HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1277 Mental Health and Substance Abuse
SPONSOR(S): Children, Families & Seniors Subcommittee, Massullo
TIED BILLS: **IDEN./SIM. BILLS:** SB 1262

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	15 Y, 0 N, As CS	Rahming	Brazzell
2) Criminal Justice & Public Safety Subcommittee	16 Y, 0 N	Frost	Hall
3) Health Care Appropriations Subcommittee	12 Y, 0 N	Fontaine	Clark
4) Health & Human Services Committee			

SUMMARY ANALYSIS

Mental health is a state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to contribute to his or her community. Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs. In Florida, the Baker Act provides legal procedures for voluntary and involuntary mental health examination and treatment, while the Marchman Act addresses substance abuse through a comprehensive system of prevention, detoxification, and treatment services. The Department of Children and Families (DCF) is the single state authority for substance abuse and mental health treatment services in the state of Florida.

The bill makes several changes to Baker Act involuntary examination procedures. The bill:

- Amends the basis for which a qualified professional makes certain patient communication and patient access determinations;
- Requires a qualified professional to document patient communication restrictions within a specified timeframe;
- Creates discharge planning and procedures that must be followed if a patient's 72-hour examination period ends on a weekend or holiday;
- Allows psychiatric nurses to release patients from involuntary exams when practicing in nationally accredited community mental health centers, under certain conditions;
- Revises certain provisions relating to the Commission on Mental Health and Substance Abuse; and
- Requires DCF to receive and maintain reports related to patient transportation to receiving facilities.

The bill revises conditions under which a Baker Act patient's communication may be restricted and requires a facility to review any restrictions on a patient's communication every three days, instead of weekly as required under current law. The bill requires a receiving facility to notify specified emergency contacts of a person being held for an involuntary examination under the Baker Act.

The bill makes changes to certain procedures in the Baker Act and Marchman Act. Specifically, the bill provides requirements for the release of clinical records from a receiving facility or service provider and requires law enforcement officers to notify emergency contacts of a person in protective custody and include such contact information in an incident report. The bill provides an emergency notification exception under the Marchman Act that is not available to involuntary examination patients under the Baker Act.

The bill also provides criminal penalties for certain prohibited activities relating to involuntary admission and treatment under the Baker Act, and makes other technical changes to existing law.

The bill may have an insignificant, negative fiscal impact on DCF, which can be absorbed within existing resources, and an indeterminate positive impact on jail beds by creating a new misdemeanor crime.

The bill provides an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Mental Health and Mental Illness

Mental health is a state of well-being in which an individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to contribute to his or her community.[1] The primary indicators used to evaluate an individual's mental health are:[2]

- **Emotional well-being**- Perceived life satisfaction, happiness, cheerfulness, peacefulness;
- **Psychological well-being**- Self-acceptance, personal growth including openness to new experiences, optimism, hopefulness, purpose in life, control of one's environment, spirituality, self-direction, and positive relationships; and
- **Social well-being**- Social acceptance, beliefs in the potential of people and society as a whole, personal self-worth and usefulness to society, sense of community.

Mental illness is collectively all diagnosable mental disorders or health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof) associated with distress or impaired functioning.[3] Thus, mental health refers to an individual's mental state of well-being whereas mental illness signifies an alteration of that well-being. Mental illness affects millions of people in the United States each year. Nearly one in five adults lives with a mental illness.[4] During their childhood and adolescence, nearly half of all children will experience a mental disorder, though the proportion experiencing severe impairment during childhood and adolescence is much lower, at about 22%.[5]

The Baker Act

The Florida Mental Health Act, otherwise known as the Baker Act, was enacted in 1971 to revise the State's mental health commitment laws.[6] The Baker Act provides legal procedures for mental health examination and treatment, including voluntary and involuntary examinations.

Rights of Patients

The Baker Act protects the rights of all individuals examined or treated for mental illness in Florida, including, but not limited to, the right to communicate freely and privately with persons outside a facility, unless the facility determines that such communication is likely to be harmful to the patient or others; and the right to not have their incoming or outgoing mail opened, delayed, held, or censored by the facility, unless there is reason to believe it contains items or substances that may be harmful to the patient or others.[7]

Currently, a facility must also provide immediate patient access to a patient's family members, guardian, guardian advocate, representative, Florida statewide or local advocacy council, or attorney,

[1] World Health Organization, *Mental Health: Strengthening Our Response,* https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response (last visited Feb. 3, 2022).
[2] Centers for Disease Control and Prevention, *Mental Health Basics*, http://medbox.iiab.me/modules/en-cdc/www.cdc.gov/mentalhealth/basics.htm (last visited Feb. 3, 2022).
[3] *Id*.
[4] National Institute of Mental Health (NIH), *Mental Illness*, https://www.nimh.nih.gov/health/statistics/mental-illness (last visited Feb. 3, 2022).
[5] *Id*.
[6] Ss. 394.451-394.47891, F.S.
[7] S. 394.459(5), F.S. Other patient rights include the right to dignity; treatment regardless of ability to pay; express and informed consent for admission or treatment; quality treatment; possession of his or her clothing and personal effects; vote in elections, if eligible; petition the court for a writ of habeas corpus to question the cause and legality of their detention in a receiving or treatment facility; and participate in their treatment and discharge planning. See, s. 394.459 (1)-(11), F.S. Current law imposes liability for damages on those who violate or abuse patient rights or privileges. See, s. 394.459 (10), F.S.

unless such access would be detrimental to the patient or the patient exercises the right not to communicate or visit with the person.[8] If a facility restricts a patient's right to communicate or receive visitors, the facility must provide written notice of the restriction and the reasons for it to the patient, the patient's attorney, and the patient's guardian, guardian advocate, or representative. A facility must review patient communication restrictions weekly.[9]

Involuntary Examination

Individuals in acute mental or behavioral health crisis may require emergency treatment to stabilize their condition. Emergency mental health examination and stabilization services may be provided on a voluntary or involuntary basis.[10] An involuntary examination is required if there is reason to believe that the person has a mental illness and because of his or her mental illness: [11]

- The person has refused voluntary examination after conscientious explanation and disclosure of the purpose of the examination or is unable to determine for himself or herself whether examination is necessary; **and**
- Without care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services; **or**
- There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.

An involuntary examination may be initiated in one of three ways,[12] including by a law enforcement officer taking a person who appears to meet the criteria for involuntary examination into custody and delivering the person or having him or her delivered to an appropriate, or the nearest, receiving facility for examination. Current law requires the officer to execute a written report detailing the circumstances under which the person was taken into custody, and to make the report a part of the patient's clinical record. However, a law enforcement officer is not currently required to include in his or her written report any available emergency contact information for the patient or other emergency contact information available through the Florida Department of Law Enforcement (FDLE) or Florida Highway Safety and Motor Vehicles (FLHSMV) electronic databases.

Involuntary examination patients must be taken to either a public or private facility which has been designated by the Department of Children and Families (DCF) as a Baker Act receiving facility. The purpose of a receiving facility is to receive and hold, or refer, as appropriate, involuntary patients under emergency conditions for psychiatric evaluation and to provide short-term treatment or transportation to the appropriate service provider.[13] The examination period must be for up to 72 hours.[14]

Within the 72-hour examination period or, if the 72-hour examination period ends on a weekend or holiday, the next working day thereafter, the patient must be released, released for voluntary outpatient treatment, or consent to and be admitted as a voluntary patient; or the facility administrator must file a petition for involuntary inpatient placement.[15]

Under current law, the receiving facility may not release an involuntary examination patient without the documented approval of a psychiatrist, or a clinical psychologist. However, if the receiving facility is

[8] S. 394.459(5)(c), F.S.
[9] *Id*. Every seven days.
[10] Ss. 394.4625 and 394.463, F.S.
[11] S. 394.463(1), F.S.
[12] S. 394.463(2)(a), F.S. An involuntary examination may also be initiated by any of the following means: A court entering an ex parte order stating that a person appears to meet the criteria for involuntary examination, based on sworn testimony. The order of the court shall be made a part of the patient's clinical record. A physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker may execute a certificate stating that he or she has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for involuntary examination and stating the observations upon which that conclusion is based. The report and certificate shall be made a part of the patient's clinical record.
[13] S. 394.455(39), F.S.
[14] S. 394.463(2)(g), F.S.
[15] An eligible patient for release or voluntary treatment that is charged with a crime must be returned to a law enforcement officer's custody. S. 394.463(g), F.S.

owned or operated by a hospital or health system, the release may also be approved by a psychiatric nurse performing within the framework of an established protocol with a psychiatrist, or an attending emergency department physician with experience in the diagnosis and treatment of mental illness who has completed the involuntary examination. A psychiatric nurse may not approve a patient's release if the involuntary examination was initiated by a psychiatrist unless the release is approved by the initiating psychiatrist.[16]

Because of the current restrictions on where a psychiatric nurse may approve Baker Act releases, there are close to 30 nationally accredited community mental health providers in Florida that operate receiving facilities licensed under chapter 394, F.S., but cannot allow their psychiatric nurses to discharge a Baker Act patient under the protocol of their psychiatrists.[17]

Current law requires DCF to prepare and provide annual reports to the agency itself, the President of the Senate, the Speaker of the House of Representatives, and the minority leaders of the Senate and the House of Representatives. The annual reports analyze data obtained from involuntary orders issued under the Baker Act, professional certificates, and law enforcement officers' reports.[18] Current law does not require a law enforcement officer's report to include data relating to an involuntary patient's transportation to a facility.

Notice Requirements

Receiving facilities must give prompt notice of the whereabouts of an involuntary examination patient to the patient's guardian, guardian advocate, health care surrogate or proxy, attorney, and representative.[19] The notice must be made by telephone or in person within 24 hours after the patient's arrival at the facility.[20] Attempts at notification must begin as soon as reasonably possible after the patient's arrival and must be documented in the patient's clinical record.[21]

Under current law, receiving facilities must adhere to notification requirements even if a patient requests that no notification be made.[22] However, pursuant to the federal Health Insurance Portability and Accountability Act, receiving facilities are likely still required to provide individuals who have capacity with the opportunity to object to any such notification.[23]

Involuntary Outpatient Placement

A person may be ordered to involuntary outpatient services upon a court finding by clear and convincing evidence that he or she meets specified criteria.[24] A petition for involuntary outpatient placement may be filed by the administrator of either a receiving facility or a treatment facility. [25] The petition must allege and sustain each of the criterion for involuntary outpatient placement and be accompanied by a certificate recommending involuntary outpatient placement by a qualified professional and a proposed treatment plan.[26]

The petition for involuntary outpatient placement must be filed in the county where the patient is located, unless the patient is being placed from a state treatment facility, in which case the petition must be filed in the county where the patient will reside.[27] Once a petition for involuntary outpatient

[16] S. 394.463(f), F.S.
[17] Email from Melanie Brown-Woofter, President and CEO, Florida Behavioral Health Association, Re: HB 1143 - FCBH Comments - HB 1277 Update (Jan. 19, 2022).
[18] S. 394.463(e), F.S.
[19] S. 394.4599(2)(a), F.S.
[20] S. 394.4599(2)(b), F.S.
[21] *Id*.
[22] Prior to the passage of ch. 2015-67, Laws of Fla., a patient could request that no notification be made.
[23] 45 C.F.R. s. 164.510(b)(2)(i-iii). If an individual with capacity is present, or otherwise available, prior to disclosure, the covered entity may use or disclose the protected health information if it: (i) Obtains the individual's agreement; (ii) Provides the individual with the opportunity to object to the disclosure, and the individual does not express an objection; or (iii) Reasonably infers from the circumstances, based the exercise of professional judgment, that the individual does not object to the disclosure.
[24] S. 394.4655(2), F.S.
[25] S. 394.4655(4)(a), F.S.
[26] S. 394.4655(4)(b), F.S.
[27] S. 394.4655(4)(c), F.S.

placement has been filed with the court, the court must hold a hearing within five working days, unless a continuance is granted.[28] At the hearing on involuntary outpatient placement, the court must consider testimony and evidence regarding the patient's competence to consent to treatment; if the court finds that the patient is incompetent to consent to treatment, it must appoint a guardian advocate.[29] If the court concludes that the patient meets the criteria for involuntary outpatient placement, it must issue an order for involuntary outpatient services.[30] The order must specify the duration of involuntary outpatient services, up to 90 days, and the nature and extent of the patient's mental illness.[31] The order of the court and the treatment plan shall be made part of the patient's clinical record.[32]

If, at any time before the conclusion of the initial hearing on involuntary outpatient placement, it appears to the court that the person does not meet the criteria for involuntary outpatient services but, instead, meets the criteria for involuntary inpatient placement, the court may order that the person be admitted for involuntary inpatient examination.[33]

Involuntary Inpatient Placement

A person may be placed in involuntary inpatient placement for treatment upon a finding of the court by clear and convincing evidence that:

- He or she is mentally ill and because of his or her mental illness:
    - He or she has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment; or is unable to determine for himself or herself whether placement is necessary; **and**
    - He or she is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, is likely to suffer from neglect or refuse to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; **or**
    - There is substantial likelihood that in the near future he or she will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm; and
- All available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate.[34]

A receiving or treatment facility administrator who retains a patient for involuntary inpatient treatment must file a petition for involuntary inpatient placement in the court in the county where the patient is located.[35] Upon filing, the clerk of the court must provide copies to DCF, the patient, the patient's guardian or representative, and the state attorney and public defender of the judicial circuit in which the patient is located.[36]

The court proceedings for involuntary inpatient placement closely mirror those for involuntary outpatient services.[37] However, unlike an order for involuntary outpatient services, which is required to be part of the patient's clinical record, nothing in the current law requires the court's order in an involuntary inpatient placement to be part of the patient's clinical record.

Baker Act Violations

[28] S. 394.4655(7)(a)1., F.S.
[29] S. 394.4655(7)(d), F.S.
[30] S. 394.4655(7)(b)1., F.S.
[31] *Id*.
[32] *Id.*
[33] S. 394.4655(7)(c), F.S. Additionally, if the person instead meets the criteria for involuntary assessment, protective custody, or involuntary admission pursuant to the Marchman Act, the court may order the person to be admitted for involuntary assessment pursuant to the statutory requirements of the Marchman Act.
[34] S. 394.467(1), F.S.
[35] S. 394.467(2)-(3), F.S.
[36] S. 394.467(3), F.S.
[37] *See* s. 394.467(6)-(7), F.S.

News reports have identified problems related to a receiving facility denying patient rights under the Baker Act, particularly as it relates to patient access. For example, the families of 10 former North Tampa Behavioral Health patients told the Tampa Bay Times that they were not allowed to see their relatives because their calls went unanswered or straight to voicemail when they attempted to check on loved ones or because the hospital insisted they come during "totally inappropriate" and "overly restrictive" visitation hours.[38] In other cases, "state inspectors found that [the hospital] did not tell patients' representatives the details of their care, even for patients who couldn't speak or make independent medical decisions."[39]

Reports also identified problems related to a patient's discharge after the 72-hour examination period. For instance, in 2015, North Tampa Behavioral Health reportedly refused to discharge an intellectually disabled patient for three weeks, despite her patient advocate arguing that an extended stay could make her condition worse. In another instance, court records showed that a lawyer helped a suicidal patient file a petition to argue for his release before a judge. However, state inspectors discovered that the hospital never sent the petition to the court. "After a state investigation, the hospital confirmed it broke the law by not submitting the court filing on time and promised to fix its process."[40]

Current law does not provide criminal penalties for intentional activities related to a person's involuntary admission under the Baker Act, such as knowingly and willfully furnishing false information for the purpose of obtaining emergency or other involuntary admission for any person or causing or conspiring to cause any person's emergency or other involuntary procedure under false pretenses. However, criminal penalties are provided for similar conduct under the Marchman Act.

Clinical Records

Clinical records maintained by mental health facilities, which can include medical records, progress notes, charts, and admission and discharge data, and all other recorded information pertaining to the patient's hospitalization or treatment,[41] are confidential and exempt from public disclosure by law.[42] Similarly, communications between a patient and a psychiatrist, psychologist, mental health counselor, marriage and family therapist, or clinical social worker are confidential.[43] The law provides for certain exceptions where a mental health professional may breach this confidentiality without the patient's consent. One instance where mental health professionals may breach confidentiality is when the patient has communicated an intent to physically harm an identifiable victim. In such instances, the mental health professional may release information from the clinical record or disclose a communication, but only to the extent necessary, to warn a potential victim or communicate the threat to a law enforcement agency.[44]

Patients may not always agree to the release of their clinical records or communications,[45] however, current law does not require a receiving facility to provide patients the option to authorize the release of their clinical records.

Commission on Mental Health and Substance Abuse

In 2021, the Legislature created the 19-member Commission on Mental Health and Substance Abuse (Commission), adjunct to DCF, to examine the current methods of providing mental health and substance abuse services in the state. Commission members include the Secretaries of the Agency for Health Care Administration and DCF, and specified members appointed by the Governor, President of the Senate, and Speaker of the House of Representatives.

[38] Neil Bedi, *How one Florida psychiatric hospital makes millions off patients who have no choice,* Tampa Bay Times (Sept. 18, 2019), https://projects.tampabay.com/projects/2019/investigations/north-tampa-behavioral-health/ (last visited Feb. 3, 2022).
[39] *Id.*
[40] Neil Bedi, *How one Florida psychiatric hospital makes millions off patients who have no choice,* Tampa Bay Times (Sept. 18, 2019), https://projects.tampabay.com/projects/2019/investigations/north-tampa-behavioral-health/ (last visited Feb. 3, 2022).
[41] S. 394.455(6), F.S.
[42] S. 394.4615, F.S.
[43] Ss. 394.4615, 456.059, 490.0147, and 491.0147, F.S.
[44] Ss. 394.4615(3)(a), 456.059, 490.0147(3), and 491.0147(3), F.S.
[45] Ss. 394.4615, 456.059, 490.0147, and 491.0147, F.S.

The purpose of the Commission is to:

- Examine the current methods of providing mental health and substance abuse services in the state;
- Improve the effectiveness of current practices, procedures, programs, and initiatives in providing such services;
- Identify any barriers or deficiencies in the delivery of such services; and
- Recommend changes to existing laws, rules, and policies necessary to implement the Commission's recommendations.

Current law requires state departments and agencies to provide assistance in a timely manner if requested by the Commission. However, current law does not authorize the Commission to request and receive access to confidential or exempt records that may be necessary to carry out its duties.

Current law also requires the Commission to hold its meetings, held quarterly or upon the call of the chair, via teleconference or other electronic means. This means that in person meetings are not allowed.

The Commission is presently required to submit an initial report by September 1, 2022, and a final report by September 1, 2023, to the Governor, President of the Senate, and Speaker of the House of Representatives on its findings and recommendations on how to best provide and facilitate mental health and substance abuse services in this state.

The Commission is repealed on September 1, 2023, unless it is reenacted by the Legislature.

Substance Abuse

Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.[46] Substance use disorders occur when the chronic use of alcohol or drugs causes significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.[47] Repeated drug use leads to changes in the brain's structure and function that can make a person more susceptible to developing a substance use disorder.[48] Brain imaging studies of persons with substance use disorders show physical changes in areas of the brain that are critical to judgment, decision making, learning and memory, and behavior control.[49]

According to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, a diagnosis of substance use disorder is based on evidence of impaired control, social impairment, risky use, and pharmacological criteria.[50] The most common substance use disorders in the United States are from the use of alcohol, tobacco, cannabis, stimulants, hallucinogens, and opioids.[51]

The Marchman Act

In the early 1970s, the federal government furnished grants for states "to develop continuums of care for individuals and families affected by substance abuse."[52] The grants provided separate funding streams and requirements for alcoholism and drug abuse. In response, the Florida Legislature enacted ch. 396, F.S., (alcohol) and ch. 397, F.S. (drug abuse). In 1993, legislation combined chapters 396 and 397, F.S., into a single law, entitled the Hal S. Marchman Alcohol and Other Drug Services Act

[46] *World Health Organization, Substance Abuse*, http://www.who.int/topics/substance_abuse/en/ (last visited Feb. 3, 2022).
[47] Substance Abuse and Mental Health Services Administration, *Substance Use Disorders,* http://www.samhsa.gov/disorders/substance-use (last visited Feb. 3, 2022).
[48] National Institute on Drug Abuse, *Drugs, Brains, and Behavior: The Science of Addiction*, https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-abuse-addiction (last visited Feb. 3, 2022).
[49] *Id.*
[50] Darran Duchene & Patrick Lane, *Fundamentals of the Marchman Act,* Risk RX, Vol. 6 No. 2 (Apr. – Jun. 2006) State University System of Florida Self-Insurance Program, *available at* http://flbog.sip.ufl.edu/risk-rx-article/fundamentals-of-the-marchman-act/ (last visited Feb. 3, 2022).
[51] *Id.*
[52] *Id.*

(Marchman Act).[53] The Marchman Act supports substance abuse prevention and remediation through a system of prevention, detoxification, and treatment services to assist individuals at risk for or affected by substance abuse.[54]

DCF is the single state authority for substance abuse and mental health treatment services in the state of Florida.[55] DCF, through its Office of Substance Abuse and Mental Health (SAMH), develops standards for prevention, treatment, and recovery services in partnership with other state agencies that also fund behavioral health services.[56] SAMH programs include a range of prevention, acute interventions (such as crisis stabilization or detoxification), residential, transitional housing, outpatient treatment, and recovery support services.[57] DCF provides treatment for substance abuse through a community-based provider system.[58]

Voluntary Admissions

An individual may receive services under the Marchman Act through either voluntary[59] or involuntary admission.[60] A person who wishes to enter substance abuse treatment may apply to a service provider for voluntary admission.[61] A service provider, within their financial and space capabilities, must admit a person when sufficient evidence exists that the person is substance abuse impaired and the service provider can safely manage the person's medical and behavioral conditions.[62]

Service provider records which pertain to the identity, diagnosis, and prognosis of and service provision to any individual are confidential and exempt from public disclosure.[63] As in the Baker Act, although Marchman Act individuals may always agree to the release of their records, current law does not require a service provider to provide individuals the option to authorize the release of their clinical records.

Involuntary Admissions

The Marchman Act establishes a variety of methods under which substance abuse assessment, stabilization, and treatment can be obtained on an involuntary basis.[64] There are five involuntary admission procedures that can be broken down into two categories: non-court involved admissions and court involved admissions. Regardless of the nature of the proceedings, an individual meets the criteria for an involuntary admission under the Marchman Act when there is good faith reason to believe the individual is substance abuse impaired and, because of such impairment, has lost the power of self-control with respect to substance use; and either has inflicted, attempted or threatened to inflict, or unless admitted, is likely to inflict physical harm on himself or herself or another; or the person's judgment has been so impaired because of substance abuse that he or she is incapable of appreciating the need for substance abuse services and of making a rational decision in regard to substance abuse services.[65]

Non-Court Involved Involuntary Admissions

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[53] Ch. 93-39, L.O.F., codified in Chapter 397, F.S. Reverend Hal S. Marchman was an advocate for persons who suffer from alcoholism and drug abuse. *Supra* note 50.
[54] *Id*.
[55] Department of Children and Families, Multi-Year Review Report SFY 19-20 and 20-21, *available at* https://www.myflfamilies.com/service-programs/samh/publications/docs/Multi-Year%20Review%20Report%20SFY%2019-20%20and%2020-21%20-%20FINAL.pdf (last visited Feb. 3, 2022).
[56] *Id.*
[57] Department of Children and Families, *Substance Abuse & Mental Health/Adults*, *available at* https://www.myflfamilies.com/service-programs/samh/for-adults.shtml (last visited Feb. 3, 2022).
[58] Department of Children and Families, *Treatment for Substance Abuse*, *available at* https://www.myflfamilies.com/service-programs/samh/substance-abuse.shtml (last visited Feb. 3, 2022).
[59] *See* s. 397.601, F.S.
[60] *See* ss. 397.675 – 397.6978, F.S.
[61] S. 397.601(1), F.S.
[62] S. 397.601(3), F.S.
[63] S. 397.507(7), F.S.
[64] *See* ss. 397.675 – 397.6978, F.S.
[65] S. 397.675, F.S.

The three types of non-court procedures for involuntary admission for substance abuse treatment under the Marchman Act are:

- **Protective Custody**: This procedure is used by law enforcement officers when an individual is substance-impaired or intoxicated in public and is brought to the attention of the officer.[66]
- **Emergency Admission**: This procedure permits an individual who appears to meet the criteria for involuntary admission to be admitted to a hospital, an addiction receiving facility, or a detoxification facility for emergency assessment and stabilization. Individuals admitted for involuntary assessment and stabilization under this provision must have a physician's certificate for admission, demonstrating the need for this type of placement and recommending the least restrictive type of service that is appropriate to the needs of the individual.[67]
- **Alternative Involuntary Assessment for Minors**: This procedure provides a way for a parent, legal guardian, or legal custodian to have a minor admitted to an addiction receiving facility to assess the minor's need for treatment by a qualified professional.[68]

Under the protective custody procedure, current law requires a law enforcement officer to execute a written report detailing the circumstances under which the person was taken into custody, and to make the report a part of the patient's clinical record. However, the officer is not currently required to include in his or her written report all readily accessible emergency contact information for the person, including information available through FDLE or FLHSMV electronic databases.

[66] Ss. 397.6771 – 397.6772, F.S. A law enforcement officer may take the individual to his or her residence, to a hospital, a detoxification center, or addiction receiving facility, or in certain circumstances, to jail. Minors, however, cannot be taken to jail.
[67] S. 397.679, F.S.
[68] S. 397.6798, F.S.

Court Involved Involuntary Admissions

The two court-involved Marchman Act procedures are involuntary assessment and stabilization, which provides for short-term court-ordered substance abuse services, and involuntary services,[69] which provides for long-term court-ordered substance abuse treatment.

Criminal Penalties for Certain Actions Related to Marchman Act

Under s. 397.581, F.S., a person commits a first degree misdemeanor, punishable by up to one year in county jail and a fine not exceeding $5,000 if he or she:

- Knowingly furnishes false information for the purpose of obtaining emergency or other involuntary admission for any person;
- Causes or otherwise secures, or conspires with or assists another to cause or secure, without reason for believing a person to be impaired, any emergency or other involuntary procedure for the person; or
- Causes, or conspires with or assists another to cause, the denial to any person of any right provided under the Marchman Act.

Patient Information Privacy

Health Information Portability and Accountability Act (HIPAA)

The Health Information Portability and Accountability Act (HIPAA) establishes national standards to protect individuals' medical records and other individually identifiable health information, otherwise known as "protected health information" (PHI).[70] HIPAA applies to health plans, health care clearinghouses, and those health care providers that conduct certain health care transactions electronically. HIPAA limits the use and disclosure of PHI without an individual's written authorization. 45 CFR § 164.510(b) permits covered entities to share with an individual's family member, other relative, close personal friend, or any other person identified by the individual, the information directly relevant to such person's involvement with the patient's health care or payment for health care.

HIPAA allows a covered entity to disclose PHI to notify, or assist in the notification of (including identifying or locating) a family member, a patient's personal representative, or another person responsible for the patient's care of the patient's location, general condition, or death.[71] However, when making disclosures to such persons, a covered entity should obtain verbal permission from the patient when possible, or otherwise be able to reasonably infer that the patient does not object to the disclosure, before disclosing information to these persons. If the patient is incapacitated or unavailable, a covered entity may, when in its professional judgment, doing so is in the patient's best interest, disclose to such persons PHI that is needed for notification purposes or that is directly relevant to the person's involvement with the patient's care or payment related or the patient's health care.[72]

Receiving facilities are HIPAA covered entities and the whereabouts of a person receiving mental health treatment is PHI.[73]

[69] The term "involuntary services" means "an array of behavioral health services that may be ordered by the court for a person with substance abuse impairment or co-occurring substance abuse impairment and mental health disorders." S. 397.311(22), F.S. SB 12 (2016), ch. 2016-241, Laws of Fla., renamed "involuntary treatment" as "involuntary services" in ss. 397.695 – 397.6987, F.S., however some sections of the Marchman Act continue to refer to "involuntary treatment." For consistency, this analysis will use the term involuntary services.

[70] PHI is information that relates to: the individual's past, present or future physical or mental health or condition, the provision of health care to the individual; or the past, present, or future payment for the provision of health care to the individual; and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual.

[71] 45 CFR § 164.510(b)(1)(ii).

[72] 45 CFR § 164.510(b)(3).

[73] DCF, Agency Analysis of 2022 HB 1277, p. 7 (Jan. 20, 2022).

Emergency Contact Information

Under s. 119.0712(2)(d), F.S., emergency contact information contained in a motor vehicle record is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, and without the express consent of the person to whom such emergency contact information applies, the emergency contact information in a motor vehicle record may only be released to law enforcement agencies for purposes of contacting those listed in the event of an emergency.

Any person who uses or releases any information contained in the Driver and Vehicle Information Database for a purpose not specifically authorized by law commits a noncriminal infraction, punishable by a fine not exceeding $2,000.[74]

Effect of Proposed Changes

Baker Act

Rights of Patients

The bill revises conditions under which a patient's communication may be restricted, specifying that a qualified professional must make the determination. The determination must be based on the communications and patient access being detrimental to the patient in a manner directly related to the patient's or other patients' clinical well-being, or the general safety of facility staff.

The bill requires a qualified professional to document specified communication restrictions within 24 hours of the restriction determination.

The bill requires facilities to review a patient's communication restrictions every three days, instead of weekly.

Involuntary Examination

The bill revises procedures related to involuntary examinations. The bill requires a law enforcement officer taking an involuntary examination patient into custody to include in his or her incident report all readily accessible emergency contact information for the patient, including any information available through FDLE or FLHSMV electronic databases. The bill specifies that a receiving facility may only use such information to inform listed emergency contacts of a patient's whereabouts and requires the information to otherwise remain confidential and exempt from disclosure.

The bill requires DCF to add reports relating to a patient's transportation to documents considered part of the patient's clinical record and to use such documents to prepare and provide annual reports required under current law. The bill maintains the requirement for DCF to provide the reports to the President of the Senate, the Speaker of the House of Representatives, the minority leaders of the Senate and the House of Representatives, and the agency itself, which appears to be a technical error.

The bill amends the restriction requiring a receiving facility to be owned or operated by a hospital or health system for a psychiatric nurse to approve a patient's release to include nationally accredited community mental health centers. As such, a psychiatric nurse, performing under the framework of an established protocol with a psychiatrist, will be allowed to release a Baker Act patient in specified community settings. However, the bill retains the prohibition on a psychiatric nurse's approval of a patient's release if the involuntary examination was initiated by a psychiatrist, unless the release is approved by the initiating psychiatrist.

The bill amends certain discharge and planning procedures under the Baker Act and requires a receiving facility or treatment facility to include and document consideration of:

- Follow-up behavioral health appointments;

[74] S. 119.071(2)(e), F.S.

- Information on how to obtain prescribed medications; and
- Information pertaining to:
    - Available living arrangements;
    - Transportation; and
    - Recovery support opportunities.

If a patient's 72-hour examination period ends on a weekend or holiday and a receiving facility intends to file a petition for involuntary services, the bill authorizes the facility to hold a patient through the next working day thereafter. However, the bill requires the petition for involuntary services to be filed no later than such date. If the receiving facility fails to file a petition for involuntary services at the close of the next working day, the patient must be released from the receiving facility. On the other hand, if a receiving facility does not intend to file a petition for involuntary services, it may only postpone release of a patient until the next working day if a qualified professional documents that adequate discharge planning and procedures are not possible until then.

Notice Requirements

The bill maintains the requirement that a receiving facility give prompt notice to specified persons of the whereabout of an involuntary examination patient, but adds emergency contacts identified through FDLE or FLHSMV electronic databases to the list of specified persons, even if a patient requests that no notification be made.

The bill as written may create a conflict with HIPAA, which preempts state law on the use and disclosure of PHI. Therefore, to comply with HIPAA, the term "emergency contact" would need to be defined to be consistent with those persons specifically authorized to receive information under 45 CFR § 164.510(b) and a patient should be given the opportunity to object to disclosure of their whereabouts to such persons.[75]

Clinical Records

The bill requires a receiving facility to document that they have provided patients who were admitted voluntarily the option to authorize the release of their clinical record information to the patient's healthcare surrogate or proxy, attorney, representative, or known emergency contact. This must be done within 24 hours of the voluntary admission.

Criminal Penalties

The bill creates criminal penalties for specified unlawful actions related to obtaining Baker Act services which mirror the criminal penalties provided under current law for similar actions related to the Marchman Act.

Under the bill, a person commits a first-degree misdemeanor, punishable by up to one year in jail,[76] and a fine of up to $5,000, if he or she knowingly and willfully:

- Furnishes false information for the purpose of obtaining emergency or other involuntary admission for any person; or
- Causes, or conspires with another to cause, another person's emergency or other involuntary procedure under false pretenses.

[75] DCF, Agency Analysis of 2022 HB 1277, p. 7 (Jan. 20, 2022).
[76] S. 775.082(4)(a), F.S.

Commission on Mental Health and Substance Abuse

The bill allows the Commission to meet in person or remotely and authorizes reimbursement for per diem and travel expenses associated with in person meetings.

The bill provides the Commission access to confidential and exempt records under certain circumstances and extends the initial report's due date to January 1, 2023.

Marchman Act

Voluntary Admissions

The bill requires a service provider to document that it has provided individuals admitted voluntarily the option to authorize the release of their clinical record information to the individual's healthcare surrogate or proxy, attorney, representative, or known emergency contact. This must be done within 24 hours of the voluntary admission.

Involuntary Admissions

The bill requires a law enforcement officer taking a person into protective custody for involuntary substance abuse treatment to include in his or her report all readily accessible emergency contact information for the patient, including information available through FDLE or FLHSMV electronic databases. The bill specifies that a receiving facility may only use such information to inform listed emergency contacts of a patient's whereabouts and requires the information to otherwise remain confidential and exempt from disclosure.

The bill requires a law enforcement officer to notify a known emergency contact of an adult taken into custody if a nearest relative is unavailable, unless the adult requests that there be no notification. The bill requires officers to document notifications, or attempts at notification, in the same written reports detailing the circumstances under which the person was involuntarily taken into custody.

The bill also makes a number of technical changes to current law.

The bill provides an effective date of July 1, 2022.

B. SECTION DIRECTORY:

Section 1: Amends s. 394.459, F.S., relating to rights of patients.
Section 2: Amends s. 394.4599, F.S., relating to notice.
Section 3: Amends s. 394.4615, F.S., relating to clinical records; confidentiality.
Section 4: Amends s. 394.463, F.S., relating to involuntary examination.
Section 5: Amends s. 394.468, F.S., relating to admission and discharge procedures.
Section 6: Amends s. 394.9086, F.S., relating to the Commission on Mental Health and Substance Abuse.
Section 7: Amends s. 397.601, F.S., relating to voluntary admissions.
Section 8: Amends s. 397.6772, F.S., relating to protective custody without consent.
Section 9: Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

The bill may have an indeterminate, yet insignificant, fiscal impact on DCF to provide per diem reimbursement to members of the Commission on Mental Health and Substance Abuse. The bill allows for meetings to occur via teleconference or in person. The department has sufficient existing resources should members' attendance require reimbursement of per diem expenditures.

The department contracts with the University of South Florida's Baker Act Reporting Center to produce the statutorily-required Annual Report on the Baker Act. DCF indicates that the additional reporting requirements of the bill will create a recurring workload increase of $75,000 to the existing contract. There is also an anticipated nonrecurring cost of $15,000 to modify and test the data management system for inclusion of the additional reporting. [77] A review of the department's budgetary reversions shows there are sufficient resources to absorb this increase.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate positive impact on the number of jail beds by creating a new misdemeanor crime.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Receiving facilities will likely experience an increase in workload to implement the bill.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The department has sufficient rulemaking authority to implement the bill's provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 25, 2022, the Children, Families & Seniors Subcommittee adopted a strike-all amendment to HB 1277 and reported the bill favorably as a committee substitute. The amendment:

- Removes all provisions relating to telehealth;
- Amends the basis for which a qualified professional makes certain patient communication and patient access determinations;

[77] DCF, Agency Analysis of 2022 HB 1277, p. 5 (Jan. 20, 2022).

- Requires a qualified professional to document patient communication restrictions within a specified timeframe;
- Adds a community mental health center setting to the current law restrictions on when a psychiatric nurse may release a patient from a receiving facility.
- Limits the use of a patient's emergency contact information;
- Amends certain discharge and planning procedures under the Baker Act;
- Amends what constitutes unlawful activities under the Baker Act and the associated criminal penalties; and
- Revises certain provisions relating to the Commission on Mental Health and Substance Abuse.