
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 267 **Hearing Date:** May 12, 2015
Author: Leyva
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Urgency: No **Fiscal:** No
Consultant: AA

Subject: *Registered Sex Offenders: Local Ordinances*

HISTORY

Source: San Bernardino County

Prior Legislation: AB 655 (Quirk-Silva) – 2014, died in Senate
SB 386 (Correa) – 2013, amended into unrelated bill

Support: Crime Victims United of California

Opposition: American Civil Liberties Union; California Public Defenders Association;
California Reform Sex Offender Laws; Housing California; Citizens for Criminal
Justice Reform – California; Legal Services for Prisoners with Children; 2
individuals

PURPOSE

The purpose of this bill is to authorize local ordinances which restrict the presence of certain sex offenders, by 1) providing that a local agency is not preempted by state law from enacting and enforcing an ordinance that restricts a person required to register as a sex offender for an offense committed against a minor from being present at schools, parks, day care centers, or other locations where children regularly gather within the local agency's jurisdiction; and 2) authorizing a local agency to adopt ordinances, rules, or regulations that are more restrictive than state law relating to a person's ability to be present at schools, parks, day care centers, or other locations where children regularly gather within the local agency's jurisdiction when the person is required to register as a sex offender for an offense committed against a minor.

Current law generally requires persons convicted of enumerated sex offenses to register within five working days of coming into a city or county, with specified law enforcement officials in the city, county, or city and county where he or she is domiciled, as specified.¹ (Penal Code § 290.)

¹ Penal Code section 290(b) provides: "Every person described in subdivision (c) for the rest of his or her life while residing in, or, if he or she has no residence, while located within California, or while attending school or working in California, as described in section 290.002 and 290.01, shall be required to register with the chief of police of the city in which he or she is residing, or if he or she has no residence, is located, or the sheriff of the county if he or she is residing, or if he or she has no residence, is located, in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California

Current law provides that no person who is required to register as a sex offender because of a conviction for a crime where the victim was a minor under 16 years of age shall be an employer, employee, or independent contractor, or act as a volunteer with any person, group, or organization in a capacity in which the registrant would be working directly and in an unaccompanied setting with minor children² on more than an incidental and occasional basis or have supervision or disciplinary power over minor children. This subdivision shall not apply to a business owner or an independent contractor who does not work directly in an unaccompanied setting with minors. (Penal Code § 290.95(c).)

Current law provides that every person required to register as a sex offender who applies for or accepts a position as an employee or volunteer with any person, group, or organization where the registrant would be working directly and in an unaccompanied setting with minor children on more than an incidental and occasional basis or have supervision or disciplinary power over minor children, shall disclose his or her status as a registrant, upon application or acceptance of a position, to that person, group, or organization. (Penal Code § 290.95(a).)

Current law provides that every person required to register as a sex offender who applies for or accepts a position as an employee or volunteer with any person, group, or organization where the applicant would be working directly and in an accompanied setting with minor children, and the applicant's work would require him or her to touch the minor children on more than an incidental basis, shall disclose his or her status as a registrant, upon application or acceptance of the position, to that person, group, or organization. (Penal Code § 290.95(b).)

Current law prohibits the issuance of a license to operate or manage a community care facility to a person required to register as a sex offender, as specified. (Health and Safety Code § 1522.) In addition to the applicant, this section is applicable to criminal convictions of the following persons:

- A. Adults responsible for administration or direct supervision of staff.
- B. Any person, other than a client, residing in the facility.
- C. Any person who provides client assistance in dressing, grooming, bathing, or personal hygiene. Any nurse assistant or home health aide, as specified.
- D. Any staff person, volunteer, or employee who has contact with the clients.
- E. If the applicant is a firm, partnership, association, or corporation, the chief executive officer or other person serving in like capacity.
- F. Additional officers of the governing body of the applicant, or other persons with a financial interest in the applicant, as determined necessary by the department by regulation. (*Id.*)

Current law provides that any person required to register as a sex offender shall disclose this fact to the licensee of a community care facility before becoming a client of that facility, as specified. Any person or persons operating a community care facility that accepts as a client an individual who is required to register as a sex offender shall confirm or deny whether any client of the

State University, or community college if he or she is residing, or if he or she has no residence, is located upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence or location within, any city, county, or city and county, or campus in which he or she temporarily resides, or, if he or she has no residence, is located.”

² For purposes of this section, “working directly and in an unaccompanied setting” includes, but is not limited to, providing goods or services to minors.

facility is a registered sex offender in response to any person who inquires whether any client of the facility is a registered sex offender, as specified. (Health and Safety Code § 1522.01.)

Current law requires that individuals, who are volunteer candidates for mentoring children in foster care settings, as defined by DSS, shall be subject to a criminal background investigation prior to having unsupervised contact with the children. The criminal background check shall be initiated and conducted pursuant to either Sections 1522 and 1522.1 or Section 1596.603, as applicable. Sections 1522 and 1522.1 may be utilized by a county social services agency in cooperation with, or as a component of, a licensed foster family agency. (Health and Safety Code § 1522.06.)

Current law provides that persons required to register as a sex offender based upon the commission of an offense against a minor, are prohibited from residing, except as a client, and from working or volunteering in any of the following:

- (1) A child day care facility or children’s residential facility that is licensed by the State Department of Social Services, a home certified by a foster family agency, or a home approved by a county child welfare services agency.
- (2) A home or facility that receives a placement of a child who has been, or may be, declared a dependent child of the juvenile court pursuant to Section 300 of the Welfare and Institutions Code or who has been, or may be, declared a ward of the juvenile court pursuant to Section 601 or 602 of the Welfare and Institutions Code. (Penal Code § 3003.6)

Current statutory law, as enacted by Proposition 83 in November of 2006, provides that, “. . . it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.

(c) Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290.” (Penal Code § 3003.5.)

Current case law provides that it is unconstitutional to apply these residency restrictions “across the board to petitioners and similarly situated registered sex offenders on parole in San Diego County.” (*In re William Taylor* (2015) 60 Cal. 4th 1019.)

Current case law provides that state law regulating the management of sex offenders in the community supersedes any local ordinances in this area. (*People v. Nguyen* (2014) 222 Cal.App.4th 1168, rw. den.)

This bill would provide the following:

- A local agency (defined by the bill to mean a city, county, or city and county) is not preempted by state law from enacting and enforcing an ordinance that restricts a person required to register pursuant to Section 290 for an offense committed against a minor from being present at schools, parks, day care centers, or other locations where children regularly gather within the local agency’s jurisdiction.
- A local agency may adopt ordinances, rules, or regulations that are more restrictive than state law relating to a person’s ability to be present at schools,

parks, day care centers, or other locations where children regularly gather within the local agency's jurisdiction when the person is required to register pursuant to Section 290 for an offense committed against a minor.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past eight years, this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In February of this year the administration reported that as "of February 11, 2015, 112,993 inmates were housed in the State's 34 adult institutions, which amounts to 136.6% of design bed capacity, and 8,828 inmates were housed in out-of-state facilities. This current population is now below the court-ordered reduction to 137.5% of design bed capacity."(Defendants' February 2015 Status Report In Response To February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).

While significant gains have been made in reducing the prison population, the state now must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Stated Need for This Bill

The author states:

SB 267 is about giving locals the necessary tools to protect their children in their community. This bill would allow local governments to restrict the presence of registered sex offenders, who commit crimes against children, around schools, parks, day care centers, or other locations where children regularly gather. In January 2014, the Court of Appeal, Fourth District Division 3, decided the case of *People v. Nguyen* (2014) 222 Cal.App.4th 1168, concluding that the City of Irvine was preempted by provisions in the Penal Code from restricting the location of registered sex offenders from city parks. Prior to the opinion issued in *People v. Nguyen* numerous counties and cities across the state had adopted local regulations concerning the presence of sex offenders at locations in their community where children are present. In response to this case, an organization that supports sex offender rights has sued in excess of 20 local jurisdictions, forcing them to repeal all or part of their local regulations on the presence of sex offenders. This bill clarifies the legislative intent that local governments are not preempted by state law from enacting presence restrictions that are stricter than the state requirements, with regard to sex offenders.

2. What This Bill Would Do

As explained above, this bill would authorize local governments to enact ordinances restricting the ability of persons required to register as a sex offender for an offense against a minor to be present at schools, parks, day care centers, or other locations where children regularly gather within the local agency's jurisdiction. As noted by the author, in *People v. Nguyen* (2014) 222 Cal. App. 4th 1168, the Court of Appeal for the Fourth Appellate District (Division 3 – Santa Ana) struck down a local ordinance of the City of Irvine restricting sex offenders required to register for a crime against a minor from entering “upon or into any City park and recreational facility where children regularly gather without written permission from the Director of Public Safety/Chief of Police or his designee is guilty of a misdemeanor.” That ordinance broadly defined “City park and recreational facility” as “community parks, neighborhood parks, the Orange County Great Park, open space preserves, trails, including structures thereon, and all other lands and facilities under the ownership, operation or maintenance of the City that are utilized for public park or recreational purposes, whether passive or active.” (*People v. Nguyen* at 1173.)³

SHOULD STATE LAW REGULATING THE MANAGEMENT OF SEX OFFENDERS
IN THE COMMUNITY NOT PREEMPT LOCAL ORDINANCES?

³ The court reasoned that the “state law impliedly preempts (the Irvine ordinance) based on the implicit registration requirement it imposes on sex offenders who wish to enter a city park and recreational facility.” (*Id.* at 1190.)

3. Restrictions on Sex Offender Registrants in the Community

As noted above, several existing statutory provisions impose limits on persons required to register as sex offenders. Current laws generally prohibit registered sex offenders from working in positions having direct, unsupervised contact with children. In addition, registered sex offenders cannot work at community care facilities, including child day-care facilities, residential care facilities for the elderly, public schools, and certain recreational jobs. Existing law also requires public school districts and private schools to conduct criminal record checks on teachers and administrators.

Recent cases have centered on the residency restrictions for sex offender registrants imposed by a voter initiative, Proposition 83, in 2006. This bill has been amended to remove residency; its restrictions on presence remain in the bill. The reasoning of court decisions concerning residency may inform the Committee's consideration of this bill's proposal concerning local ordinances which would impose greater restrictions on a registrant's presence. Earlier this year the California Supreme Court explained:

As we next explain, we are persuaded that blanket enforcement of the mandatory residency restrictions of Jessica's Law, as applied to registered sex offenders on parole in San Diego County, cannot survive even the more deferential rational basis standard of constitutional review. Such enforcement has imposed harsh and severe restrictions and disabilities on the affected parolees' liberty and privacy rights, however limited, while producing conditions that hamper, rather than foster, efforts to monitor, supervise, and rehabilitate these persons. Accordingly, it bears no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has infringed the affected parolees' basic constitutional right to be free of official action that is unreasonable, arbitrary, and oppressive. (*In re William Taylor, infra*, at 1038.)

Members may wish to discuss whether this bill would advance the "state's legitimate goal of protecting children from sexual predators," and how this bill, which would apply not only to parolees but any sex offender registrant whose past offense was against a minor, would affect registrants who are living law-abiding lives, especially if ordinances vary from jurisdiction to jurisdiction.

Members also may wish to discuss whether due process would require actual notice of each jurisdiction's ordinance, and how sex offender registrants affected by these ordinances would receive actual notice of their requirements. In *Lambert v. California* (1957) 355 U.S. 225, the United States Supreme Court held that requiring convicted felons to register within five days of coming into the city of Los Angeles when such persons had not had actual notice of the city's registration requirement was an unconstitutional denial of due process. Many counties have many local jurisdictions within their boundaries. For example, there are 88 cities within Los Angeles County, 28 cities in Riverside County, 24 incorporated cities in San Bernardino County, and 17 cities in San Diego County. Unlike persons who are personally informed of their duty to register, it is unclear how persons subject to a patchwork of unknown, potentially multiple and varying local ordinances restricting their presence in public places would gain actual knowledge of these restrictions.

WOULD THIS BILL VIOLATE CONSTITUTIONAL DUE PROCESS RIGHTS?

HOW WOULD A PATCHWORK OF VARYING PRESENCE ORDINANCES BE?

WOULD PUBLIC SAFETY BE ENHANCED BY LOCAL COMMUNITIES DETERMINING WHERE SOME PERSONS WHO ARE REQUIRED TO REGISTER AS SEX OFFENDERS MAY OR MAY NOT BE PRESENT?

An October 2014 report released by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (“SMART”) in the federal Department of Justice developed the Sex Offender Management Assessment and Planning Initiative (SOMAPI), “a project designed to assess the state of research and practice in sex offender management. That report states in part:

Despite the intuitive value of using science to guide decision making, laws and policies designed to combat sex offending are often introduced or enacted without empirical support. The reasons why this occurs are complex and are not explored here. However, there is little question that both public safety and the efficient use of public resources would be enhanced if sex offender management strategies were based on evidence of effectiveness. . . . ¶

(S)udies have revealed that proximity to schools and other places where children congregate had little relation to where offenders met child victims.⁴

The SOMAPI report included the following related recommendations:

- Jurisdictions should use specialized supervision with a rehabilitation orientation as one component of an overall sex offender management strategy.
- Given COSA's (Circles of Support and Accountability⁵) ability to facilitate collaboration with members of the community, the SOMAPI forum experts recommend COSA as a sex offender management strategy.
- Given the limitations of scope and methodology in existing SORN (Sex Offender Registration and Notification) research, further research is desirable to inform any future changes to SORN.
- SOMAPI forum participants do not recommend expanding the residency restriction policy.

WOULD THIS BILL ENHANCE PUBLIC SAFETY AND THE EFFICIENT USE OF PUBLIC RESOURCES?

4. California Sex Offender Management Board: Containment Model and Exclusion Zones

As explained in a recent report issued by the California Sex Offender Management Board:

⁴ SOMAPI (<http://smart.gov/SOMAPI/index.html>.)

⁵ “The COSA model begins after offenders have completed legal supervision. It helps offenders garner community resources while holding them accountable to a self-monitoring plan. Studies of COSA have consistently found that its participants sexually recidivate at a significantly lower rate than the comparison group.” (SOMAPI, *infra*.)

AB 1844, known as the Chelsea King Child Predator Prevention Act, was signed into law by the Governor in 2010 and made several changes to the Penal Code regarding sex offender management. One significant change now requires that each registered sex offender on parole or county probation be managed under the Containment Model. Though there is flexibility in local application, the essence of Containment is that it include a victim-centered approach to policy and practice, supervision (State Parole or County Probation), specialized treatment provided by certified mental health professionals, and polygraph evaluations provided by certified polygraph examiners. The vision is when these partners are collaborating, the sex offender will be “contained”, thereby reducing the risk of sexual reoffending (Penal Code §§ 290.09, 1203.067, 3008, and 9003.)⁶

Members and the author may wish to discuss the implementation of the Containment Model in local jurisdictions, and whether its implementation may be an important priority for effectively managing sex offenders in the community.

With respect to exclusion zones, as this bill proposes, the Board states:

CASOMB has discussed whether to recommend a model ordinance on where sex offenders can go in the community. **However, no research shows that exclusion zones are helpful in preventing re-offense.** Restrictions about where the offender can go in a community are routinely imposed as part of the individual parole and probation conditions because they can be fashioned to relate to the particular offender. State laws already preclude registered sex offenders from being on school campuses and from working with children under defined circumstances. (Penal Code §§ 626.81, 290.95.) **There is no evidence that broader restrictions will be effective, or will not be counter-productive by preventing offenders from obtaining appropriate employment.**

CASOMB takes the position that any law precluding sex offenders from being in particular places (“exclusion zones”) must be tailored to the individual, including a consideration of the risk level of the offender in order to be effective and need to have reasonable distances and protected places along with consistency in implementation statewide. Correlating the tiered registry and exclusion zones would assist law enforcement in monitoring those individuals most likely to reoffend and would increase options for housing and employment in the interest of developing offender stability in order to prevent recidivism.⁷

IS THIS BILL INCONSISTENT WITH THE FINDINGS AND
RECOMMENDATIONS OF THE CALIFORNIA SEX OFFENDER MANAGEMENT
BOARD?

-- END --

⁶ CSOMB, Year-End Report (2014)(http://www.cce.csus.edu/portal/admin/handouts/CASOMB_End_of_Year_Report_to_Legislature_2014.pdf)

⁷ CSOMB, Year-End Report (2014), supra at 17-18 (emphasis added).