

3138

2013-2014 Regular Sessions

I N S E N A T E

January 30, 2013

Introduced by Sens. KRUEGER, RIVERA -- read twice and ordered printed,
and when printed to be committed to the Committee on Crime Victims,
Crime and 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 ASSEM-
BLY, 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,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 (d) physical conditions that minimize risk of re-offense, including
56 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.