

## VIDEORECORD CHILD FORENSIC INTERVIEWS

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<http://www.house.mi.gov/hfa>

**House Bill 4298 (reported as substitute H-5)**  
**Sponsor: Rep. Robert L. Kosowski**

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

**House Bill 4299 (reported as substitute H-6)**  
**Sponsor: Rep. Jim Runestad**

**House Bill 4300 (reported as substitute H-1)**  
**Sponsor: Rep. Pamela Hornberger**

**Committee: Judiciary**  
**Complete to 3-6-18**

**BRIEF SUMMARY:** Taken together, the bills would amend various acts to:

- Require an electronic recording of an interview of a child conducted in a child assessment center in a child abuse or neglect investigation. (*Electronic recording* refers to a video recording of a witness statement.)
- Allow an exception from this requirement for good cause, such as equipment failure or an exigent circumstance.
- Allow the statement to be considered in a hearing to expunge irrelevant or inaccurate evidence from the Central Registry (of child abuse and neglect).
- Allow a videorecorded statement to be admissible as evidence at trial, and also admissible at a preliminary examination, under certain conditions.
- Eliminate the reference to the Department of Health and Human Services (DHHS) currently contained in the definition of “custodian of the videorecorded statement.”
- Specify who may view a videorecorded statement.
- Increase the penalty for unauthorized disclosure of a statement.
- Specify that retention of a videorecorded statement would be done under county protocols established under Section 8 of the Child Protection Law.

The bills are tie-barred to each other, meaning no bill could become law unless all were enacted. The bills would each take effect 180 days after enactment.

**FISCAL IMPACT:** The bills would have an indeterminate fiscal impact on state and local governments. (See *Fiscal Information*, below, for a more detailed discussion.)

### **THE APPARENT PROBLEM:**

A forensic interview involving a child who may be the victim of (or witness to) neglect and/or physical or sexual abuse is an important part of an investigation when neglect and/or physical or sexual abuse of a child is reported to Child Protective Services or law enforcement. Often the forensic interview is conducted at a child advocacy center, also

referred to as a child assessment center or CAC. According to the Michigan Chapter of the National Children's Alliance, CACs are "community based, child-focused and child-friendly facilities where representatives from many disciplines meet to discuss and make decisions about investigation, treatment and prosecution of child abuse cases." Individuals with specialized training in interviewing children conduct the forensic interviews following the Michigan Forensic Interviewing Protocol. According to information on the DHHS website, the goal of the Protocol is "to obtain a statement from a child in a developmentally-sensitive, unbiased, and truth-seeking manner, that will support accurate and fair decision-making in the criminal justice and child welfare systems."

In 2006, the Governor's Task Force on Child Abuse and Neglect supported, as a best practice, that forensic interviews of sexually abused children at CACs or similar programs be videorecorded. It is reported, however, that not all CACs record every forensic interview and that some CACs do not even have the equipment necessary to videorecord a forensic interview.

Some child abuse experts maintain that it is not always in the best interest of a child to videorecord the interview and, in some cases, that doing so may actually hinder obtaining a quality interview (one that accurately presents what happened). However, supporters of videorecording forensic interviews believe that the practice reduces trauma to child victims and lessens the risk of re-victimizing the child by asking them the same questions over and over. It captures exactly what the interviewer and child said, as well as intonations and body language that help to establish an accurate interpretation of the statements beyond what a transcript can supply. Thus, some feel that the best practice of videorecording forensic interviews in suspected child abuse or child sexual assault cases as recommended by the Task Force should be mandated in statute.

In a separate but related matter, some feel that persons who are the subject of a Central Registry case, as well as the DHHS hearing officer, should be able to access the recorded forensic interviews when seeking to correct inaccurate information in or expunge a child abuse allegation from the Registry. Currently, other than DHHS and law enforcement agencies, only a court and a defendant in a criminal child abuse or neglect case have access to the videorecorded statements. But not all Central Registry cases lead to criminal charges. It is believed that broadening access to the videorecordings of the forensic interviews may better enable parents and others to identify and clear up misunderstandings or inaccurate statements in a Central Registry report.

### ***THE CONTENT OF THE BILLS:***

**House Bill 4298** would add a new section to the Child Protection Law, which pertains to complaints of child abuse or child neglect made to Children's Protective Services (CPS) and how complaints are handled. At the time a child is interviewed in an ***accredited or creditable child assessment center*** under the protocols established by the county as required under Section 8(6), the bill would require the person conducting the interview to make an electronic recording of the interview in its entirety, ***absent good cause***. The

recording would have to be started at the beginning of the interview and not be turned off until the interview is completed.

An *accredited or creditable child assessment center* would mean a facility or service provider that has received accreditation or is eligible for accreditation from the National Children's Alliance.

*Absent good cause* would include, but not be limited to, inoperability of the recording equipment or other exigent circumstances.

A custodian of the videorecorded statement would have to retain, and allow access to, electronic recordings in the same manner as provided by Section 2163a of the Revised Judicature Act (as revised by HB 4299).

Failure to make an electronic recording of an interview under the new provision, including failure to record the interview in its entirety, would not prevent a forensic interviewer or other witness present during the taking of the statement from testifying in court as to the circumstances and content of the individual's statement if the court determines that the statement is otherwise admissible.

**House Bills 4299 and 4300** would amend provisions within the Revised Judicature Act (RJA) and the Juvenile Code (a chapter within the Probate Code), respectively.

Provisions in each of those two acts allow special accommodations for a witness who is under 16 years old or developmentally disabled and who is an alleged victim of abuse or criminal sexual conduct, though the RJA also applies to vulnerable adults. The special accommodations apply to criminal prosecutions and juvenile proceedings and include, among other things, videotaping witness statements.

***Failure to record an interview***

Failure to make a video recording of an interview under the bills, including failure to record the interview in its entirety, would not prevent a forensic interviewer or other witness present during the taking of the videorecorded statement from testifying in court as to the circumstances and content of the individual's statement if the court determined that the testimony is otherwise admissible.

***Use of a videorecorded statement by a court***

House Bill 4300 would amend the Juvenile Code to apply the provisions pertaining to videorecorded statements to a proceeding brought under Section 7(6) of the Child Protection Law (Central Registry cases).

[Section 7(6) of the Child Protection Law establishes a mechanism by which the subject of a report or record made under the act may request the DHHS to hold a hearing to determine whether the report or record in whole or in part should be amended or expunged from the Central Registry. ***Central Registry*** is the system maintained at the DHHS that is used to

keep a record of all reports filed with the department under the Child Protection Law in which relevant and accurate evidence of child abuse or neglect is found to exist.]

Under the RJA, a court may consider a videorecorded statement in a proceeding only if authorized in statute. For instance, a videorecorded statement may be considered by the court in determining the sentence or used as a factual basis for a no contest plea or to supplement a guilty plea. House Bill 4299 would amend the RJA to also allow a videorecorded statement to be considered in court proceedings for any of the following:

- Admission as evidence at the preliminary examination *in addition to* (but not instead of) the live testimony of the witness if the statement was taken according to the forensic interviewing protocol implemented as required under Section 8 of the Child Protection Law.
- Admission for impeachment purposes (current law). The bill would add that if any part of a videorecorded statement were admitted for impeachment purposes, the entire statement would be admissible.
- Consideration by a hearing officer in a hearing pertaining to a Central Registry case held under Section 7(6) of the Child Protection Law.
- Admission as evidence at trial, so long as the admission is consistent with any requirements of the confrontation clause of the Sixth Amendment to the U.S. Constitution and if the statement was taken according to the forensic interviewing protocol implemented as required by Section 8 of the Child Protection Law.

#### ***Copy of videorecorded statement provided to the defense***

Both acts provide that a defendant or respondent in an abuse or neglect case has a reasonable right to view and hear the videorecorded statement at a reasonable time before the defendant's pretrial or trial of the case or before the statement is entered into evidence. The bills would specify this must be done no later than 10 days before the court proceeding; House Bill 4299 would amend the RJA to also require this be done for a hearing held on a petition to amend or expunge a Central Registry record.

Further, in a child abuse or neglect proceeding, a court may order that a copy of the videorecorded statement be given to the defense in preparation for a court proceeding and under protective conditions. The bills would require the order to specify who can view the videorecorded statement, indicate the time by which the recording is required to be returned, and state a reason for the release of the videorecorded statement. House Bill 4299 (RJA) would allow the protective conditions to include a prohibition on defense counsel providing a defendant with his or her own copy of the videorecorded statement or a prohibition on a defendant proceeding pro se from receiving or retaining his or her own copy.

#### ***Penalty***

Currently, a person who intentionally releases a videorecorded statement in violation of the RJA or Juvenile Code is guilty of a misdemeanor punishable by imprisonment for not more than 93 days and/or a fine of not more than \$500. The bills would increase the maximum term of imprisonment to 1 year and the maximum fine to \$2,500. Under the bills, the

amended sections would not affect the ability to investigate, arrest, prosecute, or convict an individual for any other violation of Michigan law.

***Definition of “custodian of the videorecorded statement”***

Both bills would remove the DHHS from the definition of “custodian of the videorecorded statement” for purposes of their respective acts. As revised, in both acts, “custodian of the videorecorded statement” would mean the investigating law enforcement agency, prosecuting attorney, or Department of the Attorney General or another person designated under the county protocols established as required by Section 8 of the Child Protection Law.

***Retention of videorecorded statements***

The bills would require a videorecorded statement to be retained under the county protocols established under Section 8 of the Child Protection Law (which references protocols developed by the Governor’s Task Force on Children’s Justice and published in certain department publications), and House Bill 4299 (RJA) would require a videorecorded statement to adhere to the forensic interviewing protocol implemented as required in Section 8 of the Child Protection Law.

Further, both bills would specify that the DHHS is not responsible for storing or retaining a videorecorded statement. (Currently, retention of video recordings is governed by protocols established by county prosecutors. In general, video recordings are likely to be retained at the facility in which the interview took place. In a criminal investigation, the investigating law enforcement agency and/or court would likely retain and store forensic video recordings. Access to the video recordings is limited, and only those authorized by statute may view them, and then only for authorized purposes.)

MCL 722.638f (HB 4298, Child Protection Law)

MCL 600.2163a (HB 4299, Revised Judicature Act)

MCL 712A.17b (HB 4300, Juvenile Code)

***BACKGROUND INFORMATION:***

These bills are similar to House Bills 4547, 4548, and 4549 of the 2015–2016 legislative session. For a discussion of those bills, see:

<http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-4547-F6E35752.pdf>

***FISCAL INFORMATION:***

Corrections and the Judiciary:

Given the increase in the maximum term of imprisonment and the increase in the amount of fines that could be assessed, the bills could increase costs on local correctional systems and could increase funding for local libraries. New convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by

jurisdiction. The bills would have an indeterminate fiscal impact on the judiciary and local court funding units. The fiscal impact would depend on how the provisions of the bills affected caseloads and related administrative costs. Any increase in penal fine revenues would increase funding for local libraries, which are the constitutionally designated recipients of those revenues.

DHHS and other governmental entities:

The bills would have a minimal fiscal impact on the state and local units of government. The state currently has the videorecording of the interviews of children during a child abuse or neglect investigation as a best practice.

***ARGUMENTS:***

***For:***

House Bill 4298 would place in statute the Michigan Forensic Interviewing Protocol's recommendation that forensic interviews in child abuse investigations be videorecorded as a best practice. Supporters say that in cases involving child abuse and/or sexual abuse of children, if all forensic interviews involving a child were videotaped, there would be a clear record of exactly what the child said to the interviewer, rather than just the interviewer's written notes. Such a record could prevent undue influence on a child by an interviewer through misleading questions or body language, or written reports that did not accurately reflect the words and/or intonation of the child or that were influenced by the interviewer's own biases. The recording could also protect interviewers from charges that they did not follow current forensic protocols. Having one quality interview may eliminate the need for multiple interviews with the same child, thus sparing the child from the trauma of having to relive the event over and over again. Many, if not most, child assessment centers already videorecord child forensic interviews in accordance with the state's Forensic Interviewing Protocol. Moreover, the bill would provide for a departure from the requirement under certain circumstances, such as if the equipment did not work properly or videotaping the interview would cause the child undue distress.

House Bills 4299 and 4300 would allow viewing and use of the videorecordings in a hearing to correct errors or false information in a Central Registry report or to have the report expunged from the Registry. If the interviewer's written report contained misleading or inaccurate representations of the child's statements, identifying errors in the reports could prevent some children from wrongfully being taken away from parents who did not abuse them.

Lastly, the bills establish storage and retention requirements. Custodians of videorecorded statements would have to retain the videorecordings the county protocols established under the Child Protection Law (Michigan Forensic Interviewing Protocol) and which reflect the best practices as recommended by the 2006 Governor's Task Force on Child Abuse and Neglect.

***For:***

The provision in House Bill 4299 allowing a court to issue protective conditions prohibiting defense counsel from providing a defendant with his or her own copy of the videorecorded statement or prohibiting a defendant proceeding pro se from receiving or retaining his or her own copy, is meant to prevent certain defendants, such as a suspected serial child molester, from being able to watch the recording an unlimited number of times. This is because some child molesters enjoy hearing the abusive incident described or take pleasure in seeing the pain and distress of the victim when recounting an abusive incident. The prohibition is not mandated, but would give a court discretion on a case-by-case basis. If a personal copy were denied, a defendant would still be able to view the videorecorded statement in the presence of his or her attorney or, if representing himself or herself, at the court.

***For:***

A pilot project conducted by the Governor's Task Force on Child Abuse and Neglect found that when interviews were videorecorded, it resulted in more pleas being entered to the original charge (rather than to a lesser offense) and in a higher percentage of criminal cases being pled out rather than going to trial. Pleading to a criminal charge of abuse and/or neglect spares a child victim the additional trauma of having to testify in a trial, as well as reducing costs to an often overburdened judiciary system. Many more children may be spared from having to testify against their abusers if all child abuse forensic interviews were videorecorded from beginning to end.

***For:***

The committee substitutes, unlike the bills as introduced, would no longer include the Department of Health and Human Services as a custodian of the videorecorded statement, thus relieving the department from issues relating to retaining the videorecorded statements and providing access to them. If there were instances in which it would be appropriate for the DHHS to retain videorecorded statements and to make them accessible to other entities or individuals, those situations could be addressed in a county's child forensic interview protocols.

***Against:***

House Bills 4299 and 4300 mark a departure regarding who may view a videorecorded forensic interview and for what purposes. In doing so, the bills would allow access to video recordings of forensic interviews to a subject of a Central Registry case and for a purpose other than for the prosecution or defense of a criminal abuse or neglect allegation. (Note: Not all Central Registry cases result in criminal prosecution; therefore, a local prosecutor may not be in possession of the videorecorded statement.)

***Against:***

Not all child assessment centers have the videorecording equipment necessary to comply with the recording requirements. These are private, not public, nonprofit entities funded by private donations. Though committee testimony suggested that these interviews could be done by a DHHS employee's smartphone, it is not that simple or inexpensive. For one thing, recording a forensic interview on a public employee's private phone, or even a

department-issued phone, would be a serious breach of confidentiality. Moreover, both statute and the state Protocol require that the recording equipment be out of sight of the child, behind a one-way window. To meet the high standard for criminal prosecutions, the visual and audio portions of the recording must be of high quality. Unless funding is provided, some CACs may not be able to afford to provide the equipment, thus forcing the interviews to be conducted elsewhere where the bills' provisions would not apply.

***Response:***

Reportedly, only four CACs in the state are without videorecording equipment. Costs for equipment have come down in recent years, and there may be grants or other revenue sources that could enable these remaining CACS to obtain the necessary equipment.

***POSITIONS:***

The following entities testified in support of, or indicated support for, various versions of the bills:

Citizens for Parental Rights (1-30-18)  
Michigan Judges Association (1-30-18)  
Michigan Coalition to End Domestic and Sexual Violence - HBs 4299 and 4300  
(9-12-17)  
ACLU of Michigan (6-20-18)  
Children's Law Section, Michigan State Bar (5-2-17)  
Families Civil Liberties Union (5-2-17)

The following entities testified to or indicated a neutral position for the bills as reported from committee (1-30-18):

Michigan Department of Health and Human Services  
UAW Local 6000  
Prosecuting Attorneys Association of Michigan  
Criminal Defense Attorneys of Michigan (CDAM)

The following entities do not oppose HB 4298 as reported from committee (2-15-18):

Michigan Coalition to End Domestic and Sexual Violence  
Michigan Domestic and Sexual Violence Prevention and Treatment Board

Legislative Analyst: Susan Stutzky  
Fiscal Analysts: Robin Risko  
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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.