

LEGISLATURE OF NEBRASKA
ONE HUNDRED FIFTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 107

Introduced by Crawford, 45.

Read first time January 06, 2017

Committee: Judiciary

1 A BILL FOR AN ACT relating to crimes and punishment; to amend sections
2 28-101, 28-318, 28-319, 28-319.01, 28-320, 28-320.01, 28-320.02,
3 28-813.01, 28-1463.04, and 28-1463.05, Reissue Revised Statutes of
4 Nebraska; to prohibit sexual assault of a patient or client or a
5 student; to harmonize provisions; and to repeal the original
6 sections.

7 Be it enacted by the people of the State of Nebraska,

1 Section 1. (1) A health professional commits the offense of sexual
2 abuse of a patient or client if such health professional subjects a
3 patient or client who is at least sixteen years of age but less than
4 nineteen years of age to sexual penetration or sexual contact.

5 (2) A health professional who subjects a patient or client who is at
6 least sixteen years of age but less than nineteen years of age to sexual
7 penetration is guilty of sexual abuse of a patient or client in the first
8 degree. Sexual abuse of a patient or client in the first degree is a
9 Class IIA felony.

10 (3) A health professional who subjects a patient or client who is at
11 least sixteen years of age but less than nineteen years of age to sexual
12 contact is guilty of sexual abuse of a patient or client in the second
13 degree. Sexual abuse of a patient or client in the second degree is a
14 Class IIIA felony.

15 (4) A person who is a volunteer or an employee of a school commits
16 the offense of sexual abuse of a student if such volunteer or school
17 employee subjects a student who is at least sixteen years of age but less
18 than nineteen years of age to sexual penetration or sexual contact.

19 (5) A person who is a volunteer or an employee of a school who
20 subjects a student who is at least sixteen years of age but less than
21 nineteen years of age to sexual penetration is guilty of sexual abuse of
22 a student in the first degree. Sexual abuse of a student in the first
23 degree is a Class IIA felony.

24 (6) A person who is a volunteer or an employee of a school who
25 subjects a student who is at least sixteen years of age but less than
26 nineteen years of age to sexual contact is guilty of sexual abuse of a
27 student in the second degree. Sexual abuse of a student in the second
28 degree is a Class IIIA felony.

29 (7) A person who is a volunteer or an employee of a youth center
30 commits the offense of sexual abuse of a patient or client if such
31 volunteer or employee subjects a patient or client who is at least

1 sixteen years of age but less than nineteen years of age to sexual
2 penetration or sexual contact.

3 (8) A person who is a volunteer or an employee of a youth center who
4 subjects a patient or client who is at least sixteen years of age but
5 less than nineteen years of age to sexual penetration is guilty of sexual
6 abuse of a patient or client in the first degree. Sexual abuse of a
7 patient or client in the first degree is a Class IIA felony.

8 (9) A person who is a volunteer or an employee of a youth center who
9 subjects a patient or client who is at least sixteen years of age but
10 less than nineteen years of age to sexual contact is guilty of sexual
11 abuse of a patient or client in the second degree. Sexual abuse of a
12 patient or client in the second degree is a Class IIIA felony.

13 (10) A person who occupies a position of special trust in relation
14 to the victim commits the offense of sexual penetration or sexual abuse
15 of a child if such person subjects a child that is at least sixteen years
16 of age but less than nineteen years of age to sexual penetration or
17 sexual contact.

18 (11) A person who occupies a position of special trust who subjects
19 a child who is at least sixteen years of age but less than nineteen years
20 of age to sexual penetration is guilty of sexual abuse of a child in the
21 first degree. Sexual abuse of a child in the first degree is a Class IIA
22 felony.

23 (12) A person who occupies a position of special trust who subjects
24 a child who is at least sixteen years of age but less than nineteen years
25 of age to sexual contact is guilty of sexual abuse of a child in the
26 second degree. Sexual abuse of a patient or client in the second degree
27 is a Class IIIA felony.

28 (13) It is not a defense to a charge under this section that the
29 student, child, patient, or client consented to such sexual penetration
30 or sexual contact.

31 (14) For purposes of this section:

1 (a) Direct contact means care, supervision, guidance, or control;

2 (b) Employee means a teacher, a supervisor, a supervising principal,
3 a principal, an assistant principal, a vice-principal, a director of
4 vocational education, a facility administrator, a facility operating
5 officer, a dental hygienist, a visiting teacher, a home and school
6 visitor, a counselor, a program manager, a child nutrition program
7 specialist, a security guard, a librarian, a secretary, a nurse, a
8 substitute teacher, a janitor, a cafeteria worker, a bus driver, a
9 teacher aide, any other employee of a school or youth facility who has
10 direct contact with students, patients, or clients, an independent
11 contractor who has a contract with a school or youth facility for
12 purposes of performing services for the school or youth facility,
13 including, but not limited to, a coach or an athletic trainer. Employee
14 does not include a student, patient, or client employed at the school or
15 youth facility or an independent contractor or any employee of an
16 independent contractor who has no direct contact with students, patients,
17 or clients;

18 (c) Health professional means an individual who is or who holds
19 himself or herself out to be credentialed under the Uniform Credentialing
20 Act or who otherwise provides professional physical or mental health
21 services, assessment, diagnosis, treatment, or counseling, including, but
22 not limited to, a physician, an osteopathic physician, a chiropractor, a
23 dentist, a marriage and family therapist, a master social worker, a
24 mental health practitioner, a nurse, a physical therapist, a professional
25 counselor, a psychiatrist, a psychiatric mental health nurse specialist,
26 a psychologist, a social worker, or a substance abuse counselor;

27 (d) Patient or client means a person who receives physical or mental
28 health services from a health professional;

29 (e) Position of special trust means a person over nineteen years of
30 age who is, in relation to the child victim, an employer, a religious
31 counselor, a scout leader, a camp counselor, a babysitter, a foster

1 parent, or a state employee or contracted provider in juvenile justice
2 proceedings;

3 (f) Religious counselor means a minister, priest, rabbi, bishop, or
4 other recognized member of the clergy;

5 (g) Student means a person who is currently enrolled in or attending
6 public or private elementary or secondary school or a postsecondary
7 educational institution or was a student enrolled in or who attended a
8 public or private elementary or secondary school or a postsecondary
9 educational institution within thirty days of the alleged contact;

10 (h) Volunteer means a person who is not an elected or appointed
11 official or employee of a school who, at the request or with the
12 permission of the school board or board of education of the school,
13 engages without remuneration in activities related to the purposes and
14 functions of the school or for its general benefit. Volunteer does not
15 include a student enrolled in the school; and

16 (i) Youth facility means a youth development center, youth group
17 home, youth rehabilitation and treatment center, licensed residential
18 facility serving children and youth, mental health institution serving
19 children and youth, a youth shelter, or a staff secure juvenile facility
20 as defined in section 43-245.

21 Sec. 2. Section 28-101, Reissue Revised Statutes of Nebraska, is
22 amended to read:

23 28-101 Sections 28-101 to 28-1357, 28-1418.01, 28-1429.03, and
24 28-1601 to 28-1603 and section 1 of this act shall be known and may be
25 cited as the Nebraska Criminal Code.

26 Sec. 3. Section 28-318, Reissue Revised Statutes of Nebraska, is
27 amended to read:

28 28-318 As used in sections 28-317 to 28-322.04 and section 1 of this
29 act, unless the context otherwise requires:

30 (1) Actor means a person accused of sexual assault;

31 (2) Intimate parts means the genital area, groin, inner thighs,

1 buttocks, or breasts;

2 (3) Past sexual behavior means sexual behavior other than the sexual
3 behavior upon which the sexual assault is alleged;

4 (4) Serious personal injury means great bodily injury or
5 disfigurement, extreme mental anguish or mental trauma, pregnancy,
6 disease, or loss or impairment of a sexual or reproductive organ;

7 (5) Sexual contact means the intentional touching of the victim's
8 sexual or intimate parts or the intentional touching of the victim's
9 clothing covering the immediate area of the victim's sexual or intimate
10 parts. Sexual contact shall also mean the touching by the victim of the
11 actor's sexual or intimate parts or the clothing covering the immediate
12 area of the actor's sexual or intimate parts when such touching is
13 intentionally caused by the actor. Sexual contact shall include only such
14 conduct which can be reasonably construed as being for the purpose of
15 sexual arousal or gratification of either party. Sexual contact shall
16 also include the touching of a child with the actor's sexual or intimate
17 parts on any part of the child's body for purposes of sexual assault of a
18 child under sections 28-319.01 and 28-320.01 and section 1 of this act;

19 (6) Sexual penetration means sexual intercourse in its ordinary
20 meaning, cunnilingus, fellatio, anal intercourse, or any intrusion,
21 however slight, of any part of the actor's or victim's body or any object
22 manipulated by the actor into the genital or anal openings of the
23 victim's body which can be reasonably construed as being for nonmedical
24 or nonhealth purposes. Sexual penetration shall not require emission of
25 semen;

26 (7) Victim means the person alleging to have been sexually
27 assaulted;

28 (8) Without consent means:

29 (a)(i) The victim was compelled to submit due to the use of force or
30 threat of force or coercion, or (ii) the victim expressed a lack of
31 consent through words, or (iii) the victim expressed a lack of consent

1 through conduct, or (iv) the consent, if any was actually given, was the
2 result of the actor's deception as to the identity of the actor or the
3 nature or purpose of the act on the part of the actor;

4 (b) The victim need only resist, either verbally or physically, so
5 as to make the victim's refusal to consent genuine and real and so as to
6 reasonably make known to the actor the victim's refusal to consent; and

7 (c) A victim need not resist verbally or physically where it would
8 be useless or futile to do so; and

9 (9) Force or threat of force means (a) the use of physical force
10 which overcomes the victim's resistance or (b) the threat of physical
11 force, express or implied, against the victim or a third person that
12 places the victim in fear of death or in fear of serious personal injury
13 to the victim or a third person where the victim reasonably believes that
14 the actor has the present or future ability to execute the threat.

15 Sec. 4. Section 28-319, Reissue Revised Statutes of Nebraska, is
16 amended to read:

17 28-319 Except as provided in section 1 of this act:

18 (1) Any person who subjects another person to sexual penetration (a)
19 without the consent of the victim, (b) who knew or should have known that
20 the victim was mentally or physically incapable of resisting or
21 appraising the nature of his or her conduct, or (c) when the actor is
22 nineteen years of age or older and the victim is at least twelve but less
23 than sixteen years of age is guilty of sexual assault in the first
24 degree; -

25 (2) Sexual assault in the first degree is a Class II felony. The
26 sentencing judge shall consider whether the actor caused serious personal
27 injury to the victim in reaching a decision on the sentence; and -

28 (3) Any person who is found guilty of sexual assault in the first
29 degree for a second time when the first conviction was pursuant to this
30 section or any other state or federal law with essentially the same
31 elements as this section shall be sentenced to a mandatory minimum term

1 of twenty-five years in prison.

2 Sec. 5. Section 28-319.01, Reissue Revised Statutes of Nebraska, is
3 amended to read:

4 28-319.01 Except as provided in section 1 of this act:

5 (1) A person commits sexual assault of a child in the first degree:

6 (a) When he or she subjects another person under twelve years of age
7 to sexual penetration and the actor is at least nineteen years of age or
8 older; or

9 (b) When he or she subjects another person who is at least twelve
10 years of age but less than sixteen years of age to sexual penetration and
11 the actor is twenty-five years of age or older; ~~and~~ -

12 (2) Sexual assault of a child in the first degree is a Class IB
13 felony with a mandatory minimum sentence of fifteen years in prison for
14 the first offense; ~~and~~ -

15 (3) Any person who is found guilty of sexual assault of a child in
16 the first degree under this section and who has previously been convicted

17 (a) under this section, (b) under section 28-319 of first degree or
18 attempted first degree sexual assault, (c) under section 28-320.01 before
19 July 14, 2006, of sexual assault of a child or attempted sexual assault
20 of a child, (d) under section 28-320.01 on or after July 14, 2006, of
21 sexual assault of a child in the second or third degree or attempted
22 sexual assault of a child in the second or third degree, or (e) in any
23 other state or federal court under laws with essentially the same
24 elements as this section, section 28-319, or section 28-320.01 as it
25 existed before, on, or after July 14, 2006, shall be guilty of a Class IB
26 felony with a mandatory minimum sentence of twenty-five years in prison;
27 and -

28 (4) In any prosecution under this section, the age of the actor
29 shall be an essential element of the offense that must be proved beyond a
30 reasonable doubt.

31 Sec. 6. Section 28-320, Reissue Revised Statutes of Nebraska, is

1 amended to read:

2 28-320 Except as provided in section 1 of this act:

3 (1) Any person who subjects another person to sexual contact (a)
4 without consent of the victim, or (b) who knew or should have known that
5 the victim was physically or mentally incapable of resisting or
6 appraising the nature of his or her conduct is guilty of sexual assault
7 in either the second degree or third degree; -

8 (2) Sexual assault shall be in the second degree and is a Class IIA
9 felony if the actor shall have caused serious personal injury to the
10 victim; and -

11 (3) Sexual assault shall be in the third degree and is a Class I
12 misdemeanor if the actor shall not have caused serious personal injury to
13 the victim.

14 Sec. 7. Section 28-320.01, Reissue Revised Statutes of Nebraska, is
15 amended to read:

16 28-320.01 Except as provided in section 1 of this act:

17 (1) A person commits sexual assault of a child in the second or
18 third degree if he or she subjects another person fourteen years of age
19 or younger to sexual contact and the actor is at least nineteen years of
20 age or older; -

21 (2) Sexual assault of a child is in the second degree if the actor
22 causes serious personal injury to the victim. Sexual assault of a child
23 in the second degree is a Class II felony for the first offense; -

24 (3) Sexual assault of a child is in the third degree if the actor
25 does not cause serious personal injury to the victim. Sexual assault of a
26 child in the third degree is a Class IIIA felony for the first offense; -

27 (4) Any person who is found guilty of second degree sexual assault
28 of a child under this section and who has previously been convicted (a)
29 under this section, (b) under section 28-319 of first degree or attempted
30 first degree sexual assault, (c) under section 28-319.01 for first degree
31 or attempted first degree sexual assault of a child, or (d) in any other

1 state or federal court under laws with essentially the same elements as
2 this section, section 28-319, or section 28-319.01 shall be guilty of a
3 Class IC felony and shall be sentenced to a mandatory minimum term of
4 twenty-five years in prison; and -

5 (5) Any person who is found guilty of third degree sexual assault of
6 a child under this section and who has previously been convicted (a)
7 under this section, (b) under section 28-319 of first degree or attempted
8 first degree sexual assault, (c) under section 28-319.01 for first degree
9 or attempted first degree sexual assault of a child, or (d) in any other
10 state or federal court under laws with essentially the same elements as
11 this section, section 28-319, or section 28-319.01 shall be guilty of a
12 Class IC felony.

13 Sec. 8. Section 28-320.02, Reissue Revised Statutes of Nebraska, is
14 amended to read:

15 28-320.02 (1) No person shall knowingly solicit, coax, entice, or
16 lure (a) a child sixteen years of age or younger or (b) a peace officer
17 who is believed by such person to be a child sixteen years of age or
18 younger, by means of an electronic communication device as that term is
19 defined in section 28-833, to engage in an act which would be in
20 violation of section 28-319, 28-319.01, or 28-320.01 or subdivision
21 ~~subsection~~ (1) or (2) of section 28-320. A person shall not be convicted
22 of both a violation of this subsection and a violation of section 28-319,
23 28-319.01, or 28-320.01 or subdivision ~~subsection~~ (1) or (2) of section
24 28-320 if the violations arise out of the same set of facts or pattern of
25 conduct and the individual solicited, coaxed, enticed, or lured under
26 this subsection is also the victim of the sexual assault under section
27 28-319, 28-319.01, or 28-320.01 or subdivision ~~subsection~~ (1) or (2) of
28 section 28-320.

29 (2) A person who violates this section is guilty of a Class ID
30 felony. If a person who violates this section has previously been
31 convicted of a violation of this section or section 28-308, 28-309,

1 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01, 28-320.01,
2 28-813.01, 28-833, 28-1463.03, or 28-1463.05 or subdivision ~~subsection~~
3 (1) or (2) of section 28-320, the person is guilty of a Class IC felony.

4 Sec. 9. Section 28-813.01, Reissue Revised Statutes of Nebraska, is
5 amended to read:

6 28-813.01 (1) It shall be unlawful for a person to knowingly possess
7 any visual depiction of sexually explicit conduct, as defined in section
8 28-1463.02, which has a child, as defined in such section, as one of its
9 participants or portrayed observers.

10 (2)(a) Any person who is under nineteen years of age at the time he
11 or she violates this section shall be guilty of a Class IV felony for
12 each offense.

13 (b) Any person who is nineteen years of age or older at the time he
14 or she violates this section shall be guilty of a Class IIA felony for
15 each offense.

16 (c) Any person who violates this section and has previously been
17 convicted of a violation of this section or section 28-308, 28-309,
18 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01, 28-320.01,
19 28-833, 28-1463.03, or 28-1463.05 or subdivision ~~subsection~~ (1) or (2) of
20 section 28-320 shall be guilty of a Class IC felony for each offense.

21 (3) It shall be an affirmative defense to a charge made pursuant to
22 this section that:

23 (a) The visual depiction portrays no person other than the
24 defendant; or

25 (b)(i) The defendant was less than nineteen years of age; (ii) the
26 visual depiction of sexually explicit conduct portrays a child who is
27 fifteen years of age or older; (iii) the visual depiction was knowingly
28 and voluntarily generated by the child depicted therein; (iv) the visual
29 depiction was knowingly and voluntarily provided by the child depicted in
30 the visual depiction; (v) the visual depiction contains only one child;
31 (vi) the defendant has not provided or made available the visual

1 depiction to another person except the child depicted who originally sent
2 the visual depiction to the defendant; and (vii) the defendant did not
3 coerce the child in the visual depiction to either create or send the
4 visual depiction.

5 (4) In addition to the penalties provided in this section, a
6 sentencing court may order that any money, securities, negotiable
7 instruments, firearms, conveyances, or electronic communication devices
8 as defined in section 28-833 or any equipment, components, peripherals,
9 software, hardware, or accessories related to electronic communication
10 devices be forfeited as a part of the sentence imposed if it finds by
11 clear and convincing evidence adduced at a separate hearing in the same
12 prosecution, conducted pursuant to section 28-1601, that any or all such
13 property was derived from, used, or intended to be used to facilitate a
14 violation of this section.

15 Sec. 10. Section 28-1463.04, Reissue Revised Statutes of Nebraska,
16 is amended to read:

17 28-1463.04 (1) Any person who is under nineteen years of age at the
18 time he or she violates section 28-1463.03 shall be guilty of a Class III
19 felony for each offense.

20 (2) Any person who is nineteen years of age or older at the time he
21 or she violates section 28-1463.03 shall be guilty of a Class ID felony
22 for each offense.

23 (3) Any person who violates section 28-1463.03 and has previously
24 been convicted of a violation of section 28-1463.03 or section 28-308,
25 28-309, 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01,
26 28-320.01, 28-813, 28-833, or 28-1463.05 or subdivision ~~subsection~~ (1) or
27 (2) of section 28-320 shall be guilty of a Class IC felony for each
28 offense.

29 Sec. 11. Section 28-1463.05, Reissue Revised Statutes of Nebraska,
30 is amended to read:

31 28-1463.05 (1) It shall be unlawful for a person to knowingly

1 possess with intent to rent, sell, deliver, distribute, trade, or provide
2 to any person any visual depiction of sexually explicit conduct which has
3 a child as one of its participants or portrayed observers.

4 (2)(a) Any person who is under nineteen years of age at the time he
5 or she violates this section shall be guilty of a Class IIIA felony for
6 each offense.

7 (b) Any person who is nineteen years of age or older at the time he
8 or she violates this section shall be guilty of a Class IIA felony for
9 each offense.

10 (c) Any person who violates this section and has previously been
11 convicted of a violation of this section or section 28-308, 28-309,
12 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, 28-319.01, 28-320.01,
13 ~~28-813.01~~ ~~28-813~~, 28-833, or 28-1463.03 or subdivision ~~subsection~~ (1) or
14 (2) of section 28-320 shall be guilty of a Class IC felony for each
15 offense.

16 Sec. 12. Original sections 28-101, 28-318, 28-319, 28-319.01,
17 28-320, 28-320.01, 28-320.02, 28-813.01, 28-1463.04, and 28-1463.05,
18 Reissue Revised Statutes of Nebraska, are repealed.