

ABUSE OF A VULNERABLE CHILD

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House Bill 4071 (H-2) as reported from committee
Sponsor: Rep. Bronna Kahle

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4072 as reported from committee
Sponsor: Rep. Julie Calley

1st Committee: Families, Children and Seniors
2nd Committee: Judiciary
Complete to 10-21-21

BRIEF SUMMARY: House Bills 4071 and 4072 would together create enhanced penalties for a first offense of child abuse in the second, third, or fourth degree if the victim of the abuse is a vulnerable child and the person who commits the offense is either performing duties in a facility or home regulated under the child care licensing act or is acting within his or her health profession at the time the offense occurs.

FISCAL IMPACT: House Bill 4071 would have fiscal implications for the judiciary and state and local corrections systems. House Bill 4072 would not have a fiscal impact on state or local government. (See **Fiscal Information**, below, for a detailed discussion.)

THE APPARENT PROBLEM:

In 2018, it came to light that several employees of a business providing applied behavior analysis (ABA) therapies to autistic individuals had engaged in abusive conduct that involved four nonverbal children with autism. The incidents occurred on multiple occasions and included physical abuse, with video footage showing one child cowering in his chair under the raised hand of his ABA therapist and being slapped in the mouth and face. Because the children could not speak, they were not able to tell their parents or other adults what they experienced during their therapy sessions.

Despite the existence of videos documenting the children being hit and yelled at, some feel that prosecution with an appropriate punishment was difficult due to apparent “gaps” in the law. For instance, because the facility did not routinely record sessions, there were limited recordings for law enforcement to review in order to document the full nature of the abuse the children had experienced. Because the children could not speak, they could not report how many occasions they had been subjected to abusive treatment or the extent to which that abuse impacted them emotionally or mentally. As a result, certain elements of child abuse that carry higher penalties could not be proven even though regression in the children’s behavior implied that it had been ongoing and significant.

It has been noted that several Michigan laws provide harsher penalties for crimes in which individuals who are less able to protect themselves were targeted, such as statutes addressing criminal sexual conduct and child pornography and for those who meet the definition of a “vulnerable adult.” However, there is no distinction in law regarding criminal penalties for abuse directed at a child in general and abuse directed at a child who, due to cognitive or

physical impairments, is even more vulnerable because of the inability to tell others or to physically protect himself or herself. Nor is there a harsher penalty for health professionals who, when engaging in their profession, engage in abusive conduct of those children. Legislation to address these issues has been offered.

THE CONTENT OF THE BILLS:

House Bill 4071 would amend the Michigan Penal Code to create enhanced penalties for a first offense of second, third, or fourth degree child abuse if the victim of the abuse is a ***vulnerable child*** and the person who commits the offense is doing either of the following at the time the offense occurs:

- Performing duties in a facility or home regulated under 1973 PA 116, known as the child care licensing act.
- Acting within the health profession he or she is licensed or registered for, or otherwise authorized to engage in the practice of, under Article 15 (Occupations) of the Public Health Code.

Vulnerable child would mean an unemancipated minor (less than 18 years of age) who meets one or more of the following:

- He or she has a ***developmental disability***.
- He or she is nonverbal.
- He or she has a ***mental illness***.
- He or she has a ***physical disability***.

Developmental disability would mean, for an individual who is older than five years of age, a severe, chronic condition that meets all of the following:

- The condition is attributable to a mental or physical impairment or a combination of mental and physical impairments.
- The condition is manifested before the individual is 22 years old.
- The condition is likely to continue indefinitely.
- The condition results in substantial functional limitations in three or more of the following areas of major life activity:
 - Self-care.
 - Receptive and expressive language.
 - Learning.
 - Mobility.
 - Self-direction.
 - Capacity for independent living.
 - Economic self-sufficiency.
- The condition reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

For a child up to and including age five, ***developmental disability*** would mean a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in developmental disability as defined above if services are not provided.

Mental illness would mean a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life that was diagnosed by a licensed medical professional.

Physical disability would mean a determinable physical characteristic that may result from disease, injury, congenital condition of birth, or functional disorder that was diagnosed by a licensed medical professional.

The table below shows current maximum terms of imprisonment and those under the enhanced penalties proposed by the bill. See **Background Information**, below, for a description of the elements constituting second, third, and fourth degree child abuse.

Degree of child abuse offense	Current penalty (first offense)	Proposed enhanced penalty (first offense)	Subsequent offense (currently and under the bill)
Second degree	Felony, 10 years	Felony, 15 years	Felony, 20 years
Third degree	Felony, 2 years	Felony, 3 years	Felony, 5 years
Fourth degree	Misdemeanor, 1 year	Felony, 2 years	Felony, 2 years

MCL 750.136b

House Bill 4072 would amend the sentencing guidelines provisions of the Code of Criminal Procedure to add the felony offenses proposed by HB 4071 for child abuse of a vulnerable child, as follows:

- Second degree child abuse of a vulnerable child would be a class C crime against a person with a statutory maximum term of imprisonment of 15 years.
- Third degree child abuse of a vulnerable child would be a class G crime against a person with a statutory maximum term of imprisonment of three years.
- Fourth degree child abuse of a vulnerable child would be a class H crime against a person with a statutory maximum term of imprisonment of two years.

The bill is tie-barred to House Bill 4071, which means that it could not take effect unless House Bill 4071 were also enacted.

MCL 777.76g

Each bill would take effect 90 days after its enactment.

BACKGROUND INFORMATION:

A person is guilty of child abuse in the **second degree** if any of the following apply:

- He or she knowingly or intentionally commits an act that is cruel to a child or that is likely to cause serious physical or mental harm to a child, regardless of whether harm results.
- His or her omission or reckless act causes serious physical harm or serious mental harm to a child.

- He or she, or a licensee under the child care licensing act, intentionally violates a licensing rule for family and group child care homes under that act and the violation causes the death of a child.

A person is guilty of child abuse in the **third degree** if either of the following applies:

- He or she knowingly or intentionally causes physical harm to a child.
- He or she knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.

A person is guilty of child abuse in the **fourth degree** if either of the following applies:

- His or her omission or reckless act causes physical harm to a child.
- He or she knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results.

FISCAL INFORMATION:

House Bill 4071 would have an indeterminate fiscal impact on the state and on local units of government. The fiscal impact would depend on the number of individuals convicted of child abuse of a vulnerable child in the second, third, or fourth degree. New felony convictions would result in increased costs related to state prisons and to state probation supervision. In fiscal year 2020, the average cost of prison incarceration in a state facility was roughly \$42,200 per prisoner per year, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,300 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs.

House Bill 4072 is a companion bill to House Bill 4071 and amends sentencing guidelines to include second, third, and fourth degree child abuse of a vulnerable child. The bill would not have a direct fiscal impact on the state or on local units of government.

ARGUMENTS:

For:

Sometimes an incident reveals a gap in the state’s criminal law that needs to be filled so that justice is achieved. House Bills 4071 and 4072 would fill such a gap by providing an enhanced penalty for anyone who, as person regulated under the Public Health Code and in the course of their profession, abuses a child who meets the definition of “vulnerable child.” Many of these children, due to a physical, cognitive, or neurological condition, cannot speak or communicate in words—whether by speech, sign language, or assistive devices—and therefore cannot tell their parents or guardians and law enforcement if they have been assaulted or mistreated by a health professional or agency employee who was trusted to provide necessary services. It is believed that enhancing the length of time someone could be incarcerated will deter those who provide services to the state’s most vulnerable children from inflicting harm and will provide greater justice in cases if they do. In addition, state law already provides enhanced penalties

for many crimes in which the victims are members of a protected population, such as the elderly or very young. To supporters, the bills would give a voice to the voiceless.

Against:

A concern has been raised that the definition of “vulnerable child” remains too broad. Although the committee-passed version of HB 4071 narrows its applicability, some feel that the definition will still capture a population that it is not intended to. For example, although the legislation was offered in response to a case of nonverbal, autistic children being abused by therapists providing ABA therapies, some children who may meet the definition due to the nature of their disability may still be able to communicate effectively and therefore assist in a prosecution. For them, the enhanced penalty may not be necessary, as an offender could be prosecuted under the existing child abuse laws. Therefore, some would say that the definition of “vulnerable child” should be further refined to better fit those who need the protection the most.

POSITIONS:

Representatives of the Lenawee County Prosecutor’s Office testified in support of the bills. (5-11-21)

The following entities indicated support for the bills:

- Michigan Council for Maternal and Child Health (3-10-21)
- Michigan Catholic Conference (5-11-21)
- Michigan Domestic and Sexual Violence Prevention and Treatment Board (9-21-21)
- Prosecuting Attorneys Association of Michigan (9-21-21)

The Department of Health and Human Services indicated support for HB 4071. (9-21-21)

The Michigan Coalition to End Domestic and Sexual Violence indicated a neutral position on the bills. (3-16-21)

The following entities indicated opposition to the bills (3-16-21):

- American Civil Liberties Union (ACLU)
- Citizens for Parental Rights

Legislative Analysts: Susan Stutzky
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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.