

**Testimony Before the Senate Judiciary Committee
Amended Substitute House Bill 606**

June 24, 2020

Good morning, Chair Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the committee. My name is Pete Van Runkle. I am Executive Director of the Ohio Health Care Association (OHCA). OHCA is the state's largest organization representing long-term services and supports providers. We count in our membership more than 1,100 assisted living communities, providers serving people with intellectual and developmental disabilities, home care and hospice agencies, and skilled nursing centers.

We appear before you this morning as a proponent of Am. Sub. House Bill 606 as passed by the House. Like Senate Bill 308, which this chamber passed earlier in June, House Bill 606 would protect, on a limited basis, both health care providers and other businesses from being sued for money damages for actions taken in response to the unprecedented crisis of COVID-19. As an association representing health care providers, our interest relates only to the health care portions of the bill. We thank the sponsor, Representative Diane Grendell, Representative Bill Seitz, and Speaker Larry Householder for their efforts in shaping this important legislation, moving it out of the House, and ensuring it is an emergency measure.

OHCA members provide essential services that were not suspended during COVID-19. Their patients and residents and the people they serve in their homes did not go away when the virus struck. Our heroic health care workers were there and continue to be there to provide the care these individuals need despite COVID-19. As OHCA members can attest, COVID-19 is still present in Ohio. Although the number of cases has diminished, every day our members continue to serve patients and residents with COVID-19 and continue striving to protect others they serve from contracting the virus.

As members of the committee are well aware, the COVID-19 pandemic is a hundred-year event that goes far beyond anything any of us have experienced and anything contemplated in the Ohio Revised Code. The rapidity of spread, the high prevalence of negative outcomes among the elderly and people with underlying medical conditions, and the fact that the virus can be transmitted by people who show no outward symptoms make our members' jobs in providing care exceedingly difficult. This has been compounded immensely throughout the pandemic by shortages of critical supplies such as personal protective equipment and test kits, massive

additional costs and revenue losses to providers, ongoing difficulties retaining staff because of quarantines and concerns about working in an environment with exposure risk, and ever-changing guidelines for care delivery.

Most importantly, it is impossible under the current state of the science to protect completely against COVID-19 or to guarantee that it will not spread, particularly in the congregate care settings that make up the bulk of OHCA's membership. This reality underscores most clearly that the ordinary principles of liability are not appropriate for COVID-19-related claims. We emphasize that under House Bill 606, health care providers would be liable for egregious behavior related to COVID-19, but the circumstances of the pandemic demand that liability be viewed through a different lens.

Unfortunately, the statistics in Ohio and elsewhere show that people who are older and who have chronic medical conditions are much more susceptible to negative outcomes, including death, from COVID-19. These negative outcomes will lead to lawsuits, despite the unpredictability of COVID-19, the presence of community spread, and the reality of asymptomatic and pre-symptomatic transmission. There literally is nothing a health care provider or anyone else can do to guarantee that a person will not contract COVID-19. The scientific knowledge of COVID-19 and how to deal with it continues to evolve to this very day. Guidelines promulgated by government agencies are quite different now than when COVID-19 first hit America. As a result, the standard of care for health care providers has evolved continually and will be quite unclear to juries of the future.

OHCA supports Am. Sub. House Bill 606 because the legislation protects our members from liability for providing care in good faith during an incredibly difficult and constantly changing environment, without shutting the door for plaintiffs to recover damages under appropriate circumstances. Like Senate Bill 308, House Bill 606 balances these competing interests. It creates a clear pathway that keeps plaintiffs from being able to obtain large damage awards based simply on a jury's understandable sympathy, which leads them to assign blame to health care providers after the fact for an outcome they could not have controlled at the time.

House Bill 606 builds on current Ohio law providing limited immunity to certain health care providers in disasters and emergencies. Unfortunately, the existing statutes are a patchwork of coverage developed over time and are specific to certain circumstances and types of providers, while excluding other, similar situations. House Bill 606 would fill these gaps by temporarily establishing a comprehensive liability protection system that includes all health care providers and services.

Significantly, House Bill 606 creates this protection in uncodified law that sunsets on December 31, 2020, at which time the House felt the pandemic would be over. The special liability provisions for COVID-19 would end on that date, and the law would return to its current state.

As the COVID-19 pandemic progressed, many other states either already had liability protection on the books or added protection through legislation or executive order. As occurred in those

states, House Bill 606 recognizes for Ohio that the unprecedented nature of COVID-19 requires higher standards than for garden-variety negligence or medical malpractice lawsuits.

In addition to sunseting the liability protection, the House made many changes to House Bill 606 before voting it out, including amendments that secured the necessary majority for an emergency clause. From OHCA's perspective, the key provisions of the health care portion of the House-passed version of the bill are outlined below.

- The bill takes great care to protect all health care providers, as opposed to the very limited coverage of the current disaster and emergency statutes. House Bill 606 specifically enumerates all possible health care facilities and agencies as well as every identifiable individual health care professional, including nursing assistants and direct support professionals. All of the long-term services and supports providers OHCA represents are covered, which is vitally necessary because they all have been affected by COVID-19.
- House Bill 606 covers all types of health care services, including personal care, instead of listing only emergency treatment as is the case under the current law provisions.
- The legislation clearly defines, for purposes of the temporary provisions, gross negligence and reckless disregard.
- The bill covers provision of health care services as a result of or in response to a disaster or emergency when injury, death, or loss to person or property allegedly arise from the provider's act, omission, or decision in providing, withholding, or withdrawing services or in complying with an executive order or director's order.
- House Bill 606 applies to all causes of action damages for injury, death, or loss to person or property, including claims arising under resident or patient bills of rights and contractual claims arising out of statutory or regulatory requirements applicable to health care providers, as well as medical claims. This language prevents plaintiffs from evading the intent of the legislation by styling tort claims as something else.
- The bill specifically includes wrongful death claims, which is critical because we anticipate that most lawsuits relating to COVID-19 will be for wrongful death. The Ohio Supreme Court has determined conclusively that the constitutional prohibition on limiting damages for wrongful death does not prevent the legislature from establishing other rules for wrongful death claims such as specifying the standard of liability. As with other causes of action based on COVID-19, House Bill 606 does not preclude wrong death claims, it requires the plaintiff to meet a higher standard to collect damages because of the nature of the pandemic.
- The legislation specifies that the standard of liability for a tort action is reckless disregard for the consequences so as to affect the life or health of the patient, intentional conduct,

or willful or wanton misconduct. For professional disciplinary actions, the standard is gross negligence. In both cases, these standards are temporary through December 31, 2020.

- The House-passed bill is an emergency measure that takes effect immediately upon signature by the Governor.

While OHCA strongly supports Am. Sub. House Bill 606, we recommend removing the words “or intentional conduct” from the bill’s liability standard, at line 1179. These words were added late in the House process and create a potential loophole because they could be interpreted to deny coverage when a health care provider’s conduct is deemed intentional, thereby frustrating the standard of recklessness or wanton/willful misconduct. The wording suggests that any intentional act or omission, not only acts or omissions done with intent to cause harm, would lead to liability.

We also feel it is critical for the committee to retain provisions in the final version of House Bill 606 necessary to support the emergency clause. Health care providers need the emergency clause because without it, the legislation, if it is passed, would not take effect until sometime this fall. Many more claims could accrue in the 90 days between passage and effective date. While we appreciate that House Bill 606 makes the liability protection retroactive to the Governor’s emergency declaration on March 9, 2020, that language may be subject to challenge on constitutional grounds. The emergency clause would guarantee at least the 90 days are covered. Accordingly, we support maintaining provisions needed to ensure the emergency clause stays in place when the bill returns to the House.

Thank you for the opportunity to testify in support of Am. Sub. House Bill 606. We urge the committee’s favorable consideration of the bill and would be happy to answer any questions you may have.