, defendants, or other parties, or the number of  
16          claims or causes of action, in which the claimant al-  
17          leges a health care liability claim. Such term does  
18          not include a claim or action which is based on  
19          criminal liability; which seeks civil fines or penalties  
20          paid to Federal, State, or local government; or which  
21          is grounded in antitrust.

22          (7) HEALTH CARE LIABILITY ACTION.—The  
23          term “health care liability action” means a civil ac-  
24          tion brought in a State or Federal court or pursuant  
25          to an alternative dispute resolution system, against

1 a health care provider, a health care organization, or  
2 the manufacturer, distributor, supplier, marketer,  
3 promoter, or seller of a medical product, regardless  
4 of the theory of liability on which the claim is based,  
5 or the number of plaintiffs, defendants, or other par-  
6 ties, or the number of causes of action, in which the  
7 claimant alleges a health care liability claim.

8 (8) HEALTH CARE LIABILITY CLAIM.—The  
9 term “health care liability claim” means a demand  
10 by any person, whether or not pursuant to alter-  
11 native dispute resolution, against a health care pro-  
12 vider, health care organization, or the manufacturer,  
13 distributor, supplier, marketer, promoter, or seller of  
14 a medical product, including third-party claims,  
15 cross-claims, counter-claims, or contribution claims,  
16 which are based upon the provision of, use of, or  
17 payment for (or the failure to provide, use or pay  
18 for) health care services or medical products, regard-  
19 less of the theory of liability on which the claim is  
20 based, or the number of plaintiffs, defendants, or  
21 other parties, or the number of causes of action.

22 (9) HEALTH CARE ORGANIZATION.—The term  
23 “health care organization” means any person or en-  
24 tity which is obligated to provide or pay for health  
25 benefits under any health plan, including any person

1 or entity acting under a contract or arrangement  
2 with a health care organization to provide or admin-  
3 ister any health benefit.

4 (10) HEALTH CARE PROVIDER.—The term  
5 “health care provider” means any person or entity  
6 required by State or Federal laws or regulations to  
7 be licensed, registered, or certified to provide health  
8 care services, and being either so licensed, reg-  
9 istered, or certified, or exempted from such require-  
10 ment by other statute or regulation.

11 (11) HEALTH CARE ITEMS OR SERVICES.—The  
12 term “health care items or services” means any  
13 items or services provided by a health care organiza-  
14 tion, provider, or by any individual working under  
15 the supervision of a health care provider, that relates  
16 to the diagnosis, prevention, or treatment of any  
17 human disease or impairment, or the assessment or  
18 care of the health of human beings.

19 (12) MALICIOUS INTENT TO INJURE.—The  
20 term “malicious intent to injure” means inten-  
21 tionally causing or attempting to cause physical in-  
22 jury other than providing health care items or serv-  
23 ices.

24 (13) MEDICAL PRODUCT.—The term “medical  
25 product” means a drug, device, or biological product

1 intended for humans, and the terms “drug”, “de-  
2 vice”, and “biological product” have the meanings  
3 given such terms in sections 201(g)(1) and 201(h)  
4 of the Federal Food, Drug, and Cosmetic Act (21  
5 U.S.C. 321(g)(1) and (h)) and section 351(a) of the  
6 Public Health Service Act (42 U.S.C. 262(a)), re-  
7 spectively, including any component or raw material  
8 used therein, but excluding health care services.

9 (14) NONECONOMIC DAMAGES.—The term  
10 “noneconomic damages” means damages for phys-  
11 ical impairment, mental anguish, disfigurement, loss  
12 of enjoyment of life, loss of society and compani-  
13 ship, loss of consortium (other than loss of domestic  
14 service), hedonic damages, injury to reputation, and  
15 all other nonpecuniary losses of any kind of nature.

16 (15) PUNITIVE DAMAGES.—The term “punitive  
17 damages” means damages awarded, for the purpose  
18 of punishment or deterrence, and not solely for com-  
19 pensatory purposes, against a health care provider,  
20 health care organization, or a manufacturer, dis-  
21 tributor, or supplier of a medical product. Punitive  
22 damages are neither economic nor economic dam-  
23 ages.

24 (16) STATE.—The term “State” means each of  
25 the several States, District of Columbia, the Com-

1       monwealth of Puerto Rico, the Virgin Islands,  
2       Guam, American Samoa, the Northern Mariana Is-  
3       lands, the Trust Territory of the Pacific Islands, and  
4       any other territory or possession of the United  
5       States, or any political subdivision thereof.

○