

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 10-81

Constitutionality of sex offender residency restriction pertaining to student residence facilities

QUESTIONS

1. Does House Bill 3625/Senate Bill 3481, which amends Tennessee Code Annotated, Title 49, Chapter 8, Part 2, apply only to institutions under the control of the Board of Regents?

2. Could House Bill 3625/Senate Bill 3481, if enacted, be successfully defended against challenges based on claims that it violates the prohibition against *ex post facto* laws that are set forth in the United States and Tennessee Constitutions?

3. If House Bill 2789/Senate Bill 2725, as amended, were to become law, would the provisions of House Bill 3625/Senate Bill 3481, if enacted, prohibit violent juvenile sex offenders from residing in student residence facilities owned or operated by institutions under the control of the Board of Regents?

4. If House Bill 2789/Senate Bill 2725, as amended, were to become law, do the provisions of Rule 0240-02-06-.02(2) of the Tennessee Board of Regents prohibit violent juvenile sexual offenders from residing in on-campus student residence facilities owned or operated by institutions under the control of the Board of Regents?

OPINIONS

1. HB 3625/SB 3481, if enacted, would apply only to institutions under the control of the Board of Regents.

2. If HB 3625/SB 3481 is enacted and challenged on grounds that it violates the prohibitions against *ex post facto* laws, a credible argument could be made that such statute is not punitive and therefore does not violate such prohibitions.

3. HB 3625/SB 3481, if enacted, would prohibit violent juvenile sex offenders, whose crimes are committed on or after July 1, 2010, from residing in student residence facilities owned or operated by institutions under the control of the Board of Regents if HB 2789/SB 2725 becomes law.

4. Rule 0240-02-06-.02(2) would prohibit violent juvenile sex offenders, whose crimes are committed on or after July 1, 2010, from residing in on-campus student residence facilities

owned or operated by institutions under the control of the Board of Regents if HB 2789/SB 2725 is enacted and the conditions set forth in the Rule are satisfied.

ANALYSIS

1. The primary objective of statutory construction is to ascertain and give effect to the intent of the legislature. *State v. Hannah*, 259 S.W.3d 716, 722 (Tenn. 2008). If the language of the statute is clear and unambiguous, courts will ascertain legislative intent from the plain meaning of the text. *Lanier v. Rains*, 229 S.W.3d 656, 661 (Tenn. 2007). The express mention of one subject means the exclusion of other subjects that are not mentioned. *Bryant v. Baptist Health System Home Care of East Tenn.*, 213 S.W.3d 743, 749 (Tenn. 2006).

HB 3625/SB 3481, by its plain and unambiguous terms purports to amend Chapter 8 of Title 49 only. The failure to mention institutions that are established and governed by any other chapter indicates a legislative intent to apply the provisions of the Bill to educational institutions that are owned and controlled by the Board of Regents only and not to institutions that are part of the University of Tennessee system.¹

2. HB 3625/SB 3481, as amended, provides that a student who is registered as a sex offender pursuant to the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 is ineligible to reside in any student facility managed or acquired by an institution.²

By its plain terms, if the Bill is enacted, it would apply to sexual offenders who committed their crimes before the effective date of the law, as well as those who committed their crimes subsequently.³

¹ The University of Tennessee system is established and governed by Chapter 9 of Title 49.

² HB 3625/SB 3481, as amended, provides in pertinent part that “[n]o student who is registered as a sex offender pursuant to the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004, compiled in title 40, chapter 39, part 2, shall be eligible to reside in any student residence facility managed or acquired by an institution.”

³ Because the clear language of the Bill makes its provisions applicable to all registered sex offenders regardless of when their crimes were committed, the legislature may intend retroactive application of the Bill’s provisions. On the other hand, the absence of express language providing for retroactive application arguably supports the conclusion that the legislature does not intend such application. *See Van Tran v. State*, 66 S.W.3d 790, 798 (Tenn. 2001) (holding that, while, in particular case, issue was “close,” the absence of express language providing for retroactive application “supports the conclusion” that the legislature did not intend such application). It must be noted that HB 3625/SB 3481 could potentially be applied retroactively to violent juvenile sexual offenders who commit their offenses between July 1, 2010 and June 30, 2011. Pursuant to Amendment No. 2 to HB 3625, the effective date of the act is July 1, 2011. Furthermore, according to Amendment No. 1 to SB 2725, violent juvenile sex offenders are individuals adjudicated delinquent for committing a violent juvenile sex offense on or after July 1, 2010. Based upon the foregoing, retroactive application of HB 3625/SB 3481 to violent juvenile sex offenders is possible. For the purposes of this opinion letter, without expressing an opinion on the issue, an intention of retroactive application to all classifications of sexual offenders is assumed.

The prohibitions against *ex post facto* laws in U.S Const. art. I, § 10 and Tenn. Const. art. I, § 11 apply only if a statute imposes punishment. *Smith v. Doe*, 538 U.S. 84 (2003); *Kansas v. Hendricks*, 521 U.S. 346 (1997). If the legislature's purpose in enacting HB 3625/SB 3481 is to establish a regulatory measure that is civil, nonpunitive, and intended to protect the public, it will be upheld even if it is applied retroactively, so long as the statute is not punitive in effect.⁴

If HB 3625/SB 3481 is enacted into law, a credible argument can be made that the statute does not impose punishment and therefore is not subject to the prohibitions against *ex post facto* laws under the United States and Tennessee Constitutions. It could therefore be argued that the plain language of the statute indicates that the legislature intended to protect the inhabitants of college residence halls from the dangers that are posed by sex offenders and not to impose additional punishment.⁵

⁴ See *Doe v. Bredesen*, 507 F.3d 889 (6th Cir. 2007); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999). In *Bredesen*, the Sixth Circuit Court of Appeals, citing *Smith v. Doe*, 538 U.S. 84, 97 (2003), outlined the factors to be analyzed in order to determine if a statute is punitive in effect. In making such a determination, courts are guided by several factors including whether the regulatory scheme: 1) has been regarded in our history and traditions as punishment; 2) imposes an affirmative disability or restraint; 3) promotes the traditional aims of punishment; 4) has a rational connection to a nonpunitive purpose; or 5) is excessive with regard to purpose. *Bredesen*, 507 F.3d at 1004.

Other courts have found that a residency restriction that prohibits sex offenders from living near a school, park, etc., does not violate the prohibition on *ex post facto* laws because it is intended for a nonpunitive, regulatory scheme, and applying the Supreme Court's factors from *Smith v. Doe*, 538 U.S. 84, 97 (2003), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the effect of the statute was not so punitive as to negate that intent. See *Doe v. Miller*, 405 F.3d 700, 718-23 (8th Cir. 2005); *Lee v. State*, 895 So.2d 1038, 1041-44 (Ala. Crim. App. 2004); *People v. Morgan*, 881 N.E.2d 507, 510-12 (Ill. App. Ct. 2007); *People v. Leroy*, 828 N.E.2d 769, 779-82 (Ill. App. Ct. 2005); *State v. Seering*, 701 N.W.2d 655, 666-69 (Iowa 2005); *Doe v. Baker*, No. CIV.A.1:05-CV-2265, 2006 WL 905368, at *3-6 (N.D. Ga. Apr. 5, 2006). But see *State v. Pollard*, 908 N.E.2d 1145, 1150-54 (Ind. 2009) (applying the factors, the residency restriction did violate the *ex post facto* clause, especially in light of the excessiveness factor); *Commonwealth v. Baker*, 295 S.W.3d 437, 443-47 (Ky. 2009) (applying the *Smith* factors, a statute that prohibits sex offenders from residing within 1,000 feet of a school, public playground, or day care violates the prohibition on *ex post facto* laws).

⁵ As illustrated by *Smith v. Doe*, *Kansas v. Hendricks*, *Doe v. Bredesen*, and *Cutshall*, courts have given states wide latitude in regulating the conduct of convicted sexual offenders. *Smith*, for example, upheld statutes that provided for the retrospective application of the offender registration statutes. *Hendricks* upheld the retroactive application of a civil commitment statute that continued the incarceration of sexual offenders following the expiration of their prison sentence. The reasoning of the court in those cases could be used to support an argument that HB 3625/SB 3481 is constitutional.

Constitutional challenges to sex offender laws have also been brought under the double jeopardy clause of the Fifth Amendment to the United States Constitution. In *Cutshall v. Sundquist*, 193 F.3d 466, 473 (6th Cir. 1999), the court applied the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), to conduct the double jeopardy analysis. In addition, some courts have been presented with constitutional challenges to sex offender residency restrictions on substantive due process grounds. Other courts have concluded there was no substantive due process violation because there is no fundamental right implicated, and applying the rational basis standard, the residency restriction was rationally related to the government's legitimate purpose. See *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1015 (8th Cir. 2006); *Doe v. Miller*, 405 F.3d 700, 709-15 (8th Cir. 2005); *Doe v. Baker*, No. CIV.A.1:05-CV-2265, 2006 WL 905368, at *6-7 (N.D. Ga. Apr. 5, 2006); *People v. Leroy*, 828 N.E.2d 769, 776-77 (Ill. App. Ct. 2005); *State v. Groves*, 742 N.W.2d 90, 92-93 (Iowa 2007); *State v. Seering*, 701 N.W.2d 655, 662-65

3. HB 3625/SB 3481, if enacted, would prohibit violent juvenile sex offenders, whose crimes are committed on or after July 1, 2010,⁶ from residing in student residence facilities owned or operated by institutions under the control of the Board of Regents if HB 2789/SB 2725 becomes law.

The analysis hinges on the definition of the term “offender.” As presently written, the definition of the term “offender” contained in Tenn. Code Ann. § 40-39-202(10) (Supp. 2009) does not include a juvenile who has been adjudicated delinquent for a sexual offense. However, HB 2789/SB 2725 specifically includes a violent juvenile sexual offender⁷ in the definition of the term “offender.”⁸ As a result, if HB 2789/SB 2725 is enacted, violent juvenile sex offenders, whose crimes are committed on or after July 1, 2010, will be required to register as sex offenders pursuant to the Sexual Offender Registration, Verification and Tracking Act.⁹

Therefore, if HB 2789/SB 2725 becomes law, violent juvenile sex offenders, whose crimes are committed on or after July 1, 2010, would be prohibited from residing in student residence facilities owned or operated by institutions under the control of the Board of Regents in the event that HB 3625/SB 3481 is enacted.

4. Rule 0240-02-06-.02(2) prohibits registered sex offenders, whose victim was a minor, from residing in on-campus student residence facilities if the campus includes certain facilities, such as public, private or parochial schools, licensed day care centers, etc., or if the campus is within one thousand feet of such facilities.¹⁰

(Iowa 2005). *But see Elwell v. Township of Lower*, 2006 WL 3797974 (N.J. Super. Ct. Law Div. 2006) (holding that the residency restriction at issue violated substantive due process).

⁶ See Amendment No. 1 to SB 2725 which defines “violent juvenile sex offense” as certain crimes that occur on or after July 1, 2010.

⁷ Pursuant to Amendment No. 1 to SB 2725, a “violent juvenile sex offender” is defined as “a person fourteen (14) years of age or more but less than eighteen (18) years of age who has been adjudicated delinquent in this state for any act that constitutes a violent juvenile sexual offense as defined in this section and: (A) [h]as been found to be at high risk of re-offending by a court exercising juvenile jurisdiction; or (B) [h]as a prior adjudication of delinquency for a violent juvenile sexual offense. When a violent juvenile sexual offender becomes eighteen (18) years of age, such offender shall become a violent sexual offender and this part governing violent sexual offenders shall be applicable to such violent sexual offender, unless otherwise set out in this part.”

⁸ According to Section 5 of HB 2789/SB 2725, the term “offender” is defined as a “sexual offender, violent sexual offender and *violent juvenile sexual offender*, unless otherwise designated. An offender who qualifies both as a sexual offender and a violent sexual offender or as a violent juvenile sexual offender and as a violent sexual offender shall be considered a violent sexual offender.” (emphasis added).

⁹ See Tenn. Code Ann., Title 40, Chapter 39, Part 2.

¹⁰ Rule 0240-02-06-.02(2) provides that “[n]o student who is registered as a sex offender pursuant to the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 and whose victim was a minor, shall be eligible to reside in any on-campus student residence facilities, including dormitories and apartments if (a) the campus includes a public school, private or parochial school, licensed day care center, other

As set forth above, HB 2789/SB 2725 specifically includes violent juvenile sexual offenders within the definition of the term “offender” and requires that violent juvenile sex offenders, whose crimes are committed on or after July 1, 2010, register as sex offenders pursuant to the Sexual Offender Registration, Verification and Tracking Act. Therefore, if HB 2789/SB 2725 is enacted, violent juvenile sex offenders, whose crimes are committed on or after July 1, 2010, would be subject to the restrictions set forth in Rule 0240-02-06-.02(2) and would be prohibited from living in on-campus student residence facilities that are owned or operated by institutions under the control of the Board of Regents if the other requirements of the Rule are satisfied.

ROBERT E. COOPER, JR.
Attorney General and Reporter

GORDON W. SMITH
Associate Solicitor General

TIMOTHY P. HARLAN
Assistant Attorney General

Requested by:

The Honorable Tommie F. Brown
State Representative
36 Legislative Plaza
Nashville, Tennessee 37243-0128

child care facility, public park, playground, recreation center or public athletic field available for use by the general public; or (b) the campus is within one thousand feet (1,000') of a public school, private or parochial school, licensed day care center, other child care facility, public athletic field available for use by the general public.”