

4591

2013-2014 Regular Sessions

I N A S S E M B L Y

February 6, 2013

Introduced by M. of A. O'DONNELL, AUBRY -- read once and referred to the
Committee on Correction

AN ACT to amend the correction law, in relation to risk assessment
instruments for sex offenders

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY,
DO ENACT AS FOLLOWS:

1 Section 1. Subdivision 3 of section 168-d of the correction law, as
2 amended by chapter 11 of the laws of 2002, is amended to read as
3 follows:
4 3. For sex offenders released on probation or discharged upon payment
5 of a fine, conditional discharge or unconditional discharge, it shall be
6 the duty of the court applying the guidelines AND RISK ASSESSMENT
7 INSTRUMENT established in subdivision five of section one hundred
8 sixty-eight-1 of this article to determine the level of notification
9 pursuant to subdivision six of section one hundred sixty-eight-1 of this
10 article and whether such sex offender shall be designated a sexual pred-
11 ator, sexually violent offender, or predicate sex offender as defined in
12 subdivision seven of section one hundred sixty-eight-a of this article.
13 At least fifteen days prior to the determination proceeding, the
14 district attorney shall provide to the court and the sex offender a
15 written statement setting forth the determinations sought by the
16 district attorney together with the reasons for seeking such determi-
17 nations. The court shall allow the sex offender to appear and be heard.
18 The state shall appear by the district attorney, or his or her designee,
19 who shall bear the burden of proving the facts supporting the determi-
20 nations sought by clear and convincing evidence. Where there is a
21 dispute between the parties concerning the determinations, the court
22 shall adjourn the hearing as necessary to permit the sex offender or the
23 district attorney to obtain materials relevant to the determinations
24 from any state or local facility, hospital, institution, office, agency,
25 department or division. Such materials may be obtained by subpoena if

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 not voluntarily provided to the requesting party. In making the determi-
2 nations, the court shall review any victim's statement and any relevant
3 materials and evidence submitted by the sex offender and the district
4 attorney and the court may consider reliable hearsay evidence submitted
5 by either party provided that it is relevant to the determinations.
6 Facts previously proven at trial or elicited at the time of entry of a
7 plea of guilty shall be deemed established by clear and convincing
8 evidence and shall not be relitigated. The court shall render an order
9 setting forth its determinations and the findings of fact and conclu-
10 sions of law on which the determinations are based. A copy of the order
11 shall be submitted by the court to the division. Upon application of
12 either party, the court shall seal any portion of the court file or
13 record which contains material that is confidential under any state or
14 federal statute. Either party may appeal as of right from the order
15 pursuant to the provisions of articles fifty-five, fifty-six and fifty-
16 seven of the civil practice law and rules. Where counsel has been
17 assigned to represent the sex offender upon the ground that the sex
18 offender is financially unable to retain counsel, that assignment shall
19 be continued throughout the pendency of the appeal, and the person may
20 appeal as a poor person pursuant to article eighteen-B of the county
21 law.

22 S 2. Subdivision 2 of section 168-k of the correction law, as amended
23 by chapter 684 of the laws of 2005, is amended to read as follows:

24 2. The division shall advise the board that the sex offender has
25 established residence in this state. The board shall determine whether
26 the sex offender is required to register with the division. If it is
27 determined that the sex offender is required to register, the division
28 shall notify the sex offender of his or her duty to register under this
29 article and shall require the sex offender to sign a form as may be
30 required by the division acknowledging that the duty to register and the
31 procedure for registration has been explained to the sex offender. The
32 division shall obtain on such form the address where the sex offender
33 expects to reside within the state and the sex offender shall retain one
34 copy of the form and send two copies to the division which shall provide
35 the information to the law enforcement agency having jurisdiction where
36 the sex offender expects to reside within this state. No later than
37 thirty days prior to the board making a recommendation, the sex offender
38 shall be notified that his or her case is under review and that he or
39 she is permitted to submit to the board any information relevant to the
40 review. After reviewing any information obtained, and applying the
41 guidelines AND RISK ASSESSMENT INSTRUMENT established in subdivision
42 five of section one hundred sixty-eight-1 of this article, the board
43 shall within sixty calendar days make a recommendation regarding the
44 level of notification pursuant to subdivision six of section one hundred
45 sixty-eight-1 of this article and whether such sex offender shall be
46 designated a sexual predator, sexually violent offender, or predicate
47 sex offender as defined in subdivision seven of section one hundred
48 sixty-eight-a of this article. This recommendation shall be confiden-
49 tial and shall not be available for public inspection. It shall be
50 submitted by the board to the county court or supreme court and to the
51 district attorney in the county of residence of the sex offender and to
52 the sex offender. It shall be the duty of the county court or supreme
53 court in the county of residence of the sex offender, applying the
54 guidelines AND RISK ASSESSMENT INSTRUMENT established in subdivision
55 five of section one hundred sixty-eight-1 of this article, to determine
56 the level of notification pursuant to subdivision six of section one

1 hundred sixty-eight-1 of this article and whether such sex offender
2 shall be designated a sexual predator, sexually violent offender, or
3 predicate sex offender as defined in subdivision seven of section one
4 hundred sixty-eight-a of this article. At least thirty days prior to the
5 determination proceeding, such court shall notify the district attorney
6 and the sex offender, in writing, of the date of the determination
7 proceeding and the court shall also provide the district attorney and
8 sex offender with a copy of the recommendation received from the board
9 and any statement of the reasons for the recommendation received from
10 the board. This notice shall include the following statement or a
11 substantially similar statement: "This proceeding is being held to
12 determine whether you will be classified as a level 3 offender (risk of
13 repeat offense is high), a level 2 offender (risk of repeat offense is
14 moderate), or a level 1 offender (risk of repeat offense is low), or
15 whether you will be designated as a sexual predator, a sexually violent
16 offender or a predicate sex offender, which will determine how long you
17 must register as a sex offender and how much information can be provided
18 to the public concerning your registration. If you fail to appear at
19 this proceeding, without sufficient excuse, it shall be held in your
20 absence. Failure to appear may result in a longer period of registration
21 or a higher level of community notification because you are not present
22 to offer evidence or contest evidence offered by the district attorney."
23 The court shall also advise the sex offender that he or she has a right
24 to a hearing prior to the court's determination, that he or she has the
25 right to be represented by counsel at the hearing and that counsel will
26 be appointed if he or she is financially unable to retain counsel. A
27 returnable form shall be enclosed in the court's notice to the sex
28 offender on which the sex offender may apply for assignment of counsel.
29 If the sex offender applies for assignment of counsel and the court
30 finds that the offender is financially unable to retain counsel, the
31 court shall assign counsel to represent the sex offender pursuant to
32 article eighteen-B of the county law. If the district attorney seeks a
33 determination that differs from the recommendation submitted by the
34 board, at least ten days prior to the determination proceeding the
35 district attorney shall provide to the court and the sex offender a
36 statement setting forth the determinations sought by the district attor-
37 ney together with the reasons for seeking such determinations. The court
38 shall allow the sex offender to appear and be heard. The state shall
39 appear by the district attorney, or his or her designee, who shall bear
40 the burden of proving the facts supporting the determinations sought by
41 clear and convincing evidence. It shall be the duty of the court apply-
42 ing the guidelines AND RISK ASSESSMENT INSTRUMENT established in subdi-
43 vision five of section one hundred sixty-eight-1 of this article to
44 determine the level of notification pursuant to subdivision six of
45 section one hundred sixty-eight-1 of this article and whether such sex
46 offender shall be designated a sexual predator, sexually violent offen-
47 der, or predicate sex offender as defined in subdivision seven of
48 section one hundred sixty-eight-a of this article. Where there is a
49 dispute between the parties concerning the determinations, the court
50 shall adjourn the hearing as necessary to permit the sex offender or the
51 district attorney to obtain materials relevant to the determinations
52 from the state board of examiners of sex offenders or any state or local
53 facility, hospital, institution, office, agency, department or division.
54 Such materials may be obtained by subpoena if not voluntarily provided
55 to the requesting party. In making the determinations the court shall
56 review any victim's statement and any relevant materials and evidence

1 submitted by the sex offender and the district attorney and the recom-
2 mendation and any material submitted by the board, and may consider
3 reliable hearsay evidence submitted by either party, provided that it is
4 relevant to the determinations. If available, facts proven at trial or
5 elicited at the time of a plea of guilty shall be deemed established by
6 clear and convincing evidence and shall not be relitigated. The court
7 shall render an order setting forth its determinations and the findings
8 of fact and conclusions of law on which the determinations are based. A
9 copy of the order shall be submitted by the court to the division. Upon
10 application of either party, the court shall seal any portion of the
11 court file or record which contains material that is confidential under
12 any state or federal statute. Either party may appeal as of right from
13 the order pursuant to the provisions of articles fifty-five, fifty-six
14 and fifty-seven of the civil practice law and rules. Where counsel has
15 been assigned to represent the sex offender upon the ground that the sex
16 offender is financially unable to retain counsel, that assignment shall
17 be continued throughout the pendency of the appeal, and the person may
18 appeal as a poor person pursuant to article eighteen-B of the county
19 law.

20 S 3. Subdivision 5 and the opening paragraph of subdivision 6 of
21 section 168-1 of the correction law, subdivision 5 as added by chapter
22 192 of the laws of 1995, subparagraph (i) of paragraph (a) of subdivi-
23 sion 5 and the opening paragraph of subdivision 6 as amended by chapter
24 11 of the laws of 2002, are amended and a new subdivision 5-a is added
25 to read as follows:

26 5. The board shall develop guidelines and procedures AND USE A VALI-
27 DATED RISK ASSESSMENT INSTRUMENT to assess the risk of a repeat offense
28 by such sex offender and the threat posed to the public safety. SUCH
29 RISK ASSESSMENT INSTRUMENT SHALL BE PERIODICALLY SUBJECTED TO EMPIRICAL
30 RE-VALIDATION. Such guidelines [shall] MAY be based upon, but not limit-
31 ed to, the following:

32 (a) criminal history factors indicative of high risk of repeat
33 offense, including:

34 (i) whether the sex offender has a mental abnormality or personality
35 disorder that makes him or her likely to engage in predatory sexually
36 violent offenses;

37 (ii) whether the sex offender's conduct was found to be characterized
38 by repetitive and compulsive behavior, associated with drugs or alcohol;

39 (iii) whether the sex offender served the maximum term;

40 (iv) whether the sex offender committed the felony sex offense against
41 a child;

42 (v) the age of the sex offender at the time of the commission of the
43 first sex offense;

44 (b) other criminal history factors to be considered in determining
45 risk, including:

46 (i) the relationship between such sex offender and the victim;

47 (ii) whether the offense involved the use of a weapon, violence or
48 infliction of serious bodily injury;

49 (iii) the number, date and nature of prior offenses;

50 (c) conditions of release that minimize risk or re-offense, including
51 but not limited to whether the sex offender is under supervision;
52 receiving counseling, therapy or treatment; or residing in a home situ-
53 ation that provides guidance and supervision;

54 (d) physical conditions that minimize risk of re-offense, including
55 but not limited to advanced age or debilitating illness;

1 (e) whether psychological or psychiatric profiles indicate a risk of
2 recidivism;

3 (f) the sex offender's response to treatment;

4 (g) recent behavior, including behavior while confined;

5 (h) recent threats or gestures against persons or expressions of
6 intent to commit additional offenses; and

7 (i) review of any victim impact statement.

8 5-A. (A) THE BOARD IN CONSULTATION WITH THE DEPARTMENT AND THE DIVI-
9 SION OF CRIMINAL JUSTICE SERVICES SHALL MAINTAIN A STATEWIDE DATABASE OF
10 SEX OFFENDER RECIDIVISM STATISTICS.

11 (B) THE BOARD IN CONSULTATION WITH THE DEPARTMENT AND THE DIVISION OF
12 CRIMINAL JUSTICE SERVICES SHALL CONDUCT A PERIODIC RETROACTIVE STUDY AT
13 LEAST EVERY FIVE YEARS TO DETERMINE THE PREDICTIVE VALUE OF THE RISK
14 ASSESSMENT INSTRUMENT USED TO ASSIGN RISK OF REPEAT OFFENSE LEVELS TO
15 SEX OFFENDERS PURSUANT TO SUBDIVISION SIX OF THIS SECTION. AFTER EACH
16 SUCH STUDY THE BOARD SHALL PREPARE A DETAILED REPORT TO THE GOVERNOR AND
17 LEGISLATURE DETERMINING THE PREDICTIVE VALUE OF THE RISK ASSESSMENT
18 INSTRUMENT AND THE PREDICTIVE VALUE OF EACH FACTOR CONSIDERED IN THE
19 OVERALL RISK ASSESSMENT WHEN APPLIED TO THE STATEWIDE DATABASE MAIN-
20 TAINED PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION. THE REPORT SHALL
21 INCLUDE RECOMMENDED CHANGES TO THE RISK ASSESSMENT INSTRUMENT TO ENHANCE
22 ITS PREDICTIVE CAPABILITIES FOR THE PURPOSE OF PERIODIC REVALIDATION OF
23 SUCH INSTRUMENT PURSUANT TO SUBDIVISION FIVE OF THIS SECTION. THE FIRST
24 SUCH STUDY SHALL BE COMPLETED WITHIN TWO YEARS OF THE EFFECTIVE DATE OF
25 THIS SUBDIVISION.

26 Applying these guidelines AND THE VALIDATED RISK ASSESSMENT
27 INSTRUMENT, the board shall within sixty calendar days prior to the
28 discharge, parole, release to post-release supervision or release of a
29 sex offender make a recommendation which shall be confidential and shall
30 not be available for public inspection, to the sentencing court as to
31 whether such sex offender warrants the designation of sexual predator,
32 sexually violent offender, or predicate sex offender as defined in
33 subdivision seven of section one hundred sixty-eight-a of this article.
34 In addition, the guidelines AND SUCH INSTRUMENT shall be applied by the
35 board to make a recommendation to the sentencing court which shall be
36 confidential and shall not be available for public inspection, providing
37 for one of the following three levels of notification depending upon the
38 degree of the risk of re-offense by the sex offender.

39 S 4. Subdivisions 1 and 2 of section 168-n of the correction law,
40 subdivision 1 as amended by chapter 11 of the laws of 2002 and subdivi-
41 sion 2 as amended by chapter 453 of the laws of 1999, are amended to
42 read as follows:

43 1. A determination that an offender is a sexual predator, sexually
44 violent offender, or predicate sex offender as defined in subdivision
45 seven of section one hundred sixty-eight-a of this article shall be made
46 prior to the discharge, parole, release to post-release supervision or
47 release of such offender by the sentencing court applying the guidelines
48 AND RISK ASSESSMENT INSTRUMENT established in subdivision five of
49 section one hundred sixty-eight-1 of this article after receiving a
50 recommendation from the board pursuant to section one hundred sixty-
51 eight-1 of this article.

52 2. In addition, applying the guidelines AND RISK ASSESSMENT INSTRUMENT
53 established in subdivision five of section one hundred sixty-eight-1 of
54 this article, the sentencing court shall also make a determination with
55 respect to the level of notification, after receiving a recommendation
56 from the board pursuant to section one hundred sixty-eight-1 of this

1 article. Both determinations of the sentencing court shall be made thir-
2 ty calendar days prior to discharge, parole or release.
3 S 5. This act shall take effect on the one hundred eightieth day after
4 it shall have become a law.