SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 120

SPONSOR: Senators Fasano and Lynn

SUBJECT: Sexual Offenders

DATE: March 29, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Favorable
2.	Noble	Sadberry	ACJ	Favorable
3.			AP	Withdrawn: Favorable
4.				
5.				
6.				

I. Summary:

This bill amends the conditional release statute (s. 947.1405, F.S.) to specify that certain sex offenders under conditional release cannot live within 1,000 feet of a designated public school bus stop. Under current law such offenders are prohibited from living within 1,000 feet of a "school, day care center, park, playground, or other place where children regularly congregate." As of October 1, 2004, a releasee subject to the statute would be prohibited from moving to a location within the 1,000-foot buffer zone. Conversely, as of the same date, district school boards would be required to relocate any existing school bus stop and are prohibited from establishing a new school bus stop if the site is within 1,000 feet of the existing residence of a releasee who is subject to the statute. In order to facilitate compliance with the new requirements, the bill amends s. 1006.22(12)(c), F.S., to require district school boards to provide the location of school bus stops to the Department of Corrections.

The bill also creates s. 794.065, F.S., prohibiting persons convicted for committing certain sex offenses after October 1, 2004, from living within 1,000 feet of a school, day care center, park, or playground if their victim was under 16 years old. Violation of the prohibition would constitute a new crime, with the level depending upon the classification of the qualifying offense.

The effective date of the bill is October 1, 2004.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 794.065, 947.1405 and 1006.22.

II. Present Situation:

Conditional Release Supervision

With the abolition of parole in 1983, a growing number of offenders were released from prison without post-release supervision. To remedy the public safety concerns associated with this new development, the Legislature adopted the Conditional Release Program Act of 1988 to mandate that certain offenders be supervised upon their release from prison. Section 947.1405, F.S., requires an inmate convicted of repeated violent crimes who is nearing the end of his or her sentence to be released under close supervision until completion of 100 percent of the court-imposed sentence. A conditional releasee who violates the conditions of release may be returned to prison with forfeiture of any accrued gain time. When a violation is alleged, the releasee is entitled to a hearing before the Parole Commission or its hearing officer. After a hearing, the commission can revoke conditional release, impose new conditions on the release, or allow conditional release to continue.

The Florida Supreme Court explained the purposes of the conditional release program as follows:

> The Legislature has determined that habitual offenders and offenders who have committed certain types of violent offenses after having served a prior commitment to prison should receive supervision after release. This supervision should help these former inmates in bridging the gap between prison and the outside world. To encourage releasees to comply with the terms and conditions of supervision, the program provides that if the releasee fails to do so, the releasee will be returned to prison and his gain time will be forfeited.
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> *Duncan v. Moore*, 754 So.2d 708, 710 (Fla. 2000).

The conditional release program, in practice, operates as follows. When an inmate is sentenced to a prison term, the inmate is given a "maximum sentence expiration date," which is the date that the inmate's sentence will expire. Each inmate is given a "tentative release date," the date that the inmate will be released from prison when all of the inmate's gain time is deducted from his or her sentence. When an inmate meets the eligibility criteria in law and is within 180 days of his or her tentative release date, the inmate's records are compiled and reviewed by the Department of Corrections (department) and the department recommends to the Parole Commission the terms and conditions of the conditional release. After reviewing the recommendations of the department, the Parole Commission establishes the terms and conditions of the inmate's conditional release and may determine the length of the inmate's supervision. The period of conditional release supervision cannot exceed the maximum penalty imposed by the court.

Statutorily Mandated Conditions of Release for Certain Sex Offenders

Section 947.1405(7), F.S., provides certain requirements for an inmate who is eligible for conditional release and who was convicted for certain sex crimes committed on or after October 1, 1995, in which the victim was a minor. These crimes include violation of ch. 794, F.S. (sexual battery); s. 800.04, F.S. (lewd or lasciviousness offenses committed upon or in the presence of a person under 16 years of age); s. 827.071, F.S. (causing or promoting sexual performance of a child); or s. 847.0145, F.S. (selling or buying of minors). In addition to any other terms and conditions imposed by the Parole Commission, s. 947.1405(7)(a), F.S., requires the commission to impose conditions including:

1. A mandatory curfew;
2. ***If the victim was under the age of 18, a prohibition on living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate;***
3. Active participation in a sex offender treatment program;
4. A prohibition on contact with the victim, except under specified circumstances;
5. If the victim was under the age of 18, a prohibition on unsupervised contact with children until certain conditions are met;
6. If the victim was under the age of 18, a prohibition on working at any school, day care center, park, playground, or other place where children regularly congregate, as prescribed by the commission;
7. A prohibition on the viewing or possession of pornographic or sexually stimulating materials;
8. A requirement that the releasee submit a DNA sample to the Florida Department of Law Enforcement;
9. A requirement that the releasee make restitution to the victim; and
10. Submission to warrantless searches by the releasee's probation officer of the releasee's person, residence and vehicle.

The department indicates that the statute applied to 79 sex offenders who were released from prison to conditional release supervision in Fiscal Year 2002-2003. Thirty-three of these offenders were still under conditional release supervision as of July 1, 2003.

The current statute does not specifically prohibit a releasee from living within 1,000 feet of a public school bus stop. However, under the doctrine of statutory interpretation known as *ejusdem generis*, if an enumeration of specific things is followed by some more general word, the general word is construed to refer to things of the same kind as those specifically enumerated. Thus, while a school bus stop is certainly a place where children regularly congregate, it can be argued that it is not the same type as the specific places mentioned. The question has not been judicially determined and the department has not treated living near a school bus stop as a violation of the terms of conditional release.

III. Effect of Proposed Changes:

Section 1 of the bill amends the conditional release statute to specifically state that certain sex offenders who are under conditional release and whose victims were under 18 years of age cannot live within 1,000 feet of a public school bus stop. Violation of the prohibition could result in revocation of conditional release status.

This section also provides that, as of October 1, 2004, district school boards would be prohibited from establishing a new school bus stop, and required to move an existing bus stop, if it is within 1,000 feet of the existing residence of a releasee who is subject to the statute. The section also includes a complementary provision that specifically prohibits qualifying releasees from relocating to a residence that is within 1,000 feet of a public school bus stop. This is apparently a reinforcement of the provision that the releasee will not be required to move from an existing residence since the prohibition has not previously been enforced. However, it might also be raised in support of an assertion that the current statute does not prohibit qualifying releasees from living within 1,000 feet of a school bus stop.

Section 1 also provides that, beginning on October 1, 2004, neither the department or the commission may approve a residence that is within 1,000 feet of a school, day care center, park, playground, designated school bus stop, or other place where children regularly congregate. This does not appear to be necessary because the 1,000 foot restriction is a mandatory condition of conditional release that must be imposed by the commission. Unlike some of the other conditions listed in s. 947.1405(7)(a)1-10, F.S., the statute does not give the commission discretion to waive or modify the 1,000 foot buffer zone.

There are fewer than 50 actively supervised conditional release offenders who meet the statutory criteria, but it is not known if any live within 1,000 feet of a school bus stop. Annually, approximately 100 qualifying sex offenders enter conditional release supervision and would have to reside outside of the buffer zone.

Section 2 of the bill creates s. 794.065, F.S., which will prohibit persons convicted of certain sex offenses against a victim under 16 years of age from living within 1,000 feet of a school, day care center, park, or playground. The qualifying offenses are: sexual battery (s. 794.011, F.S.); lewd or lascivious offense on or in the presence of a person less than 16 years old (s. 800.04, F.S.); sexual performance by a child (s. 827.071, F.S.); and selling or buying of minors (s. 847.0145, F.S.). The new statute will only apply to offenses committed after October 1, 2004.

Violation of the prohibition created by Section 2 would constitute a new crime. If the original conviction was classified as a first degree felony or higher, the violation of s. 794.065, F.S., would be classified as a third degree felony; if the original conviction was classified as a second or third degree felony, the violation of s. 794.065, F.S., would be classified as a first degree misdemeanor.

In order to facilitate compliance with the new requirements created in Section 1 of the bill, Section 3 amends s. 1006.22(12)(c), F.S., to require district school boards to provide the location of school bus stops to the Department of Corrections.

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:

Article I, s. 9, U.S. Const., and article I, s. 10, Fla. Const., prohibit ex post facto laws. In evaluating whether a law violates the ex post facto clause, courts apply a two-prong test: (1) whether the law is retrospective in its effect; and (2) whether the law alters the definition of criminal conduct or increases the penalty by which a crime is punishable. See *Gwong v. Singletary*, 683 So. 2d 109, 112 (Fla. 1996); *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995).

It can be argued that a prohibition on where someone can live constitutes punishment under the ex post facto clause of either the state or federal constitutions. No court has directly addressed the issue. If a court were to hold that a restriction on where a person can live is punishment, and that a school bus stop is not already included in the general category of places where children regularly congregate, retrospective application of this condition to conditional releasees would violate the ex post facto clauses.

Courts have held that provisions requiring the registration of certain sexual offenders are merely regulatory and therefore not punishment under the ex post facto clause. See, e.g., *Simmons v. State*, 753 So. 2d 762, 763 (Fla. 4th DCA 2000). If a court were to hold that restrictions on living location were regulatory, or that a school bus stop is already included in the general category of places where children regularly congregate, it would find no ex post facto violation.

These ex post facto concerns relate only to the provisions of Section 1 of the bill. By its terms, Section 2 applies only to persons who commit qualifying offenses on or after October 1, 2004.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

By placing restrictions on where certain offenders on conditional release supervision and certain convicted felons can live, there may be additional violations, revocations and convictions that result in an unspecified number of offenders returning to prison. However, there would probably be a minimal increase in prison admissions and any readmission is likely to be of short duration. There may also be some cost for local school boards to provide school bus stop locations to the Department of Corrections.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.