HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 463 w/CS Mental Health
SPONSOR(S): Simmons
TIED BILLS: **IDEN./SIM. BILLS:** SB 700

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Future of Florida's Families	15 Y, 1 N w/CS	Walsh	Liem
2) Judiciary	16 Y, 0 N w/CS	Thomas	Havlicak
3) Human Services Appropriations			
4) Appropriations			
5)			

SUMMARY ANALYSIS

HB 463 amends the Baker Act to include voluntary and involuntary outpatient treatment as alternatives to inpatient commitment. The bill provides criteria and procedures for receipt of outpatient services, assuming such services and programs are available.

The bill grants the Department of Children and Families rulemaking authority to implement the act.

The bill will have an indeterminate, but perhaps substantial, fiscal impact to state and local governments. It will impact the workload of courts, state attorneys, and public defenders. The Agency for Health Care Administration reports the bill will have some fiscal impact on their agency. The bill will have a fiscal impact on local governments depending on each local government's involvement with the provision of services prescribed by the bill.

The bill takes effect January 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[x]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[x]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[X]

For any principle that received a "no" above, please explain:

The bill limits individual freedom and decreases personal responsibility in that the criteria for involuntary outpatient treatment allow a person to be involuntarily examined and treated based upon a third party's belief that, taking into account the person's current reported or observed behavior and previous mental health history, there is a substantial likelihood that without care or treatment the person will pose a threat to self or others.

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Part I of ch. 394, F.S., is known as the Florida Mental Health Act or the "Baker Act."[1] Florida's Baker Act is a civil commitment law which provides a process for the involuntary examination and subsequent involuntary placement (admission) of a person for inpatient treatment of a mental, emotional or behavioral disorder.[2] For purposes of the Baker Act, mental illness is defined as an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with a person's ability to meet the ordinary demands of living, regardless of cause or origin.[3] The term does not include retardation, developmental disability, intoxication, or conditions manifested only by antisocial behavior or substance abuse impairment.

INVOLUNTARY EXAMINATION

A person may be brought in for an involuntary examination at a receiving facility[4] for evaluation including short-term emergency service and treatment for no longer than 72 hours.[5] The process for involuntary e*xamination* is initiated in one of three ways:

1. *Ex parte court order:*[6] A judge may enter an ex parte order stating that the person meets the statutory criteria for emergency admission. The order must include findings and must direct the law enforcement officer to take the person to the nearest receiving facility for examination and

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[1] Section 394.451, F.S.
[2] *See* Part I, s. 394.451- s. 394.4789, F.S. The Act was first enacted in 1971.
[3] Section 394.455(18), F.S.
[4] Section 394.455(26), F.S., defines "receiving facility" as "any public or private facility designated by the department to receive and hold involuntary patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment. The term does not include a county jail." The department designates receiving facilities pursuant to s. 394.461, F.S.
[5] Section 394.463(2)(f) and (g), F.S.
[6] Section 394.463(2)(a)1., F.S.

treatment. A copy of the order must be sent to the Agency for Health Care Administration (AHCA).[7] The order is valid for 7 days or some other timeframe specified in the order.

2. *Law enforcement officer report*:[8] A law enforcement officer may take into custody a person who appears to meet the statutory criteria for involuntary examination and deliver that person to the nearest receiving facility. The law enforcement officer must provide a written report detailing the underlying basis for taking the person into custody. The receiving facility must forward a copy of the report to AHCA.

3. *Health professional certificate*:[9] A physician, clinical psychologist, psychiatric nurse or clinical social worker may execute a certificate stating that the person has been examined within the preceding 48 hours and that the person appears to meet the statutory criteria for involuntary examination. The certificate must include the observations underlying the determination. A law enforcement officer must take into custody and deliver the person to the nearest receiving facility for involuntary examination. The law enforcement officer must prepare a written report. A copy of the certificate must be sent to AHCA.

Criteria for Involuntary Examination: A person may be taken to a receiving facility for involuntary examination if there is reason to believe that he or she is mentally ill and because of his or her mental illness the person:

1. a) has refused voluntary examination after conscientious explanation and disclosure of the purpose of the examination or b) is unable to determine for himself or herself if the examination is necessary; and

2. a) without care or treatment, is likely to suffer from neglect, or refuses to care for himself or herself, which poses a real and present threat of substantial harm to his or her well-being, and it is not apparent that harm may be avoided through the help of willing family members or friends or the provision of other services, or b) there is a substantial likelihood, as evidenced by recent behavior that, without care or treatment, the person will cause serious bodily harm to himself or herself or others in the near future.[10]

INVOLUNTARY PLACEMENT

Petition: After the examination, if the patient is not released and will not voluntarily consent or otherwise refuses to be admitted for treatment, the patient may be involuntarily placed for treatment (admitted to) at a receiving facility pending transfer to a treatment facility or involuntarily placed for treatment in a treatment facility upon the filing of a petition by the receiving facility's administrator.[11] The petition must be supported by a psychiatrist's opinion and a second opinion from a clinical psychologist or psychiatrist. In counties populated by less than 50,000, the second opinion can be provided by a physician with special mental health training. Florida has 27 counties with less than 50,000 in population as of the 2000 U.S. Census.[12]

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[7] The Policy and Services Research Data Center at the Louis de la Parte Florida Mental Health Institute, in agreement with AHCA, serves as the repository for these forms and carries out the data entry and analytic functions for AHCA. During the calendar year 2001, the Center received and entered data from 95,990 Baker Act Initiation Forms. See *The Florida Mental Health Act (The Baker Act) 2001 Annual Report*, Florida Agency for Health Care Administration.
[8] Section 394.463(2)(a)2., F.S.
[9] Section 394.463(2)(a)3., F.S.
[10] Section 394.463(1), F.S.
[11] Section 394.467, F.S.
[12] The following Florida counties have populations totaling less than 50,000 based on the 2000 official U.S. census: Baker, Bradford, Calhoun, Desoto, Dixie, Flagler, Franklin, Gadsden, Gilchrist, Glades, Gulf, Hamilton, Hardy, Hendry, Holmes,

Appointment of counsel: If a person does not already have counsel, a public defender must be appointed within one day of the filing of the petition for involuntary placement for inpatient treatment. Most persons subject to the Baker Act do not have private counsel. The state attorney for the circuit appears at the hearing as a representative of the State.

Hearing; Determination of Competence and Appointment of Guardian Advocate, and Independent Expert Examination: The hearing on the petition must be held within five days. The court may appoint a general master to preside at the hearing. A general master does not have the authority to issue orders but only has authority to issue a recommendation to the court which in turn may approve, modify or reject the recommendation. One of the professionals who executed the involuntary placement certificate must also be a witness at the hearing. The individual who is the subject of the hearing has a right to an independent expert examination. If the individual cannot afford the examination, the court is directed to provide for one.

At the hearing for involuntary placement, the court must determine if the person is competent to consent to treatment. If the person is not competent to consent and a guardian has not yet been appointed to consent on behalf of the person, the court must appoint a guardian advocate who will have that authority.[13] The guardian advocate has that authority for as long as the person is deemed incompetent to consent or is discharged from a facility or is transferred from involuntary to voluntary status.[14] The court can grant additional powers to the guardian advocate. Upon sufficient evidence, the court can (or the hearing officer can recommend to) restore the person's competence. The patient and the guardian advocate must be given a copy of the order restoring competence, or the certificate of discharge containing the restoration of competence.[15]

Criteria for Involuntary Inpatient Placement: A person may be involuntarily placed for treatment upon a finding of the court by clear and convincing evidence that the person is mentally ill and because of the mental illness the person:

1. a) has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment, or b) is unable to determine for himself or herself if placement is necessary; and

2. a) 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 which poses a real and present threat of substantial harm to his or her well-being, or b) there is substantial likelihood, as evidenced by recent behavior, that in the near future he or she will inflict serious bodily harm on himself or herself or another person, causing, attempting, or threatening harm; and

3. all available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate.[16]

Jackson, Jefferson, Lafayette, Levy, Liberty, Madison, Okeechobee, Suwannee, Taylor, Wakulla, Walton, and Washington.

[13] Section 394.4598, F.S. Section 394.455(12), F.S., defines "guardian advocate" as "a person appointed by a court to make decisions regarding mental health treatment on behalf of a patient who has been found incompetent to consent to treatment pursuant to this part. The guardian advocate may be granted specific additional powers by written order of the court, as provided in this part."

[14] Section 394.4598(7), F.S.

[15] *Id.*

[16] Section 394.467(1), F.S.

CONTINUED INVOLUNTARY PLACEMENT FOR INPATIENT TREATMENT

If a patient continues to meet the criteria for continued involuntary placement, the facility's administrator must file a petition for continued involuntary placement before the period of treatment in the order expires.[17] The petition must include an attachment that contains the patient's physician or clinical psychologist's statement justifying the continuance, describing the patient's treatment, and specifying the individualized plan to be followed.

Hearings for continued involuntary placement are conducted by administrative law judges in the Division of Administrative Hearings.[18] The hearings are not judicial. The patient must be represented by the public defender if the patient is not otherwise represented by private counsel.[19] If the administrative law judge finds that the patient meets the criteria for continued placement, then he or she may order continued placement for a maximum of 6 additional months.[20] This process is repeated prior to the expiration of each ordered period.

At all times during a person's involuntary inpatient placement, a patient (or guardian or guardian advocate on behalf of the patient) retains the right to request transfer from one facility to another, provided the other facility accepts the patient or the availability of appropriate facility resources in the case of transfer between public facilities.[21]

CONFIDENTIALITY OF CLINICAL RECORDS

All information about a person in a mental health facility is maintained as confidential and only released with the consent of the person or a legally authorized representative.[22] However, certain information can be released without consent to the person's attorney, in response to a court order, if there has been a threat of harm to parents, next-of-kin, or others. Persons in mental health facilities have the right to access their own clinical records under the patient's bill of rights.[23]

STATE'S MENTAL HEALTH AGENCY

The Department of Children and Families is designated as the State's Mental Health Authority. The department and AHCA exercise executive and administrative supervision over all mental health facilities, programs, and services.[24] The department is responsible for reporting to AHCA any violations of the rights or privileges of patients and procedure provided by any facility or professional and AHCA is authorized to impose sanctions for such violations.[25] The Florida Local Advocacy Council also has statutory responsibility to oversee the proper implementation of the Baker Act. Any designated receiving and treatment facility must allow the council access to a patient and the clinical and legal records.[26] The council is also required to receive notice of any person admitted as an involuntary patient.[27]

[17] Section 394.467(7)(b), F.S.
[18] Section 394.467(7)(a), F.S.
[19] Section 394.467(7)(c), F.S.
[20] Section 394.467(7)(d), F.S.
[21] Section 394.4685, F.S.
[22] Section 394.4615, F.S.
[23] Section 394.459, F.S.
[24] Section 394.457, F.S.
[25] Section 394.459(9), F.S.
[26] Section 394.459(5)(c), F.S.
[27] Section 394.4599(2)(b), F.S.

RECENT TRENDS AND EFFORTS IN MENTAL HEALTH SYSTEMS

According to data collected by the Agency for Health Care Administration and analyzed by the Louis de la Parte Florida Mental Health Institute, 62,339 adults in Florida received involuntary examinations pursuant to the Baker Act during Fiscal Year 2002-2003. Of those, 10,712 received multiple examinations, including 460 receiving six or more.[28]

Mental health advocates and professionals believe that many hospitalizations could be avoided if a person with serious mental illness received early interventions and appropriate treatment services. In many cases when persons with mental illness do not receive the proper services, other serious problems exist such as becoming homeless, incarcerated, suicidal, victimized or prone to violent episodes.

Judges and other professionals in Florida's criminal justice system and mental health system find that many persons with mental illness who commit misdemeanors cycle in and out of the county jails because they do not have access to the appropriate mental health treatment and support services.[29] These experts believe that persons with mental illness continue to commit misdemeanors for the following reasons:

- many persons are not diagnosed and treated in jail immediately after arrest,
- many persons who are stabilized in jail or in a mental health facility decompensate quickly when returning to their home because the appropriate psychiatric medications or other treatment modalities that help maintain mental stability are discontinued, and
- there is a lack of managing and monitoring of the client in the community to assure that service needs are being met.

Mental health experts in Florida's community mental health system believe that one of the more subtle outcomes of the deinstitutionalization of persons with mental illness from the state mental health hospitals has been their reinstitutionalization in the criminal justice system.[30]

Many states have adopted new treatment standards that are not based solely on dangerousness to self or others but are based on a patient's well established medical and treatment history and other factors such as self-neglect, violence, or arrest for criminal behavior. Forty-one states have laws allowing courts to order participation in outpatient treatment.[31]

In August, 1999, the state of New York passed Kendra's Law, named for Kendra Webdale, who died after being pushed onto the subway tracks in Manhattan by a man with a history of mental illness and hospitalizations. Kendra's Law put in place assisted outpatient treatment to ensure that individuals with mental illness and a history of hospitalizations or violence participate in community-based services. The New York State Office of Mental Health reports[32] that between November 1999 and December 3, 2002, almost 2500 court orders for assisted outpatient treatment were

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[28] *Special Report of Repeated Baker Act Examinations Statewide*, Department of Mental Health Law and Policy, Florida Mental Health Institute, University of South Florida, February, 2004. *See also The Florida Mental Health Act (The Baker Act) 2002 Annual Report*, Florida Agency for Health Care Administration (revised 11/25/03). Mental health professionals brought fifty-one percent of the Baker Act initiations, followed by law enforcement officials (45 percent), and judges (4 percent). The average age of a person subjected to the Baker Act is 37 years old

[29] *Jail Diversion Strategies for Misdemeanor Offenders with Mental Illness: Preliminary Report*, Department of Mental Health Law & Policy, Florida Mental Health Institute, University of South Florida, 1999.

[30] *Emerging Judicial Strategies for the Mentally Ill*, Bureau of Justice Assistance, April 2000.

[31] *Briefing Paper*, Treatment Advocacy Center, Arlington, Virginia, March 2003. *See also* www.psychlaws.org

[32] *Kendra's Law: An Interim Report on the Status of Assisted Outpatient Treatment*, New York State Office of Mental Health, January 1, 2003, page 6.

issued. Significantly, after six months of assisted outpatient treatment, participants' incidence of hospitalization, homelessness, arrest and incarceration all declined from pre-participation levels.[33]

Research conducted in North Carolina by Duke University suggests that a sustained outpatient commitment order (180+ days), when combined with intensive mental health services, may increase treatment adherence and reduce the risk of negative outcomes such as relapse, violent behavior, victimization, and arrest. According to the Duke researchers, two factors associated with reduced recidivism and improved outcomes among people with severe mental illness appear to be intensive mental health treatment and enhanced monitoring for a sustained period of time. In the Duke study, outcomes were only improved for those under court order who received intensive mental health services. The researchers could not conclude if court orders without intensive treatment make a difference in client outcomes.[34]

EFFECTS OF THE BILL

Definitions

HB 463 amends section 394.455, F.S., to add definitions of service provider, involuntary examination, and involuntary placement.

Guardian Advocates

The bill amends section 394.4598, F.S., relating to the Guardian Advocate, to correct cross-references and to require that the guardian advocate be discharged from an order for involuntary inpatient or outpatient placement when the patient is transferred to voluntary status.

Mental Health Counselors

The bill adds mental health counselors to the list of professionals authorized to: assess a mental health resident in an assisted living facility pursuant to s. 394.4574, F.S.; execute a certificate that a person appears to meet the criteria for involuntary inpatient examination; and deem as clinically appropriate a treatment plan for involuntary outpatient services.

Clinical Record

The bill amends section 394.4615, F.S., relating to confidentiality of clinical records, to allow for release of information from the clinical record when determining whether a person meets the criteria for involuntary outpatient placement or for preparing the proposed treatment plan. The bill specifies that the records may be released to the state attorney, the public defender or the patient's private legal counsel, the court, and the appropriate mental health professionals in accordance with state and federal laws.

Involuntary Examination

The bill amends section 394.463, F.S., relating to involuntary examinations, to provide additional criteria to take a person to a receiving facility for involuntary examination. The bill requires that there must be a reason to believe that the person has a mental illness; that based on the person's current reported or observed behavior, and considering their past mental history, there is a substantial likelihood that

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[33] *Id.*, Table 5, page 9.
[34] *The Effectiveness of Involuntary Outpatient Treatment: Empirical Evidence and the Experience of Eight States*, M. Susan Ridgely, Randy Borum, John Petrilla, Santa Monica, CA, RAND, MR-1340-CSCR, 2001. *See* www.rand.org/publications/MR/MR1340.

without care or treatment the person will suffer from neglect or refuse to care for himself or herself, or the person will cause serious bodily harm to himself or herself or others in the future.

The bill requires that AHCA receive and maintain copies of involuntary outpatient and involuntary inpatient placement orders. The bill allows a patient to be offered voluntary placement if he or she does not meet the criteria for involuntary inpatient or outpatient placement. It also provides that a petition for involuntary outpatient placement shall be filed in the circuit court by the administrator of a receiving or treatment facility or one of the examining professionals. A petition for involuntary inpatient placement is to be filed by the facility administrator.

Involuntary Outpatient Placement

The bill creates new section 394.4655, F.S., relating to involuntary outpatient placement.

CRITERIA FOR INVOLUNTARY OUTPATIENT PLACEMENT

Requires the court to find by clear and convincing evidence that:

- The person is 18 or older; and
- The person has a mental illness; and
- Based on a clinical determination the person is unlikely to survive safely in the community without supervision; and
- The person has a history of noncompliance with treatment for mental illness; and
- The person has:
  - At least twice within the last 36 months been admitted for examination or placement in a receiving or treatment facility or received mental health services in a forensic or correctional facility, which period of time excludes any period during which the person was admitted or incarcerated; or
  - Engaged in one or more acts of serious violent behavior to self or others or engaged in attempts at serious bodily harm to self or others within the preceding 36 months; and
- The person is unlikely to voluntarily participate in treatment; and
- The person is in need of involuntary outpatient placement in order to prevent a relapse or deterioration of condition which would result in harm to self or others; and
- The person will likely benefit from involuntary outpatient placement; and
- All available less restrictive alternatives have been judged to be inappropriate.

Each of the criteria must be alleged and substantiated in a petition for involuntary outpatient placement which shall include a clinical determination by a qualified professional.

PROCEDURE FOR INVOLUNTARY OUTPATIENT PLACEMENT

<u>From a receiving facility</u>

Upon recommendation of the facility administrator, a patient may be retained by a receiving facility unless the patient is stabilized and no longer meets the criteria for involuntary examination, in which case the patient must be placed in outpatient treatment while awaiting hearing.

The recommendation must be based on the opinion of a psychiatrist and the second opinion of a clinical psychologist or another psychiatrist, both of whom have examined the patient within the preceding 72 hours. In counties of less than 50,000 persons and upon certification by the facility administrator that such a second opinion cannot be obtained, the second opinion may be provided by a licensed physician with training and experience in mental disorders or by a psychiatric nurse. The recommendations must be entered on an involuntary outpatient placement certificate.

Voluntary examination for outpatient placement

A patient may be examined on an outpatient basis for an involuntary outpatient placement certificate in a manner similar to that from a receiving facility. However, the certificate must be supported by the opinion of a psychiatrist and clinical psychologist or another psychiatrist, both of whom have examined the patient within the preceding 7 days.

From a treatment facility

A patient in involuntary inpatient treatment may be examined in a treatment facility for an involuntary outpatient placement certificate in a manner similar to that from a receiving facility, prior to the expiration of the period during which the treatment facility is authorized to retain the patient.

Petition for involuntary outpatient placement

The petition for involuntary outpatient placement must allege and substantiate each of the criteria and shall include a clinical determination by a qualified professional. The petition for involuntary outpatient placement may be filed by the receiving or treatment facility administrator or one of the examining professionals. It must be filed in the county where the patient is located. The clerk of court shall provide copies of the proposed treatment plan and the petition to DCF, the patient, his or her guardian or representative, the state attorney and the public defender. No filing fee may be charged.

Appointment of counsel

The bill requires that the public defender be appointed to represent the person who is the subject of the petition within one working day of receipt. The public defender represents the person until dismissal of the petition, expiration of the court order, or discharge from involuntary outpatient placement.

Continuances

The bill entitles the patient to one continuance of the hearing of up to four weeks with consent of his or her counsel.

Hearing on involuntary outpatient placement

The bill requires that the hearing shall be held within five days in the county where the patient is located. The state attorney shall represent the state as the real party in interest.

A master may be appointed to preside. One of the examining professionals must testify at the hearing. The patient has the right to an independent expert examination. The court must allow testimony from individuals, including the person's family members, deemed by the court to be relevant, regarding the person's prior history and how it relates to the person's current condition. The testimony must be under oath and the proceedings recorded. The patient may refuse to testify.

The court shall issue an order for involuntary outpatient placement for up to six months if the court concludes the patient meets the criteria. The service provider shall discharge the patient at any time the patient no longer meets the criteria.

The bill requires that the receiving facility administrator or designated DCF representative must identify a service provider having primary responsibility for the patient. The service provider must prepare a written treatment plan for submittal to the court and to the petitioner prior to the hearing for consideration by the court for inclusion in the involuntary outpatient placement order. The plan

may provide for multiple services deemed clinically appropriate by the provider's treatment professional.

The bill requires that the service provider must certify that the services are available and will be provided. If the service provider certifies that treatment services are not available, the petition must be withdrawn. The court cannot order services that are not available in the patient's local community or in which there is no space available.

The bill provides that the treatment plan can be modified after the placement order is entered upon agreement of the patient and the service provider. Agreed modifications require notice to the court; modifications with which the patient disagrees must be approved by the court.

When, in the clinical judgment of a physician and after efforts to solicit compliance, the patient fails or refuses to comply with the ordered involuntary outpatient treatment plan, and the patient may meet the criteria for involuntary examination, a person may be brought to a receiving facility. If after examination a person no longer meets the criteria, the person must be discharged. Otherwise, the service provider must determine whether modifications should be made to the treatment plan and attempt to engage the patient in involuntary outpatient treatment. The treatment plan can be modified upon agreement of the patient or his or her guardian advocate and the service provider. Agreed modifications require notice to the court; modifications with which the patient or his or her guardian advocate disagree must be approved by the court.

If prior to the conclusion of the initial hearing it appears that the person meets the criteria for involuntary inpatient placement, the court may order the person admitted for involuntary examination. If the person meets the criteria for involuntary assessment, protective custody, or involuntary admission, the court may order the person admitted for involuntary assessment for a period of five days.

At the hearing, the court shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the patient is found to be incompetent, the court must appoint a guardian advocate.

<u>Procedure for continued involuntary outpatient placement</u>

The bill requires that the service provider shall file a continued involuntary outpatient placement certificate prior to expiration of the ordered treatment plan if the person continues to meet the criteria for involuntary outpatient placement. The certificate must be accompanied by a physician's statement justifying the request, a description of the existing treatment plan, and a plan for continued treatment.

The public defender shall be appointed to represent the person on the petition within one court working day of receipt. The patient and his or her attorney may agree to a period of continued involuntary outpatient placement without a hearing.

Procedures for hearings for continued involuntary outpatient placement are the same as for the initial hearing except that the court need not consider whether the person has at least twice within the last 36 months been admitted for examination or placement in a receiving or treatment facility or received mental health services in a forensic or correctional facility, which period of time excludes any period during which the person was admitted or incarcerated immediately preceding the filing of the petition; or engaged in one or more acts of serious violent behavior to self or others or engaged in attempts at serious bodily harm to self or others within the preceding 36 months. This procedure shall be repeated prior to expiration of each additional treatment period. If the patient previously was found incompetent, the court shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the patient is found to be incompetent, the court must appoint a guardian advocate.

Involuntary inpatient placement

The bill amends existing law on involuntary placement to clarify that it relates to involuntary inpatient placement and to conform cross-references.

Rulemaking

The bill provides DCF authority to adopt rules necessary to implement the act.

C. SECTION DIRECTORY:

Section 1: Amends s. 394.455, F.S., relating to definitions.

Section 2: Amends s. 394.4574, F.S., relating to responsibilities of the Department of Children and Families for a mental health resident who resides in certain assisted living facilities.

Section 3: Amends s. 394.4598, F.S., relating to guardian advocates.

Section 4: Amends s. 394.4615, F.S., relating to clinical records.

Section 5: Amends s. 394.463, F.S., relating to involuntary examination.

Section 6: Creates s. 394.4655, F.S., relating to involuntary outpatient placement.

Section 7: Amends s. 394.467, F.S., relating to involuntary inpatient placement.

Section 8: Amends s. 394.495, F.S., relating to child and mental health system of care; conforms references to renumbered paragraphs.

Section 9: Amends s. 394.496, F.S., relating to service planning; conforms references to renumbered paragraphs.

Section 10: Amends s. 394.498, F.S., relating to child and adolescent interagency system of care demonstration models; conforms references to renumbered paragraphs.

Section 11: Amends s. 419.001, F.S., relating to site residential homes; conforms references to renumbered paragraphs.

Section 12: Amends s. 744.704(7), F.S.; conforms references to renumbered paragraphs.

Section 13: Provides a grant of rulemaking authority to DCF.

Section 14: Provides that the provisions of this act are severable.

Section 15: Provides an effective date of January 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   There are no known or expected fiscal impacts on state government revenues.

2. Expenditures:

   See Fiscal Comments below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   There are no known or expected fiscal impacts on local government revenues.

2. Expenditures:

   The Florida Association of Counties advises that there will be an undetermined fiscal impact to counties due to the required 25 percent matching funds that must be provided for mental health services. See discussion of local government mandate impact under "Constitutional Issues" below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

HB 463 amends the criteria for involuntary examination to include persons who have at least twice within the last 36 months been admitted for examination. According to data collected by the Agency for Health Care Administration and analyzed by the Louis de la Parte Florida Mental Health Institute, over the 36 month period from July 2000 through June 2003, 149,693 adults received an involuntary examination pursuant to the Baker Act. Of those, 31,285 adults received more than one examination, including 17,957 (12.24 percent) who received two or more, and 6,257 (4.27 percent) who received three or more.[35]

DCF reports that although this bill will result in an increase in involuntary examinations for persons who do not comply with their involuntary outpatient placement treatment plan, the department estimates that service providers will be able to implement the requirements of the bill within existing resources.

AHCA reports that the annual cost for receiving and processing forms required by this bill is estimated to be $65,000 for the first year and $80,000 for each additional year due to anticipated growth. This includes the equivalent of 1.5 FTE staff positions (three separate individuals, each a part-time employee): one person to prepare the data for database entry, a second to enter the data, and a third to check the data for accuracy. In addition, a 0.5 FTE supervisor would be needed. AHCA will contract with an outside source to perform these functions.

The Office of the State Courts Administrator reports as follows:

> Statewide implementation of HB 463 in the trial courts will require the equivalent of two to three fulltime circuit judges. Accordingly, the initial recurring fiscal impact of HB 463 on the circuit courts is conservatively estimated to range from $636,608 to $954,912. State due process expenses for independent expert examinations, court reporting, disability accommodations, and court interpreting can also be expected to increase.
>
> There will be modest non-recurring effects in FY 2004-05 for education programs to prepare the judiciary for implementation of the bill. There will also be moderate non-recurring effects in either FY 2004-05 or FY 2005-06, in order to study and adjust the Weighted Caseload System judicial workload weight assigned to Baker Act cases.

[35] *Ibid*.

While previously funded by the counties, pursuant to Chapter 2003-402, Laws of Florida, due process costs of independent expert examinations, court reporting, disability accommodations, and court interpreting will become state obligations on July 1, 2004. Because the number and length of court hearings will increase under the legislation, the state's costs for these due process services are expected to increase as well.

It is anticipated that there will be some fiscal impact on the offices of state attorneys and public defenders throughout the state associated with the increased workload occasioned by the requirements of the bill.

Provisions of the bill implicate the implementation of Revision 7 to Article V of the Florida Constitution which shifts major costs of Florida's judicial system from the counties to the state.[36] The Legislature is still in the process of identifying and determining the substantive and financial responsibilities of the state court system, the offices of the public defender, the offices of the state attorney, the counties, the clerks of the court and other interested stakeholders by the constitutional deadline of July 1, 2004.[37] At a minimum, the following costs incurred by application of the bill's provisions will have to be borne or absorbed by the state or local government: 1) the cost of an independent expert examination in a hearing for involuntary outpatient placement if an indigent person exercises the right to an independent expert examination, 2) the cost of required recordings of proceedings on initial and continued involuntary outpatient placement, 3) the cost of *available* services or treatment under a proposed treatment plan recommended by a service provider which may run the gamut of intensive case management, periodic urinalysis, therapy, and counseling, 4) the cost of an appointed guardian advocate if the person is determined to be incompetent and without a guardian to make mental health decisions,[38] 5) the cost of legal representation (public defender if private counsel not otherwise available) required for petitions for initial involuntary placement who must then be retained for the duration of a person's court-ordered involuntary placement for outpatient services, 6) the cost of state attorneys representing the state at judicial hearings for the initial and continued involuntary placement for outpatient services, 7) the cost of evaluations of individuals, preparation of necessary reports, proposed treatment plans and the provision of witnesses and expert testimony for proceedings including a determination of competence, and 8) the court costs associated with taking testimony and evidence regarding a patient's competence including court reporting, disability accommodations, and court interpreting which are just some of the state due process services to be assumed by the state.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   To the extent that political subdivisions, including cities and counties are obligated to pay for certain services or processes attendant with the new statutory framework for involuntary examination, involuntary placement and continued involuntary placement for outpatient services, the bill could constitute a prohibited local mandate for which no funding source[39] is provided to such political subdivisions. Florida's Constitution provides:

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[36] Article V, SEC. 14, FLA. CONST.

[37] *See* e.g., chapter 2003-402, L.O.F.

[38] Issues pertaining to guardianship were of such concern that in June, 2003, the Governor established by Executive Order a Joint Work Group on Guardianship for the Developmentally Disabled. Some of the key findings of this work group reflect that there are an insufficient number of people willing to serve as guardians or guardian advocates and that there is a significant fiscal impact associated with increasing the availability of these services. Aside from the issue of availability, guardian advocates are required to submit to minimum educational and training requirements in order to serve.

[39] Under current law, no filing fees may be assessed for Baker Act proceedings.

> No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989 … and the law requiring such expenditure is approved by two-thirds of the membership of each house of the Legislature…[40]

The local government mandate constitutional provision does not apply if the legislation has an "insignificant fiscal impact."[41] The term "insignificant fiscal impact" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. The insignificant fiscal impact exemption threshold for fiscal year 2004-05 is $1.74 million.

It is indeterminate at this time how much counties and cities would be required to spend to effectuate parts of this Act. The provisions of the bill will affect counties differently depending on whether outpatient services are available based on existence, space or funding at the time a person is subject to involuntary examination and involuntary placement for outpatient services. If it is determined that the Act does constitute a mandate, it does not include constitutionally required language that provides that the Legislature has determined that this legislation fulfills an important state interest, in accordance with Section 18 of Article VII of the State Constitution. Further, if it does constitute a mandate, the bill would need to pass by a vote of at least two-thirds of the membership of each house.[42]

2. Other:

<u>Due Process Issues</u>

Both the Fourteenth Amendment to the United States Constitution, and Article I, s. 9 of the Florida Constitution forbid the state from depriving any person "of life, liberty or property, without due process of law." Florida courts have largely treated the requirements of the federal and state Due Process Clauses as identical. Procedural due process generally requires that a party who may be deprived of life, liberty or property receive adequate notice and an opportunity to be heard.[43]

The bill may implicate constitutional substantive and procedural due process considerations affecting a person's liberty. While the bill does not commit patients to an inpatient facility, it is designed to have the state mandate certain medical care on behalf of a person, even against that person's will. Having the state forcibly require a person to submit to mental health examinations and treatment against their will is significant. Reviewing the application of the Baker Act in a particular case, the Florida Supreme Court stated:

> The deprivation of liberty which results from confinement under a state's involuntary commitment law has been termed a "massive curtailment of liberty." *Humphrey v. Cady, 405 U.S. 504, 509 (1972).* Those whom the state seeks to involuntarily commit to a mental institution are entitled to the protection of our Constitutions, as are those incarcerated in our correctional institutions. Chief Justice Warren Burger elaborated upon this principle, concurring in O'Conner v. Donaldson, 422 U.S. 563, 580 (1975):

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[40] Article VII, SEC. 18(a), FLA. CONST.
[41] Article VII, SEC. 18(d), FLA. CONST.
[42] Article VII, SEC. 18(b), FLA. CONST.
[43] *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. *Specht v. Patterson*, 386 U.S. 605, 608 (1967). Cf *In re Gault*, 387 U.S. 1, 12-13 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.[44]

This bill amends the Baker Act. While this bill adds involuntary outpatient placement to the current Baker Act, not all the same procedural due process considerations have been picked up in this bill. For example:

- A person subject to a petition for involuntary *outpatient* placement is not accorded the same opportunity or right to participate as a person subject to involuntary *inpatient* placement in the development of a treatment and discharge plan or to choose the service provider from whom he or she may receive treatment or services as a person subject to involuntary *inpatient* placement. The administrator of a facility or a designated department representative selects the service provider who unilaterally develops the treatment plan. The first opportunity the involuntarily placed person has to provide input or seek modification of an outpatient service plan is *after* the proposed recommended treatment plan is court-approved and incorporated into the involuntary *outpatient* placement order.

Public Records Issues:

The bill may implicate the public records law. Under current law, a clinical record is confidential and exempt from disclosure and applies to clinical records for involuntary ***inpatient*** examinations and services.[45] Involuntary ***outpatient*** examinations and services don't exist under current law and, therefore, are not covered by existing public records exemptions. This constitutes an implicit expansion of the existing provisions for confidentiality and exemption from disclosure. Such expansion would constitute a new exemption and necessitates a separate public records bill.

Every person has the constitutional right to access public records and meetings in connection with official business of any public body, officer, or employee of the state, or persons acting on their behalf.[46] The term "public records" has been defined by the Legislature to include "… all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[47] This definition of "public records" has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.[48] Unless these public records are exempted by the Legislature, they are open for public inspection, regardless of their final form.[49] The State Constitution permits exemptions to open government requirements and states that these exemptions can be established by general law passed by two-thirds vote of each house, provided: (1) the law creating the exemption states with specificity the public necessity justifying the

[44] *Shuman v. State*, 358 So.2d 1333 (Fla. 1978).
[45] Section 394.4615, F.S. "Clinical records" are defined in s 394.455(3), F.S., as "all parts of the record… which pertains to the patient's hospitalization and treatment."
[46] Article I, SEC. 24(a), FLA. CONST.
[47] Section 119.011(1), F.S.,
[48] *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[49] *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979).

exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law.[50]

B. RULE-MAKING AUTHORITY:

DCF is authorized to adopt any rules necessary to implement the provisions of the act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

At its March 9, 2004, meeting, the Committee on the Future of Florida's Families adopted a Committee Substitute, which amended HB 463 in the following ways:

Definitions

Further amend s. 394.466, F.S., to add a definition of "involuntary examination."

Clinical Record

Further amend s. 394.4615, F.S., relating to confidentiality of clinical records, to allow for the release of information from the clinical record in accordance with state and federal laws.

Involuntary Outpatient Placement

Voluntary examination for outpatient placement

Amend new s. 394.4655(2)(b) to require that the involuntary outpatient placement certificate must be supported by the opinion of a psychiatrist and clinical psychologist or another psychiatrist, both of whom have examined the patient within the preceding 7 [rather than 14] days.

Provides requirements for petition for involuntary outpatient placement

Further amend new s. 394.4655(3)(c) to require that the Clerk of Court provide copies of the proposed treatment plan and the petition [rather than just the petition] to DCF, the patient, his or her guardian or representative, the state attorney and the public defender.

Provides requirements for hearing on involuntary outpatient placement

Further amend new s. 394.4655(6)(c) to require that if prior to the conclusion of the initial hearing it appears that the person meets the criteria for involuntary inpatient placement, the court may order the person admitted for involuntary examination [rather than involuntary placement].

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[50] In addition, the general law provides for a limited exemption period. The Open Government Sunset Review Act of 1995 establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of five years. In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption. Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:
(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
(b) The exemption is necessary for the effective and efficient administration of a governmental program; or
(c) The exemption affects confidential information concerning an entity.

Procedure for continued involuntary outpatient placement

Further amend new s. 394.4655(7)(d) to allow the patient and the patient's attorney to agree to a period of continued involuntary outpatient placement without a hearing.

At its March 30, 2004, meeting, the Committee on Judiciary adopted a Committee Substitute, which amended the bill in the following ways:

- Adds mental health counselors to the list of professionals authorized to: assess a mental health resident in an assisted living facility pursuant to s. 394.4574, F.S.; execute a certificate that a person appears to meet the criteria for involuntary inpatient examination; and deem as clinically appropriate a treatment plan for involuntary outpatient services.
- Removes the phrase "nurse providing psychiatric services consistent with chapter 464" and inserting the phrase "psychiatric nurse."

This analysis is drafted to the Committee Substitute.