

**REPORT OF THE JUDICIAL COUNCIL
ADVISORY COMMITTEE ON K.S.A. 59-29a11 REGARDING
RESIDENCY RESTRICTIONS FOR SEXUALLY VIOLENT PREDATORS
ON TRANSITIONAL OR CONDITIONAL RELEASE**

DECEMBER 2, 2016

In May 2016, Senator Jeff King asked the Judicial Council to review K.S.A. 59-29a11(b) and its limitations on the location of transitional or conditional release facilities for individuals who have participated in the sexually violent predator program. The Judicial Council agreed to undertake the study and created a new advisory committee for the purpose.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Advisory Committee on K.S.A. 59-29a11 are:

Hon. Bruce Gatterman, Chair, Chief Judge of the 24th Judicial District; Larned
Wes Cole; Chairman of the Governor's Behavioral Health Services Planning Council;
Osawatomie

Eldon Dillingham, Member of the Family, Friends and Other Concerned Citizens of
SPTP Residents; Wamego

Dr. Mike Dixon, Director and Chief Forensic Psychologist for SPTP; Parsons

Laura Farmer, Department of Corrections Victims Services; Topeka

Mike Francis, defense attorney; Topeka

Ed Klumpp, Kansas Association of Chiefs of Police, Kansas Sheriffs Association, and
Kansas Peace Officers Association; Tecumseh

Kimberly Lynch, Senior Litigation Counsel, Kansas Department for Aging and
Disability Services; Topeka

Derenda Mitchell, Director of the Attorney General's Sexually Violent Predator Unit;
Topeka

Hon. William Ossmann; District Judge in the 3rd Judicial District; Topeka

Brandon Smith, Policy Director, Governor's Office; Topeka

METHOD OF STUDY

The Advisory Committee on K.S.A. 59-29a11 held three meetings, one subcommittee meeting, and one conference call during the fall of 2016. In addition to Sen. King's letter requesting the study of the statute (Attachment #1), the Committee reviewed the following materials:

- 2016 SB 481, which would have amended K.S.A. 59-29a11(b), and related legislative minutes and testimony
- The Sexually Violent Predator Act, K.S.A. 59-29a01, *et seq.*, and case law about its constitutionality.
- Legislative history relating to K.S.A. 59-29a11(b).
- Other states' statutes setting residency restrictions.
- Research findings on sex offender residency restrictions from the Kansas Department of Corrections website.
- Law review and other articles on the efficacy and constitutionality of sex offender residency restrictions.

BACKGROUND

Sexual Predator Treatment Program

Kansas enacted the Sexually Violent Predator Act in 1994. Under the Act, a person found to be a sexually violent predator may be civilly committed to the Sexual Predator Treatment Program (SPTP) at Larned State Hospital. "Sexually violent predator" is defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence." K.S.A. 59-29a02(a).

There are three tiers in the SPTP. The last tier and transitional release are conducted at reintegration facilities and are followed by conditional release. After completing the first two

inpatient tiers of treatment, if the secretary of KDADS determines the person is not likely to reoffend, the person may petition the court to be placed on transitional release. K.S.A. 59-29a10. “Transitional release” is defined as “any halfway house, work release, sexually violent predator treatment facility or other placement designed to assist the person’s adjustment and reintegration into the community once released from commitment.” K.S.A. 59-29a02(i).

From transitional release, treatment staff may recommend to the court that the person be placed on conditional release. K.S.A. 59-29a18. During conditional release, the person is supervised by the court. After five years of remaining violation free while on conditional release, a person may petition the court for final discharge from the program. K.S.A. 59-29a19.

K.S.A. 59-29a11(b) sets limitations on the location of both transitional and conditional release facilities and buildings. The statute provides:

“No transitional release or conditional release facility or building shall be located within 2,000 feet of a licensed child care facility, an established place of worship, any residence in which a child under 18 years of age resides, or the real property of any school upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any grades one through 12. This subsection shall not apply to any state institution or facility.”

Although subsection (b) applies to both transitional release and conditional release buildings or facilities, in reality, there are currently no transitional release facilities or buildings that fall under the statute’s limitations because all three of the existing transitional release facilities are located on state hospital grounds and run by KDADS. Therefore, they are exempt from the provisions of subsection (b).

When a person is placed on transitional release, he will begin looking for his own housing within the community where he will live once he is placed on conditional release. Housing is approved by both the treatment staff and the court. This is the point at which it can be difficult to find housing that meets the restrictions set out in K.S.A. 59-29a11(b).

Legislative History of K.S.A. 59-29a11(b)

The residency restrictions contained in K.S.A. 59-29a11(b) were first added to the statute in 2006 by 2006 SB 506, which was heard in both the House and Senate Judiciary Committees. The Committee reviewed the minutes and written testimony from those legislative committee meetings. Recommended by then Attorney General Phil Kline, as originally drafted, SB 506 would have imposed residency restrictions on both registered sex offenders generally as well as persons on transitional or conditional release from the SPTP.

The Department of Corrections persuaded the Senate Judiciary Committee to remove the residency restrictions for registered sex offenders and add a provision prohibiting cities and counties from adopting their own residency restriction on sex offenders. (Now K.S.A. 22-4913(a).) The DOC cited research indicating that residency restrictions for registered sex offenders are not effective and may actually be detrimental to public safety.

2016 Proposed Legislation to Amend K.S.A. 59-29a11(b)

In 2016, the legislature was asked to consider amending K.S.A. 59-29a11(b) by reducing the 2000 foot restriction to $\frac{1}{4}$ mile (1320 feet) and by deleting the restriction on living within 2000 feet of a child's residence. See 2016 SB 481. After a hearing, the Senate Judiciary Committee amended the bill by adding back a 300 foot restriction on living near a child's residence. The committee recommended the bill favorably for passage as amended, but the bill was never debated or voted on by the full Senate.

DISCUSSION

In his letter requesting that the Judicial Council review K.S.A. 59-29a11(b), Senator King specifically asked the Council to "examine the constitutionality and practicality of these geographic restrictions, while putting primary emphasis on public safety. Any learnings that the Judicial Council could incorporate from other states would be greatly appreciated."

At least 30 states have some type of residency restrictions for sex offenders. These restrictions vary in the kinds of places that are off-limits, the size of the buffer zone, and the types of offenders to whom the restrictions apply. See Cynthia Calkins et al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 Psychol. Pub. Pol'y & L. 443, 453 (2014).

The Committee acknowledged that there is research indicating that residency restrictions on sex offenders in other states have been ineffective at reducing recidivism and have had unintended consequences such as causing offenders to go underground because of the difficulty in finding housing. Restrictions have prevented some offenders from living with supportive family members or living near employment opportunities and treatment providers. See *id.* at 454-55.

However, some Committee members questioned the relevance of this research because it deals with broad restrictions on sex offenders generally and not with restrictions on sexually violent predators who have been subject to civil commitment. Kansas does not have residency restrictions on sex offenders generally and, in fact, prohibits cities and counties from enacting such restrictions. See K.S.A. 22-4913(a). The residency restrictions in K.S.A. 59-29a11(b) apply only to persons who have been civilly committed as sexually violent predators and not sex offenders in general. Persons who have been civilly committed as sexually violent predators represent only a small percentage of all sex offenders.

There was a difference of opinion on the Committee about the relevance of distinguishing between sex offenders generally and sexually violent predators who have been subject to civil commitment. On one hand, persons who have been civilly committed as sexually violent predators have been found by a court or jury to be likely to engage in repeat acts of sexual violence. See K.S.A. 59-29a07; 59-29a02(a). On the other hand, these persons have completed their inpatient treatment and are only placed on transitional or conditional release after a court hearing to determine if their mental abnormality or personality disorder has so changed that the person is safe to be placed on release. See K.S.A. 59-29a08; 59-29a18.

Several Committee members shared that, in their personal experience, the residency restrictions found in K.S.A. 59-29a11(b) have made it more difficult, though not impossible, for persons petitioning for conditional release to find housing, particularly the restriction on living within 2000 feet of the residence of a child. Difficulty in finding housing has not yet been a widespread problem because of the relatively small number of people who have reached the conditional release stage. However, the number of people petitioning to be placed on conditional release is expected to increase in the future.

In addition, some Committee members believe there is a good rationale for having residency restrictions for sexually violent predators. For example, from a clinical perspective, when a sexually violent predator has visual access to children, the predator may have more deviant thoughts about children and that can start the offending cycle. Treatment plans for sexually violent predators on conditional release are designed to limit this kind of situation, and it would be counterproductive to therapy for a predator to live in close proximity to children. In addition, from a law enforcement perspective, observation of children is often a predator's first step and is also the stage at which law enforcement is commonly called in to investigate suspicious activity. If a predator can observe children from his own residence without being noticed, that is one less opportunity for law enforcement to intervene.

The consensus of the Committee was that there should be some residency restrictions for persons on transitional or conditional release, but those restrictions should not be so burdensome that they make it unreasonably difficult to find housing. The Committee agreed that it is important for people on release not to become isolated from their communities; they need to be near their support systems, jobs and public transportation.

Proposed amendments

After reviewing K.S.A. 59-29a11(b) and other states' laws on residency restrictions, the Committee identified several areas where the Kansas statute could be clarified or improved. The Committee recommends proposed legislation, which accomplishes the following:

1) Clarifies that the restrictions apply to any place where a person on transitional or conditional release resides.

2) Creates a mechanism for the court to grant exceptions to the residency restrictions, but limits the court from setting a restriction less than 500 feet.

3) Provides that if a school, day care, etc. moves in within the restricted distance from a person's court-approved residence after the person has established residence, that will not constitute a violation of transitional or conditional release.

4) Requires a conditional release plan to include provisions setting out what a person should do if he loses his court-approved housing due to an emergency situation, such as a natural disaster or eviction.

The most important element of the proposed legislation is the provision allowing the court to grant exceptions to the residency restrictions down to a minimum of 500 feet after considering the recommendation of the treatment staff and the person and after making written findings on the record. Authorizing the court to grant such exceptions would allow the restrictions to be more tailored to the individual and the community. For example, not all sexually violent predators are pedophiles, so child-related restrictions are not always appropriate. Allowing individualized residency restrictions is consistent with recent proposed changes to the sexual predator treatment program that also focus on more individualized treatment.

The Committee discussed whether it would be helpful to reduce the current 2000 foot restrictions. As one option, the Committee reviewed 2016 SB 481, which would have set different distance restrictions on schools, churches and child care facilities (1/4 mile) versus homes where children reside (300 ft). However, a majority of the Committee ultimately agreed that the better approach was to leave the restrictions at 2000 feet but allow the court to grant exceptions depending upon individual circumstances.

Constitutionality

Part of Senator King's study request was for the Council to examine the constitutionality of the residency restrictions in K.S.A. 59-29a11(b). The Committee chose not to opine on the ultimate legal question of whether the statute's provisions are constitutional, either as they appear in current law or as the Committee recommends they be amended. However, the Committee did review case law on the topic from other jurisdictions and noted the following trends.

Statutes imposing residency restrictions on sex offenders have been upheld in many of the jurisdictions where they have been challenged. See *Validity of Statutes Imposing Residency Restriction on Registered Sex Offenders*, 25 A.L.R.6th 227. The leading case in this area is *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 757 (U.S. 2005). In that case, the Eighth Circuit Court of Appeals held that an Iowa statute prohibiting persons who had committed a sex offense against a minor from residing within 2,000 feet of a school or child care facility did not violate due process, was not an ex post facto violation, did not interfere with the right of offenders to travel, and did not violate the right against self-incrimination.

While there do not appear to be any cases dealing specifically with residency restrictions against sexually violent predators who have been subject to civil commitment, there are some cases in which courts have found broad residency restrictions against sex offenders to be unconstitutional, particularly in the context of retroactive application. See, e.g., *Nasal v. Dover*, 169 Ohio App. 3d 262, 862 N.E.2d 571 (2006) (residency restrictions were unconstitutional as retroactively applied to offender who owned and lived in home near a school for years before residence restrictions were enacted leading to trial court order that he vacate his residence). See also *Elwell v. Township of Lower*, 2006 WL 3797974 (NJ Super Ct. Law Div. 2006) (residency restrictions violated due process rights under New Jersey Constitution because they were overly broad, did not differentiate between tiers of offenders, and did not attempt to assess actual risk posed by individual offender); and *In re Taylor*, 60 Cal. 4th 1019, 184 Cal. Rptr. 3d 682, 343 P.3d 867 (2015) (in county where 97% of multifamily rental housing was not compliant with residency restrictions, blanket enforcement of restrictions was unconstitutional).

Amending the Kansas statute to clarify the extent of its application and to allow more individualized residency restrictions should make it less vulnerable to a constitutional challenge.

RECOMMENDATION

The Committee recommends the attached proposed legislation.

59-29a11. Transitional release, conditional release or final discharge; subsequent discharge petitions, limitations; prohibition of location of facilities; facilities subject to zoning; county limitations; annual report by secretary for aging and disability services. (a) If a person has previously filed a petition for transitional release, conditional release or final discharge without the secretary for aging and disability services approval and the court determined either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person's condition had not significantly changed so that it is safe for the person to be at large, then the court shall deny the subsequent petition, unless the petition contains facts upon which a court could find the condition of the petitioner had significantly changed so that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing.

(b)(1) No person on transitional release or conditional release facility or building shall be located reside within 2,000 feet of a licensed child care facility, an established place of worship, any residence in which a child under 18 years of age resides, or the real property of any school upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any grades one through 12. This subsection shall not apply to a person residing in any state institution or facility.

(2) After considering the recommendation of the treatment staff and the person, and after making written findings on the record, the court may grant exceptions to any of the geographic restrictions in this subsection, except that the court may not set a restriction of less than 500 feet.

(3) Changes in the ownership of or use of property within the restricted distance from the residence of a person on transitional release or conditional release that occur after the person establishes a court-approved residence shall not form the basis for a finding that the person has violated the terms of transitional or conditional release. For purposes of this subsection, a person has established a court-approved residence when the person does any of the following with court approval:

(A) Purchases a residence or enters into a specifically enforceable contract to purchase a residence.

(B) Enters into a written lease contract for a residence and for as long as the person is lawfully entitled to remain on the premises.

(C) Resides with an immediate family member who established residence in accordance with this subsection. For purposes of this subsection, "immediate family member" means a child or sibling who is 18 years of age or older, or a parent, grandparent, legal guardian, or spouse.

(4) Any conditional release plan under K.S.A. 59-29a19 shall include provisions directing what the person must do to establish a temporary residence in the event that the person loses their court-approved residence as a result of an emergency situation, including but not limited to eviction or an act of God that renders the residence uninhabitable.

(c) Transitional release or conditional release facilities or buildings shall be subject to all regulations applicable to other property and buildings located in the zone or area that are imposed by any municipality through zoning ordinance, resolution or regulation, such municipality's building regulatory codes, subdivision regulations or other nondiscriminatory regulations.

(d) On and after July 1, 2015, the secretary for aging and disability services shall place no more than 16 sexually violent predators in any one county on transitional release or conditional release.

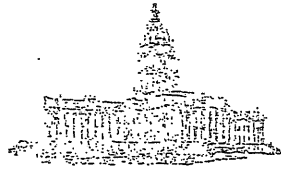
(e) The secretary for aging and disability services shall submit an annual report to the governor and the legislature during the first week of the regular legislative session detailing activities related to the transitional release and conditional release of sexually violent predators. The report shall include the status of such predators who have been placed in transitional release or conditional release including the number of any such predators and their locations; information regarding the number of predators who have been returned to the sexually violent predator treatment program at Larned state hospital along with the reasons for such return; and any plans for the development of additional transitional release or conditional release facilities.

State of Kansas

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May 18, 2016

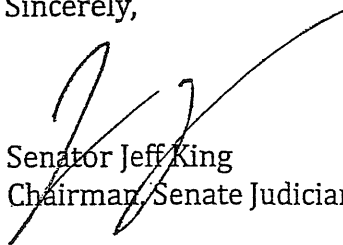
Nancy J. Strouse
Executive Director
Kansas Judicial Council
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Dear Nancy:

I respectfully ask the Kansas Judicial Council to review 59-29a11(b) and its limitations on the location of transitional release or conditional releases facilities for individuals who have participated in the sexually violent predator program. Specifically, I would like the Judicial Council to examine the constitutionality and practicality of these geographic restrictions, while putting primary emphasis on public safety. Any learnings that the Judicial Council could incorporate from other states would be greatly appreciated.

I would appreciate receiving the Council's response prior to the 2017 session. Should you require additional information or have any questions, please do not hesitate to contact me at 620.714.1881. Thank you for your consideration.

Sincerely,


Senator Jeff King
Chairman, Senate Judiciary Committee