The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL:	CS/SB 1284
INTRODUCER:	Criminal Justice Committee, Senators Crist, and others
SUBJECT:	Sexual Offenders and Predators
DATE:	March 18, 2010 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	**Fav/CS**
2.	Wolfgang	Yeatman	CA	**Favorable**
3.			JU	
4.			JA	
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill deals with regulation of sexual offenders, sexual predators, and other persons who have committed certain sex-related crimes. Its provisions include:

- Enhancement of the punishment for the offense of loitering and prowling when it is committed by a person who has been convicted of certain sexual offenses and is knowingly within 300 feet of a school or child care facility during operating hours or a park, playground or school bus stop while children are present.
- Creation of a misdemeanor that applies to persons who have been convicted of certain sexual offenses and who approach a child at a public park or playground with the intent to engage in conduct or communication of a sexual nature.
- A prohibition requiring a person who has been convicted of certain sexual offenses to notify officials before entering the building or grounds of a child care facility or school, and requiring the offender to be directly supervised while on school grounds.
- Preemption of local residency limits for a person convicted of a sexual offense, with a provision for municipalities and counties to extend the state's 1,000 foot restriction to as far as 2500 feet around schools, child care facilities, and other specifically-identified facilities where multiple children congregate for group activities or supervision.

- Requirements for registration and reporting of a transient address if no permanent or temporary address is available.
- A requirement to search the Dru Sjodin National Sex Offender Public Website when a person is placed on misdemeanor probation.
- A requirement that the conditions of probation, community control, or conditional release for certain sexual offenders include prohibitions against visiting schools, child care facilities, parks or playgrounds without approval from his or her probation officer. The offender also would be prohibited from handing out candy at Halloween, wearing certain costumes during other holidays, or entertaining at children's parties, and could not wear a clown suit without prior approval from his or her probation officer.
- A requirement that any sexual predator or sexual offender who is placed on community supervision must be evaluated and, if needed, treated by a qualified practitioner trained to treat sex offenders.
- A requirement that the polygraph examination required of probationers, community controlees, and conditional releasees who have committed certain sex offenses must be performed by a polygrapher who is a member of a national or state polygraph association and who is certified as a postconviction sex offender polygrapher, and that the results must be provided to the offender's probation officer and therapist.

This bill creates section 856.022 of the Florida Statutes. This bill substantially amends the following sections of the Florida Statutes: 794.065 (which is transferred and renumbered as 775.215), 943.0435, 943.04352, 944.606, 944.607, 947.1405, 948.001, 948.30, 948.31, 985.481, and 985.4815.

II. Present Situation:

Sexual Predators and Sexual Offenders

The distinction between a sexual predator and a sexual offender is based on the offense of conviction, the date the offense occurred or when sanctions were completed, and whether the person has previously been convicted of a sexual offense. Sexual predator status can only be conferred for offenses committed on or after October 1, 1993. Sexual offender status applies only if the person was released from the sanction for the designated offense on or after October 1, 1997. The list of designated offenses is not identical for sexual offenders and sexual predators, but commission of any of the following offenses would require registration as either a sexual offender or a sexual predator:

- Kidnapping, false imprisonment, or luring or enticing a child where the victim is a minor and the defendant is not the victim's parent (ss. 787.01, 787.02, and 787.025(2)(c), F.S.).
- Sexual battery under ch. 794.011, F.S. (except false accusation of another under s. 794.011(10), F.S.).
- Sexual activity by a person who is 24 years old or older with a minor who is 16 or 17 years old (s. 794.05, F.S.).
- Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.).
- Selling or buying of minors into sex trafficking or prostitution (s. 796.035, F.S.).
- Lewd or lascivious offenses upon or in the presence of a person under 16 (s. 800.04, F.S.).
- Lewd or lascivious offenses upon an elderly or disabled person (s. 825.1025, F.S.).

- Enticing, promoting, or possessing images of sexual performance by a child (s. 827.071, F.S.).
- Distribution of obscene materials to a minor (s. 847.0133, F.S.).
- Computer pornography (s. 847.0135, F.S.) (except traveling to meet a minor under s. 847.0135(4), F.S.).
- Transmission of child pornography by electronic device (s. 847.0137, F.S.).
- Transmission of material harmful to minors to a minor by electronic device (s. 847.0138, F.S.).
- Selling or buying of minors for child pornography (s. 847.0145, F.S.).
- Sexual misconduct by a DJJ employee with a juvenile offender (s. 985.701(1), F.S.).
- Violating a similar law of another jurisdiction.

A sexual predator or sexual offender is required to comply with a number of statutory requirements.[1] During initial registration, a sexual predator or sexual offender who is not in the custody of DOC, the Department of Juvenile Justice (DJJ), or a local jail is required to provide certain information including the "address of legal residence and address of any temporary residence, within the state or out of the state, including a rural route address and a post office box…" to the sheriff's department within 48 hours of sentencing or of establishing a residence. The sheriff's office provides this information to the Florida Department of Law Enforcement (FDLE) for inclusion in the statewide database. The offender or predator must also register at a driver's license office within 48 hours of the initial registration at the sheriff's department.

Both sexual predators and sexual offenders must report any change of permanent or temporary residence within the state to the driver's license office within 48 hours. If a new permanent or temporary residence is not established, the sheriff's office must be given the address for the residence or other location that will be occupied until a new residence is established. Temporary residence is defined as:

> …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.

The county sheriff or municipal police chief must notify day care centers and schools within a 1-mile radius of the sexual predator's permanent or temporary residence within 48 hours of the notification by the predator. In addition, the sheriff or police chief is required to notify the community of the presence of the predator in an appropriate manner, which is often by posting on the sheriff's website. Both notices must include the predator's address, including the name of the municipality or county.

DOC and DJJ are required to provide FDLE with information including "the offender's intended residence address, if known" six months prior to release from custody or commitment. The

[1] The specific offender reporting requirements and law enforcement reporting and notification requirements are found in ss. 775.21, 943.0435, 944.606, 944.607, 985.48, and 985.4815, F.S.

agencies must also provide FDLE with the "current or intended permanent or temporary address, if known" during the time of incarceration or residential commitment.

Section 947.1405, F.S., the conditional release statute, requires that certain inmates who are released prior to completion of the full term of their sentence of incarceration be maintained under close supervision during the duration of the term. Sexual predators and inmates who have committed certain sexual crimes are among those who are subject to conditional release supervision. The Parole Commission sets the length and terms of supervision and the conditional releasee is supervised by DOC correctional probation officers. Statutorily-mandated conditions include a prohibition against certain sexual offenders whose victim was under 18 years old from having contact with children unless approved by the commission. The commission also imposes a special condition that prohibits these offenders from loitering within 1,000 feet of a school, day care center, park, playground, designated public school bus stop, restaurant with attached playground, amusement park, business establishment whose primary clients are children, or other place where children regularly congregate, and from working at or living within 1,000 feet of such places.

Community Supervision

Probation is a form of community supervision that requires 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. Community control is a form of intensive community supervision, including surveillance on weekends and holidays, administered by officers with restricted caseloads. Probationers and community controllees who have committed certain sexual offenses are prohibited from residing within 1,000 feet of schools, day care centers, playgrounds, parks, or other places where children regularly congregate. There are also local city and county ordinances that impose additional residence restrictions, including wider exclusion zones and additional areas of exclusion. Such offenders who have victims under the age of 18 also have conditions restricting unsupervised contact with minors and restrictions from working or volunteering 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. The employment condition restricts supervised sex offenders from working or volunteering at these places, but does not currently limit them from visiting for any other purpose.

Section 948.30(1)(e), F.S., restricts sex offenders who are on conditional release or in community supervision from having contact with children if their victim was less than eighteen years old. Section 794.065, F.S., prohibits certain sex offenders who are not under supervision from residing within 1,000 feet of a school, day care center, park, or playground. Also, s. 775.21(10)(c), F.S., prohibits certain designated sexual predators who are not under supervision from working or volunteering at any business, school, day care center, park, playground, or other place where children regularly congregate. However, there are no other restrictions prohibiting sex offenders who are not under supervision from having contact with children.

Section 948.30(2)(a), F.S., requires that a court-ordered treatment program for a probationer or community controlee who committed a specified sexual offense must include participation in at least annual polygraph examinations. The examination must be conducted by a polygrapher

trained specifically in the use of the polygraph for the monitoring of sex offenders, if 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 a violation of community supervision.

Section 948.31, F.S., provides that the court must require a diagnosis and evaluation to determine the need of certain probationers or community controlees for treatment. If the court determines that such a need is established by the diagnosis and evaluation process, it must require outpatient counseling as a term or condition of community supervision for any person who was found or pled guilty to sexual battery, a lewd or lascivious offense, exploitation of a child, or prostitution. The statute specifies that this counseling can be obtained from a community health center, a recognized social service agency providing mental health services, a private mental health professional, or through other professional counseling.

Loitering and Prowling

"Loitering and prowling" is a second degree misdemeanor prohibited by s. 856.021, F.S. The elements required to be proven for conviction are that the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warranted justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. Among circumstances that 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 him or herself, or manifestly endeavors to conceal him or herself or any object. Because it is a misdemeanor, all elements of the offense must be committed in the officer's presence prior to arrest. An unusual requirement of the statute is that the law enforcement officer must give the suspect an opportunity to dispel any alarm or immediate concern by requesting the suspect to identify him or herself and to explain his or her presence or conduct.

Misdemeanor Probation Services

Section 943.04352, F.S., requires that the public or private entity which provides misdemeanor probation services must conduct a search of an offender's name or other identifying information against the registration information regarding sexual predators and sexual offenders maintained by FDLE when the offender is placed on probation for a misdemeanor.

Residency Exclusions

As part of the effort to protect children from sexual predators and offenders, many states have passed laws to prohibit such offenders from living near places that are typically frequented by children. These residency exclusions (also referred to as "buffer zones") are based on the idea that if sexual offenders do not live near places where children gather, such as schools or day care centers, they will be less likely to commit sexual offenses against children who frequent those places. In theory, removing the offender from close proximity to children will both lessen the opportunity and reduce the temptation for the offender to reoffend.

Critics of residency exclusion laws point out that the great majority of sexual offenses against children are committed by someone who has developed a relationship with a child. This person is often a family member, an adult or adolescent family friend, or a person in a position of trust or authority. A counterpoint is that residency exclusion zones at least limit the opportunity for an offender to begin the initial process of breaking down the child's natural wariness of strangers.

For instance, if the child goes by the house of a man who waves a friendly greeting every day, he or she may be less likely to consider that person as a stranger. The offender could use that as a point of vulnerability to begin cultivating an exploitative relationship with the child.

As residency exclusion zones become more restrictive by increasing distance or adding new protected places, it becomes more difficult for offenders to find a lawful place to live. Critics, including some law enforcement officials, have expressed concern that increasingly restrictive residency exclusion laws have the counter-productive effect of causing offenders to quit registering their addresses rather than moving.

Constitutional and other challenges to state sex offender residency restrictions around the country have been largely unsuccessful. In *Doe v. Miller* and *Weems v. Little Rock Police Dept*., the United States Court of Appeal for the Eighth Circuit held that nothing in the Constitution prevented Iowa from using its police powers to establish residence restrictions against sex offenders in furtherance of the health and safety of the state's citizens.[2]

In Florida, state law prohibits persons who have committed certain sex offenses from residing within 1,000 feet of designated places.[3] These restrictions apply for life to offenders who committed certain offenses after October 1, 2004, and for the duration of supervision for offenders placed on conditional release after certain dates, and offenders on probation or community control for committing designated offenses after certain dates.[4] These designated offenses are: s. 794.011, F.S. (sexual battery), s. 800.04, F.S. (lewd or lascivious offenses upon or in the presence of a person under 16), s. 827.071, F.S. (enticing, promoting, or possessing images of sexual performance by a child), and s. 847.0145, F.S. (selling or buying of minors). The residency restrictions do not apply to offenders who committed a similar offense in another jurisdiction. The restrictions are as follows:

- *Unsupervised Persons* – Section 794.065, F.S., applies to persons convicted for committing a designated offense on or after October 1, 2004, if the victim was less than 16 years of age. Such an offender is prohibited from residing within 1,000 feet of a school, day care center, park, or playground. Violation is a first degree misdemeanor if the underlying offense was a second or third degree felony, and it is a third degree felony if the underlying offense was a first degree felony.

- *Conditional Releasees* – Section 947.1405(7)(a), F.S., applies to offenders on conditional release supervision who committed a designated offense on or after October 1, 1995, if the victim was less than 18 years of age. As a condition of supervision, such offenders are prohibited from residing within 1,000 feet of a school, day care center, park, playground, designated public school bus stop, or other place where children regularly congregate. This provision became effective on October 1, 2004, and the Parole Commission and DOC were prohibited from approving establishment of a residence inside the exclusion zone on or after that date. Also, school boards were required to relocate existing school bus stops within

[2] *Weems v. Little Rock Police Dept*., 453 F.3d 1010, 1014 (8th Cir. 2006); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005). The Iowa statute at issue in *Miller* precluded sexual offenders from residing within 2,000 feet of designated locations.
[3] Section 794.065, F.S.
[4] Section 947.1405(7)(a)2., F.S.

1,000 feet of an offender's residence and are prohibited from establishing new bus stops within the proscribed distance.

- *Probationers and Community Controllees* – Section 948.30(1)(b), F.S., also applies to offenders on probation or community control supervision who committed a designated offense on or after October 1, 1995, if the victim was less than 18 years of age. However, the list of places from which the exclusionary zone is measured does not include "designated public school bus stop." Also, the statute specifies that measurement is to be made by straight line distance, not by a pedestrian or automobile route. DOC reports that it measures in a straight line for all offenders who are subject to a residency exclusion even if the method is not specified in the statute.

DOC reports that it expends considerable effort in attempting to assist supervised offenders in locating residences that are not in violation of the conditions of supervision. It is particularly difficult in the case of conditional releasees because they must comply with an exclusion zone around public school bus stops. DOC and the Department of Education have developed a process to identify whether an offender's residence or proposed residence is within 1,000 feet of a school bus stop. In addition, DOC has also made progress in collecting data and automating the process for identifying the locations of other protected places. However, the success of this task is dependent upon the cooperation of other state and local agencies that do not have a specific statutory duty to assist in the process.

Local Residency-Restriction Ordinances

DOC reports that as of February 23, 2010, 148 Florida cities and counties had local residency exclusions.[5] Most of these local laws extend the distance of the residence restriction, and many include additional protected locations. In at least 10 counties, including Miami-Dade, Polk, and Duval counties, there are ordinances that apply throughout the county to restrict sexual offenders and predators from living within 2,500 feet of schools and other protected locations. Unlike the state law, many of the local ordinances include a "grandfather clause" that does not require an offender to move if a prohibited location is established near their current home.

The varying local ordinances setting forth residency restrictions pose significant problems for DOC. In addition to ensuring compliance with the statewide 1,000-foot restriction, DOC must be aware of the details of the more restrictive local ordinances in order for offenders to find a residence that is acceptable. There has been media coverage highlighting the difficulty of sex offenders finding a residence that complies with local residency exclusions. The most widely-publicized situation relates to the establishment of a "camp" by sexual offenders underneath the Julia Tuttle Bridge in Miami-Dade County.[6]

In August 2009, the Broward County Sexual Offender and Sexual Predator Residence Task Force released its final report regarding "issues involved with the residency restrictions of sexual

[5] Department of Corrections Analysis of Senate Bill 1284 (February 23, 2010), p. 4.

[6] *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; *Miami Sex Offender Shantytown Finally Dismantled*, Miami Herald, March 8, 2010; http://www.miamiherald.com/2010/03/08/1518420/sex-offender-shantytown.html

offenders and sexual predators convicted of certain sex offenses."[7] The following were among the Task Force's findings:

- Residency restrictions in Broward County limit housing availability and result in homelessness, transiency, and clustering.
- Research on residency restrictions has not found empirical evidence indicating that residency restriction laws achieve their intended goals of preventing abuse, protecting children, or reducing reoffending.
- There is no evidence that larger buffer zones are more effective in protecting children than the state's 1,000-foot restriction.[8]

State Preemption of Local Ordinances
A local government may regulate matters already regulated by a state statute if the Legislature has not preempted the area either expressly or by implication.[9] Preemption reserves an area in which local government might otherwise act and reserves it exclusively for regulation by the Legislature.[10]

No District Courts of Appeal opinions have considered whether the Legislature has preempted local sex offender residency requirements. The only known circuit court case addressing the issue is *Exile v. Miami-Dade County*, 16 F.L.W. Supp. 1044b (Fla. 11th Cir. 2009). In *Exile*, the 11th Circuit Court for Miami-Dade County found that the Legislature did not intend to preempt local sex offender residency ordinances.

III. Effect of Proposed Changes:

Section 1 creates s. 856.022, F.S., which includes several new crimes classified as first degree misdemeanors. The section applies only to persons who have previously been convicted of a crime that is a qualifying offense for designation as either a sexual offender or a sexual predator and whose victim was under 18 years of age. This includes offenders who are designated as a sexual offender or a sexual predator as well as those who are not so designated for a reason such as commission of the qualifying offense prior to the effective date of the designation laws. Persons who have been pardoned or whose conviction was set aside in a post-conviction proceeding are excepted from the statute.

The new misdemeanor of loitering or prowling by a person convicted of a qualifying sexual offense is an aggravated form of loitering and prowling, which is a second degree misdemeanor prohibited by s. 856.021, F.S. In addition to proving the elements of loitering or prowling, conviction of the aggravated form of the offense requires proof that: (a) the crime was committed by a person who had previously been convicted of one of the qualifying offenses; and (b) the offender was knowingly within 300 feet of: (1) a child care facility or pre-K though 12 school, or on the facility's or school's property, when it was in operation; or (2) a park or playground while

[7] *Final Report: Sexual Offender & Sexual Predator Residence Task Force*. http://www.floridaatsa.com
[8] The Broward County Board of County Commissioners ultimately adopted a 2500 foot residency restriction. See Chapter 21, Article XI, Sec. 21-164 – Sec. 21-170, Broward County Code of Ordinances.
[9] 12A FLA. JUR 2D *Counties*, Etc. s. 181 (2008).
[10] *Pinellas County v. City of Largo*, 964 So. 2d 847, 853 (Fla. 2d DCA 2007).

children are present and congregating in such a manner that a reasonable person would be aware of their presence.

The second new misdemeanor provides that it is unlawful for a person who committed one of the qualifying crimes and whose offense was committed on or after July 1, 2010 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 likely raises a First Amendment, freedom of speech, issue. See section on Constitutional Issues.

The third new misdemeanor prohibits a person who committed one of the qualifying crimes from knowingly being in, or on the grounds of, a child care facility or pre-K through 12 school when it is in operation unless he or she: (a) has given written notification of intent to be present to the school board, superintendent, principal, or child care facility owner; (b) has notified the owner or the principal's office when arriving and departing the premises; and (c) remains under direct supervision of a school official when in the vicinity of children. An exception is made for voting and for picking up and dropping off the person's own children or grandchildren.

Section 2 amends s. 775.21, F.S., the sexual predator statute, to clarify the meaning of "temporary residence" and to add references to and a definition of "transient residence." The definition of "temporary residence" is amended to provide "vacation, business, or personal travel destinations in or out of" Florida as examples of temporary residences. "Transient residence" is newly defined as:

> 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 may include, but is not limited to, a place where the person sleeps or seeks shelter and a location that has no specific street address.

This section of the bill also makes amendments throughout s. 775.21, F.S., to require registration and notification of transient addresses in the same manner as is currently required for permanent or temporary addresses. It also provides that a sexual predator who vacates a temporary or transient residence, or who gives notice of intent to do so but does not, must provide notice in the same manner as is currently required for those vacating a permanent residence.

Section 3 transfers and amends s. 794.065, F.S., renumbering it as s. 775.215, F.S. The statute relates to preemption of residency distance limitations for persons who have been convicted of certain sexual offenses.

The section expressly preempts to the state the adoption of residency restrictions for persons who are required to register as a sexual predator or sexual offender.

Subsection (1) provides that any municipal or county ordinance that imposes residency exclusions that exceed the statewide restrictions in the section or in ss. 947.1405 and 948.30, F.S., are superseded by the statewide restrictions.

Subsection (2) provides that any part of a local ordinance adopted before July 1, 2010, that exceeds the statewide residency restrictions is repealed and abolished as of that date, with one exception. The exception is that local governments can maintain a residency restriction of up to 2,500 feet around a school, child care facility, or "other similar facility where multiple children congregate in one location for group activities or supervision." If a local residency restriction is to be applied to an "other similar facility," the facility must be specifically identified in a separate ordinance that is enacted upon the written recommendation of the jurisdiction's chief law enforcement officer.

Subsections (2)(b) and (c) set forth the exception described above and provide that a restriction that meets the requirements of the exception is not preempted. Therefore, a local government can enact a residency restriction within the terms of the exception on or after July 1, 2010.

Subsection (2)(d) states that the section does not prevent an ordinance from applying retroactively to a person convicted of a sexual offense before the ordinance was enacted, or "to apply to a person who was convicted of an offense proscribed in Florida Statutes or similar offenses in another jurisdiction."

Section (3) defines terms that are not defined in the current statute.

- "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 in s. 1003.01, F.S., which is "an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, or other public school level authorized under rules of the State Board of Education." The section specifies that the term includes voluntary prekindergarten education programs as described in s. 1002.53(3), F.S., public schools 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. 1002.37, F.S, and a K-8 Virtual School as established in s. 1002.415, F.S. However, it does not include facilities dedicated exclusively to the education of adults.

- "Child care facility" has the same meaning as in s. 402.302, F.S. Section 402.302(2), F.S., provides that the term includes "any child care center or child care arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care, wherever operated, and whether or not operated for profit." However, it does not include: "(a) Public schools and nonpublic schools and their integral programs, except as provided in s. 402.3025; (b) Summer camps having children in full-time residence; (c) Summer day camps; (d) Bible schools normally conducted during vacation periods; or (e) Operators of transient establishments, as defined in

> chapter 509, which provide child care services solely for the guests of their establishment or resort, provided that all child care personnel of the establishment are screened according to the level 2 screening requirements of chapter 435."

Section (4) amends the current statewide residency restriction that prohibits a person who has been convicted of certain sexual offenses from residing within 1,000 feet of a school, park, playground, or day care center. "Day care center," which was undefined, is replaced by "child care facility." In addition, a new grandfather clause is included. This clause provides that a person is not in violation of the restriction and cannot be forced to relocate if he or she was living in a residence that was in compliance with the restriction before a school, child care facility, park, or playground was established within 1,000 feet of the residence.

Section (5) applies the state's residency restriction to persons who committed similar sexual offenses in jurisdictions other than Florida on or after the effective date of the act, unless they have had the requirement to register as a sexual predator or a sexual offender removed.

Section 4 amends s. 943.0435, F.S., the sexual offender registration statute, to incorporate the same amendments that are made to the sexual predator statute in Section 2 of the bill.

Section 5 amends s. 943.04352, F.S., to require that the entity that provides misdemeanor probation services must search the name of an offender against the Dru Sjodin National Sex Offender Public Website maintained by the United States Department of Justice when the court places the offender on misdemeanor probation. This is in addition to the existing requirement to search the FDLE Internet site that maintains registration information regarding sexual predators and sexual offenders.

Section 6 amends s. 944.606, F.S., to require more specificity in the residence information that must be provided to law enforcement agencies by DOC prior to the release of a person who was convicted of committing certain sexual offenses. The offenses are the same as the prerequisite offenses in Section 1 of the bill. DOC is currently required to provide "the offender's intended residence address, if known." The amendment requires notice of the:

> address of any planned permanent residence or temporary residence within the state or out of state, including a rural route address and a post office box; if no permanent or temporary address, any transient residence within the state; address, location, or description and dates of any known future temporary residence within the state or out of state; …

Section 7 amends s. 944.607, F.S., to add disclosure of a transient address or current or known future temporary address to a sexual offender's existing requirement for registering with DOC when entering community supervision and reregistering with the local sheriff's office thereafter.

Section 8 amends s. 947.005, F.S., to add or change several definitions for terms that are used throughout chapter 947, F.S., which relates to the Parole Commission. These include addition of the definitions of "park," "playground," "school," and "child care facility," that are in section 3 of the bill. In addition, the definition of "qualified practitioner" is amended to be "social worker, mental health counselor, or a marriage and family therapist licensed under chapter 491 who, as

determined 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 chapter 459; or a psychologist licensed under chapter 490." The current definition includes a social worker, mental health counselor, or marriage and family therapist who is licensed under chapter 491, F.S., and practices in accordance with his or her respective practice act. There is currently no requirement that these practitioners have coursework, training, qualifications, and experience to treat sex offenders as determined by rule of their respective boards.

Section 9 amends s. 947.1405, F.S., which applies to conditional releasees, in several ways:

- A grandfather clause is created to provide that a conditional release does not violate the residency restriction terms of his or her release and cannot be forced to relocate if he or she was living in a residence that was in compliance with the restriction before a school, child care facility, park, playground, designated school bus stop, or other place where children congregate was established within 1,000 feet of the residence.

- The term "qualified practitioner," as newly defined, is added throughout the section to ensure that any treatment of evaluation of a conditional release who have committed certain sexual offenses is performed by a qualified practitioner.

- Modification of the requirement for polygraph examinations of conditional releasees who have committed certain sex offenses to require that they be performed by a polygrapher who is a member of a national or state polygraph association and who is certified as a postconviction sex offender polygrapher. Also, there is a new requirement to provide the results of the polygraph examination to the offender's probation officer and qualified practitioner.

Section 947.1405(12), F.S., is created to require the Parole Commission to order certain additional conditions of conditional release supervision if the crime for which the releasee is subject to conditional release was committed on or after the effective date of the act, and he or she had been convicted at any time of an enumerated sexual offense when the victim was under 18 years of age. These new conditions do not apply to releasees who otherwise meet the requirements but either: (1) were 21 years old or younger and whose victim was 16 or 17 years old at the time the offense was committed; (2) have received a pardon for the offense; or (3) have been removed from the requirement to register as a sexual predator or sexual offender.

The first new condition is a prohibition on visiting the following areas unless prior approval is obtained from the releasee's supervising officer: (1) a child care facility, pre-K through 12 school, or any real property comprising a child care facility or pre-K through 12 school when the child care facility or school is in operation; or (2) a park or playground while children are present. The commission is given authority to designate additional locations. The statute provides that it does not prohibit a releasee from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service as defined in s. 775.0861, F.S.[11] In essence, this provision of the bill codifies the commission's existing practice of setting special

[11]Section 775.0861, F.S., defines a religious service 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."

terms of conditional release. However, the prohibition against "visiting" one of the places is more restrictive to the releasee than "loitering" that is currently prohibited by the commission.

The second new condition prohibits the conditional releasee from distributing candy or other items to children on Halloween; wearing a Santa Clause 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 before Easter; entertaining at children's parties; or wearing a clown costume. However, a releasee can wear a clown costume if he or she gets prior approval from the commission.

Section 10 amends s. 948.001, F.S., to add or change several definitions for terms that are used throughout chapter 948, F.S., which relates to probation and community control. These definitions are the same as those added to s. 947.005, F.S., in section 8 of the bill and are discussed in the analysis of that section.

Section 11 amends s. 948.30, F.S., relating to additional conditions of probation or community control for certain sexual offenders, to include the same changes as are made concerning conditional releasees in Section 9 of the bill. The analysis of the effects of Section 9 is applicable to this section, except that the conditions of probation and community control do not include a restriction from residing within 1,000 feet of a school bus stop, and there is currently no "loitering" prohibition as a condition of supervision unless it was specifically imposed by the sentencing court.

Section 12 amends s. 948.31, F.S., concerning court-ordered sex offender treatment for certain sex offenders on community supervision in the following ways:

- The category of offenders who must be evaluated to determine whether there is a need for treatment is expanded to include all sexual predators and sexual offenders. This would include some offenders whose victim was not a minor.
- An evaluation is still required, but a diagnosis does not have to be made. The evaluation must be conducted by a qualified practitioner.
- If determined to be appropriate, the court must order sex offender treatment instead of outpatient counseling. If sex offender treatment is ordered, it must be obtained from a qualified practitioner as defined in s. 948.001, F.S., who is specifically trained to treat sex offenders.[12] Current law requires outpatient counseling by a community mental health center, a recognized social service agency providing mental health services, or a private mental health professional, or other professional counseling. Providers are not currently required to have special training in treating sex offenders.
- A provider cannot provide treatment if he or she has been convicted or adjudicated delinquent for committing one of the offenses included within the definition of "sex offender" at s. 943.0435(1)(a)1.a.(I), F.S.
- Requires the court to impose a restriction against contact with minors if sexual offender treatment is recommended. This requirement applies to all offenders, not just those whose

[12] The bill does not indicate what constitutes the required specific training. The Florida Department of Health's Board of Psychology rescinded Rule 64B19-18.001, F.A.C., which specified criteria for psychologists to designate themselves as qualified practitioners for the purpose of evaluating and treating sex offenders, on January 31, 2008.

victim was under 18 years old as is the case with other statutory prohibitions against contact with minors.

Section 13 amends s. 985.481, F.S., to provide more specificity as to residence information that must be provided to law enforcement by DJJ prior to the release of a sexual offender from residential commitment.

Section 14 amends s. 985.4815, F.S., to add disclosure of a transient address or known future temporary address to a juvenile sexual offender's existing requirement to register with DJJ when under supervision by DJJ and to reregister with the local sheriff's office thereafter.

Section 15 provides that nothing in the bill reduces or diminishes a court's jurisdiction.

Section 16 is a severability clause that preserves other provisions of the bill if any provision is held to be invalid, as long as the preserved provisions can be given effect without the invalid provisions.

Section 17 establishes the bill's effective date as July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

First Amendment Issues
The section of the bill that makes it a misdemeanor for a sexual offender to make a communication of any type containing any sexual content may be a violation of the First Amendment of the United States Constitution. Prohibitions involving communication or the "intent to communicate" generally triggers first amendment review.[13] When the legislature attempts to infringe upon fundamental constitutional rights, such legislation is subject to a two part test. First, the legislation at issue must be justified by a compelling state interest, and, second, the legislative enactment must be narrowly drawn to address only the legitimate state interests at stake. Obscenity is not protected by the first amendment. In those cases, the burden is on the government to prove that the speech appeals to the prurient interest, is patently offensive in light of community standards, and

[13] *Wooley v. Maynard*, 430 U.S. 705, 713 n. 10 (1977).

lack serious literary, artistic, political, or scientific value.[14] Although making a "communication containing any content of a sexual nature" could be considered overbroad because it likely covers more than "obscene" communication, in limited situations heightened protections have been allowed when children are involved.[15]

Ex Post Facto Issues

The new criminal offenses that are created in Section 1 and 3 of the bill are subject to analysis under the ex post facto clauses of the Florida and United States Constitutions[16] because Section 1 depends upon prior conviction of a criminal offense and Section 3 allows residency restrictions to apply retroactively to a person convicted of sexual offenses before the date of the enactment of the ordinance.

In general, the ex post facto clauses prohibit prosecution of a person for actions that were not criminal at the time they were committed or an increase in the punishment for a crime after a person commits the crime.[17] The U.S. Supreme Court has held Alaska's sex offender registration statutes were valid as against an ex post facto claim. The reasoning behind the ruling centered on the finding that the Alaska statutes were determined to be regulatory not punitive.

> The determinative question is whether the legislature meant to establish "civil proceedings." If the intention was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, the Court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Because the Court ordinarily defers to the legislature's stated intent, only the clearest proof will suffice to override that intent and transform what has been denominated a civil remedy into a criminal penalty.[18]

One distinction between the Alaska registration requirements and the bill in question is that the bill does create "physical restraints" in a sense by allowing for retroactive residency restrictions and forbidding sexual offenders from going certain places. The Supreme Court noted as important that the Alaska restrictions did "not subject respondents to an affirmative disability or restraint. It imposes no physical restraint, and so does not resemble imprisonment, the paradigmatic affirmative disability or restraint."[19] However, the courts are to give the Legislature leeway and the provisions of this CS are designed to protect the public from sex offenders just as the Alaska registration requirements were. In the 8th Circuit two appellate level cases have held that residency restrictions that applied to offenders who sustained convictions prior to the enactment of

[14] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).
[15] *Miller v. California*, 413 U.S. 15 (1973); *but see Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).
[16] U.S. Const. art. 1, § 10, cl. 1; Art. 1, s. 10, Fla. Const.
[17] *See, e.g., L. Ross, Inc. v. R.W. Roberts Const. Co., Inc*., 466 So. 2d 1096 (5th DCA. 1985), decision approved, 481 So. 2d 484 (Fla. 1986).
[18] *Smith v. Doe*, 538 U.S. 84 (2003) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1960)).
[19] *Id*.

the statute were, like the registration requirements, intended to protect the public safety, be regulatory and non-punitive, and not punitive in effect.[20]

Section 1 is probably not an ex post facto violation because it essentially applies to enhance the punishment only when the sex offender commits a new crime (loitering or prowling by a person convicted of a sexual offense). The new offense that prohibits persons who have been previously convicted of certain sexual offenses from knowingly approaching, contacting or communicating with a child at a park or playground is not subject to ex post facto challenge because it applies only if the prerequisite prior offense was committed on or after the effective date of the bill. The new offense of knowingly being present in a child care facility or school without giving written notification may be construed as a regulatory measure analogous to requiring sexual offenders and sexual predators to register with the government.

Whether Section 3 of the bill is subject to ex post facto challenge will rely primarily on whether the provisions of the ordinances that apply retroactively are punitive or regulatory in nature.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Additional employment costs could be incurred by child care facilities and schools that must provide direct supervision of persons who are subject to the restrictions against unsupervised contact with children in such facilities.

C. Government Sector Impact:

The Criminal Justice Impact Conference has determined that the bill would have an insignificant impact on the state prison population.

FDLE estimates that implementing the bill's changes in registration and notification requirements would cost a total of $64,450 in the first year and $900 in subsequent years. The first year estimate attributes $37,800 to notification and documentation of registrants and $26,650 to system programming and maintenance.

VI. Technical Deficiencies:

Section 3 of the bill expressly preempts the field of residency restrictions that apply to persons who are required to register as a sexual predator or a sexual offender. Section 943.04354, F.S., allows a court to remove the registration requirement for offenders who satisfy several criteria, including that the victim was between 14 and 17 years old and that the offender was not more

[20] *Weems v. Little Rock Police Dept*., 453 F.3d 1010, 1014 (8th Cir. 2006); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

than 4 years older at the time of the offense. While persons who have had the registration requirement removed will be expressly exempted from the state's residency restriction by amendments made in the bill, local governments could enact residency restrictions that apply to them because they are not included in the preemption provision.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on March 9, 2010:

- Corrects technical deficiencies noted in the original bill analysis.
- Changes the enhancement of punishment for the offense of loitering and prowling when it is committed by a person who has been convicted of certain sexual offenses to specify locations and require that it occur during operating hours or when children are present.
- Removes the requirement that an offender cannot be at a child care facility or school unless he or she is the parent or guardian of a minor who is in close proximity.
- Preempts local residency restrictions, but grants counties and municipalities the authority to enact a residency restriction up to 2,500 feet from specified locations.
- Creates "grandfather clauses" in state residence restriction statutes. By virtue of preemption, this will also apply to any local ordinances enacted within the limited grant of authority.
- Applies the state residency restriction to persons convicted of sexual offenses in other jurisdictions.
- Amends the definition of "qualified practitioner" in ss. 947.005 and 948.001, F.S., for purposes of diagnosing and treating sex offenders who are under community supervision.
- Requires that a qualified practitioner perform certain court-ordered functions that previously did not specify a "qualified practitioner."
- Creates definitions of "child care facility," "park," "playground," and "school" in ss. 947.005 and 948.001, F.S.
- Provides criteria for polygraphers who can examine sex offenders.
- Creates more specific criteria concerning conditions of community supervision or conditional release that prohibit certain sexual offenders from visiting schools, parks, playgrounds, and child care facilities when children are present, clarifying restrictions on wearing costumes designed to appeal to children, and removing the bill's general restriction from participating at holiday events where children are present.
- Includes a statement that "the Legislature intends that nothing in this act reduce or diminish a court's jurisdiction."
- Includes a severability clause.

B. Amendments:

None.