HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 119 Sexual Offenders and Predators
SPONSOR(S): Glorioso
TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Public Safety & Domestic Security Policy Committee	11 Y, 0 N, As CS	Cunningham	Cunningham
2)	Military & Local Affairs Policy Committee		Nelson	Hoagland
3)	Criminal & Civil Justice Appropriations Committee			
4)	Criminal & Civil Justice Policy Council			
5)				

SUMMARY ANALYSIS

The bill creates restrictions for a person convicted of an offense listed in the sexual offender statute where the victim was under the age of 18 as follows:

- The bill makes it a first degree misdemeanor if a person convicted of such an offense commits loitering or prowling within 300 feet of a place where children were congregating.

- The bill makes it a first degree misdemeanor for a person convicted of such an offense to knowingly approach, contact or communicate with a child under 18 years of age in any public park building or on real property comprising any public park or playground with intent to engage in conduct of a sexual nature, or to make a communication of any type containing any content of a sexual nature.

- The bill also makes it a first degree misdemeanor for a person convicted of such an offense to:
  - knowingly be present in any child care facility or pre-K-12 school or on real property comprising any child care facility or pre-K-12 school when the child care facility or school is in operation unless the offender has provided written notification of his or her intent to be present to the school board, superintendent, principal or child care facility owner;
  - fail to notify the child care facility owner or the school principal's office when he or she arrives and departs the child care facility or school; or
  - fail to remain under the direct supervision of a school official or designated chaperone when present in the vicinity of children.

- The bill adds a definition of the term "transient residence" to the sexual predator and sexual offender registration statutes and requires an offender to provide information regarding his or her transient residence during the registration process.

- The bill provides legislative intent language relating to a state-established uniform residency restriction distance; defines the terms "park," "playground," "child care facility" and "school"; and specifies that an offender may not be forced to move if he or she is living in a residence that complies with the statutory sex offender residency restrictions and a child care facility, park, playground or school is subsequently established within 1,000 feet of the offender's residence.

- The bill prohibits offenders on supervision for specified sexual offenses from visiting schools, child care facilities, parks and playgrounds without prior approval of the offender's supervising officer. The bill also prohibits such offenders from distributing candy or other items to children on Halloween, wearing a Santa Claus, Easter Bunny or clown costume, or entertaining at children's parties without prior approval.

On February 23, 2010, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact on the Department of Corrections.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Sexual Predator/Offender Registration (Sections 2, 4, 6, 7, 13 and 14)

Present Situation

In very general terms, the distinction between a sexual predator and a sexual offender depends on what offense the person has been convicted of, whether the person has previously been convicted of a sexual offense and the date the offense occurred. A sexual predator or sexual offender must comply with a number of statutory registration requirements.[1] Failure to comply with these requirements is a third or second degree felony, depending on the offense.

During initial registration, a sexual predator or sexual offender is required to provide certain information, including the address of his or her permanent or temporary residence, to the sheriff's department who, in turn, provides this information to the Florida Department of Law Enforcement (FDLE) for inclusion in the statewide database. For a sexual predator or sexual offender who is not in the custody of or under the supervision of the Department of Corrections or a local jail, this information must be provided within 48 hours of establishing or maintaining a residence.

A sexual predator or offender is required to update information regarding his or her permanent or temporary residence. A sexual predator or offender who vacates a permanent residence and fails to establish or maintain another permanent or temporary residence must, within 48 hours after vacating the permanent residence, report in person to the sheriff's office of the county in which he or she is located. The sexual predator or offender must provide an address for the residence or other location that he or she is or will be occupying during the time in which he or she fails to establish or maintain a permanent or temporary residence. Currently, the term "temporary residence" is defined as follows:

> A place where the person abides, lodges, or resides for a period of 5 or more days in the aggregate during any calendar year and which is not the person's

[1] See, generally, ss. 775.21, 943.0435 and 944.607, F.S.

> permanent address or, for a person whose permanent residence is not in this state, a place where the person is employed, practices a vocation, or is enrolled as a student for any period of time in this state.[2]

Effect of the Bill

The bill amends the definition of the term "temporary residence" to specify that the definition includes, but is not limited to, vacation, business or personal travel destinations in or out of the state.

The bill also requires a sexual predator or offender to provide information regarding his or her transient residence. The bill defines the term "transient residence" to mean:

> A place or county where a person lives, remains, or is located for a period of 5 or more days in the aggregate during a calendar year and which is not the person's permanent or temporary address. The term includes, but is not limited to, a place where the person sleeps or seeks shelter, and a location that has no specific street address.

Loitering or Prowling (Section 1)

Present Situation

The loitering statute, s. 856.021, F.S., provides as follows:

> (1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.
>
> (2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself, or manifestly endeavors to conceal himself or herself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself or herself and explain his or her presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

All persons are prohibited from loitering (not just sexual offenders), and a violation of the statute is a second degree misdemeanor.

Although there are statutory restrictions on where certain people who have been convicted of a sexual offense can reside[3] (discussed below), there are currently no statutory restrictions on where a person who has been convicted of a sexual offense can visit.[4]

Effect of the Bill

The bill creates various restrictions for persons convicted of an offense listed in the sexual offender statute[5] where the victim was under the age of 18. Specifically, the bill provides that if such a

[2] Section 775.21(2)(g), F.S.

[3] See, ss. 794.065, 947.1405(7)(a)2 and 948.30(1)(b), F.S

[4] Certain sexual predators who have committed an offense against a minor victim and certain offenders who are on supervision for a sexual offense are prohibited from working at specified locations. See, ss. 775.21(10)(b), 947.1405(7)(a)6. and 948.30(1)(f), F.S.

person commits loitering or prowling within 300 feet of a place where children were congregating, the offense will be a first degree misdemeanor.

The bill also makes it a first degree misdemeanor for a person convicted of such an offense to:

- Knowingly approach, contact or communicate with a child under 18 years of age in any public park building or on real property comprising any public park or playground with intent to engage in conduct of a sexual nature, or to make a communication of any type containing any content of a sexual nature. This will only apply to an offender who committed a sexual offense on or after the date the bill becomes a law.

- Knowingly be present in any child care facility or pre-K-12 school or on real property comprising any child care facility or pre-K-12 school when the child care facility or school is in operation unless the offender has provided written notification of his or her intent to be present to the school board, superintendent, principal, or child care facility owner;

- Fail to notify the child care facility owner or the school principal's office when he or she arrives and departs the child care facility or school; or

- Fail to remain under the direct supervision of a school official [6] or designated chaperone when present in the vicinity of children.

The bill provides that it is not a violation of the above provisions if the child care facility or school is a voting location and the offender is present for the purpose of voting during the hours designated for voting or if the offender is only dropping off or picking up his or her own children or grandchildren at the child care facility or school.

Sex Offender Residency Restrictions (Section 3)

Present Situation

Before October 1, 2004, there was no statutory prohibition on where a sexual predator or sexual offender who was no longer on supervision could live.[7] In other words, a sexual predator or sexual offender who was not on supervision could live wherever he or she wished but was required to report his or her residence to law enforcement. During the 2004 legislative session, s. 794.065, F.S. was created [8] which made it unlawful for a person convicted on or after October 1, 2004 (the effective date of the law) of a specified sexual battery or lewd or lascivious offense,[9] against a victim under the age of 16 from living within 1,000 feet of a school, day care center, park or playground. The offense is a third degree felony if the sexual offense for which the offender previously was convicted was classified as a first degree felony or higher. The offense is a first

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[5] The offenses referenced include s. 787.01, F.S. (kidnapping); s. 787.02, F.S. (false imprisonment); s. 787.025, F.S. (luring or enticing a child); s. 794.011, F.S. (sexual battery); s. 794.05, F.S. (unlawful sexual activity with certain minors); s. 796.03, F.S. (procuring a person under the age of 18 for prostitution); s. 796.035, F.S. (selling or buying of a minor into sex trafficking or prostitution); s. 800.04, F.S. (lewd or lascivious offenses); s. 825.1025(2)(b), F.S. (lewd or lascivious battery on an elderly person); s. 827.071, F.S. (promoting sexual performance by a child); s. 847.0133, F.S. (selling or showing obscenity to a minor); s. 847.0135, F.S. (traveling to meet a minor for the purpose of engaging in illegal sexual activity); s. 847.0137, F.S. (transmitting child pornography); s. 847.0138, F.S. (transmitting material harmful to minors); and s. 985.701, F.S. (sexual misconduct by a Department of Juvenile Justice employee).

6 The bill defines the term "school official" to mean a principal, school resource officer, teacher or any other employee of the school, the superintendent of schools, a member of the school board, a child care facility owner or a child care provider.

7 In cases in which the victim was a minor, a sexual predator is prohibited from working in a business, school, day care center, park, playground or other place where children regularly congregate. Section 775.21(10)(b), F.S. If a sexual predator or sexual offender is working at or attending an institution of higher education, this fact must be disclosed to FDLE who then, in turn, must inform the institution of higher education. Sections 775.21(6)(a)1b and 943.0435(2)(b)2, F.S.

8 See, ch. 2004-391, L.O.F.

9 Included are ss. 794.011, 800.04, 827.071 and 847.0145, F.S.

degree misdemeanor if the sexual offense for which the offender previously was convicted was classified as a second or third degree felony.

In recent years, a large number of cities and counties throughout the state have passed local ordinances designed to restrict where people who have been convicted of a sexual offense can live. According to the Department of Corrections, as of October 19, 2009, there were 148 such local ordinances. Generally, the ordinances appear to be modeled after s. 794.065, F.S., but extend the distance from 1,000 feet to 2,500 feet or more. Many of the ordinances also prohibit an offender from living within a certain distance of places such as libraries, churches and bus stops that are not included in the state statute.

A great deal of press coverage has documented that many local residency exclusions make it significantly more difficult for a sexual offender to obtain a legal residence. In Miami-Dade County, a varying number of sexual offenders have reported their address as underneath the Julia Tuttle Bridge.[10]

On April 14, 2009, the Broward County Board of County Commissioners adopted an ordinance creating residency exclusions for sexual offenders that was to be effective for 90 days. The commission also created the Sexual Offender & Sexual Predator Residence Task Force, which was required "to review, research, and make recommendations to the Board of County Commissioners regarding the issues involved with the residency restrictions of sexual offenders and sexual predators convicted of certain sex offenses."[11]

On August 25, 2009, the final task force report was released. Among the findings found in the task force report were the following:

- Residency restrictions limit housing availability and create an increased number of homeless sex offenders.
- Because 24 cities within the county had adopted residency ordinances, a high percentage of sex offenders were living (sometimes referred to as "clustering") in small unincorporated areas.
- A review of the available research on residency restrictions found "no empirical evidence to indicate that these laws achieve their intended goals of preventing abuse, protecting children, or reducing reoffending."[12]
- No evidence was found indicating that "larger buffer zones are more effective in protecting children than the state's 1,000-foot restriction."[13]

As noted above, s. 794.065, F.S., makes it a crime for any person who has been convicted of a violation of s. 794.011, s. 800.04, s. 827.071, s. 847.0135(5) or s. 847.0145, F.S.,[14] regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age, to reside within 1,000 feet of any school, day care center, park or playground. The statute does not currently define the terms "school," "day care center," "park" or "playground."

Effect of the Bill

[10] *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, New York Times, July 10, 2009; http://www.nytimes.com/2009/07/10/us/10offender.html.

[11] RESOLUTION NO. 2009-309; http://bcegov3.broward.org/NewsRelease/Attachments/2199_114_04-28-2009_Sexual%20Offender%20resolution.doc.

[12] *Final Report: Sexual Offender & Sexual Predator Residence Task Force, p*age 6. http://www.royallcreations.com/fatsa/Final_Report_-_Sexual_Offender_Sexual_Residence_Task_Force.pdf.

[13] Id.

[14] These offenses relate to sexual battery, lewd and lascivious offenses, sexual performance by a child, computer pornography-related offenses, and selling or buying minors.

The bill renumbers s. 794.065, F.S., which is currently located in the sexual battery chapter, to ch. 775, F.S. (specifically s. 775.215, F.S.), the chapter in which the sexual predator statute is located. The bill also provides the following legislative intent language:

> It is the intent of the legislature that there be one state-established residency restriction distance applicable to the residence of persons described in this section and that such state-established residency restriction distance be uniformly applied throughout the state.

The bill replaces references to "day care center" with the term "child care facility" and provides the following definitions:

- "Child care facility" has the same meaning as provided in s. 402.302, F.S.
- "Park" means all public and private property specifically designated as being used for recreational purposes and where children regularly congregate.
- "Playground" means a designated independent area in the community or neighborhood that is designated solely for children and has one or more play structures.
- "School" has the same meaning as provided in s. 1003.01, F.S., and includes a private school as defined in s. 1002.01, F.S., a voluntary prekindergarten education program as described in s. 1002.53(3), F.S., a public school as described in s. 402.3025(1), F.S., the Florida School for the Deaf and the Blind, the Florida Virtual School as established in s. 1002.415, F.S., but does not include facilities dedicated exclusively to the education of adults.

The bill also makes it a crime for any person who has been convicted, on or after the effective date of the bill, of an offense *in another jurisdiction that is substantially similar to* a violation of s. 794.011, s. 800.04, s. 827.071, s. 847.0135(5) or s. 847.0145, F.S., regardless of whether adjudication has been withheld, in which the victim of the offense was less than 16 years of age, to reside within 1,000 feet of any school, child care facility, park or playground.

The bill provides that the residency restrictions in s. 775.215, F.S., do not apply to those that have been removed from the requirement to register as a sexual offender or sexual predator pursuant to s. 943.04354, F.S.[15] The bill also specifies that an offender who is subject to the residency restrictions in s. 775.215, F.S., does not violate the restriction and cannot be forced to move if the offender is living in a residence that meets the requirements of s. 775.215, F.S., (i.e., is not within 1,000 feet of a prohibited location) and a school, child care facility, park or playground is subsequently established within 1,000 feet of the offender's residence.

Search of Registration Information (Section 5)

Present Situation

Section 943.04342, F.S., provides that when the court places a defendant on misdemeanor probation, the public or private entity providing probation services must conduct a search of the probationer's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by FDLE.

Effect of the Bill

The bill requires that the probation service also search the probationer's name through the Dru Sjodin National Sex Offender Public maintained by the United States Department of Justice.

Conditions of Supervision (Sections 8, 9, 10 and 11)

[15] Section 943.04354, F.S., excludes certain persons from registering as a sexual offender or sexual offender based upon the age of the victim and age of the offender at the time the offense was committed. These cases are often referred to as "Romeo and Juliet" cases.

Present Situation

Probation and Community Control

Probation is a form of community supervision of offenders requiring specified contacts with probation officers, compliance with standard statutory terms and conditions, and compliance with any specific terms and conditions required by the sentencing court.[16] Community control is a form of intensive, supervised custody in the community administered by officers with restricted caseloads. Community control is an individualized program in which the freedom of an offender is restricted within the community, home or non-institutional residential placement and specific sanctions are imposed and enforced.[17]

Conditional Release

The conditional release program requires an inmate convicted of repeated violent offenses that is nearing the end of his or her sentence to be released under close supervision.[18] The Parole Commission sets the length and conditions of release after reviewing information provided by the Department of Corrections.[19] The Department of Corrections supervises the offender while on conditional release.

Conditions of Probation/Community Control/Conditional Release

Currently, s. 948.30, F.S., requires the court to impose the following conditions of supervision on offenders who are on probation or community control for specified sexual offenses:[20]

1. A prohibition from living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate if the victim was under the age of 18.[21]
2. A prohibition on any contact with the victim unless approved by the victim, the offender's therapist and the sentencing court.[22]
3. If the victim was under the age of 18, a prohibition on contact with a child under the age of 18 except in specified circumstances.[23]
4. If the victim was under the age of 18, a prohibition on working for pay or as a volunteer at any place where children regularly congregate, including but not limited to schools, day care centers, parks, playgrounds, pet stores, libraries, zoos, theme parks and malls.[24]

Section 947.1405(7)(a), F.S., requires the Parole Commission to impose a list of conditions similar to those described above on inmates convicted of certain sexual offenses[25] or offenses against children, who are subject to conditional release.

Effect of the Bill

[16] Section 948.001(5), F.S.

[17] Section 948.001(2), F.S.

[18] Inmates who qualify for conditional release include: 1) those who have previously served time in a correctional institution and are currently incarcerated for one of a list of violent offenses including murder, sexual battery, robbery, assault or battery; 2) inmates sentenced as habitual offenders, violent habitual offenders or violent career criminals; and 3) inmates who were found to be sexual predators. Section 947.1405(2), F.S

[19] The length of supervision cannot exceed the maximum penalty imposed by the court. Section 947.1405(6).

[20] Section 948.30(1)(b), F.S. The specified offenses include sexual battery offenses (ch. 794, F.S.), lewd or lascivious offenses (s. 800.04, F.S), promoting sexual performance by a child (s. 827.071, F.S.), traveling to meet a minor for the purpose of engaging in illegal sexual activity (s. 874.0135, F.S.) and selling or buying minors for child pornography (s. 847.0145, F.S.)

[21] Section 948.30(1)(b), F.S.

[22] Section 948.30(1)(d), F.S.

[23] Section 948.30(1)(e), F.S.

[24] Section 948.30(1)(f), F.S.

[25] Offenses include sexual battery (ch.794, F.S.), lewd or lascivious offenses (s. 800.04, F.S.); sexual performance by a child (s. 827.071, F.S.) and selling or buying of minors (s. 847.0145, F.S.).

Residency Restrictions

As noted above, ss. 948.30 and 947.1405, F.S., contain conditions of supervision prohibiting specified offenders from living within 1,000 feet of a school, day care center, park, playground or other place where children regularly congregate if the victim was under the age of 18. The bill amends these statutes to provide that an offender does not violate his or her supervision and cannot be forced to move if the offender is living in a compliant residence (i.e., not within 1,000 feet of a prohibited location) and a school, child care facility, park or playground is subsequently established within 1,000 feet of the offender's residence. The bill also defines the terms "school," "child care facility," "park" and "playground" in the same manner as in s. 775.215, F.S. (described above).

Additional Conditions of Supervision

The bill also amends ss. 948.30 and 947.1405, F.S., to provide that in addition to all other conditions imposed, the court (or Parole Commission in the case of conditional releasees) must impose the following conditions of supervision on offenders who have convicted of committing, or attempting, soliciting or conspiring to commit an offenses listed in s. 943.0435(1)(a)1.a.(I), F.S.,[26] or a similar offense in another jurisdiction, where the victim was under 18 and where the offense was committed on or after the day the bill becomes a law:

1. A prohibition on visiting schools, child care facilities, parks and playgrounds without prior approval of the offender's supervising officer. The bill provides that the court may also designate additional locations to protect the victim. The bill provides that this does not prohibit the probationer or community controlee from visiting such locations for the sole purpose of attending religious services[27] or for the purpose of picking up or dropping of the offender's children or grandchildren.

2. A prohibition on distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on or preceding Christmas; wearing an Easter Bunny costume, or other costume to appeal to children, on or preceding Easter; entertaining at children's parties; or wearing a clown costume; without prior approval from the court (or Parole Commission in the case of conditional releasees).

Unlike the conditions of supervision relating to residency restrictions which only apply to an offender on supervision for a specified sexual offense, the new conditions apply to a person "who has been convicted at any time of committing" one of the listed offenses, regardless of the offense for which they are on supervision.

The bill provides that the above conditions are not required to be imposed on those that have been removed from the requirement to register as a sexual offender or sexual predator pursuant to s. 943.04354, F.S.

Polygraph Examinations (Section 9 and 11)

Present Situation

Currently, pursuant to s. 948.30(2)(a), F.S., for a probationer or community controllee who committed a specified sexual offense on or after October 1, 1997, the court must order, as part of a treatment program, that the probationer or community controllee participate at least annually in polygraph examinations to obtain information necessary for risk management and treatment and to

[26] See, footnote 5 for a description of the offenses listed in s. 943.0435(1)(a)1.a.(I), F.S.

[27] The bill refers to the definition of the term "religious service" contained in s. 775.0861, F.S. The term is defined as "a religious ceremony, prayer, or other activity according to a form and order prescribed for worship, including a service related to a particular occasion."

the reduce the sex offender's denial mechanisms. The examination must be conducted by a polygrapher trained specifically in the use of the polygraph for the monitoring of sex offenders where available and must be paid for by the sex offender. The results of the polygraph examination cannot be used as evidence in court to prove that a violation of probation occurred.

Effect of the Bill

The bill requires that the polygraph examiner be a member of a national or state polygraph association and be certified as a post-convicted sex offender polygrapher, where available. The bill also provides that the results of the polygraph examination must be provided to the probationer or community controllee's probation officer and qualified practitioner. The bill makes the same changes to s. 947.1405, F.S., the conditional release statute.

Evaluation and Treatment of Offenders on Supervision (Section 12)

Present Situation

Section 948.31, F.S., mandates that courts require a diagnosis and evaluation to determine the need of certain probationers or community controllees for treatment. If the court determines that such a need is established by the diagnosis and evaluation process, the court must require outpatient counseling as a term or condition of probation or community control for any person who was found or pled guilty to sexual battery, a lewd or lascivious offense, exploitation of a child or prostitution.

Current law provides that the treatment can be obtained from a community health center, a recognized social service agency providing mental health services, or a private mental health professional or through other professional counseling.

Effect of the Bill

The bill amends this provision to remove reference to the court requiring a "diagnosis" of the probationer or community controllee and retains the reference to an "evaluation." The bill requires that the evaluation be conducted by a qualified practitioner. The bill also removes reference to the court requiring "outpatient" treatment and instead refers to "sex offender treatment."

The bill alters the offenses for which this treatment can be ordered, if needed, to include any offense for which a person can be designated as a sexual predator or subject to registration as a sexual offender.

The bill requires that treatment be obtained from a qualified practitioner as defined in s. 948.001, F.S.[28] Treatment may not be administered by a qualified practitioner who has been convicted or adjudicated delinquent of committing an offense listed in the sexual offender statute. The bill provides that the court must impose restrictions against contact with minors if sex offender treatment is recommended.

Sex Offender Treatment - Qualified Practitioners (Sections 8, 9, 10, and 11)

Present Situation

Sections 948.30 and 947.1405, F.S., require courts to impose the following conditions of supervision involving sex offender treatment or therapists on certain offenders:

[28] The term "qualified practitioner" is defined to mean a psychiatrist licensed under chapter 458 or chapter 459, a psychologist licensed under chapter 490, or a social worker, a mental health counselor, or a marriage and family therapist licensed under chapter 491 who practices in accordance with his or her respective practice act.

- A prohibition on any contact with the victim, directly or indirectly, including through a third person, unless approved by the victim, the offender's therapist, and the sentencing court.[29]
- Unless otherwise indicated in the treatment plan provided by the sexual offender treatment program, a prohibition on viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services that are relevant to the offender's deviant behavior pattern.[30]
- A prohibition on accessing the Internet or other computer services until the offender's sex offender treatment program, after a risk assessment is completed, approves and implements a safety plan for the offender's accessing or using the Internet or other computer services.[31]

Sections 948.001 and 947.005, F.S., currently define the term "qualified practitioner" as "a psychiatrist licensed under chapter 458 or chapter 459, a psychologist licensed under chapter 490, or a social worker, a mental health counselor, or a marriage and family therapist licensed under chapter 491 who practices in accordance with his or her respective practice act."

Effect of the Bill

The bill amends the above-described conditions of supervision by:

- Prohibiting contact with a victim unless approved by the victim, the sentencing court, and by a *qualified practitioner in the sexual offender treatment program*.
- Prohibiting an offender from viewing the above-described sexually stimulating material unless otherwise indicated in the treatment plan provided *by a qualified practitioner* in the sexual offender treatment program.
- Specifying that a *qualified practitioner* in the sex offender treatment plan must approve and implement a safety plan allowing an offender to access or use the Internet.

The bill defines the term "qualified practitioner" as "a social worker, mental health counselor, or a marriage and family therapist licensed under ch. 491 who, as designated by rule of the respective boards, has the coursework, training, qualifications, and experience to treat sex offenders; or a psychiatrist licensed under chapter 458 or 459; or a psychologist licensed under chapter 490."

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1: Creates s. 856.022, F.S., relating to loitering or prowling by certain offenders in close proximity to children; provides a penalty.

Section 2: Amends s. 775.21, F.S., relating to the Florida Sexual Predators Act.

Section 3: Renumbers s. 794.065, F.S., as s. 775.215, F.S., relating to residency restriction for persons convicted of certain sexual offenses; provides Legislative intent.

Section 4: Amends s. 943.0435, F.S., relating to sexual offenders required to register with the department; provides a penalty.

Section 5: Amends s. 943.04352, F.S., relating to search of registration information regarding sexual predators and sexual offenders required when placement on misdemeanor probation.

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[29] Sections 948.30(1)(d) and 947.1405(7)(a)4., F.S.
[30] Sections 948.30(1)(g) and 947.1405(7)(a)7., F.S.
[31] Sections 948.30(1)(h) and 947.1405(7)(a)8., F.S.

Section 6: Amends s. 944.606, F.S., relating to sexual offenders; notification upon release.

Section 7: Amends s. 944.607, F.S., relating to notification to Department of Law Enforcement of information on sexual offenders.

Section 8: Amends s. 947.005, F.S., relating to definitions.

Section 9: Amends s. 947.1405, F.S., relating to conditional release program.

Section 10: Amends s. 948.001, F.S., relating to definitions.

Section 11: Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 12: Amends s. 948.31, F.S., relating to evaluation and treatment of sexual predators and offenders on probation or community control.

Section 13: Amends s. 985.481, F.S., relating to sexual offenders adjudicated delinquent; notification upon release.

Section 14: Amends s. 985.4815, F.S., relating to notification to Department of Law Enforcement of information on juvenile sexual offenders.

Section 15: Specifies that the Legislature intends that nothing in the bill reduce or diminish a court's jurisdiction.

Section 16: Provides a severability clause.

Section 17: Directs the Division of Statutory Revision to replace the phrase "the effect date of this act" wherever it occurs in the bill with the date the act becomes law.

Section 18: Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See, FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   This bill could have an impact on county jails. The bill creates a first degree misdemeanor offense for a person who has been convicted of a specified sexual offense to loiter or prowl within 300 feet of a place where children were congregating. The bill will also make it a first degree misdemeanor for a person who has been convicted of certain sexual offenses to approach, contact or communicate with a minor child in a public park or playground or knowingly be present in a child care facility or a school with specified exceptions.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See, comments below relating to child care facilities.

D. FISCAL COMMENTS:

On February 23, 2010, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact on the Department of Corrections.

The bill provides that with specified exceptions, certain offenders cannot be present in a child care facility or school unless they given written notice to the school or day care. The bill provides if the offender is to be present in the vicinity of children, the offender must remain under direct supervision of a child care facility or school official or designated chaperone. This could place an additional workload on schools and child care facilities that provide such supervision.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Florida statutes contain restrictions on where certain sex offenders are permitted to reside. Those restrictions only apply to those who committed a qualifying offense after the effective date of the legislation creating the restriction.[32] The first section of the bill would prohibit certain people who have previously committed a specified sexual offense from going to a school in certain circumstances. Specifically, the provision requires a person who has committed a prior specified sexual offense to give written notice of his or her intent to be present at a school, to notify the school of their arrival and departure and to remain under the direct supervision of a school official. This provision may be challenged as a violation of the ex post facto clause of the state or federal constitution. Courts may treat this provision as if it were a requirement to "register" in which case it may be analogous to the requirements to register as a sexual offender. Thus far, courts have routinely upheld sexual offender registry requirements. See, e.g., *Smith v. Doe*, 123 S.Ct. 1140 (2003).

Alternatively, this requirement of the bill of the bill might be comparable to statutes which restrict where a sexual offender can live. Because statutes of this type are of recent origin, there is a limited amount of relevant case law nationwide and no relevant Florida appellate court caselaw. In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) *cert denied* 126 S.Ct. 757 (2005), the court considered a challenge to an Iowa statute that prohibits a person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or registered child care facility. The court recognized that the "restricted areas in many cities encompass the majority of the available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence." *Id.* at 705. The question in an ex post fact challenge is whether the law imposes retroactive punishment for a criminal act after it has been committed. The court applied a test set forth by the United States Supreme Court in *Smith v. Doe*, 123 S.Ct. 1140 (2003) where the Supreme Court upheld a challenge to an Alaska statute requiring sex offenders to register.

[32] See, ss. 794.065, F.S, 947.1405 and 948.30, F.S.

The 8th Circuit summarized the test to be applied as follows:

> Under this test, a court must first consider whether the legislature meant the statute in question to establish 'civil' proceedings. If the legislature intended criminal punishment, then the legislative intent controls the inquiry and the law is necessarily punitive. If, however, the legislature intended its law to be civil and nonpunitive, then we must determine whether the law is nevertheless, so punitive either in purpose or in effect as to negate the State's nonpunitive intent. Only the clearest proof will transform what the legislature has denominated a civil regulatory measure into a criminal penalty.

Miller, 405 F.3d at 718. (citations and internal quotations omitted).

The court also considered the following factors that the Supreme Court described as "useful guideposts" in determining whether a law has a punitive effect:

> Whether the law has been regarded in our history and traditions as punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose.

Id. at 719.

The court considered each of these factors and rejected appellee's claim that the statute violated the ex post facto clause. See, also*, Iowa v. Seering*, 701 N.W.2d 655 (Iowa 2005) (an Iowa Supreme Court case affirming statute and rejecting ex post facto claim).

On October 1, 2009, applying the same test as that of the *Miller* court, above, the Kentucky Supreme Court held that a state law which restricts where registered sexual offenders may live would be an ex post facto punishment if it were applied to offenders who committed their offense before the effective date of the statute.[33] See, also, *State v. Pollard,* 908 N.E. 2d 1145 (Ind. 2009) (holding that residency restriction as applied to defendant who committed offense prior to effective date of statute violated ex post facto clause).

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

Section 1 of the bill prohibits an offender who had been convicted of a specified sexual offense against a victim under the age of 18 from being present in a child care facility or school or on the real property of a school or day care while the school is in operation unless he or she provides written notice to the principal or child care facility owner. The bill provides if the offender is to be present in the vicinity of children, the offender must remain under direct supervision of a child care facility or school official or designated chaperone. This could have broad impact on where these offenders would be able to go without providing written notice and having a chaperone. Depending on how the phrase "while the school is in operation" is interpreted, an offender may be prohibited from going to these places, for example, without providing written notice and having a designated chaperone:

- A church that contains a day care center;
- A school parent-teacher conference;

[33] *Com. v. Baker,* 295 S.W.3d 437 (Ky. 2009).

- A school play or music program;
- A high school football game;
- An adult education program held at a high school in the evening.

The provisions of this section of the bill relating to schools apparently apply to any person who has been convicted of one of a list of sexual offenses, regardless of how long ago the offense was committed. By contrast, the sexual offender and sexual predator statutes only apply to offenders who have been released from sanction for their offense after a certain date. For example, the sexual offender statute applies to offenders who have been released from sanction for the qualifying offense on or after October 1, 1997. This section of the bill will limit the behavior of people who are not required to be registered as a sexual predator or sexual offender and have never had such restrictions placed on them.

Other Comments

A local government may regulate matters already regulated by a state statue if the Legislature has not preempted the area either expressly or by implication. Preemption essentially takes a topic or field in which local government might otherwise establish local laws and reserves that topic for regulation exclusively by the legislature. *Citizens For Responsible Growth v. City of St. Pete Beach,* 940 So. 2d 1144 (Fla. Dist. Ct. App. 2d Dist. 2006).

The CS for the bill removes language which provided that the establishment of residency exclusions applicable to the residence of a person required to register as a sexual offender or predator is expressly preempted to the state. The current language beginning on Line 585 of the CS appears to have the same effect with regard to the issue of a state-established residency restriction distance.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 1, 2010, the Public Safety & Domestic Security Policy Committee adopted a strike-all amendment to the bill. The strike-all amendment:

- Provides that a person commits loitering or prowling by a person convicted of a sex offense against a minor if, in committing loitering or prowling, the person was within 300 feet of a place where children were congregating.
- Specifies that the loitering provision, the provision prohibiting certain persons from approaching children in parks, the provisions requiring certain persons to provide notification and remain under supervision when visiting child care facilities, the provisions relating to residency restrictions, and the provisions prohibiting certain persons under supervision from visiting parks or wearing specified costumes, do not apply to persons who have been removed from the requirement to register as a sexual offender or sexual predator pursuant to s. 943.04354, F.S.
- Adds legislative intent language regarding sexual offender residency restrictions.
- Defines the terms “school,” “child care facility,” “park,” “playground” and “qualified practitioner.”
- Provides that a person may not be forced to relocate if the person’s residence is in compliance with existing sexual offender residency restrictions and a school, child care facility, park or playground is subsequently established within 1,000 feet of the person’s residence.
- Extends application of the sexual offender residency restrictions to persons who have been convicted of an offense in another jurisdiction that is substantially similar to a violation of ss. 794.011, 800.04, 827.071, 847.0135(5), or 847.0145, F.S., where the victim of the offense was less than 16 years of age.
- Requires a qualified practitioner to approve certain actions relating to a sexual offender’s conditions of supervision.

- Requires polygraphers conducting polygraph examinations on sexual offenders to be a member of a national or state polygraph association and certified as a postconviction sex offender polygrapher.
- Adds a condition of supervision prohibiting specified offenders from visiting schools, child care facilities, park and playgrounds without prior approval of the offender's supervising officer.

This analysis is drafted to the Committee Substitute.