

LEGISLATURE OF NEBRASKA
ONE HUNDRED SIXTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 43

FINAL READING

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

Read first time January 10, 2019

Committee: Judiciary

- 1 A BILL FOR AN ACT relating to victims' rights; to amend section 29-1926,
- 2 Reissue Revised Statutes of Nebraska, and sections 29-119 and
- 3 29-1917, Revised Statutes Supplement, 2019; to adopt the Sexual
- 4 Assault Victims' Bill of Rights Act; to redefine a term and change
- 5 rules of criminal procedure relating to plea agreements and
- 6 depositions; and to repeal the original sections.
- 7 Be it enacted by the people of the State of Nebraska,

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

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

5 (1)(a) Advocate means:

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

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

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

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

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

23 (3) Sexual assault means a violation of section 28-319, 28-319.01,
24 28-320, 28-320.01, 28-320.02, 28-322.01, 28-322.02, 28-322.03, 28-322.04,
25 28-322.05, 28-703, or 28-1463.03, sex trafficking or sex trafficking of a
26 minor under section 28-831, or subdivision (1)(c) or (g) of section
27 28-386 or subdivision (1)(d), (e), or (f) of section 28-707;

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

1 investigation; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 Sec. 8. (1) Upon an initial interaction with a victim relating to
28 or arising from a sexual assault of such victim, a health care provider
29 or peace officer, and in the case of a victim under eighteen years of
30 age, the Department of Health and Human Services, shall provide the
31 victim with information that explains the rights of victims under the

1 Sexual Assault Victims' Bill of Rights Act and other relevant law. The
2 information shall be presented in clear language that is comprehensible
3 to a person proficient in English at the fifth grade level, accessible to
4 persons with visual disabilities, and available in all major languages
5 spoken in this state. This information shall include, but not be limited
6 to:

7 (a) A clear statement that a victim is not required to participate
8 in the criminal justice system or to undergo a medical evidentiary or
9 physical examination in order to retain the rights provided by the act
10 and other relevant law;

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

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

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

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

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

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

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

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

9 29-119 For purposes of this section and sections 23-1201, 29-120,
10 and 29-2261, unless the context otherwise requires:

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

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

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

16 (2)(a) Victim means a person who has had a personal confrontation
17 with an offender as a result of a homicide under sections 28-302 to
18 28-306, a first degree assault under section 28-308, a second degree
19 assault under section 28-309, a third degree assault under section 28-310
20 when the victim is an intimate partner as defined in section 28-323, a
21 first degree false imprisonment under section 28-314, a first degree
22 sexual assault under section 28-319, a sexual assault of a child in the
23 first degree under section 28-319.01, a second or third degree sexual
24 assault under section 28-320, a sexual assault of a child in the second
25 or third degree under section 28-320.01, domestic assault in the first,
26 second, or third degree under section 28-323, or a robbery under section
27 28-324. Victim also includes a person who has suffered serious bodily
28 injury as defined in section 28-109 as a result of a motor vehicle
29 accident when the driver was charged with a violation of section 60-6,196
30 or 60-6,197 or with a violation of a city or village ordinance enacted in
31 conformance with either section.

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

4 (c) In the case of a violation of section 28-813.01, 28-1463.03,
5 28-1463.04, or 28-1463.05, victim means a person who was a child as
6 defined in section 28-1463.02 and a participant or portrayed observer in
7 the visual depiction of sexually explicit conduct which is the subject of
8 the violation and who has been identified and can be reasonably notified.

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

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

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

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

23 29-1917 (1) Except as provided in section 29-1926, at any time after
24 the filing of an indictment or information in a felony prosecution, the
25 prosecuting attorney or the defendant may request the court to allow the
26 taking of a deposition of any person other than the defendant who may be
27 a witness in the trial of the offense. The court may order the taking of
28 the deposition when it finds the testimony of the witness:

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

31 (b) May be of assistance to the parties in the preparation of their

1 respective cases.

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

5 (3) Except as provided in subsection (4) of this section, the The
6 proceedings in taking the deposition of a witness pursuant to this
7 section and returning it to the court shall be governed in all respects
8 as the taking of depositions in civil cases, including section 25-1223.

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

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

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

23 (5) ~~(4)~~ A deposition taken pursuant to this section may be used at
24 the trial by any party solely for the purpose of contradicting or
25 impeaching the testimony of the deponent as a witness.

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

28 29-1926 (1)(a) Upon request of the prosecuting or defense attorney
29 and upon a showing of compelling need, the court shall order the taking
30 of a videotape deposition of a child victim of or child witness to any
31 offense punishable as a felony. The deposition ordinarily shall be in

1 lieu of courtroom or in camera testimony by the child. If the court
2 orders a videotape deposition, the court shall:

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

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

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

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

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

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

28 (e) Unless otherwise required by the court, the child shall testify
29 in the presence of the prosecuting attorney, the defense attorney, the
30 defendant, and any other person deemed necessary by the court, including
31 the parent or guardian of the child victim or child witness, an advocate

1 as defined in section 2 of this act, or a counselor or other person with
2 whom the child is familiar. Such parent, guardian, advocate, counselor,
3 or other person shall be allowed to sit with or near the child unless the
4 court determines that such person would be disruptive to the child's
5 testimony. Unless waived by the defendant, all persons in the room shall
6 be visible on camera except the camera operator.

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

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

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

24 (i) The nature of the offense;

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

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

30 (iv) The child's age;

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

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

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

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

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

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

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

18 (2)(a) No custodian of a videotape of a child victim or child
19 witness alleging, explaining, denying, or describing an act of sexual
20 assault pursuant to section 28-319, 28-319.01, or 28-320.01 or child
21 abuse pursuant to section 28-707 as part of an investigation or
22 evaluation of the abuse or assault shall release or use a videotape or
23 copies of a videotape or consent, by commission or omission, to the
24 release or use of a videotape or copies of a videotape to or by any other
25 party without a court order, notwithstanding the fact that the child
26 victim or child witness has consented to the release or use of the
27 videotape or that the release or use is authorized under law, except as
28 provided in section 28-730 or pursuant to an investigation under the
29 Office of Inspector General of Nebraska Child Welfare Act. Any custodian
30 may release or consent to the release or use of a videotape or copies of
31 a videotape to law enforcement agencies or agencies authorized to

1 prosecute such abuse or assault cases on behalf of the state.

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

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

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

14 Sec. 12. Original section 29-1926, Reissue Revised Statutes of
15 Nebraska, and sections 29-119 and 29-1917, Revised Statutes Supplement,
16 2019, are repealed.