HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: 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		Kramer	Cunningham
2)	Military & Local Affairs Policy Committee			
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 regularly congregate, including but not limited to, a school, day care center, park or playground.
- 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. This will only apply to an offender who committed the sexual offense on or after July 1, 2010.
- 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 through 12 school or on real property comprising any child care facility or pre-K through 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 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 creates 775.215, F.S. which provides that the adoption of residency distance limitations for persons convicted of a sexual offense is expressly preempted to the state and the provisions of state law establishing such distance limitations supersede the distance limitations in any such municipal or county ordinances.

The bill further provides that any provision of an ordinance adopted by a county or municipality prior to July 1, 2010, imposing residency exclusions for the residence of a sex offender in excess of the requirements of state law is repealed and abolished as of July 1, 2010. The bill provides an exception for a county or municipality ordinance adopted prior to July 1, 2010 upon the recommendation of the chief law enforcement officer of the county or city and upon a finding of public necessity that increases the distance exclusions for residence of a person subject to the provision of state law up to a maximum distance of 1,750 feet.

The bill will prohibit certain offenders on supervision for a sexual offense from visiting areas where children regularly congregate, including but not limited to, schools, day care centers, parks and playgrounds. The bill will prohibit these offenders on supervision 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.

On February 25, 2009, the Criminal Justice Impact Conference determined that a substantially similar 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 and 7]: 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 requirements.[1] Failure to comply with these requirements is a third or second degree felony, depending of 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 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 sexual offender is required to update information regarding his or her permanent or temporary residence. A sexual predator or sexual 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 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 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]

The bill specifies that the definition includes but is not limited to vacation, business or personal travel destinations in or out of the state.

The bill defines the term "transient residence" to mean:

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

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

> 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.

The bill requires a sexual predator or sexual offender to provide information regarding his or her transient residence.

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

The loitering statute, section 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.

Currently, a violation of this section is a second degree misdemeanor.

The bill provides restrictions for a person convicted of an offense listed in the sexual offender statute[5] where the victim was under the age of 18 as follows. The bill provides that if a person convicted of such an offense commits loitering or prowling within 300 feet of a place where children regularly congregate, including but not limited to, a school, day care center, park or playground, the offense will be a first degree misdemeanor.

It will be 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 July 1, 2010.

It will also be a first degree misdemeanor for a person convicted of such an offense to:

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[3] See s. 775.21(10)(b);947.1405(7)(a)6.;.948.30(1)(f), F.S.

[4] See s. 794.065; 947.1405(7)(a)2; 948.30(1)(b), F.S

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

1. Knowingly be present in any child care facility or pre-K through 12 school or on real property comprising any child care facility or pre-K through 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;
2. Fail to notify the child care facility owner or the principal's office when he or she arrives and departs the child care facility or school; or
3. 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 provision 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.

Unlawful place of residence for persons convicted of certain sex offenses: 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 session, section 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 was previously convicted was classified as a first degree felony or higher. The offense is a first degree misdemeanor if the sexual offense for which the offender was previously 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 section 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 ninety days. The commission also created the Sexual Offender & Sexual Predator Residence Task Force on 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]

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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. s. 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. ss. 775.21(6)(a)1b, 943.0435(2)(b)2, F.S.

8 See 2004-391, Laws of Florida.

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

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

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]

Subsequent to the release of the task force report, the Board of County Commissioners removed the repealer language from the previously adopted ordinance. The ordinance prohibits certain sexual offenders in unincorporated parts of the county from living within 2,500 feet of a school, designated public school bus stop, day care center, park or playground.[14]

Preemption of local ordinances: [Section 3] The bill creates 775.215, F.S. which provides that the adoption of residency distance limitations for persons convicted of sexual offenses, is expressly preempted to the state and the provisions of sections 794.065, 947.1405 and 948.30, F.S. establishing such distance limitations supersede the distance limitations in any such municipal or county ordinances.

The bill further provides that any provision of an ordinance adopted by a county or municipality prior to July 1, 2010, imposing residency exclusions for the residence of a person subject to the provisions of s. 794.065, 947.1405 or 948.30 in excess of the requirements of those provisions is repealed and abolished as of July 1, 2010. The bill provides an exception for a county or municipality ordinance adopted prior to July 1, 2010 upon the recommendation of the chief law enforcement officer of the county or city and upon a finding of public necessity that increases the distance exclusions for residence of a person subject to the provision of state law up to a maximum distance of 1,750 feet.

In effect, it appears that this section of statute would bar a county or municipality from adopting any residency exclusion ordinance after July 1, 2010 and would only allow ordinances passed prior to that date to be maintained if they applied distance exclusions up to 1,750 feet, were recommended by the county or city's chief law enforcement officer and based upon a finding of public necessity.

Probation and community control - generally: 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.[15] Community control is a form of intensive, supervised custody in the community, including surveillance on weekends and holidays, 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.[16]

Conditional release - generally: 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.[17] The Parole Commission sets the length and conditions of release after reviewing

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

[13] Id.

[14] Chapter 21, Article XI, Sec. 21-164 – Sec. 21-170, Broward County Code of Ordinances.

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

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

[17] Inmates who qualify for conditional release include: 1) those who have previously served time in a correctional institution and are currently incarcerated for one a list of violent offenses including murder, sexual battery, robbery, assault or battery; 2) inmates

information provided by the Department of Corrections.[18] The Department of Corrections supervises the offender while on conditional release.

Conditions of probation/community control/conditional release: Currently, an offender who is on probation or community control for a specified sexual offense[19] and therefore supervised by the Department of Corrections must comply with additional terms and conditions of supervision including the following:

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.[20]
2. A prohibition on any contact with the victim unless approved by the victim, the offender's therapist and the sentencing court.[21]
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.[22]
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.[23]

For inmates convicted of certain sexual offenses[24] or offenses against children, who are subject to conditional release, section 947.1405(7)(a), F.S., requires the Parole Commission to impose a list of conditions similar to those above.

Additional conditions required by HB 119 [Sections 8 and 9]: The bill amends s. 948.30, F.S. to expand the list of offenses for which additional conditions of supervision must be imposed to include all offenses listed in the sexual offender statute (rather than just the five offenses listed in footnote 14 above) and provides that in addition to all other conditions imposed, if the offense was committed on or after July 1, 2010, the court must impose the following conditions:

1. A prohibition on visiting areas where children regularly congregate, including but not limited to, schools, day care centers, parks and playgrounds. 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's attendance at religious services[25].

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.

These conditions will apply if the victim was under 18 unless the victim was 16 or 17 and the offender was not more than 21 years of age. Unlike the conditions of probation currently in s. 948.30 relating to residency restrictions which only apply to a person on probation 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

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sentenced as a habitual offender, a violent habitual offender or a violent career criminal; 3) inmates who were found to be a sexual predator. s. 947.1405(2), F.S

[18] The length of supervision cannot exceed the maximum penalty imposed by the court. (see s. 947.1405(6)).

[19] s. 948.30(1)(b), F.S. The specified offenses include sexual battery offenses (chapter 794), 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 (874.0135) and selling or buying minors for child pornography (s. 847.0145, F.S.)

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

[21] S. 948.30(1)(d), F.S.

[22] s. 948.30(1)(e), F.S.

[23] s. 948.30(1)(f), F.S.

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

[25] 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."

offenses, regardless of the offense for which they are on supervision. The bill also requires that these conditions be placed on conditional releasees who meet the above criteria.

Polygraph examinations: [Sections8 and 9] 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 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.

The bill requires that the polygraph examiner be authorized by the DOC. The bill also provides that the results of the polygraph examination must be provided to the probationer or community controllee's probation officer and therapist. The bill makes similar changes to the s. 947.1405, F.S., the conditional release statute.

Evaluation and treatment of offenders on supervision: [Section 10] Section 948.31, F.S. provides that the court must 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.

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 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.

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. The bill amends this to require that the treatment be obtained from a qualified practitioner as defined in s. 948.001.[26] 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.

Search of registration information: [Section 5] 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. The bill requires that the probation service also must search the probationer's name through the Dru Sjodin National Sex Offender Public maintained by the United States Department of Justice.

B. SECTION DIRECTORY:

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

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

[26] 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.

Section 3. Creates s. 775.215, F.S., relating to residency exclusions for sexual offenders or predators; local ordinances preempted.

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

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. 947.1405, F.S., relating to conditional release program.

Section 9. Amends s. 948.30, F.S., relating to additional terms and conditions of probation or community control for certain sex offenses.

Section 10. Amends s. 948.31, F.S., relating to evaluation and treatment of sexual predators and offenders on probation or community control.

Section 11. Amends s. 985.481, F.S., relating to sexual offenders adjudicated delinquent; notification upon release.

Section 12. Amends s. 985.4815, F.S., relating to notification to Department of Law Enforcement of information on juvenile sexual offenders.

Section 13. Provides effective date of July 1, 2010.

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:

   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 certain places. 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. This could have a county jail impact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See comments below relating to day care centers.

D. FISCAL COMMENTS:

On February 25, 2009, 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 day care centers 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.[27] 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.

[27] 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))(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.[28] *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:

Section 1: Section 1 of the bill would prohibit 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;
- a school play or music program;
- a high school football game;
- an adult education program held at a high school in the evening.

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

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.

Section 3: It appears that this section of statute would bar a county or municipality from adopting any residency exclusion ordinance after July 1, 2010 and would only allow ordinances passed prior to that date to be maintained if they did not exceed state law or if they were recommended by the county or city's chief law enforcement officer and upon a finding of public necessity and increased the distance exclusions to a maximum distance of 1,750 feet. Although it is somewhat unclear, this would apparently not permit ordinances to be maintained or created which applied to places not included in state law. State law only applies to schools, day care centers, parks and playgrounds. Of particular importance would be whether a county or municipality ordinance which barred residences in proximity to bus stops could be created or allowed to remain in effect. [State law includes bus stops only for the relatively few offenders who are on conditional release.]

The Broward County Sexual Offender & Sexual Predator Residence Task Force report noted that in that county, there were twenty-four city ordinances which all applied to bus stops and further found that "bus stops appear to be the most restrictive part of residence laws across the state".[29] As part of its recommendations, the task force stated, "[i]t is clear that bus stops diminish housing availability within buffer zones to a literal point of non-existence. We recommend that if a residential exclusion zone is passed it should not include bus stops as a prohibited venue."[30]

It also appears that the newly created section of statute would preclude a county or municipal ordinance from applying to offenders convicted of offenses not included in state law.

Section 9: Lines 1071 and 1082 refer to the "commission". This section of statute relates to conditions of supervision that must be placed on probationers and community controlees and the reference should be to the "court" rather than the "commission".

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

[29] *Sexual Offender & Sexual Predator Residence Task Force,* August 25, 2009, p. 25.

[30] *Id. at* 35.