

LEGISLATIVE BILL 43

Approved by the Governor August 06, 2020

Introduced by Bolz, 29; Hunt, 8; Hansen, M., 26; Cavanaugh, 6; Vargas, 7.

A BILL FOR AN ACT relating to victims' rights; to amend section 29-1926, Reissue Revised Statutes of Nebraska, and sections 29-119 and 29-1917, Revised Statutes Supplement, 2019; to adopt the Sexual Assault Victims' Bill of Rights Act; to redefine a term and change rules of criminal procedure relating to plea agreements and depositions; and to repeal the original sections.

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

Section 1. Sections 1 to 8 of this act shall be known and may be cited as the Sexual Assault Victims' Bill of Rights Act.

Sec. 2. For the purposes of the Sexual Assault Victims' Bill of Rights Act:

(1)(a) Advocate means:

(i) Any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor's office, whose primary purpose is assisting domestic violence and sexual assault victims. This includes employees or supervised volunteers of an Indian tribe or a postsecondary educational institution;

(ii) A representative from a victim and witness assistance center as established in sections 81-1845 to 81-1847 or a similar entity affiliated with a law enforcement agency or prosecutor's office; or

(iii) An advocate who is employed by a child advocacy center that meets the requirements of subsection (2) of section 28-728.

(b) If reasonably possible, an advocate shall speak the victim's preferred language or use the services of a qualified interpreter;

(2) Health care provider means any individual who is licensed, certified, or registered to perform specified health services consistent with state law;

(3) Sexual assault means a violation of section 28-319, 28-319.01, 28-320, 28-320.01, 28-320.02, 28-322.01, 28-322.02, 28-322.03, 28-322.04, 28-322.05, 28-703, or 28-1463.03, sex trafficking or sex trafficking of a minor under section 28-831, or subdivision (1)(c) or (g) of section 28-386 or subdivision (1)(d), (e), or (f) of section 28-707;

(4) Sexual assault forensic evidence means evidence collected by a health care provider contained within any sexual assault forensic evidence collection kit, including a toxicology kit, or any forensic evidence collected by law enforcement through the course of an investigation; and

(5)(a) Sexual assault victim or victim means any person who is a victim of sexual assault who reports such sexual assault:

(i) To a health care provider, law enforcement, or an advocate, including anonymous reporting as provided in section 28-902; and

(ii) In the case of a victim who is under eighteen years of age, to the Department of Health and Human Services.

(b) Sexual assault victim or victim also includes, if the victim described in subdivision (5)(a) of this section is incompetent, deceased, or a minor who is unable to consent to counseling services, such victim's parent, guardian, or spouse, unless such person is the reported assailant.

Sec. 3. Notwithstanding any provision of Chapter 27, article 5, any communication with a victim which is privileged, whether by statute, court order, or common law, shall retain such privilege regardless of who is present during the communication so long as the victim has a privilege with respect to each individual present. Nothing in this section shall relieve the prosecutor of the prosecutor's duty to disclose and make known to the defendant or the defendant's attorney any and all exculpatory material or information suitable for impeachment which is known to the prosecutor.

Sec. 4. (1) A victim has the right to have an advocate of the victim's choosing present during a medical evidentiary or physical examination. The health care provider shall contact the advocate before beginning the medical evidentiary or physical examination, unless declined by the victim. If an advocate cannot appear in a timely manner, the health care provider shall inform the victim of the potential impact of delaying the examination.

(2) A victim retains such right to have an advocate present at any time during any medical evidentiary or physical examination, regardless of whether the victim has previously waived such right.

(3) A victim has the right to a free forensic medical examination as provided in section 81-1429.03 without regard to whether a victim participates in the criminal justice system or cooperates with law enforcement.

(4) A victim has the right to be provided health care in accordance with best practices and established protocols for age-appropriate sexual assault forensic medical examinations as set forth in publications of the Office on Violence Against Women of the United States Department of Justice.

(5) A victim has the protection of confidential communications as provided in sections 29-4301 to 29-4304.

(6) A victim has the right to shower at no cost after the medical evidentiary or physical examination, unless showering facilities are not available.

(7) A victim has the right to anonymous reporting as provided in section 28-902.

Sec. 5. (1)(a) A victim has the right to have an advocate present during an interview by a peace officer, prosecutor, or defense attorney, unless no advocate can appear in a reasonably timely manner. In an interview involving a prosecutor, the prosecutor shall inform the victim of the victim's rights under this subsection. The peace officer, prosecutor, or defense attorney shall contact the advocate before beginning the interview, unless declined by the victim.

(b) A victim has the right to have an advocate present during a deposition as provided in sections 29-1917 and 29-1926.

(c) An advocate present at an interview or deposition under this subsection shall not interfere in the interview or deposition or provide legal advice.

(d) Nothing in this subsection shall preclude law enforcement officers or prosecutors from contacting a victim directly to make limited inquiries regarding the sexual assault.

(2) A victim has the right to be interviewed by a peace officer of the gender of the victim's choosing, if such request can be reasonably accommodated by a peace officer that is properly trained to conduct such interviews.

(3) A victim has the right to be interviewed by a peace officer that speaks the victim's preferred language or to have a qualified interpreter available, if such request can be reasonably accommodated.

(4) A peace officer, prosecutor, or defense attorney shall not, for any reason, discourage a victim from receiving a medical evidentiary or physical examination.

(5) A victim has the right to counsel. This subsection does not create a new obligation by the state or a political subdivision to appoint or pay for counsel. Treatment of the victim shall not be affected or altered in any way as a result of the victim's decision to exercise such right to counsel.

(6) A victim who is a child three to eighteen years of age has the right to a forensic interview at a child advocacy center by a professional with specialized training as provided in section 28-728. The right to have an advocate, representative, or attorney present shall not apply during such a forensic interview.

Sec. 6. (1) A victim has the right to timely analysis of sexual assault forensic evidence.

(2) Subject to section 28-902, a health care provider shall notify the appropriate law enforcement agency of a victim's reported sexual assault and submit to law enforcement the sexual assault forensic evidence, if evidence has been obtained.

(3) A law enforcement agency shall collect the sexual assault forensic evidence upon notification by the health care provider and shall retain the sexual assault forensic evidence for the longer of the statute of limitations applicable to the sexual assault or the retention period set forth in subsection (4) of section 28-902.

(4) A victim has a right to contact the investigating law enforcement agency and be provided with information on the status of the processing and analysis of the victim's sexual assault forensic evidence, if the victim did not report anonymously.

(5) A victim has the right to have the results of the analysis of the victim's sexual assault forensic evidence uploaded to the appropriate local, state, and federal DNA data bases, as allowed by law.

(6) A victim has the right to be informed by the investigating law enforcement agency, upon the victim's request, of the results of analysis of the victim's sexual assault forensic evidence, whether the analysis yielded a DNA profile, and whether the analysis yielded a DNA match, either to the named perpetrator or to a suspect already in the Federal Bureau of Investigation's Combined DNA Index System, so long as the provision of such information would not hinder or interfere with investigation or prosecution of the case associated with such information.

(7) A victim has the right to inspect or request copies of law enforcement reports concerning the sexual assault at the conclusion of the case.

Sec. 7. Sexual assault forensic evidence from a victim shall not be used:

(1) To prosecute such victim for any misdemeanor crime or any crime under the Uniform Controlled Substances Act; or

(2) As a basis to search for further evidence of any misdemeanor crime or any crime under the Uniform Controlled Substances Act that may have been committed by the victim.

Sec. 8. (1) Upon an initial interaction with a victim relating to or arising from a sexual assault of such victim, a health care provider or peace officer, and in the case of a victim under eighteen years of age, the Department of Health and Human Services, shall provide the victim with information that explains the rights of victims under the Sexual Assault Victims' Bill of Rights Act and other relevant law. The information shall be presented in clear language that is comprehensible to a person proficient in English at the fifth grade level, accessible to persons with visual disabilities, and available in all major languages spoken in this state. This information shall include, but not be limited to:

(a) A clear statement that a victim is not required to participate in the

criminal justice system or to undergo a medical evidentiary or physical examination in order to retain the rights provided by the act and other relevant law;

(b) Contact information for appropriate services provided by professionals in the fields of domestic violence and sexual assault, including advocates;

(c) State and federal relief available to victims of crime;

(d) Law enforcement protection available to the victim, including domestic violence protection orders, harassment protection orders, and sexual assault protection orders and the process to obtain such protection;

(e) Instructions for requesting information regarding the victim's sexual assault forensic evidence as provided in section 6 of this act; and

(f) State and federal compensation funds for medical and other costs associated with the sexual assault and information on any municipal, state, or federal right to restitution for a victim in the event of a conviction.

(2) The information to be provided under subsection (1) of this section shall be developed by the Attorney General and the Nebraska Commission on Law Enforcement and Criminal Justice with input from prosecutors, sexual assault victims, and organizations with a statewide presence with expertise on domestic violence, sexual assault, and child sexual assault.

(3) The information to be provided under subsection (1) of this section shall be made available for viewing and download on the web sites of the Department of Health and Human Services and the Nebraska Commission on Law Enforcement and Criminal Justice. Other relevant state agencies are also encouraged to make such information available on their web sites.

Sec. 9. Section 29-119, Revised Statutes Supplement, 2019, is amended to read:

29-119 For purposes of this section and sections 23-1201, 29-120, and 29-2261, unless the context otherwise requires:

(1) A plea agreement means that as a result of a discussion between the defense counsel and the prosecuting attorney:

(a) A charge is to be dismissed or reduced; or

(b) A defendant, if he or she pleads guilty to a charge, may receive less than the maximum penalty permitted by law; and

(2)(a) Victim means a person who has had a personal confrontation with an offender as a result of a homicide under sections 28-302 to 28-306, a first degree assault under section 28-308, a second degree assault under section 28-309, a third degree assault under section 28-310 when the victim is an intimate partner as defined in section 28-323, a first degree false imprisonment under section 28-314, a first degree sexual assault under section 28-319, a sexual assault of a child in the first degree under section 28-319.01, a second or third degree sexual assault under section 28-320, a sexual assault of a child in the second or third degree under section 28-320.01, domestic assault in the first, second, or third degree under section 28-323, or a robbery under section 28-324. Victim also includes a person who has suffered serious bodily injury as defined in section 28-109 as a result of a motor vehicle accident when the driver was charged with a violation of section 60-6,196 or 60-6,197 or with a violation of a city or village ordinance enacted in conformance with either section.

(b) In the case of a homicide, victim means the nearest surviving relative under the law as provided by section 30-2303 but does not include the alleged perpetrator of the homicide.

(c) In the case of a violation of section 28-813.01, 28-1463.03, 28-1463.04, or 28-1463.05, victim means a person who was a child as defined in section 28-1463.02 and a participant or portrayed observer in the visual depiction of sexually explicit conduct which is the subject of the violation and who has been identified and can be reasonably notified.

(d) In the case of a sexual assault of a child, a possession offense of a visual depiction of sexually explicit conduct, or a distribution offense of a visual depiction of sexually explicit conduct, victim means the child victim and the parents, guardians, or duly appointed legal representative of the child victim but does not include the alleged perpetrator of the crime.

(e) Victim also includes a person who was the victim of a theft under section 28-511, 28-512, 28-513, or 28-517 when (i) the value of the thing involved is five thousand dollars or more and (ii) the victim and perpetrator were intimate partners as defined in section 28-323.

(f) Victim also includes a sexual assault victim as defined in section 2 of this act.

Sec. 10. Section 29-1917, Revised Statutes Supplement, 2019, is amended to read:

29-1917 (1) Except as provided in section 29-1926, at any time after the filing of an indictment or information in a felony prosecution, the prosecuting attorney or the defendant may request the court to allow the taking of a deposition of any person other than the defendant who may be a witness in the trial of the offense. The court may order the taking of the deposition when it finds the testimony of the witness:

(a) May be material or relevant to the issue to be determined at the trial of the offense; or

(b) May be of assistance to the parties in the preparation of their respective cases.

(2) An order granting the taking of a deposition shall include the time and place for taking such deposition and such other conditions as the court determines to be just.

(3) Except as provided in subsection (4) of this section, the The

proceedings in taking the deposition of a witness pursuant to this section and returning it to the court shall be governed in all respects as the taking of depositions in civil cases, including section 25-1223.

(4)(a) A sexual assault victim may request to have an advocate of the victim's choosing present during a deposition under this section. The prosecuting attorney shall inform the victim that the victim may make such request as soon as reasonably practicable prior to the deposition. If the victim wishes to have an advocate present, the victim shall, if reasonably practicable, inform the prosecuting attorney if an advocate will be present, and, if known, the advocate's identity and contact information. If so informed by the victim, the prosecuting attorney shall notify the defendant as soon as reasonably practicable.

(b) An advocate present at a deposition under this section shall not interfere with the deposition or provide legal advice.

(c) For purposes of this subsection, the terms sexual assault victim, victim, and advocate have the same meanings as in section 2 of this act.

~~(5)~~ (4) A deposition taken pursuant to this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

Sec. 11. Section 29-1926, Reissue Revised Statutes of Nebraska, is amended to read:

29-1926 (1)(a) Upon request of the prosecuting or defense attorney and upon a showing of compelling need, the court shall order the taking of a videotape deposition of a child victim or child witness to any offense punishable as a felony. The deposition ordinarily shall be in lieu of courtroom or in camera testimony by the child. If the court orders a videotape deposition, the court shall:

(i) Designate the time and place for taking the deposition. The deposition may be conducted in the courtroom, the judge's chambers, or any other location suitable for videotaping;

(ii) Assure adequate time for the defense attorney to complete discovery before taking the deposition; and

(iii) Preside over the taking of the videotape deposition in the same manner as if the child were called as a witness for the prosecution during the course of the trial.

(b) Unless otherwise required by the court, the deposition shall be conducted in the presence of the prosecuting attorney, the defense attorney, the defendant, and any other person deemed necessary by the court, including the parent or guardian of the child victim or child witness, an advocate as defined in section 2 of this act, or a counselor or other person with whom the child is familiar. Such parent, guardian, advocate, counselor, or other person shall be allowed to sit with or near the child unless the court determines that such person would be disruptive to the child's testimony.

(c) At any time subsequent to the taking of the original videotape deposition and upon sufficient cause shown, the court shall order the taking of additional videotape depositions to be admitted at the time of the trial.

(d) If the child testifies at trial in person rather than by videotape deposition, the taking of the child's testimony may, upon request of the prosecuting attorney and upon a showing of compelling need, be conducted in camera.

(e) Unless otherwise required by the court, the child shall testify in the presence of the prosecuting attorney, the defense attorney, the defendant, and any other person deemed necessary by the court, including the parent or guardian of the child victim or child witness, an advocate as defined in section 2 of this act, or a counselor or other person with whom the child is familiar. Such parent, guardian, advocate, counselor, or other person shall be allowed to sit with or near the child unless the court determines that such person would be disruptive to the child's testimony. Unless waived by the defendant, all persons in the room shall be visible on camera except the camera operator.

(f) If deemed necessary to preserve the constitutionality of the child's testimony, the court may direct that during the testimony the child shall at all times be in a position to see the defendant live or on camera.

(g) For purposes of this section, child means a person eleven years of age or younger at the time the motion to take the deposition is made or at the time of the taking of in camera testimony at trial.

(h) Nothing in this section shall restrict the court from conducting the pretrial deposition or in camera proceedings in any manner deemed likely to facilitate and preserve a child's testimony to the fullest extent possible, consistent with the right to confrontation guaranteed in the Sixth Amendment of the Constitution of the United States and Article I, section 11, of the Nebraska Constitution. In deciding whether there is a compelling need that child testimony accommodation is required by pretrial videotape deposition, in camera live testimony, in camera videotape testimony, or any other accommodation, the court shall make particularized findings on the record of:

(i) The nature of the offense;

(ii) The significance of the child's testimony to the case;

(iii) The likelihood of obtaining the child's testimony without modification of trial procedure or with a different modification involving less substantial digression from trial procedure than the modification under consideration;

(iv) The child's age;

(v) The child's psychological maturity and understanding; and

(vi) The nature, degree, and duration of potential injury to the child from testifying.

(i) The court may order an independent examination by a psychologist or psychiatrist if the defense attorney requests the opportunity to rebut the showing of compelling need produced by the prosecuting attorney. Such examination shall be conducted in the child's county of residence.

(j) After a finding of compelling need by the court, neither party may call the child witness to testify as a live witness at the trial before the jury unless that party demonstrates that the compelling need no longer exists.

(k) Nothing in this section shall limit the right of access of the media or the public to open court.

(l) Nothing in this section shall preclude discovery by the defendant as set forth in section 29-1912.

(m) The Supreme Court may adopt and promulgate rules of procedure to administer this section, which rules shall not be in conflict with laws governing such matters.

(2)(a) No custodian of a videotape of a child victim or child witness alleging, explaining, denying, or describing an act of sexual assault pursuant to section 28-319, 28-319.01, or 28-320.01 or child abuse pursuant to section 28-707 as part of an investigation or evaluation of the abuse or assault shall release or use a videotape or copies of a videotape or consent, by commission or omission, to the release or use of a videotape or copies of a videotape to or by any other party without a court order, notwithstanding the fact that the child victim or child witness has consented to the release or use of the videotape or that the release or use is authorized under law, except as provided in section 28-730 or pursuant to an investigation under the Office of Inspector General of Nebraska Child Welfare Act. Any custodian may release or consent to the release or use of a videotape or copies of a videotape to law enforcement agencies or agencies authorized to prosecute such abuse or assault cases on behalf of the state.

(b) The court order may govern the purposes for which the videotape may be used, the reproduction of the videotape, the release of the videotape to other persons, the retention and return of copies of the videotape, and any other requirements reasonably necessary for the protection of the privacy and best interests of the child victim or child witness.

(c) Pursuant to section 29-1912, the defendant described in the videotape may petition the district court in the county where the alleged offense took place or where the custodian of the videotape resides for an order releasing to the defendant a copy of the videotape.

(d) Any person who releases or uses a videotape except as provided in this section shall be guilty of a Class I misdemeanor.

Sec. 12. Original section 29-1926, Reissue Revised Statutes of Nebraska, and sections 29-119 and 29-1917, Revised Statutes Supplement, 2019, are repealed.