



March 24, 2017

ENGROSSED HOUSE BILL No. 1091

DIGEST OF HB 1091 (Updated March 21, 2017 12:01 pm - DI 106)

Citations Affected: IC 35-42.

Synopsis: Accessing child pornography. Makes it a Level 6 felony to access with intent to view a photograph or other pictorial representation that depicts or describes sexual conduct by a child who the person knows is less than 18 years of age or who appears to be less than 18 years of age.

Effective: July 1, 2017.

Washburne, Hatfield

(SENATE SPONSOR — TOMES)

January 5, 2017, read first time and referred to Committee on Courts and Criminal Code.
February 2, 2017, amended, reported — Do Pass.
February 6, 2017, read second time, ordered engrossed. Engrossed.
February 7, 2017, read third time, passed. Yeas 96, nays 0.

SENATE ACTION

February 20, 2017, read first time and referred to Committee on Corrections and Criminal Law.
March 23, 2017, amended, reported favorably — Do Pass.

EH 1091—LS 6998/DI 124



March 24, 2017

First Regular Session of the 120th General Assembly (2017)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2016 Regular Session of the General Assembly.

ENGROSSED HOUSE BILL No. 1091

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

- 1 SECTION 1. IC 35-42-4-4, AS AMENDED BY P.L.13-2016,
2 SECTION 15, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2017]: Sec. 4. (a) The following definitions apply throughout
4 this section:
5 (1) "Disseminate" means to transfer possession for free or for a
6 consideration.
7 (2) "Matter" has the same meaning as in IC 35-49-1-3.
8 (3) "Performance" has the same meaning as in IC 35-49-1-7.
9 (4) "Sexual conduct" means:
10 (A) sexual intercourse;
11 (B) other sexual conduct (as defined in IC 35-31.5-2-221.5);
12 (C) exhibition of the:
13 (i) uncovered genitals; or
14 (ii) female breast with less than a fully opaque covering of
15 any part of the nipple;
16 intended to satisfy or arouse the sexual desires of any person;
17 (D) sadomasochistic abuse;

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- 1 (E) sexual intercourse or other sexual conduct (as defined in
 2 IC 35-31.5-2-221.5) with an animal; or
 3 (F) any fondling or touching of a child by another person or of
 4 another person by a child intended to arouse or satisfy the
 5 sexual desires of either the child or the other person.
- 6 (b) A person who:
- 7 (1) knowingly or intentionally manages, produces, sponsors,
 8 presents, exhibits, photographs, films, videotapes, or creates a
 9 digitized image of any performance or incident that includes
 10 sexual conduct by a child under eighteen (18) years of age;
- 11 (2) knowingly or intentionally disseminates, exhibits to another
 12 person, offers to disseminate or exhibit to another person, or
 13 sends or brings into Indiana for dissemination or exhibition matter
 14 that depicts or describes sexual conduct by a child under eighteen
 15 (18) years of age;
- 16 (3) knowingly or intentionally makes available to another person
 17 a computer, knowing that the computer's fixed drive or peripheral
 18 device contains matter that depicts or describes sexual conduct by
 19 a child less than eighteen (18) years of age; or
- 20 (4) with the intent to satisfy or arouse the sexual desires of any
 21 person:
- 22 (A) knowingly or intentionally:
- 23 (i) manages;
- 24 (ii) produces;
- 25 (iii) sponsors;
- 26 (iv) presents;
- 27 (v) exhibits;
- 28 (vi) photographs;
- 29 (vii) films;
- 30 (viii) videotapes; or
- 31 (ix) creates a digitized image of;
- 32 any performance or incident that includes the uncovered
 33 genitals of a child less than eighteen (18) years of age or the
 34 exhibition of the female breast with less than a fully opaque
 35 covering of any part of the nipple by a child less than eighteen
 36 (18) years of age;
- 37 (B) knowingly or intentionally:
- 38 (i) disseminates to another person;
- 39 (ii) exhibits to another person;
- 40 (iii) offers to disseminate or exhibit to another person; or
- 41 (iv) sends or brings into Indiana for dissemination or
 42 exhibition;



1 matter that depicts the uncovered genitals of a child less than
 2 eighteen (18) years of age or the exhibition of the female
 3 breast with less than a fully opaque covering of any part of the
 4 nipple by a child less than eighteen (18) years of age; or
 5 (C) makes available to another person a computer, knowing
 6 that the computer's fixed drive or peripheral device contains
 7 matter that depicts the uncovered genitals of a child less than
 8 eighteen (18) years of age or the exhibition of the female
 9 breast with less than a fully opaque covering of any part of the
 10 nipple by a child less than eighteen (18) years of age;

11 commits child exploitation, a Level 5 felony.

12 (c) However, the offense of child exploitation described in
 13 subsection (b) is a Level 4 felony if:

14 (1) the sexual conduct, matter, performance, or incident depicts
 15 or describes a child less than eighteen (18) years of age who:

16 (A) engages in bestiality (as described in IC 35-46-3-14);

17 (B) is mentally disabled or deficient;

18 (C) participates in the sexual conduct, matter, performance, or
 19 incident by use of force or the threat of force;

20 (D) physically or verbally resists participating in the sexual
 21 conduct, matter, performance, or incident;

22 (E) receives a bodily injury while participating in the sexual
 23 conduct, matter, performance, or incident; or

24 (F) is less than twelve (12) years of age; or

25 (2) the child less than eighteen (18) years of age:

26 (A) engages in bestiality (as described in IC 35-46-3-14);

27 (B) is mentally disabled or deficient;

28 (C) participates in the sexual conduct, matter, performance, or
 29 incident by use of force or the threat of force;

30 (D) physically or verbally resists participating in the sexual
 31 conduct, matter, performance, or incident;

32 (E) receives a bodily injury while participating in the sexual
 33 conduct, matter, performance, or incident; or

34 (F) is less than twelve (12) years of age.

35 (d) A person who knowingly or intentionally possesses **or accesses**
 36 **with intent to view:**

37 (1) a picture;

38 (2) a drawing;

39 (3) a photograph;

40 (4) a negative image;

41 (5) undeveloped film;

42 (6) a motion picture;



- 1 (7) a videotape;
 2 (8) a digitized image; or
 3 (9) any pictorial representation;
 4 that depicts or describes sexual conduct by a child who the person
 5 knows is less than eighteen (18) years of age or who appears to be less
 6 than eighteen (18) years of age, and that lacks serious literary, artistic,
 7 political, or scientific value commits possession of child pornography,
 8 a Level 6 felony.
- 9 (e) However, the offense of possession of child pornography
 10 described in subsection (d) is a Level 5 felony if:
 11 (1) the item described in subsection (d)(1) through (d)(9) depicts
 12 or describes sexual conduct by a child who the person knows is
 13 less than eighteen (18) years of age, or who appears to be less
 14 than eighteen (18) years of age, who:
 15 (A) engages in bestiality (as described in IC 35-46-3-14);
 16 (B) is mentally disabled or deficient;
 17 (C) participates in the sexual conduct, matter, performance, or
 18 incident by use of force or the threat of force;
 19 (D) physically or verbally resists participating in the sexual
 20 conduct, matter, performance, or incident;
 21 (E) receives a bodily injury while participating in the sexual
 22 conduct, matter, performance, or incident; or
 23 (F) is less than twelve (12) years of age; or
 24 (2) the child whose sexual conduct is depicted or described in an
 25 item described in subsection (d)(1) through (d)(9):
 26 (A) engages in bestiality (as described in IC 35-46-3-14);
 27 (B) is mentally disabled or deficient;
 28 (C) participates in the sexual conduct, matter, performance, or
 29 incident by use of force or the threat of force;
 30 (D) physically or verbally resists participating in the sexual
 31 conduct, matter, performance, or incident;
 32 (E) receives a bodily injury while participating in the sexual
 33 conduct, matter, performance, or incident; or
 34 (F) is less than twelve (12) years of age.
- 35 (f) Subsections (b), (c), (d), and (e) do not apply to a bona fide
 36 school, museum, or public library that qualifies for certain property tax
 37 exemptions under IC 6-1.1-10, or to an employee of such a school,
 38 museum, or public library acting within the scope of the employee's
 39 employment when the possession of the listed materials is for
 40 legitimate scientific or educational purposes.
- 41 (g) It is a defense to a prosecution under this section that:
 42 (1) the person is a school employee; and



- 1 (2) the acts constituting the elements of the offense were
 2 performed solely within the scope of the person's employment as
 3 a school employee.
- 4 (h) Except as provided in subsection (i), it is a defense to a
 5 prosecution under subsection (b), (c), (d), or (e) if all of the following
 6 apply:
- 7 (1) A cellular telephone, another wireless or cellular
 8 communications device, or a social networking web site was used
 9 to possess, produce, or disseminate the image.
- 10 (2) The defendant is not more than four (4) years older or younger
 11 than the person who is depicted in the image or who received the
 12 image.
- 13 (3) The relationship between the defendant and the person who
 14 received the image or who is depicted in the image was a dating
 15 relationship or an ongoing personal relationship. For purposes of
 16 this subdivision, the term "ongoing personal relationship" does
 17 not include a family relationship.
- 18 (4) The crime was committed by a person less than twenty-two
 19 (22) years of age.
- 20 (5) The person receiving the image or who is depicted in the
 21 image acquiesced in the defendant's conduct.
- 22 (i) The defense to a prosecution described in subsection (h) does not
 23 apply if:
- 24 (1) the person who receives the image disseminates it to a person
 25 other than the person:
- 26 (A) who sent the image; or
 27 (B) who is depicted in the image;
- 28 (2) the image is of a person other than the person who sent the
 29 image or received the image; or
- 30 (3) the dissemination of the image violates:
- 31 (A) a protective order to prevent domestic or family violence
 32 issued under IC 34-26-5 (or, if the order involved a family or
 33 household member, under IC 34-26-2 or IC 34-4-5.1-5 before
 34 their repeal);
- 35 (B) an ex parte protective order issued under IC 34-26-5 (or,
 36 if the order involved a family or household member, an
 37 emergency order issued under IC 34-26-2 or IC 34-4-5.1
 38 before their repeal);
- 39 (C) a workplace violence restraining order issued under
 40 IC 34-26-6;
- 41 (D) a no contact order in a dispositional decree issued under
 42 IC 31-34-20-1, IC 31-37-19-1, or IC 31-37-5-6 (or



- 1 IC 31-6-4-15.4 or IC 31-6-4-15.9 before their repeal) or an
 2 order issued under IC 31-32-13 (or IC 31-6-7-14 before its
 3 repeal) that orders the person to refrain from direct or indirect
 4 contact with a child in need of services or a delinquent child;
 5 (E) a no contact order issued as a condition of pretrial release,
 6 including release on bail or personal recognizance, or pretrial
 7 diversion, and including a no contact order issued under
 8 IC 35-33-8-3.6;
 9 (F) a no contact order issued as a condition of probation;
 10 (G) a protective order to prevent domestic or family violence
 11 issued under IC 31-15-5 (or IC 31-16-5 or IC 31-1-11.5-8.2
 12 before their repeal);
 13 (H) a protective order to prevent domestic or family violence
 14 issued under IC 31-14-16-1 in a paternity action;
 15 (I) a no contact order issued under IC 31-34-25 in a child in
 16 need of services proceeding or under IC 31-37-25 in a juvenile
 17 delinquency proceeding;
 18 (J) an order issued in another state that is substantially similar
 19 to an order described in clauses (A) through (I);
 20 (K) an order that is substantially similar to an order described
 21 in clauses (A) through (I) and is issued by an Indian:
 22 (i) tribe;
 23 (ii) band;
 24 (iii) pueblo;
 25 (iv) nation; or
 26 (v) organized group or community, including an Alaska
 27 Native village or regional or village corporation as defined
 28 in or established under the Alaska Native Claims Settlement
 29 Act (43 U.S.C. 1601 et seq.);
 30 that is recognized as eligible for the special programs and
 31 services provided by the United States to Indians because of
 32 their special status as Indians;
 33 (L) an order issued under IC 35-33-8-3.2; or
 34 (M) an order issued under IC 35-38-1-30.
 35 (j) It is a defense to a prosecution under this section that:
 36 (1) the person was less than eighteen (18) years of age at the time
 37 the alleged offense was committed; and
 38 (2) the circumstances described in IC 35-45-4-6(a)(2) through
 39 IC 35-45-4-6(a)(4) apply.
 40 (k) A person is entitled to present the defense described in
 41 subsection (j) in a pretrial hearing. If a person proves by a
 42 preponderance of the evidence in a pretrial hearing that the defense



1 described in subsection (j) applies, the court shall dismiss the charges
2 under this section with prejudice.



COMMITTEE REPORT

Mr. Speaker: Your Committee on Courts and Criminal Code, to which was referred House Bill 1091, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 11-8-8-4.5, AS AMENDED BY P.L.13-2016, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2017]: Sec. 4.5. (a) Except as provided in section 22 of this chapter, as used in this chapter, "sex offender" means a person convicted of any of the following offenses:

- (1) Rape (IC 35-42-4-1).
- (2) Criminal deviate conduct (IC 35-42-4-2) (before its repeal).
- (3) Child molesting (IC 35-42-4-3).
- (4) Child exploitation (IC 35-42-4-4(b) or IC 35-42-4-4(c)).
- (5) Vicarious sexual gratification (including performing sexual conduct in the presence of a minor) (IC 35-42-4-5).
- (6) Child solicitation (IC 35-42-4-6).
- (7) Child seduction (IC 35-42-4-7).
- (8) Sexual misconduct with a minor (IC 35-42-4-9) as a Class A, Class B, or Class C felony (for a crime committed before July 1, 2014) or a Level 1, Level 2, Level 4, or Level 5 felony (for a crime committed after June 30, 2014), unless:
 - (A) the person is convicted of sexual misconduct with a minor as a Class C felony (for a crime committed before July 1, 2014) or a Level 5 felony (for a crime committed after June 30, 2014);
 - (B) the person is not more than:
 - (i) four (4) years older than the victim if the offense was committed after June 30, 2007; or
 - (ii) five (5) years older than the victim if the offense was committed before July 1, 2007; and
 - (C) the sentencing court finds that the person should not be required to register as a sex offender.
- (9) Incest (IC 35-46-1-3).
- (10) Sexual battery (IC 35-42-4-8).
- (11) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian.
- (12) Criminal confinement (IC 35-42-3-3), if the victim is less



than eighteen (18) years of age, and the person who confined or removed the victim is not the victim's parent or guardian.

(13) Possession of child pornography (IC 35-42-4-4(d) or IC 35-42-4-4(e)).

(14) Promoting prostitution (IC 35-45-4-4) as a Class B felony (for a crime committed before July 1, 2014) or a Level 4 felony (for a crime committed after June 30, 2014).

(15) Promotion of human trafficking under IC 35-42-3.5-1(a)(2).

(16) Promotion of human trafficking of a minor under IC 35-42-3.5-1(b)(1)(B) or IC 35-42-3.5-1(b)(2).

(17) Sexual trafficking of a minor (IC 35-42-3.5-1(c)).

(18) Human trafficking under IC 35-42-3.5-1(d)(3) if the victim is less than eighteen (18) years of age.

(19) Sexual misconduct by a service provider with a detained or supervised child (IC 35-44.1-3-10(c)).

(20) Disseminating matter harmful to minors (IC 35-49-3-3(a)(1)), if:

(1) the person is a child care worker (as defined in IC 35-42-4-7); and

(2) the victim of the offense is a child who:

(A) receives care, supervision, or instruction from the person within the scope of the person's duties as a child care worker at a shelter care facility, as described in IC 35-42-4-7(d)(1);

(B) attends the school corporation, charter school, nonpublic school, or special educational cooperative that employs the person as a child care worker, as described in IC 35-42-4-7(d)(2); or

(C) attends a school corporation, charter school, nonpublic school, or special educational cooperative with which the person is affiliated as a child care worker, if the person:

(i) is in a position of trust with respect to the child;

(ii) engaged in the provision of care or supervision to the child;

(iii) is at least four (4) years older than the child; and

(iv) is not a student at the school or cooperative;

as described in IC 35-42-4-7(d)(3).

~~(20)~~ **(21)** An attempt or conspiracy to commit a crime listed in this subsection.

~~(21)~~ **(22)** A crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to any



of the offenses listed in this subsection.

(b) The term includes:

- (1) a person who is required to register as a sex offender in any jurisdiction; and
- (2) a child who has committed a delinquent act and who:
 - (A) is at least fourteen (14) years of age;
 - (B) is on probation, is on parole, is discharged from a facility by the department of correction, is discharged from a secure private facility (as defined in IC 31-9-2-115), or is discharged from a juvenile detention facility as a result of an adjudication as a delinquent child for an act that would be an offense described in subsection (a) if committed by an adult; and
 - (C) is found by a court by clear and convincing evidence to be likely to repeat an act that would be an offense described in subsection (a) if committed by an adult.

(c) In making a determination under subsection (b)(2)(C), the court shall consider expert testimony concerning whether a child is likely to repeat an act that would be an offense described in subsection (a) if committed by an adult.

SECTION 2. IC 11-8-8-5, AS AMENDED BY P.L.13-2016, SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2017]: Sec. 5. (a) Except as provided in section 22 of this chapter, as used in this chapter, "sex or violent offender" means a person convicted of any of the following offenses:

- (1) Rape (IC 35-42-4-1).
- (2) Criminal deviate conduct (IC 35-42-4-2) (before its repeal).
- (3) Child molesting (IC 35-42-4-3).
- (4) Child exploitation (IC 35-42-4-4(b) or IC 35-42-4-4(c)).
- (5) Vicarious sexual gratification (including performing sexual conduct in the presence of a minor) (IC 35-42-4-5).
- (6) Child solicitation (IC 35-42-4-6).
- (7) Child seduction (IC 35-42-4-7).
- (8) Sexual misconduct with a minor (IC 35-42-4-9) as a Class A, Class B, or Class C felony (for a crime committed before July 1, 2014) or a Level 1, Level 2, Level 4, or Level 5 felony (for a crime committed after June 30, 2014), unless:
 - (A) the person is convicted of sexual misconduct with a minor as a Class C felony (for a crime committed before July 1, 2014) or a Level 5 felony (for a crime committed after June 30, 2014);
 - (B) the person is not more than:
 - (i) four (4) years older than the victim if the offense was



committed after June 30, 2007; or

(ii) five (5) years older than the victim if the offense was committed before July 1, 2007; and

(C) the sentencing court finds that the person should not be required to register as a sex offender.

(9) Incest (IC 35-46-1-3).

(10) Sexual battery (IC 35-42-4-8).

(11) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian.

(12) Criminal confinement (IC 35-42-3-3), if the victim is less than eighteen (18) years of age, and the person who confined or removed the victim is not the victim's parent or guardian.

(13) Possession of child pornography (IC 35-42-4-4(d) or IC 35-42-4-4(e)).

(14) Promoting prostitution (IC 35-45-4-4) as a Class B felony (for a crime committed before July 1, 2014) or a Level 4 felony (for a crime committed after June 30, 2014).

(15) Promotion of human trafficking under IC 35-42-3.5-1(a)(2).

(16) Promotion of human trafficking of a minor under IC 35-42-3.5-1(b)(1)(B) or IC 35-42-3.5-1(b)(2).

(17) Sexual trafficking of a minor (IC 35-42-3.5-1(c)).

(18) Human trafficking under IC 35-42-3.5-1(d)(3) if the victim is less than eighteen (18) years of age.

(19) Murder (IC 35-42-1-1).

(20) Voluntary manslaughter (IC 35-42-1-3).

(21) Sexual misconduct by a service provider with a detained or supervised child (IC 35-44.1-3-10(c)).

(22) Disseminating matter harmful to minors (IC 35-49-3-3(a)(1)), if:

(1) the person is a child care worker (as defined in IC 35-42-4-7); and

(2) the victim of the offense is a child who:

(A) receives care, supervision, or instruction from the person within the scope of the person's duties as a child care worker at a shelter care facility, as described in IC 35-42-4-7(d)(1);

(B) attends the school corporation, charter school, nonpublic school, or special educational cooperative that employs the person as a child care worker, as described in IC 35-42-4-7(d)(2); or

(C) attends a school corporation, charter school,



nonpublic school, or special educational cooperative with which the person is affiliated as a child care worker, if the person:

- (i) is in a position of trust with respect to the child;**
- (ii) engaged in the provision of care or supervision to the child;**
- (iii) is at least four (4) years older than the child; and**
- (iv) is not a student at the school or cooperative;**

as described in IC 35-42-4-7(d)(3).

~~(22)~~ **(23)** An attempt or conspiracy to commit a crime listed in this subsection.

~~(23)~~ **(24)** A crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in this subsection.

(b) The term includes:

(1) a person who is required to register as a sex or violent offender in any jurisdiction; and

(2) a child who has committed a delinquent act and who:

(A) is at least fourteen (14) years of age;

(B) is on probation, is on parole, is discharged from a facility by the department of correction, is discharged from a secure private facility (as defined in IC 31-9-2-115), or is discharged from a juvenile detention facility as a result of an adjudication as a delinquent child for an act that would be an offense described in subsection (a) if committed by an adult; and

(C) is found by a court by clear and convincing evidence to be likely to repeat an act that would be an offense described in subsection (a) if committed by an adult.

(c) In making a determination under subsection (b)(2)(C), the court shall consider expert testimony concerning whether a child is likely to repeat an act that would be an offense described in subsection (a) if committed by an adult."

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to HB 1091 as introduced.)

WASHBURNE

Committee Vote: yeas 11, nays 0.

EH 1091—LS 6998/DI 124



COMMITTEE REPORT

Madam President: The Senate Committee on Corrections and Criminal Law, to which was referred House Bill No. 1091, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, delete lines 1 through 17.

Delete pages 2 through 5.

Page 6, delete lines 1 through 7.

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to HB 1091 as printed February 3, 2017.)

YOUNG M, Chairperson

Committee Vote: Yeas 6, Nays 1.

