



Ohio Legislative Service Commission

Bill Analysis

Dennis M. Papp

Sub. S.B. 42*

128th General Assembly

(As Reported by S. Judiciary - Criminal Justice)

Sens. Schaffer, Wagoner, Gibbs, Coughlin, Stewart

BILL SUMMARY

- Specifies that, subject to the exceptions described in the next dot point, the restriction in the Sex Offender Registration and Notification Law (the SORN Law) against offenders convicted of a sexually oriented offense or child-victim oriented offense establishing or occupying a residence near school, preschool, or child day-care premises applies regardless of when the offense was committed and regardless of when the offender began living in the residence.
- Provides that the SORN Law residency restriction described in the preceding dot point does not apply to a person who establishes a residence by occupying residential premises, or who occupies a residence, within 1,000 feet of school, preschool, or child day-care center premises if the person or the person's spouse: (1) is the owner of record of those residential premises at the time of the occupancy, and (2) also was the owner of record of those residential premises prior to the effective date of the school premises portion of the prohibition, regarding a residence within 1,000 feet of school premises, or the effective date of the preschool and child day-care center premises portion of the prohibition, regarding a residence within 1,000 feet of preschool or child day-care center premises.
- In the SORN Law provisions that describe the intent of the General Assembly in enacting that Law adds language that: (1) includes as one of the intents the protection of the safety and general welfare of the people of Ohio by providing a limited restriction on the locales at which offenders who have committed a sexually oriented offense or child-victim oriented offense may reside, and (2) specifies that

* This analysis was prepared before the report of the Senate Judiciary - Criminal Justice Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

one of the policies of Ohio is to provide a limited residency restriction and other safeguards under this chapter from the potential acts of sex offenders and child-victim offenders and that residency restriction and other safeguards are not punitive.

- Specifies that a registration requirement under the SORN Law for children adjudicated delinquent for a sexually oriented offense and classified a juvenile offender registrant applies regardless of when the offense was committed.

TABLE OF CONTENTS

Residence restriction for persons convicted of a sexually oriented offense or child-victim oriented offense	2
Existing law	2
Operation of the bill.....	3
Legislative intent and policy regarding the SORN Law.....	4
Registration duty of child adjudicated a delinquent child for committing a sexually oriented offense	5
Existing law	5
Operation of the bill.....	6

CONTENT AND OPERATION

Residence restriction for persons convicted of a sexually oriented offense or child-victim oriented offense

Existing law

The existing Sex Offender Registration and Notification Law (the SORN Law), contained in R.C. Chapter 2950., prohibits a person who has been convicted of, are convicted of, have pleaded guilty to, plead guilty to, a "sexually oriented offense" or a "child-victim oriented offense" (see **COMMENT 1** for definitions of the terms in quotation marks) from establishing a residence or occupying residential premises within 1,000 feet of any "school" premises or "preschool or child day-care premises" (see **COMMENT 2** for definitions of the terms in quotation marks). If a person to whom this prohibition applies violates the prohibition by establishing a residence or occupying residential premises within 1,000 feet of any school premises or preschool or child day-care center premises, an owner or lessee of real property that is located within 1,000 feet of those school premises or preschool or child day-care center premises, or the prosecuting attorney, village solicitor, city or township director of law, similar chief legal officer of a municipal corporation or township, or official designated as a prosecutor in a municipal corporation that has jurisdiction over the place at which the person establishes the residence or occupies the residential premises in question, has a

cause of action for injunctive relief against the person. The plaintiff is not required to prove irreparable harm in order to obtain the relief. Existing law does not provide a criminal penalty for a violation of the prohibition. The portion of the prohibition that pertains to school premises took effect on July 31, 2003, and the portion that pertains to preschool and child day-care center premises took effect on July 1, 2007. (See **COMMENT 3** regarding other provisions related to the prohibition.) (R.C. 2950.034(A) and (B).)

In a decision that pertained to the application of the school premises portion of the residency restriction described in the preceding paragraph (the preschool and child day-care center premises portion of the prohibition had not been enacted at the time of the facts in the case and were not at issue), the Ohio Supreme Court has held that, because the restriction was not expressly made retroactive by the General Assembly, it does not apply to an offender who bought his or her home and committed his or her offense before the effective date of the restriction. In its decision, the Court stated that it was required to apply a two-part test to determine whether the restriction could be applied retroactively--first, whether the General Assembly expressly made the statutory provision in question retroactive and, second, if it did, whether the restriction imposed by the provision was substantive or procedural in nature (see **COMMENT 4** for a summary of the two-part test). The Court concluded that, notwithstanding the contrasting verb tenses used in the restriction (i.e., "no person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to") and the fact that the provision prohibits both the establishment of a residence and the occupancy of a residence (the argument was that the references denote two different prohibited activities, and that the term "occupy" actually means "continue to occupy" and, thus, applies to an offender who established his or her home before the restriction's effective date), the language is ambiguous regarding its prospective or retroactive application. The Court stated that the language presents at best a *suggestion* of retroactivity, which is insufficient to establish the necessary intent of the General Assembly that the provision be applied retroactively. As a result, the Court concluded that the restriction was not expressly made retroactive; it stated that, because of that conclusion, it was precluded from addressing the second part of the test; and it held that the restriction does not apply to an offender who bought his or her home and committed his or her offense before the effective date of the restriction. *Hyle v. Porter* (2008), 117 Ohio St.3d 165. (See **COMMENT 5** for a summary of the facts in the case.)

Operation of the bill

The bill modifies the SORN Law residence restriction so that, subject to a "preexisting ownership" exception the bill enacts, the restriction applies regardless of when the offender committed the sexually oriented offense or child-victim oriented offense and, regarding the occupancy portion of the restriction, regardless of when the

offender commenced the occupancy. Specifically, the bill provides that, *regardless of whether the person committed the offense prior to, on, or after the bill's effective date, no person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense may do any of the following (R.C. 2950.034(A)):*

(1) Establish a residence within 1,000 feet of any school premises, *provided that this prohibition does not apply to a person who establishes a residence by occupying residential premises within 1,000 feet of school premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 31, 2003 (the effective date of the school premises portion of the prohibition);*

(2) Establish a residence within 1,000 feet of any preschool or child day-care center premises, *provided that this prohibition does not apply to a person who establishes a residence by occupying residential premises within 1,000 feet of preschool or child day-care center premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 1, 2007 (the effective date of the preschool and child day-care center premises portion of the prohibition);*

(3) *Regardless of whether the occupancy began prior to, on, or after the bill's effective date, occupy residential premises within 1,000 feet of any school premises, provided that this prohibition does not apply to a person who occupies residential premises within 1,000 feet of school premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 31, 2003;*

(4) *Regardless of whether the occupancy began prior to, on, or after the bill's effective date, occupy residential premises within 1,000 feet of any preschool or child day-care center premises, provided that this prohibition does not apply to a person who occupies residential premises within 1,000 feet of preschool or child day-care center premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 1, 2007.*

Legislative intent and policy regarding the SORN Law

A provision of the SORN Law sets forth the intent and policy of the General Assembly regarding that Law and determinations of the General Assembly related to that Law (see **COMMENT 6** for a summary of the "determinations" portion of the provision). The bill modifies the "intent" and "policy" portion of the provision by adding language that pertains to the SORN Law's residency restriction and to the fact

that the restriction is not punitive in nature. Under the bill, the "intent" and "policy" portion states that (the bill's changes are in italics): (1) the General Assembly declares that, in providing in the SORN Law for registration regarding offenders and certain delinquent children who have committed sexually oriented offenses or child-victim oriented offenses, *for a limited restriction on the locales at which offenders who have committed any such offenses may reside*, and for community notification regarding Tier III sex offenders/child-victim offenders who are criminal offenders, public registry-qualified juvenile offender registrants, and certain other juvenile offender registrants who are about to be or have been released from imprisonment, a prison term, or other confinement or detention and who will live in or near a particular neighborhood or who otherwise will live in or near a particular neighborhood, it is the General Assembly's intent to protect the safety and general welfare of the people of Ohio, and (2) the General Assembly further declares that it is the policy of Ohio to require the exchange in accordance with the SORN Law of relevant information about sex offenders and child-victim offenders among public agencies and officials, to authorize the release in accordance with that Law of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection, *and to provide a limited residency restriction and other safeguards under this chapter from the potential acts of sex offenders and child-victim offenders*, and that the exchange or release of that information, *and the residency restriction and other safeguards*, are not punitive. (R.C. 2950.02(B).)

Registration duty of child adjudicated a delinquent child for committing a sexually oriented offense

Existing law

Under the existing SORN Law, an offender who is convicted of or pleads guilty to a sexually oriented offense or a child-victim oriented offense has the duty to register the offender's residence, school, institution of higher education, and place of employment address. A child who is adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense and who is classified a juvenile offender registrant based on that adjudication has the duty to register the child's residence address and, if the child also is determined to be a public registry-qualified juvenile offender registrant, the child's school, institution of higher education, and place of employment address. The SORN Law explicitly states that the registration duties of an offender who is not confined apply regardless of when the sexually oriented offense or child-victim oriented offense was committed and, except in one instance, also explicitly states that the registration duties of a delinquent child who is not confined apply regardless of when the sexually oriented offense or child-victim oriented offense was committed. The one instance in which the SORN Law does not explicitly state that a delinquent child's registration duty applies regardless of when the

offense was committed concerns the registration duty of a child who is adjudicated a delinquent child in Ohio for committing a sexually oriented offense. (R.C. 2950.04(A)(2) to (4) and 2950.041(A)(2) to (4).)

Operation of the bill

The bill modifies the existing provision that concerns the registration duty of a child who is adjudicated a delinquent child in Ohio for committing a sexually oriented offense to specify that the duty applies regardless of when the offense was committed (R.C. 2950.04(A)(3)(a)). The bill does not change any other requirement that must be satisfied in order for a child who is adjudicated a delinquent child for a sexually oriented offense to have a registration duty under the SORN Law, including the requirement that the juvenile court must classify the child a juvenile offender registrant based on that adjudication in order for the child to have the duty.

COMMENT

1. As used in the SORN Law, the terms "sexually oriented offense" and "child-victim oriented offense" have the following meanings (R.C. 2950.01, not in the bill):

"Sexually oriented offense" means any of the following violations or offenses committed by a person, regardless of the person's age:

(a) Rape, sexual battery, gross sexual imposition, sexual imposition, importuning, voyeurism, compelling prostitution, pandering obscenity, pandering obscenity involving a minor, pandering sexually oriented matter involving a minor, or illegal use of a minor in nudity-oriented material or performance;

(b) Unlawful sexual conduct with a minor when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded guilty to rape, sexual battery, unlawful sexual conduct with a minor, or the former offense of felonious sexual penetration;

(c) Unlawful sexual conduct with a minor when the offender is at least four years older than the other person with whom the offender engaged in sexual conduct, or when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct and the offender previously has been convicted of or pleaded guilty to rape, sexual battery, unlawful sexual conduct with a minor, or the former offense of felonious sexual penetration;

(d) Aggravated murder, murder, or felonious assault when the violation was committed with a sexual motivation;

(e) Involuntary manslaughter, when the base offense is a felony and when the offender committed or attempted to commit the felony that is the basis of the violation with a sexual motivation;

(f) Menacing by stalking committed with a sexual motivation;

(g) Kidnapping, other than when it is committed for the purpose of engaging in sexual activity with the victim against the victim's will and other than when it involves a risk of serious physical harm to the victim or, if the victim is a minor, a risk of serious physical harm or the causing of physical harm to the victim, when the offense is committed with a sexual motivation;

(h) Kidnapping committed for the purpose of engaging in sexual activity with the victim against the victim's will;

(i) Kidnapping when it involves a risk of serious physical harm to the victim or, if the victim is a minor, a risk of serious physical harm or the causing of physical harm to the victim, when the victim of the offense is under 18 and the offender is not a parent of the victim of the offense;

(j) Abduction, unlawful restraint, and criminal child enticement committed with a sexual motivation, or endangering children committed by enticing, permitting, using, or allowing, etc., a child to participate in or be photographed for material or performance that is obscene, is sexually oriented matter, or is nudity-oriented matter;

(k) A violation of any former law of Ohio, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), or (j) under this definition;

(l) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in paragraph (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), or (k) under this definition.

"Child-victim oriented offense" means any of the following violations or offenses committed by a person, regardless of the person's age, when the victim is under 18 and is not a child of the person who commits the violation: (a) kidnapping, other than when it is committed for the purpose of engaging in sexual activity with the victim against the victim's will and other than when it involves a risk of serious physical harm to the victim or, if the victim is a minor, a risk of serious physical harm or the causing of physical harm to the victim, when the violation is not included in paragraph (g) of the definition of "sexually oriented offense" set forth above, (b) abduction except

when committed with a sexual motivation, unlawful restraint except when committed with a sexual motivation, or criminal child enticement except when committed with a sexual motivation, (c) a violation of any former law of Ohio, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in clause (a) or (b) of this paragraph, or (d) any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in clause (a), (b), or (c) of this paragraph.

2. As used in the existing SORN Law residency restriction:

"Residential premises" means the building in which a "residential unit" (see below) is located and the grounds upon which that building stands, extending to the perimeter of the property. "Residential premises" includes any type of structure in which a residential unit is located, including, but not limited to, multi-unit buildings and mobile and manufactured homes. As used in this definition, "residential unit" means a dwelling unit for residential use and occupancy, and includes the structure or part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or two or more persons who maintain a common household. "Residential unit" does not include a halfway house or a community-based correctional facility. (R.C. 2950.01, not in the bill.)

"School premises" means the parcel of real property on which any school is situated, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the premises at the time a criminal offense is committed, or any other parcel of real property that is owned or leased by a board of education of a school or the governing body of a school for which the State Board of Education prescribes minimum standards under R.C. 3301.07 and on which some of the instruction, extracurricular activities, or training of the school is conducted, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted on the parcel of real property at the time a criminal offense is committed (R.C. 2950.01, not in the bill, by reference to R.C. 2925.01, not in the bill).

"Preschool or child day-care center premises" means all of the following: (a) any building in which any "preschool" (see the next paragraph) or "child day-care center" (see the second succeeding paragraph) activities are conducted if the building has signage that indicates that the building houses a preschool or child day-care center, is clearly visible and discernable without obstruction, and meets any local zoning ordinances which may apply, (b) the parcel of real property on which a preschool or child day-care center is situated if the parcel of real property has signage that indicates that a preschool or child day-care center is situated on the parcel, is clearly visible and

discernable without obstruction, and meets any local zoning ordinances which may apply, and (c) any grounds, play areas, and other facilities of a preschool or child day-care center that are regularly used by the children served by the preschool or child day-care center if the grounds, play areas, or other facilities have signage that indicates that they are regularly used by children served by the preschool or child day-care center, is clearly visible and discernable without obstruction, and meets any local zoning ordinances which may apply (R.C. 2950.034(C)(3)).

"Preschool" means any public or private institution or center that provides early childhood instructional or educational services to children who are at least three years of age but less than six years of age and who are not enrolled in or are not eligible to be enrolled in kindergarten, whether or not those services are provided in a child day-care setting. "Preschool" does not include any place that is the permanent residence of the person who is providing the early childhood instructional or educational services to the children described in this paragraph. (R.C. 2950.034(C)(2).)

"Child day-care center" means any place in which "child care" (see below) or publicly funded child care is provided for 13 or more children at one time or any place that is not the permanent residence of the licensee or administrator in which child care or publicly funded child care is provided for seven to 12 children at one time. In counting children for the purposes of this provision, any children under six years of age who are related to a licensee, administrator, or employee and who are on the premises of the center must be counted. "Child day-care center" does not include any of the following: (a) a place located in and operated by a hospital in which the needs of children are administered to, if all the children whose needs are administered to are monitored under the on-site supervision of a licensed physician or licensed registered nurse, and the services are provided only for children who, in the opinion of the child's parent, guardian, or custodian, are exhibiting symptoms of a communicable disease or other illness or are injured, (b) a child day camp, or (c) a place that provides child care, but not publicly funded child care, if an organized religious body provides the child care, a parent, custodian, or guardian of at least one child receiving child care is on the premises and readily accessible at all times, the child care is not provided for more than 30 days a year, and the child care is provided only for preschool and school children. As used in this provision, "child care" means administering to the needs of infants, toddlers, preschool children, and school children outside of school hours by persons other than their parents or guardians, custodians, or relatives by blood, marriage, or adoption for any part of the 24-hour day in a place or residence other than a child's own home. (R.C. 2950.034(C)(1), by reference to R.C. 5104.01, not in the bill.)

3. Under existing law, in addition to the cause of action for injunctive relief, a landlord may bring an action under R.C. Chapter 1923. (the Forcible Entry and Detainer

Law) for possession of residential premises located within 1,000 feet of any school premises or preschool or child day-care center premises if the name of the resident/tenant or other occupant who resides in or occupies the premises appears on the State Registry of Sex Offenders and Child-Victim Offenders and the State Registry of Sex Offenders and Child-Victim Offenders indicates that the resident/tenant or other occupant was convicted of or pleaded guilty to a sexually oriented offense or a child-victim oriented offense in a criminal prosecution and was not sentenced to a serious youthful offender dispositional sentence for that offense (R.C. 5321.03(A)(5) and 1923.02(A)(14), neither in the bill).

Existing law also prohibits a tenant of any residential premises located within 1,000 feet of any school premises or any preschool or child day-care center premises from allowing any person to occupy those premises if the person's name appears on the State Registry of Sex Offenders and Child-Victim Offenders and the State Registry of Sex Offenders and Child-Victim Offenders indicates that the person was convicted of or pleaded guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense in a criminal prosecution and was not sentenced to a serious youthful offender dispositional sentence for that offense (R.C. 5321.051(A)(1), not in the bill).

The landlord may terminate the rental agreement or other tenancy of the tenant and all other occupants if the above prohibition is violated or if a person establishes residency or occupies residential premises in violation of the SORN Law's residency restriction. If the landlord does not terminate the rental agreement, the landlord is not liable in a tort or other civil action in damages for any injury, death, or loss to person or property that allegedly results from that decision. (R.C. 5321.051(A)(2) and (B) and 1923.02(A)(15), not in the bill.)

4. The two-part test referred to by the Supreme Court in *Hyle, supra*, is based on R.C. 1.48 and Section 28, Article II, Ohio Constitution, and was developed in prior Supreme Court decisions. Under the first part of the test, a court faced with the issue of determining whether a statutory provision is to be applied retroactively initially determines whether the General Assembly expressly made the provision in question retroactive, as required by R.C. 1.48. Under the second part of the test, based on Section 28, Article II, Ohio Constitution, if the court determines under the first part that the General Assembly expressly made the provision in question retroactive, it then determines whether the provision retroactively impairs vested substantive rights or is merely remedial in nature. If the court determines the former, the retroactive application of the provision is unconstitutional, but if it determines the latter, the retroactive application is permissible. The court does not address the second part of the test unless it determines under the first part of the test that the General Assembly

expressly made the provision in question retroactive. *State v. Consilio* (2007), 114 Ohio St.3d 295; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100.

5. Under the facts in *Hyle, supra*, as stated in the Supreme Court's decision in the case, the appellant Porter was convicted of sexual imposition in 1995 and of sexual battery in 1999. The Court of Common Pleas of Hamilton County entered an order determining that Porter was a sexually oriented offender, and he subsequently registered as a sexually oriented offender. In 2003, the General Assembly imposed residency restrictions on certain sexually oriented offenders through the enactment of R.C. 2950.031, later amended and recodified as R.C. 2950.034. Following the enactment of R.C. 2950.031, Hyle, the chief legal officer of Green Township in Hamilton County, initiated an action against Porter that was the basis of the appeal. Hyle alleged that Porter had been convicted of a sexually oriented offense that was not registration-exempt and that Porter's residence in Cincinnati was within 1,000 feet of the premises of a school, in violation of R.C. 2950.031. Hyle sought a permanent injunction that would enjoin Porter from continuing to occupy his residence. Porter and his wife, Amanda Porter, had co-owned and lived in the house since 1991.

The trial court permanently enjoined Porter from occupying his home. The First District Court of Appeals affirmed the trial court decision and held that R.C. 2950.031 could be applied to an offender who bought his home and committed his offense before the effective date of the statute. Upon motion for reconsideration, and in response to the release of the decision in *Nasal v. Dover*, 169 Ohio App.3d 262, the court of appeals *sua sponte* certified its judgment as being in conflict with *Nasal*, and the Supreme Court agreed to resolve the conflict.

6. The "determinations" portion of the referenced SORN Law provision states, in relevant part, that the General Assembly determines and declares that it recognizes and finds all of the following: (a) if the public is provided adequate notice and information about offenders and delinquent children who commit sexually oriented offenses or child-victim oriented offenses, members of the public and communities can develop constructive plans to prepare themselves and their children for the offender's or child's release from confinement or detention--this allows members of the public and communities to meet with law enforcement personnel to prepare and obtain information about the rights and responsibilities of the public and the communities and to provide education and counseling to their children, (b) sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest, and (c) a person who is found to be a sex offender or a child-victim offender has a reduced

expectation of privacy because of the public's interest in public safety and in the effective operation of government.

HISTORY

ACTION	DATE
Introduced Reported, S. Judiciary - Criminal Justice	02-10-09 ---

S0042-RS-128.docx/jc

