

Ohio Hospital Association Testimony on Sub. H.B. 606**Senate Judiciary Committee****June 24, 2020**

The Ohio Hospital Association represents 236 hospitals and 14 health systems across the state, and we appreciate the opportunity to provide testimony today in support of Am. Sub. H.B. 606 as Passed by the House.

The need to protect our health care providers for their essential work during this pandemic is necessary to ensure providers take all steps necessary to adequately respond to this health crisis. In the midst of a statewide pandemic, disaster, or emergency, Ohioans cannot afford to have their health care providers inhibited from necessary action due to fear of litigation or liability. We need our health care providers to provide necessary care without fear that their actions will result in liability.

The current pandemic has exposed shortcomings in the existing law that we are seeking to amend (RC 2305.2311). Those shortcomings include:

- The existing law only applies to declared disasters but should include declared emergencies. For example, in this case, Governor DeWine declared a statewide emergency on March 9, 2020; President Trump did not declare Ohio a disaster until March 31, 2020. The demands on health care providers necessitating the protections did not change in between declarations; only the technical nature of the declaration changed. The bill would apply protections in declared emergencies as well.
- The protection provided in current law is insufficient because it applies only to emergency care, rather than also including other necessary services patients may need. The bill expands the protection to include other health care services delivered in response to the disaster or emergency.
- Current law does not contemplate the fact that a significant volume of health care services have been delayed pursuant to former Director Acton's March 17 order suspending non-essential procedures. Pursuant to that order, providers made very difficult judgments about which procedures to delay, which could result in adverse outcomes to patients, and subsequent lawsuits, in the future. Providers who made such decisions in good faith adherence to the Director's order should be protected.
- Current law does not cover skilled nursing facilities, assisted living facilities, or other health care facilities that are providing care during the pandemic. This bill would provide that needed protection.
- Current law expressly excludes protection for wrongful death claims. Given the high risk of mortality associated with COVID-19 patients, and that wrongful death claims are likely to make up a significant number of the claims against health care providers in the wake of the pandemic, this exclusion renders this statute deficient. Note, also, that it is not unconstitutional to treat wrongful death claims the same as other tort claims when it comes to the standards that must be met for proving such a claim. The constitutional limitation regarding wrongful death claims relates to the inability to limit damages that can be recovered in wrongful death claims; the constitution does not prohibit the establishment of standards that must be met in support of such a claim.

Many other liability protection statutes in Ohio protect health care providers except in cases of willful and wanton misconduct, and OHA supported that standard in prior versions of this bill. However, in an effort to reach a compromise in the House, OHA agreed to a “reckless disregard” standard in this bill that we believe provides sufficient protection for health care providers, particularly with the definition of “reckless disregard” that is provided in the bill, while striking the necessary balance to reach a compromise. In a pandemic, health care providers are dealing with shortages of supplies like test kits, personal protective equipment (PPE), and ventilators, managing with reduced staffing and staffing changes due to staff illness and outbreaks within facilities, and other factors inherent in a disaster or emergency. In such situations, health care providers are essentially “deputized” to respond to the public health crisis and should be granted a heightened level of statutory protection such as that provided in this bill. Health care providers have stepped up in the face of an unprecedented pandemic and should be protected from an avalanche of lawsuits resulting from circumstances beyond their control.

We do believe there is one important technical change that needs to be made in the bill that we believe the House intended to address but did not. In lines 1179 and 1237 of the bill, the term “intentional conduct” needs to be changed to “intentional misconduct” in order to make it clear that liability should not apply in cases of intentional misconduct. In addition, we understand the business community is concerned about the workers compensation amendment that was added to the bill on the House floor. We share the business community’s concern and support their efforts to have the amendment removed, though we believe the emergency clause remains a vital component of the bill.

In conclusion, we also note that many states in the Midwest have taken similar actions to provide immunities to their health care providers. Kentucky, Indiana, Michigan, Illinois, and Pennsylvania (as well as numerous other states around the country) have provided liability protection, either by legislation or executive order, to health care providers during declared disasters and emergencies such as the current COVID-19 pandemic. We ask that Ohio’s health care providers be similarly protected.

Thank you again for the opportunity to share hospitals’ perspective on this issue. Please feel free to contact OHA with any questions you may have.