Involuntary Outpatient Placement

Q. I have a question related to involuntary outpatient commitment. We are working with a man that has been receiving services through our CMHC under an involuntary outpatient order. He has recently been switched to a Medicaid HMO that contracts with a private mental health center to provide services. The new provider would like for him to remain under the IOP. I don't see anything in the Baker Act that would prohibit us for submitting to the court a service modification for a different [private] provider. Should the new provider submit a new treatment plan, listing them as the provider? Is the modification the only documentation that is necessary if the treatment plan remains the same? Does the new provider submit the modification or should we? It seems that the court must have something from the new provider agreeing to the treatment plan. The individual has about 3 months left on the IOP commitment.

A. This shouldn't be a difficult matter if the man agrees with the change of provider. If he agrees and if the treatment plan remains the same – just a change of provider – simple notice to the court should suffice. However, before doing that you should get written confirmation from the new service provider that it agrees to be the provider, that the services identified in the court ordered treatment plan are available and will be provided. The court may require such a statement since this must have been provided by the original service provider and it remains a condition of IOP. While a change of provider agreeable to the client may not be "material", it would always be appropriate to notify the court since this modifies the terms of the court's order..

The relevant pieces from the Baker Act law and rule below deal with this issue:

> **394.4655, FS Involuntary outpatient placement.**
> **(3)PETITION FOR INVOLUNTARY OUTPATIENT PLACEMENT.—**
> (b)Each required criterion for involuntary outpatient placement must be alleged and substantiated in the petition for involuntary outpatient placement. A copy of the certificate recommending involuntary outpatient placement completed by a qualified professional specified in subsection (2) must be attached to the petition. A copy of the proposed treatment plan must be attached to the petition. **Before the petition is filed, the service provider shall certify that the services in the proposed treatment plan are available. If the necessary services are not available in the patient's local community to respond to the person's individual needs, the petition may not be filed.**
> 2.The service provider that will have primary responsibility for service provision shall be identified by the designated department representative prior to the order for involuntary outpatient placement **and must, prior to filing a petition for involuntary outpatient placement, certify to the court whether the services recommended in the patient's discharge plan are available in the local community and whether the service provider agrees to provide those services.** The service provider must develop with the patient, or the patient's guardian advocate, if appointed, a treatment or service plan that addresses the needs identified in the discharge plan. The plan must be deemed to be clinically appropriate by a physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker, as defined in this chapter, who consults with, or is employed or contracted by, the service provider.
> (6)HEARING ON INVOLUNTARY OUTPATIENT PLACEMENT.—
> (b) 2.The court may not order the department or the service provider to provide services if the program or service is not available in the patient's local community, if there is no space available in the program or service for the patient, or if funding is not available for the program or service. A copy of the order must be sent to the Agency for Health Care Administration by the service provider within 1 working day after it is received from the court. **After the**

placement order is issued, the service provider and the patient may modify provisions of the treatment plan. For any material modification of the treatment plan to which the patient or the patient's guardian advocate, if appointed, does agree, the service provider shall send notice of the modification to the court. Any material modifications of the treatment plan which are contested by the patient or the patient's guardian advocate, if appointed, must be approved or disapproved by the court consistent with subsection (2).

65E-5.285, FAC Involuntary Outpatient Placement.
(3) Court Order.
(a) If the court concludes that the person meets the criteria for involuntary outpatient placement pursuant to Section 394.4655, F.S., it shall prepare an order. Recommended form CF-MH 3155, Feb. 05, "Order for Involuntary Outpatient Placement or Continued Involuntary Outpatient Placement," which is incorporated by reference and may be obtained pursuant to Rule 65E-5.120, F.A.C., of this rule chapter, or other order entered by the court, may be used for this purpose. This signed order shall be given to the person, guardian, guardian advocate or representative, counsel for the person, state attorney, and administrator of the receiving or treatment facility, with a copy of the order retained in the person's clinical record.
(b) Upon receipt of the court order for involuntary outpatient placement, the administrator of a treatment facility will provide a copy of the court order and adequate documentation of a person's mental illness to the service provider, including any advance directives, a psychiatric evaluation of the person, and any evaluations of the person performed by a clinical psychologist, mental health counselor, marriage and family therapist, or clinical social worker.
(c) In order for the department to implement the provisions of Section 394.463(2)(e), F.S., and to ensure that the Agency for Health Care Administration will be able to analyze the data it receives pursuant to that section, service providers shall forward copies of each recommended form CF-MH 3155, "Order for Involuntary Outpatient Placement or Continued Involuntary Outpatient Placement," as referenced in paragraph 65E-5.285(3)(a), F.A.C., or other order provided by the court, accompanied by mandatory form CF-MH 3118, "Cover Sheet to Agency for Health Care Administration," as referenced in subsection 65E-5.280(5), F.A.C., to: BA Reporting Center, FMHI-MHC 2637, 13301 Bruce B. Downs Boulevard, Tampa, Florida 33612-3807.
(d) At any time material modifications are proposed to the court ordered treatment plan for which the person and his or her substitute decision-maker if any, agree, the service provider shall submit recommended form CF-MH 3160, Feb. 05, "Notice to Court of Modification to Treatment Plan for Involuntary Outpatient Placement and/or Petition Requesting Approval of Material Modifications to Plan," which is incorporated by reference and may be obtained pursuant to Rule 65E-5.120, F.A.C., of this rule chapter or other form adopted by the court. Each person undergoing involuntary outpatient placement and his or her substitute decision-maker if any, must be given a copy of this form by the service provider, and if requested, the service provider shall assist the person or substitute decision-maker in its completion. If the person or his substitute decision-maker object to the modifications proposed by the service provider or wish to propose modifications not proposed by the service provider, recommended form CF-MH 3160, Feb. 05, "Notice to Court of Modification to Treatment Plan for Involuntary Outpatient Placement and/or Petition Requesting Approval of Material Modifications to Plan," as referenced in this subsection, or other form adopted by the court may be used.

Q. We have a person that we think meets the criteria for Involuntary Outpatient Placement. The MD is concerned and is willing to give this difficult rule a try because the case has life threatening medical overlays. The person has long history of non compliance and is at high risk for a stroke. My question is around the treatment plan. We have 2 mental health residential treatment beds – a part of the Unit. While they are on the locked unit, the persons

in the beds have the freedom to come and go and are there voluntarily. Can we use a RTF bed placement as part of the OP Involuntary Placement Treatment Plan?

There should be no reason why a licensed residential treatment bed couldn't be used as part of an involuntary outpatient placement treatment plan. It needs to be clear to the individual and staff that the person must be able to enter/exit at will, otherwise the involuntary inpatient placement provisions would apply.

Q. What does "Clear and Convincing" evidence really mean in the context of proving each criteria for involuntary outpatient placement?

A burden of proof by clear and convincing evidence is placed on the state attorney in eliciting evidence in an involuntary placement hearing. This means evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter at issue (Standard Jury Instructions – Criminal Cases, published by the Supreme Court of Florida, No. SC95832, June 15, 2000).

Q. If a person who has a plenary guardian (full guardianship over the person and property) is ordered to Involuntary Outpatient Placement, does the court still have to seek the guardian's authority to determine housing and treatment; or does the IOP takes precedence?

There is no legal reason why an IOP court order would need to include housing or treatment because the circuit court has already authorized the plenary guardian to make such decisions. It may be that the guardian believes that the additional IOP court order will assist in getting the ward to comply, considering that a judge has specifically ordered it rather than just authorizing the guardian to make the decisions.

Q. One of our group homes is providing treatment for a person under an involuntary outpatient commitment order. The person has a guardian advocate appointed who approves the course of treatment, including medication (injections). The person is verbally refusing the injections. Can they give the injection or is an ETO required?

Regardless of whether the person is on involuntary inpatient or involuntary outpatient placement order, if he/she has been found by the court to be incompetent to consent to treatment, the person is also incompetent to refuse consent to treatment.

If the guardian advocate has been provided full disclosure so express and informed consent has been obtained and the GA has spoken directly to the doctor and the person about the proposed treatment, the GA can provide the consent and no ETO is necessary. An ETO is only needed when no legally authorized consent can be obtained.

Logistically this can be a problem in that the person may actually fight against the injection. However, this would happen whether it was a result of an ETO or not. Efforts need to be made to prevent any physical harm to the person or others in the process. Physical holding a person during a procedure to forcibly administer psychotropic medication is a physical restraint.

Q. The involuntary inpatient provisions of the Baker Act refer to notifying the court of material changes to a treatment plan ordered by the court. How is "material" defined?

“Material” is defined in Black’s Law Dictionary as: important; more or less necessary, having influence or effect; going to the merits; having to do with matter rather than form.

Q. If a person on an involuntary outpatient order is re-hospitalized, is that order void?

No. An order for involuntary outpatient placement would not be invalidated by an admission for involuntary examination. In fact the statute [394.4655(6)(b)3, FS] says:

> If, in the clinical judgment of a physician, the patient has failed or has refused to comply with the treatment ordered by the court, and, in the clinical judgment of the physician, efforts were made to solicit compliance and the patient may meet the criteria for involuntary examination, a person may be brought to a receiving facility pursuant to s. 394.463. If, after examination, the patient does not meet the criteria for involuntary inpatient placement pursuant to s. 394.467, the patient must be discharged from the receiving facility. **The involuntary outpatient placement order shall remain in effect unless the service provider determines that the patient no longer meets the criteria for involuntary outpatient placement or until the order expires.**

The service provider must determine whether modifications should be made to the existing treatment plan and must attempt to continue to engage the patient in treatment. For any material modification of the treatment plan to which the patient or the patient's guardian advocate, if appointed, does agree, the service provider shall send notice of the modification to the court. Any material modifications of the treatment plan which are contested by the patient or the patient's guardian advocate, if appointed, must be approved or disapproved by the court consistent with subsection (2).

> 394.4655(6)(b)1. If the court concludes that the patient meets the criteria for involuntary outpatient placement pursuant to subsection (1), the court shall issue an order for involuntary outpatient placement. The court order shall be for a period of up to 6 months. The order must specify the nature and extent of the patient's mental illness. The order of the court and the treatment plan shall be made part of the patient's clinical record. **The service provider shall discharge a patient from involuntary outpatient placement when the order expires or any time the patient no longer meets the criteria for involuntary placement.** Upon discharge, the service provider shall send a certificate of discharge to the court.

The Baker Act further defines in 394.469 the power to discharge a person relies on the person no longer meeting the criteria for involuntary placement, the administrator must discharge the person, transfer to voluntary status, or place the person on convalescent status. At no time does it give an administrator the power to void a court order for involuntary outpatient placement when the person continues to meet the statutory criteria unless the order has expired.

Q. Someone who has an Involuntary Outpatient Placement order was recently admitted to a receiving facility. The Placement Order is still in effect and would be modified, if necessary. Does the facility have to go through appointing another guardian advocate or does the guardian advocate appointed while the person was in the facility at an earlier date continue to be that person's guardian advocate during the Involuntary Outpatient Placement order and does not have to be "reinitiated" when readmitted to a receiving facility?

You are right on all counts. If the person was admitted to a receiving facility based on failure to comply with a treatment order entered by a court, there may need to be a modification in the treatment plan and order. If the modifications are "material" and there is an objection to the modifications by the person, it may require a court hearing to resolve any differences. However, the

original court order and appointment of the guardian advocate remain in place, despite the intervening admission.

As you know, a competent adult, his/her guardian, guardian advocate, or health care surrogate/proxy are all authorized to consent to the release of information about a person's care under the Baker Act. Where one of these exists, a provider may wish to request such a release form be signed for the specific purpose of sharing information about IOP planning.

However, the Baker Act provides for exceptions to required authorization under 394.4615(2), including:

> (b) When the **administrator of the facility** or secretary of the department **deems release to** a qualified researcher as defined in administrative rule, **an aftercare treatment provider**, or an employee or agent of the department is necessary **for treatment of the patient**, maintenance of adequate records, compilation of treatment data, **aftercare planning**, or evaluation of programs.
>
> For the purpose of determining whether a person meets the criteria for involuntary outpatient placement or for **preparing the proposed treatment plan pursuant to s. 394.4655, the clinical record may be released to** the state attorney, the public defender or the patient's private legal counsel, the court, and to the appropriate mental health professionals, **including the service provider** identified in s. 394.4655(6)(b)2., in accordance with state and federal law.

Q. How can organizations share information about treatment planning for involuntary outpatient treatment, given protections offered by the state's Baker Act and the federal HIPAA law?

The Baker Act allows such exchange of information pursuant to Involuntary Outpatient Placement. Even HIPAA permits release of information for purposes of a person's treatment.

Q. Is outpatient commitment viable in Florida? How is it implemented? Are legal charges required? I work with a FACT Team taking care of some of the most ill psychiatric clients in the community. Refusing medication can lead to jail or commitment to hospital in short order.

Yes, the Florida Legislature enacted the involuntary outpatient placement (IOP) provisions to the Baker Act effective 1/1/05. A flow chart as well as a narrative description of the process is included in the 2006 Baker Act Handbook and is also posted on the DCF website on Baker Act related issues.

IOP has had a very slow start in most areas of Florida. Most orders have taken place in Seminole County, with a number also ordered from Gainesville and Tallahassee areas. There are few consequences to non-compliance with a court order.

No legal charges are required -- it is solely a civil provision. However, if a person has been charged with any crimes, there is always the possibility of having compliance with treatment added to the person's conditions of probation. This can be very powerful, but if the person fails or refuses to comply, it can result in arrest.

Q. What can be done when a person under an involuntary outpatient placement order refuses to comply with court-ordered treatment?

If a physician determines:

- the person has failed or refused to comply with the treatment ordered by the court, and
- Efforts were made to solicit compliance, and
- The person may meet the criteria for involuntary examination

The physician can then complete the appropriate sections of the Certificate of a Mental Health Professional form (52b) and have the person brought to a receiving facility. It is important that all appropriate efforts to remind the person of appointments, arrange transportation, provide medications, or other efforts be demonstrated before "non-compliance" is determined.

If it is determined after examination at a receiving facility that the person doesn't meet the criteria for involuntary inpatient placement, he/she must be discharged. The service provider must determine whether modifications should be made to the existing treatment plan and must attempt to continue to engage the person in treatment.

Q. Can the court order treatment that is not readily available in the community?

No. A court order is based on a proposed treatment plan developed by a service provider with the person. The plan cannot be submitted to the court for consideration unless the provider has certified that:

- Sufficient services for improvement and stabilization are currently available in the local community,
- There is space available for the person;
- Funding is available for the program or service;
- Services are clinically appropriate as determined by a physician, clinical psychologist, clinical social worker or psychiatric nurse (each as defined in the Baker Act); and
- That a service provider agrees to provide them.

Q. I assist our hospital with discharges from the hospital. There are times when we think outpatient commitment may be helpful to patients to maintain stability in the community. The question arises is where must these be ordered? Is the nearest receiving facility the only place this can be done? Can they be done with the Magistrate at the hospital for other counties? It happens that NEFSH is in the same circuit as the county one person will be going to does that make a difference?

Regarding where a petition must be filed when initiated by a Treatment Facility (different for receiving facilities), the following provisions of the Baker Act apply:

> 394.4655 Involuntary outpatient placement.--
> (3) PETITION FOR INVOLUNTARY OUTPATIENT PLACEMENT.--
> (a) A petition for involuntary outpatient placement may be filed by:
> 1. The administrator of a receiving facility; or
> 2. The administrator of a treatment facility.
> (b) Each required criterion for involuntary outpatient placement must be alleged and substantiated in the petition for involuntary outpatient placement. A copy of the certificate recommending involuntary outpatient placement completed by a qualified professional specified in subsection (2) must be attached to the petition. A copy of the proposed treatment plan must be attached to the petition. Before the petition is filed, the service provider shall certify that the services in the proposed treatment plan are available. If the necessary services are not available in the patient's local community to respond to the person's individual needs, the petition may not be filed.

(c) 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.

Regarding the other procedural requirements for outpatient placement filed by a treatment facility, the following applies:

(2) INVOLUNTARY OUTPATIENT PLACEMENT.--
(b) If a patient in involuntary inpatient placement meets the criteria for involuntary outpatient placement, the administrator of the treatment facility may, before the expiration of the period during which the treatment facility is authorized to retain the patient, recommend involuntary outpatient placement. The recommendation must be supported by the opinion of a psychiatrist and the second opinion of a clinical psychologist or another psychiatrist, both of whom have personally examined the patient within the preceding 72 hours, that the criteria for involuntary outpatient placement are met....

(c)1. The administrator of the treatment facility shall provide a copy of the involuntary outpatient placement certificate and a copy of the state mental health discharge form to a department representative in the county where the patient will be residing. For persons who are leaving a state mental health treatment facility, the petition for involuntary outpatient placement must be filed in the county where the patient will be residing.
2. The service provider that will have primary responsibility for service provision shall be identified by the designated department representative prior to the order for involuntary outpatient placement and must, prior to filing a petition for involuntary outpatient placement, certify to the court whether the services recommended in the patient's discharge plan are available in the local community and whether the service provider agrees to provide those services. The service provider must develop with the patient, or the patient's guardian advocate, if appointed, a treatment or service plan that addresses the needs identified in the discharge plan. The plan must be deemed to be clinically appropriate by a physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker, as defined in this chapter, who consults with, or is employed or contracted by, the service provider.
3. If the service provider certifies that the services in the proposed treatment or service plan are not available, the petitioner may not file the petition.

(6) HEARING ON INVOLUNTARY OUTPATIENT PLACEMENT.--
(a)1. The court shall hold the hearing on involuntary outpatient placement within 5 working days after the filing of the petition, unless a continuance is granted. The hearing shall be held in the county where the petition is filed, shall be as convenient to the patient as is consistent with orderly procedure, and shall be conducted in physical settings not likely to be injurious to the patient's condition...
(b)1. If the court concludes that the patient meets the criteria for involuntary outpatient placement pursuant to subsection (1), the court shall issue an order for involuntary outpatient placement. The court order shall be for a period of up to 6 months...
2. The court may not order the department or the service provider to provide services if the program or service is not available in the patient's local community, if there is no space available in the program or service for the patient, or if funding is not available for the program or service...

There are rules and forms that support the above statutory provisions.