

**REPORT BY THE CRIMINAL COURTS COMMITTEE,  
CRIMINAL LAW COMMITTEE, CRIMINAL JUSTICE OPERATIONS COMMITTEE  
AND CORRECTIONS AND COMMUNITY REENTRY COMMITTEE**

**THE IMPACT AND LEGALITY OF SEX OFFENDER RESIDENCY RESTRICTIONS  
CREATED BY NEW YORK'S SEXUAL ASSAULT REFORM ACT**

**INTRODUCTION**

This report is respectfully submitted by the Criminal Courts Committee, Criminal Law Committee, Criminal Justice Operations Committee and Corrections and Community Reentry Committee (the “Committees”) of the New York City Bar Association. The Association is an organization of over 24,000 members dedicated to improving the administration of justice. The members of the Committees include prosecutors, criminal defense attorneys, judges, law students, and academics who analyze laws and policies that affect the criminal justice system in New York.

Under the 2005 amendments to the Sexual Assault Reform Act (“SARA”), many convicted sex offenders in New York State are barred from “knowingly entering” within 1000 feet of the property line of any school or other facility used by persons under 18 years old. That residency and movement restriction has generated considerable debate, both as to its efficacy in protecting the public and its legality vis-a-vis the rights of convicted sex offenders. There is also an emerging consensus that the practical effect of this legislation, particularly in New York City, has been to create a housing crisis given the unavailability of compliant residences for convicted sex offenders.

The Committees support the need for appropriate monitoring and supervision of convicted sex offenders upon their release from custody. But as outlined below, residency and movement restrictions like those created by SARA are of questionable utility for the vast majority of sex offenders and can produce unintended consequences that subvert the very goals they were designed to achieve. This is especially true when those restrictions are imposed indiscriminately and without an individualized assessment of a particular sex offender’s public safety risk.

This report analyzes New York’s sex offender residency restriction statutes, surveys current social science on the efficacy of such restrictions and court opinions on their legality, and proposes areas for reform. Ultimately, while residency restrictions may well be necessary in certain rare cases, the Committees conclude that existing restrictions under SARA sweep too broadly and there is a pressing need for a more particularized approach to their application.

## NEW YORK'S SEX OFFENDER RESIDENCY AND MOVEMENT RESTRICTIONS

Over the last twenty years, the New York State Legislature has enacted a number of laws designed to monitor convicted sex offenders, prevent recidivism and protect the public. In addition to changes to the substantive crimes and the enactment of certain measures to assist and treat the victims of sexual assault, the laws have also included restrictions on a convicted sex offender's movement.

In 1996, The Sex Offender Registration Act ("SORA") went into effect. See Correction Law, § 168. This law, designed to protect the public from "the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior," set forth the rules and regulations for monitoring convicted sex offenders. See L 1995, ch. 192 § 1. Recognizing that all convicted sex offenders do not pose the same risk of recidivism or danger to the public, the Legislature set forth a framework by which to assess these risks and a related schematic for monitoring offenders based upon their assessed risk. See Correction Law § 168-l(6). An individual assessed to be a level three offender, a person deemed most in need of supervision in order to prevent recidivism, is the most closely monitored. See Correction Law § 168-l(6)(c).

In 2000, the Sexual Assault Reform Act ("SARA") went into effect. SARA created many changes in the law, but of relevance here, it created a mandatory restriction on the movement of certain convicted sex offenders. With a focus on individuals who prey upon children, and with a continued eye toward preventing recidivism, three specific statutes were enacted which sought to limit the potential contact between a sex offender who has committed his crime against a person and/or persons under the age of eighteen. Specifically, the Legislature created a mandatory restriction preventing offenders who have been convicted of enumerated crimes against individuals under eighteen years of age from entering upon school grounds, or facilities or institutions used primarily for the care and treatment of persons under eighteen when one or more persons under eighteen are in the facility or institution. See L 2000, ch 1; P.L. § 65.10(4-a); NY CLS Exec § 259-c(14); Correction Law § 272(9).

The new statutes created by SARA in regards to this mandatory restriction were: (1) Penal Law § 65.10 (4-a), which governs sex offenders serving a sentence of probation or conditional discharge; (2) Executive Law § 259-c(14), which governs sex offenders released on parole or serving a term of post-release supervision; and (3) Correction Law § 272(9), which governs sex offenders who have served a definite sentence and are then conditionally released.<sup>1</sup>

Notably, SARA also limited the definition of school grounds to "in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school." P.L. § 220.00(14)(a).

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<sup>1</sup> These statutes adopt similar prohibitions to each category of offenders. Please see Appendix A for the full text of each statute.

In 2005, these three related statutes were amended to broaden the definition of school grounds and extend the mandatory restriction to all persons who have been “designated a level three sex offender pursuant to subdivision six of section 168-I of the correction law,” irrespective of the nature of their conviction or the age of their victim. See L 2005 ch. 544, A.8894; P.L. § 65.10(4-a); NY CLS Exec § 259-c(14); Correction Law § 272(9).<sup>2</sup>

To do this, the Legislature adopted the Penal Law definition of school grounds in its entirety, thereby making it a mandatory restriction that the group of specified convicted sex offenders not knowingly enter:

(a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an “area accessible to the public” shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants. P.L. § 220.00(14) (emphasis added).

This 1000-foot zone is measured “as the crow flies.”<sup>3</sup> Thus, under current law, any level three sex offender, regardless of the nature of his or her underlying conviction or the age of the victim, cannot enter within one thousand feet of the property line of any school in New York State. As noted below, this has severely limited viable housing options.

There does seem to be some recognition by the Legislature of the housing crisis for convicted sex offenders that has arisen following passage of the 2005 amendments to the SARA statutes. In 2008, the Legislature enacted chapter 568 of the Laws of 2008 with the goal of both continuing to “better protect children, vulnerable populations and the general public from sex offenders,” while also recognizing the “importance of stable housing and support in allowing offenders to live in and re-enter the community and become law-abiding and productive citizens.” 18 N.Y.C.R.R. § 352.36(a)(1) and (2); see also, 9 N.Y.C.R.R. § 8002.7; NY CLS Exec § 243; NY CLS Soc Serv § 20. The Division of Parole, the Division of Probation and Correctional Alternatives, and the Office of Temporary and Disability Assistance are directed under that statute to “provide guidance concerning the placement and/or approval of housing for certain sex offenders” by considering many factors, including concentration of sex offenders in a particular area or on a particular property, accessibility to family/friends/treatment programs, and proximity to vulnerable populations. See 18 N.Y.C.R.R. § 352.36(b); see also, 9 N.Y.C.R.R. § 8002.7; NY CLS Exec § 243; NY CLS Soc Serv § 20(8). Nevertheless, Executive Law § 259-

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<sup>2</sup> In 2008, Penal Law § 65.10(4-a), Executive Law § 259-c(14), and Correction Law § 272(9) were amended to replace the language “section 255.25 of this chapter” with the language “section 255.25, 255.26, 255.27 of this chapter” to reflect the division of the crime of incest into different degrees.

<sup>3</sup> People v. Robbins, 5 N.Y.3d 556, 560 (2005).

c(14), and the 1000-foot exclusion zone, still appear to be a condition that must be satisfied even in the assessment of other factors relevant to a sex offender's residence.

## **PUBLIC POLICY ON SEX OFFENDER RESIDENCY RESTRICTIONS**

Since the 1990s, at least 30 states and many more local municipalities have enacted policies restricting sex offenders from living near schools and areas where children congregate.<sup>4</sup> These residency restrictions are aimed at increasing public safety by keeping offenders away from potential victims.<sup>5</sup> However, though residency restrictions are politically popular, research suggests they may not be practically effective. Further, these laws have unintended and counterproductive consequences for both the offender and the community. While residency restriction policies give the appearance of public safety, whether they actually make communities safer remains questionable at best.

There is surprisingly little research published on whether residency restrictions actually reduce recidivism among sex offenders or increase public safety.<sup>6</sup> However, the existing research casts doubt on the efficacy of these restrictions. Importantly, laws preventing offenders from living near places where children congregate target only a small subsection of sex offenses. The vast majority of sexually motivated crimes are committed by a family member or someone else known to the victim.<sup>7</sup> And persons who offend against family members or known victims rarely “cross-over” and offend against strangers.<sup>8</sup>

Even among offenders who seek out stranger victims, however, studies suggest that residency restrictions do not reduce recidivism. A 2007 Minnesota study examining the offense patterns of 224 sexual offenders released from incarceration in the years 1990-2005 indicated that residence restrictions would not have prevented any offenses.<sup>9</sup> The study determined that

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<sup>4</sup> Association for the Treatment of Sexual Abusers, *Sexual Offender Residence Restrictions*, <http://www.atsa.com/pdfs/Policy/2014SOResidenceRestrictions.pdf> (last visited Sept. 6, 2016).

<sup>5</sup> *Id.*

<sup>6</sup> Kelly M. Socia, *Residence Restriction Legislation, Sex Crime Rates, and the Spatial Distribution of Sex Offender Residences*, (Sept. 2011) <https://www.ncjrs.gov/pdffiles1/nij/grants/235979.pdf> (last visited Sept. 6, 2016).

<sup>7</sup> U.S. Dep't of Justice Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident and Offender* (2000), <http://www.bjs.gov/content/pub/pdf/saycrle.pdf> (last visited Sept. 6, 2016). Notably, sex offenders in New York who offend against family members are typically subject to their own specialized restrictions, including parole conditions that limit their contact with their minor children. See *Parental Contact Protocol*, DOCCS Directive No. 9601, enacted Aug. 21, 2013, <http://www.doccs.ny.gov/Directives/9601.pdf> (last visited Sept. 6, 2016) (discussing these restrictions).

<sup>8</sup> Jane Goodman-Delahunty, *Profiling Parental Child Sex Abuse*, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No. 465 (Jan. 2014), <http://aic.gov.au/publications/current%20series/tandi/461-480/tandi465.html> (last visited Sept. 6, 2016); Beauregard et al., *Decision Making in the Crime Commission Process: Comparing Rapists, Child Molesters, and Victim-Crossover Sex Offenders*, 39 CRIMINAL JUSTICE & BEHAVIOR 1275-1295 (2012); Fireston et al., *A Comparison of Incest Offenders Based on Victim Age*, 33 J. OF THE AMERICAN ACADEMY OF PSYCHIATRY & LAW 223-32 (2005).

<sup>9</sup> Beth M. Huebner, Timothy S. Bynum, et al., *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (July 2013) <https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf> (last visited Sept. 6, 2016).

sexual offenders who seek out victims “are more likely to go to an area relatively close to their home (i.e. within 20 miles of their residence), but still far enough away (i.e. more than one mile) to decrease the chances of being recognized.”<sup>10</sup> A Florida study concluded that treatment was more determinative of recidivism than where an offender lived, and found that repeat offenders were “careful not to re-offend in close geographical proximity to their homes.”<sup>11</sup> Similarly, a Colorado study determined that the recidivists among the 113 sexual offenders studied were no more likely to live near a school or daycare than the non-recidivists.<sup>12</sup> Though the motivation for passing residency restrictions is ostensibly public safety, one researcher found that the passage of residency restrictions was correlated not with any rise in actual sexual offending but rather with competitive election cycles.<sup>13</sup>

Apart from the questionable empirical basis for residency restrictions, there is widespread concern among experts that residency restrictions eliminate so many housing options that they actually compromise public safety.<sup>14</sup> Due to the dispersal of schools and places where children congregate, in many places it is virtually impossible for sex offenders to find housing.<sup>15</sup> Residency restrictions can thus effectively push sex offenders into illegal housing, transience, and homelessness.<sup>16</sup> This limits access to specialized treatment and impedes supervision by law enforcement.<sup>17</sup> It also creates hurdles for successful reintegration into society and could even increase recidivism.<sup>18</sup>

Residency restrictions can also prevent sexual offenders from accessing the very things that are proven to help offenders maintain a law-abiding life and successfully reenter society.<sup>19</sup> Studies show that family support and employment are significant to any offender’s successful reintegration into society.<sup>20</sup> Almost half the registered sex offenders who took part in a Florida

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<sup>10</sup> Kelly K. Bonnar-Kidd, Sexual Offender Laws and the Prevention of Sexual Violence and Recidivism, HEALTH POLICY AND ETHICS, Vol 100, No. 3 (March 2010).

<sup>11</sup> Jill S. Levenson & Leo P. Cotter, The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd, 49 INT. J. OFFENDER THER. & COMP. CRIMINOLOGY 168, 173 (2005).

<sup>12</sup> Sexual Offender Residence Restrictions, supra n.3.

<sup>13</sup> Socia, supra n.5.

<sup>14</sup> Mike Mosedale, Janus: No experts Support Residency Restrictions for Sex Offenders, Minnesota Lawyer (Mar. 31, 2016), <http://minnlawyer.com/2016/03/31/janus-no-experts-support-residency-restrictions-for-sex-offenders/> (last visited Sept. 6, 2016) (“I don’t think you can find any experts or any person who actually deals with sex offenders who thinks residency restrictions are effective. It’s amazing and quite uniform. That goes from Departments of Corrections to county attorneys and prosecutors to state task forces. Everybody says it’s a bad idea. It inhibits reentry. It inhibits stability. It inhibits supervision. And most likely it increases recidivism.”).

<sup>15</sup> Jill S. Levenson & Leo P. Cotter, at 169.

<sup>16</sup> Id. at 169.

<sup>17</sup> Sexual Offender Residence Restrictions, supra n.3.

<sup>18</sup> Jill S. Levenson & Kristen M. Zgoba, Community Protection and Repeat Sexual Offenses in Florida, INT. J. OFFENDER THER. & COMP. CRIMINOLOGY 1, 14 (2015).

<sup>19</sup> Id.

<sup>20</sup> Shelley Ross Saxon, Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives, 86 WASH. U.L. REV. 1397 (2009).

survey reported that residency restrictions “prevented them from living with supportive family members.”<sup>21</sup> Many of these offenders expressed fears that this placed them at greater risk for reoffending.<sup>22</sup> Further, the restrictions often force sex offenders to live in isolated areas where they have no access to treatment and employment.<sup>23</sup> In a well-publicized example of the unintended consequences of residency restrictions, registered sex offenders in Miami, Florida, who could not find housing compliant with the local residency rules, were found living in camps of temporary shelters under a bridge and on train tracks.<sup>24</sup>

Here in New York City, sex offenders who cannot find housing due to residency restrictions have clustered in dangerously overcrowded homes, illegally converted rooming houses, cheap motels, and homeless shelters.<sup>25</sup> In Far Rockaway, 23 offenders lived in one two-family home; in Brooklyn, 17 reported living in one two-family home.<sup>26</sup> In one case, at least 19 and as many as 50 men reported living in a converted medical office in Flatbush.<sup>27</sup> These makeshift living arrangements are often unsafe and unsanitary.<sup>28</sup> In the latter example, there were only 2 bathrooms for up to 50 men, and the building itself had been cited multiple times by the city for hazardous conditions.<sup>29</sup> The rooming house was operated by a shadowy nonprofit and managed by another resident with a criminal history.<sup>30</sup>

Ideally, legislation around sexually motivated offenses should serve both to promote public safety and rehabilitate offenders. Laws that fail to meet these goals, or that tend to undermine them, should be reconsidered. The practical efficacy of residency restrictions has not been proven, but as these examples illustrate, there is clear evidence that such policies create potentially dangerous negative consequences that, at times, can undermine the very goals those restrictions were enacted to serve.

## LITIGATION AROUND SEX OFFENDER RESIDENCY RESTRICTIONS

Given the practical effects of the 2005 SARA amendments on convicted sex offenders, there have been a variety of legal actions brought against Executive Law § 259-c(14) and, in particular, the 1000-foot residency restriction to which all level three sex offenders are now

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<sup>21</sup> Jill S. Levenson & Leo P. Cotter, at 172.

<sup>22</sup> Saxer, *supra* n.18.

<sup>23</sup> *Id.*

<sup>24</sup> Charles Rabin, *ACLU sues over rule on where sex offenders can live in Miami-Dade*, MIAMI HERALD (Oct. 23, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article3329717.html> (last visited Sept. 6, 2016).

<sup>25</sup> Jie Jenny Zou & Roger Miller, *Housing the Unwanted*, The New York World (Mar. 18, 2015), <http://www.thenewyorkworld.com/2015/03/18/housing-unwanted/> (last visited Sept. 6, 2016).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

subject. New York courts are divided on the law's constitutionality, and the issue is now pending before the Court of Appeals. All lower courts appear to acknowledge, however, that whether constitutional or not, the 1000-foot residency restriction has led to harsh consequences for convicted sex offenders, especially those seeking to live in New York City since, as one court observed, the "chance that [a sex offender] could find . . . an apartment in New York City which was not within 1000 feet of a school is probably non-existent."<sup>31</sup> That view is consistent with that of courts nationwide which have considered this issue, thus confirming a growing awareness of the need for legislative reform of sex offender residency restrictions,

The 1000-foot residency restriction imposed by Executive Law § 259-c(14) was found unconstitutional under the Ex Post Facto Clause in Berlin v. Evans, 31 Misc.3d 919 (Sup Ct., N.Y. Co., Apr. 11, 2011). There, the petitioner, who had resided in Manhattan prior to being convicted of a sex offense, was released to parole as a low-risk, Level I sex offender and was barred under § 259-c(14) from returning to his former apartment because it was located within 1000 feet of a school. The petitioner encountered significant difficulty locating compliant housing and ultimately ended up residing at an address in the Bronx. In declaring § 259-c(14) unconstitutional, the court analyzed whether it increased the punishment for a criminal offense under the framework governing Ex Post Facto claims set forth in Smith v. Doe, 538 U.S. 84 (2003). Not only did the court conclude that the legislative intent for § 259-c(14) was arguably punitive, but it held that, as applied to the petitioner, the law's impact clearly was as well, since he had "effectively been banished from Manhattan" without any "individual assessment" as to his risk to public safety.<sup>32</sup>

One other trial court in New York has declared § 259-c(14) unconstitutional on this same basis. See Devine v. Annucci, 45 Misc.3d 1001 (Sup. Ct., Kings Co., Sept. 29, 2014). There, the petitioner was convicted of sex offenses in 2002, released from prison in 2008 as a low level sex offender, and began serving a term of post-release supervision. After several years without incident, the petitioner was informed in 2013 that the residence he shared with his fiancé and her children was not compliant with § 259-c(14), forcing him to move. Like in Berlin, the Devine court ruled that § 259-c(14)'s residency restriction was unconstitutional because it essentially banished the petitioner from the entire borough of Brooklyn given that few if any residences were more than 1000 feet from school grounds. The court underscored that, because "New York City is a metropolis densely populated by schools and other institutions that primarily cater to individuals under the age of 18," § 259-c(14) was not, in effect, "a residency restriction, but a comprehensive movement restriction."<sup>33</sup> Other factors bearing on the restriction's unconstitutionality included the lack of any individualized assessment and that allowing sex offenders to reside at home tended to reduce recidivism, something which the law undermined.

By comparison, the Appellate Division, First Department, rejected an Ex Post Facto challenge to § 259-c(14) in a split decision. See Williams v. Dep't of Corr. & Cmty.

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<sup>31</sup> People v. McFarland, 35 Misc.3d 1243(A), 2012 WL 2367876 at \*7 (Sup. Ct., N.Y. Cnty June 21, 2012), rev'd on other grounds by 120 A.D.3d 1121 (1st Dep't 2014).

<sup>32</sup> Berlin, 31 Misc.3d at 926-30. Notably, because the People's appeal from that decision was dismissed due to the petitioner's death, there was no appellate review. See Berlin v. Evans, 103 A.D.3d 405 (1st Dep't 2013).

<sup>33</sup> Devine, 45 Misc.3d at 1007.

Supervision, 136 A.D.3d 147 (1st Dep’t 2016) (Gische, J.). Affirming the trial court’s ruling, the First Department relied substantially on the reduced liberty interests of parolees, analogizing the 1000-foot residency restriction to other types of special conditions imposed as part of parole and held that it was not punitive. Nevertheless, it recognized that the restraints imposed by § 259-c(14) were “neither minor nor indirect, especially when applied to parolees released to live in densely populated areas” like New York City.<sup>34</sup> The court further held that, under the highly deferential standard applicable to Ex Post Facto claims, there was a sufficiently rational connection between § 259-c(14)’s nonpunitive intent and its actual effect on parolees to survive a constitutional challenge. Disagreeing with the majority, the dissent concluded that § 259-c(14)’s putative effect amounted to retroactive punishment that violated the Ex Post Facto Clause, especially given the absence of a “factual context to support a rational connection between the 1,000-foot movement and residency restriction and its stated legitimate purpose of protecting children from sex offenders.”<sup>35</sup>

Although Williams is the only Appellate Division decision to address directly the constitutionality of § 259-c(14), Devine is currently on appeal before the Second Department. Were it to affirm the trial court’s ruling, there would be a clear split in the Appellate Division on this issue. In any event, leave was recently granted in Williams and so the Court of Appeals will soon consider the constitutionality of § 259-c(14).<sup>36</sup>

The lack of consensus among New York courts regarding the constitutionality of § 259-c(14)’s residency restriction reflects a national trend. State and federal courts throughout the country have reached widely different conclusions while analyzing analogous statutes. Sex offender residency restrictions have been found unconstitutional on grounds of vagueness and, like in New York, as violative of the Ex Post Facto Clause.<sup>37</sup> Other courts have disagreed, however, ruling that they neither violate the Ex Post Facto Clause nor a sex offender’s substantive due process rights.<sup>38</sup> Notably, at least one court has declared a sex offender

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<sup>34</sup> Williams, 136 A.D.3d at 157.

<sup>35</sup> Williams, 136 A.D.3d at 168 (Kapnick, J., dissenting); see id. at 165-69.

<sup>36</sup> Only one federal court seems to have considered the constitutionality of § 259-c(14), rejecting a pro se Ex Post Facto challenge to the 1000-foot residency restriction. See Wallace v. New York, 40 F.Supp.3d 278 (E.D.N.Y. 2014).

<sup>37</sup> See, e.g., Doe v. Snyder, 101 F.Supp.3d 672 (E.D. Mich. 2015) (1000-foot Michigan sex offender residency restriction unconstitutional as void for vagueness given inability to delineate geographic exclusion zones); Starkey v. Oklahoma Dep’t of Corr., 305 P.3d 1004 (Okla. 2013) (2000-foot Oklahoma sex offender residency restriction unconstitutional as applied under Ex Post Facto Clause); State v. Williams, 952 N.E.2d 1108 (Oh., 2011) (application of amendments to state sex offender law enacted following defendant’s date of conviction unconstitutional as violative of Ex Post Facto Clause); F.R. v. St. Charles Cnty Sheriff’s Dep’t, 301 S.W.3d 56 (Mo. 2010) (same, as to 1000-foot Missouri statute); Commonwealth v. Baker, 295 S.W.3d 437 (Ky. 2009) (same, as to 1000-foot Kentucky statute); State v. Pollard, 908 N.E.2d 1145 (Ind. 2009) (same, as to 1000-foot Indiana statute); Mikaloff v. Walsh, 2007 WL 2572268 (N.D. Ohio, Sept. 4, 2007) (same, as to 1000-foot Ohio statute).

<sup>38</sup> See, e.g., McGuire v. Strange, 83 F.Supp.3d 1231 (M.D. Ala. 2015) (Alabama sex offender residency restriction not unconstitutional as applied under Ex Post Facto Clause); Duarte v. City of Lewisville, --- F.Supp.3d ---, 2015 WL 5719835 (E.D. Tex., Sept. 28, 2015) (1500-foot local municipal sex offender residency restriction not unconstitutional); Doe v. Miller, 405 F.3d 700 (8th Cir. 2005) (2000-foot Iowa sex offender residency restriction did not violate Ex Post Facto Clause or offender’s substantive due process rights); Weems v. Little Rock Police Dep’t, 453 F.3d 1010 (8th Cir. 2006) (same, as to 2000-foot Arkansas statute).



residency restriction unconstitutional as tantamount to an unlawful taking of the sex offender's property.<sup>39</sup>

One of the most recent state rulings on the legality of a sex offender residency restriction was the decision of the California Supreme Court in In re Taylor, 343 P.3d 867 (Cal. 2015). There, designated sex offenders in San Diego County who had been released to parole challenged the constitutionality of a residency restriction which the State had used as a mandatory condition for all sex offender parolees, analogous to how § 259-c(14) operates in New York. The manner by which the California Supreme Court analyzed that legislation illustrates the panoply of legal and public policy issues that arise with such statutes and suggests one way the New York Court of Appeals may view Executive Law § 259-c(14).

Construing the petitioners' claim in In re Taylor as an as-applied constitutional challenge, the California Supreme Court held that blanket enforcement of the residency restriction against all sex offender parolees violated their substantive due process rights to intrastate travel, to establish and maintain a home, and to freely associate with others within their homes because the restriction bore no rational relationship to any advanced state interest. The court emphasized, among other things, that the restriction barred parolees from residing in virtually all urban areas and living and associating with family members; curtailed severely the parolees' access to rehabilitative social services, typically located in densely populated areas, which hindered their treatment and ability to maintain employment; and increased substantially incidents of parolee homelessness, which put the public at risk because it made supervision far more difficult. Thus, while the court held that the state retained the authority to impose residency restrictions on an individualized basis given a parolee's particular circumstances, it ruled that universal enforcement of the statutory residency restriction was unconstitutional.

The decision in In re Taylor underscores a critical problem with sex offender residency restrictions that many courts have identified: the need for individualized assessment. That issue informed the decisions in Berlin, 31 Misc.3d 919, and Devine, 45 Misc.3d 1001, and speaks to one of the fundamental flaws with such legislation.

Litigation around the 1000-foot buffer zone created by § 259-c(14) has focused on more than just the constitutionality of the statute itself. As noted already, the scarce supply of housing in New York that complies with that restriction, especially in New York City, has directly affected the release of sex offenders from prison. In several cases, inmates who have been held in state prison after completing their sentences because suitable housing could not be identified have challenged their continued detention.<sup>40</sup> The Appellate Division, Third Department, has ruled, however, that an inmate may not be held in prison past the expiration of his sentence while

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<sup>39</sup> See Mann v. Georgia Dep't of Corr., 653 S.E.2d 770 (Ga. 2007) (Georgia sex offender residency restriction amounted to unconstitutional taking where day-care center opened within 1000-foot exclusion zone of defendant's house, preventing him from residing there).

<sup>40</sup> See, e.g., People ex rel. Johnson v. Superintendent, Fishkill Corr. Facility, 47 Misc.3d 984 (Sup. Ct., Dutchess Co., Mar. 3, 2015); People ex rel. White v. Superintendent, Woodbourne Corr. Facility, 45 Misc.3d 1202(A) (Sup. Ct., Sullivan Co., Sept. 25, 2014). Notably, a class action was recently filed challenging DOCCS's continued detention of sex offenders beyond their release date. See Verified Petition in R.A. v. Annucci, <https://www.documentcloud.org/documents/2841853-R-A-v-Annucci.html> (last visited Sept. 6, 2016).

serving post-release supervision, even if § 259-c(14) compliant housing cannot be located.<sup>41</sup> Instead, the inmate “must be released to either suitable housing or a residential treatment facility,” and “DOCCS remains statutorily obligated to assist in the process” of identifying suitable housing.<sup>42</sup>

Clearly, therefore, § 259-c(14)’s residency restriction continues to present serious questions for New York courts, both in terms of its constitutionality and its practical effect on the release and management of convicted sex offenders. Absent a definitive ruling from the Court of Appeals, these will remain open questions. But the concerns identified by New York courts about § 259-c(14), and courts nationwide about residency restrictions generally, highlight possible areas for reform.

## CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, the Committees believe that there is a considerable need for reform of SARA and its sex offender residency and movement restrictions. As a practical matter, the scarcity of compliant housing for sex offenders, especially in New York City, is of serious concern. Not only has it resulted in sex offenders being held in prison past their release date, but as recognized by the California Supreme Court in In re Taylor, the lack of housing can actually increase recidivism by depriving sex offenders of employment, family ties, social services, and even supervision. The 1000-foot exclusion zone created by Executive Law § 259-c(14) can thus undermine the very goals it was enacted to achieve. Moreover, there are legitimate grounds to question the constitutionality of SARA’s residency and movement restrictions and the efficacy of such restrictions in general.

For all of these reasons, the Committees urge the Legislature to reconsider Executive Law § 259-c(14) and propose the following recommendations:

- (1) The definition of “school grounds” under SARA should be limited to P.L. § 220.00(14)(a), eliminating the 1000-foot buffer zone, consistent with how the statute was enacted originally**

SARA’s residency restriction was limited originally to a prohibition on knowingly entering into or upon “school grounds” as defined under P.L. § 220.00(14)(a) – i.e. the “real property” line of any school building, structure, playing field, or land. The 2005 amendments to SARA substantially expanded this restriction by adopting the full definition of “school grounds” under P.L. § 220.00, which included a 1000-foot zone extending beyond the real property line. See P.L. § 220.00(14)(b).

The above shows that it was the creation of this 1000-foot zone that has proved most problematic, both legally and practically. The Committees recommend, therefore, that SARA be amended so that its definition of “school grounds” be limited to that provided under P.L.

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<sup>41</sup> See People ex rel. Green v. Superintendent of Sullivan Corr. Facility, 137 A.D.3d 56 (3d Dep’t 2016).

<sup>42</sup> Id. at 60; see also Joseph Goldstein, Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates, N.Y. TIMES (Aug. 21, 2014) (reporting on this problem).

§ 220.00(14)(a), thus eliminating the 1000-foot buffer zone, which is consistent with how the statute was enacted originally.

**(2) Section 259-c(14)'s residency and movement restrictions should not apply automatically**

The above confirms the questionable utility of sex offender residency and movement restrictions in general. Yet even assuming that such restrictions may be useful in certain cases, § 259-c(14) sweeps far too broadly by making vast numbers of sex offenders automatically subject to those restrictions without any determination as to their necessity. Not only does this over application undermine SARA's goals by potentially increasing recidivism rates, but the lack of a particularized assessment raises serious questions about the constitutionality of the restrictions. The Committees recommend, therefore, that § 259-c(14) be amended to eliminate the automatic application of that statute's residency and movement restrictions to any sex offender.

**(3) The People should bear the burden of proving the necessity of § 259-c(14) based on the sex offender's individualized circumstances**

Instead of § 259-c(14)'s automatic application, the Committees recommend that the statute's residency and movement restrictions should apply only if the People prove their necessity based on the sex offender's individualized circumstances – i.e. by demonstrating that the restrictions are necessary to protect the public from that specific sex offender. This determination should be made by the court at sentencing on the underlying offense, just as with other special conditions of parole or supervised release, and would be subject to later revision, where applicable, given changed circumstances. For sex offenders whose underlying offenses are from another jurisdiction, the court would determine at the SORA hearing whether the People had proved the necessity of the restrictions by clear and convincing evidence.

Criminal Courts Committee  
Kerry Ward, Chair\*

Criminal Law Committee  
Monica J. Hickey-Martin, Chair

Criminal Justice Operations Committee  
Risa B. Gerson, Chair

Corrections and Community Reentry Committee  
Alex Lesman, Chair

October 2016

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\* This report was drafted under the leadership of Kate Paek.

## APPENDIX A

Penal Law § 65.10 (4-a), which governs sex offenders serving a sentence of probation or conditional discharge:

4-a. When imposing a sentence of probation or conditional discharge upon a person convicted of a offense defined in article one hundred thirty, two hundred thirty-five or two hundred sixty-three of this chapter, or section 255.25 of this chapter, and the victim of such offense was under the age of eighteen at the time of such offense, the court shall require, as a mandatory condition of such sentence, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in paragraph (a) subdivision fourteen of section 220.00 of this chapter, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her probation officer or the court and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the probation officer or the court and the superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender. P.L. § 65.10(4-a) (2000).

Executive Law § 259-c(14), which governs sex offenders released on parole or serving a term of post-release supervision:

14. notwithstanding any other provision of law to the contrary, where a person serving a sentence for an offense defined in article one hundred thirty, one hundred thirty-five or two hundred sixty-three of the penal law or section 255.25 of the penal law and the victim of such offense was under the age of eighteen at the time of such offense, is released on parole or conditionally released pursuant to subdivision one or two of this section, the board shall require as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in paragraph (a) of subdivision fourteen of section 220.00 of the penal law, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while on or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution, such sentenced offender may, with the written authorization of his or her parole officer and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited

purposes authorized by the parole officer and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender. NY CLS Exec § 259-c(14) (2000).

Correction Law § 272(9), which governs for sex offenders who have served a definite sentence and are then conditionally released:

9. notwithstanding any other provision of law to the contrary, where a person serving a definite sentence for an offense defined in article one hundred thirty, two hundred thirty-five or two hundred sixty-three of the penal law or section 255.25 of the penal law and the victim of such offense was under the age of eighteen at the time of such offense, is conditionally released pursuant to section 70.04 of the penal law, the local conditional release commission shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in paragraph (a) of subdivision fourteen of section 220.00 of the penal law or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her probation officer and the superintendent or chief administrator of the facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the probation officer and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender. Correction Law § 272(9) (2000).