**HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS**

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

**FINAL HOUSE FLOOR ACTION:** 117 **Y's** 0 **N's** **GOVERNOR'S ACTION:** Approved

**SUMMARY ANALYSIS**

CS/CS/HB 1277 passed the House on March 8, 2022, as CS/CS/SB 1262.

The Florida Baker Act, ch. 394, F.S., governs voluntary and involuntary mental health examination and treatment and the Florida Marchman Act, ch. 397, F.S., does the same for substance abuse.

The bill makes several changes to Baker Act involuntary examination procedures within a receiving facility. It:

- Requires a qualified professional to make the determination to restrict patient communication with people outside a facility, and document the restrictions within 24 hours;
- Requires facilities to review a patient's communication restrictions every three days, instead of weekly;
- Requires certain discharge planning and procedures when a patient's 72-hour examination period ends on a weekend or holiday; and
- Allows psychiatric nurses to release patients from involuntary exams when practicing in nationally accredited community mental health centers, under certain conditions.

The bill requires receiving facilities and service providers to provide individuals the option to authorize the release of their clinical records.

The bill requires law enforcement officers to notify emergency contacts of a person in protective custody under the Marchman Act, and include the contact information in the incident report under both the Baker and Marchman Acts. Law enforcement officers must use the emergency contact information contained in motor vehicle records for this purpose, and the bill creates an exception to the current confidentiality requirements for the use of that information, for that purpose. This exception also permits a receiving facility, hospital or licensed detoxification or addictions receiving facility to use such information for the sole purpose of informing a patient's emergency contacts of the patient's whereabouts.

The bill provides criminal penalties for certain intentional activities relating to involuntary admission and treatment under the Baker Act.

The bill reiterates current law that authorizes facilities to release patients via telehealth.

The bill grants the Commission on Mental Health and Substance Abuse access to any information or records necessary to carry out its duties, including confidential and exempt records held by state agencies. The bill gives Commission members the option to hold in-person meetings and provides reimbursement for associated travel expenses. Finally, the bill extends the initial report due date to January 1, 2023.

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

The bill was approved by the Governor on April 6, 2022, ch. 2022-36, L.O.F., and will become effective on July 1, 2022.

# I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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 live 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.

*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.[7] 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:[8]

- 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

[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] Ss. 394.4625 and 394.463, F.S.
[8] S. 394.463(1), F.S.

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.

Transportation

An involuntary examination may be initiated in one of three ways,[9] 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.[10] The examination period must be for up to 72 hours.[11]

Facilities that accept patients based on a law enforcement officer's report must send a copy of this report to DCF within five working days.[12]

Release

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.[13]

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 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. Additionally, 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.[14]

Because of the current setting restrictions on where a psychiatric nurse may approve Baker Act releases, community mental health providers which operate receiving facilities cannot allow their

[9] 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.

[10] S. 394.455(39), F.S.

[11] S. 394.463(2)(g), F.S.

[12] S. 394.463(a)2., F.S.

[13] 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.

[14] S. 394.463(f), F.S.

psychiatric nurses to discharge a Baker Act patient under the protocol of their psychiatrists, including nearly 30 who are nationally accredited.[15]

Current law requires DCF to prepare and provide annual reports to the agency itself,[16] 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.[17] Current law does not require DCF to receive or maintain reports relating to an involuntary patient's transportation to a facility.

*Patient Rights – Communication*

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.[18]

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, unless such access would be detrimental to the patient or the patient exercises the right not to communicate or visit with the person.[19] 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.[20]

Baker Act Violations

*Access to Relatives*

News reports have identified problems related to a receiving facility violating patient rights under the Baker Act, particularly as it relates to a patient's right to have access to family members. 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.[21]

*Release and Due Process*

[15] Email from Melanie Brown-Woofter, President and CEO, Florida Behavioral Health Association, Re: HB 1143 - FCBH Comments - HB 1277 Update (Jan. 19, 2022).
[16] This appears to be a technical error, as agency reports are typically provided to the Legislature and the Governor.
[17] S. 394.463(e), F.S.
[18] 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.
[19] S. 394.459(5)(c), F.S.
[20] *Id*. Every seven days.
[21] 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).

State investigators also confirmed problems at North Tampa Behavioral Health related to a patient's discharge after the 72-hour examination period. The Agency for Health Care Administration (AHCA)[22] determined that the facility "failed to either discharge or petition the court for involuntary placement within the 72-hour examinations period for one of four sampled patients."[23] According to the investigation report, the hospital's risk manager confirmed AHCA's finding, indicating the facility's administrator signed the Notice of Petition for Involuntary Placement more than 24 hours after the 72-hour examination period expired.

Additionally, AHCA determined that the facility failed to timely file the patient's habeas corpus petition[24] with the court.[25] This also contributed to the patient being held at the facility longer than permitted under law.

*False Information, False Pretenses, and Denial of Patient Rights*

Unlike the Marchman Act (see below), the Baker Act does not make it a crime to knowingly and willfully furnish false information for the purpose of obtaining emergency or other involuntary admission, cause or conspire to cause any person's emergency or other involuntary procedure under false pretenses, or cause, or conspire with or assist another to cause, the denial of a person's rights under the Baker Act. However, criminal penalties are provided for similar conduct under the Marchman Act, which likely deters individuals with nefarious motives from misusing the system to involuntarily admit someone that does not need to be admitted for evaluation or treatment.

**Substance Abuse**

Substance abuse refers to the harmful or hazardous use of psychoactive substances, including alcohol and illicit drugs.[26] 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.[27] 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.[28] 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.[29]

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.[30] The most common substance use disorders in the United States are from the use of alcohol, tobacco, cannabis, stimulants, hallucinogens, and opioids.[31]

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[22] The Agency for Health Care Administration (AHCA) is responsible for the administration of the Florida Medicaid program, licensure and regulation of Florida's health facilities and for providing Floridians information about the quality of care they receive. AHCA, *Home*, https://ahca.myflorida.com/ (last visited Feb. 21, 2022).
[23] AHCA, *Summary Statement of Deficiencies*, https://apps.ahca.myflorida.com/dm_web/DMWeb_Docs/9536816.pdf (last visited Feb. 21, 2022).
[24] At any time, and without notice, a person held in a receiving or treatment facility, or a relative, friend, guardian, guardian advocate, representative, or attorney, or the department, on behalf of such person, may petition for a writ of habeas corpus to question the cause and legality of such detention and request that the court order a return to the writ in accordance with ch. 79, F.S. S. 394.459(8)(a), F.S.
[25] *Supra,* note 23. The administrator of any receiving or treatment facility receiving a petition under this subsection shall file the petition with the clerk of the court on the next court working day. S. 394.459(8)(c), F.S.
[26] *World Health Organization, Substance Abuse*, http://www.who.int/topics/substance_abuse/en/ (last visited Feb. 3, 2022).
[27] Substance Abuse and Mental Health Services Administration, *Substance Use Disorders,* http://www.samhsa.gov/disorders/substance-use (last visited Feb. 3, 2022).
[28] 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).
[29] *Id.*
[30] 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).
[31] *Id*.

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."[32] 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 (Marchman Act).[33] 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.[34]

DCF is the single state authority for substance abuse and mental health treatment services in the state of Florida.[35] 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.[36] SAMH programs include a range of prevention, acute interventions (such as crisis stabilization or detoxification), residential, transitional housing, outpatient treatment, and recovery support services.[37] DCF provides treatment for substance abuse through a community-based provider system.[38]

*Voluntary Admissions*

An individual may receive services under the Marchman Act through either voluntary[39] or involuntary admission.[40] A person who wishes to enter substance abuse treatment may apply to a service provider for voluntary admission.[41] 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.[42]

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.[43] 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.[44] 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

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[32] *Id*.
[33] 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 30.
[34] *Id*.
[35] 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).
[36] *Id.*
[37] 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).
[38] 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).
[39] *See* s. 397.601, F.S.
[40] *See* ss. 397.675 – 397.6978, F.S.
[41] S. 397.601(1), F.S.
[42] S. 397.601(3), F.S.
[43] S. 397.507(7), F.S.
[44] *See* ss. 397.675 – 397.6978, F.S.

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.[45]

*Non-Court Involved Involuntary Admissions*

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.[46]
- **Emergency Admission**: This procedure permits an individual who appears to meet the criteria for involuntary admission to be admitted to a hospital, an addictions 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.[47]
- **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 addictions receiving facility to assess the minor's need for treatment by a qualified professional.[48]

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 the written report all readily accessible emergency contact information for the person, including information available through FDLE or FLHSMV electronic databases.

*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,[49] which provides for long-term court-ordered substance abuse treatment.

*False Information, False Pretenses, and Denial of Patient Rights*

[45] S. 397.675, F.S.
[46] 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 addictions receiving facility, or in certain circumstances, to jail. Minors, however, cannot be taken to jail.
[47] S. 397.679, F.S.
[48] S. 397.6798, F.S.
[49] 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.

Unlike the Baker Act, the Marchman Act makes certain intentional activities related to involuntary admission criminal offenses. 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 that person:

- 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**

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.[50] The notice must be made by telephone or in-person within 24 hours after the patient's arrival at the facility.[51] 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.[52]

Under current law, receiving facilities must adhere to notification requirements even if a patient requests that no notification be made.[53] 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.[54]

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,[55] are confidential and exempt from public disclosure by law.[56] Similarly, communications between a patient and a psychiatrist, psychologist, mental health counselor, marriage and family therapist, or clinical social worker are confidential.[57] 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.[58]

[50] S. 394.4599(2)(a), F.S.
[51] S. 394.4599(2)(b), F.S.
[52] *Id*.
[53] Prior to the passage of ch. 2015-67, Laws of Fla., a patient could request that no notification be made.
[54] 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.
[55] S. 394.455(6), F.S.
[56] S. 394.4615, F.S.
[57] Ss. 394.4615, 456.059, 490.0147, and 491.0147, F.S.
[58] Ss. 394.4615(3)(a), 456.059, 490.0147(3), and 491.0147(3), F.S.

Patients may always agree to the release of their clinical records or communications;[59] however, current law does not require a receiving facility to provide patients the option to authorize the release of their clinical records.

Health Information Portability and Accountability Act (HIPAA)

The federal Health Information Portability and Accountability Act (HIPAA) establishes national standards to protect medical records and other individually identifiable health information, known as "protected health information" (PHI).[60] HIPAA applies to health plans, health care clearinghouses, and health care providers that conduct certain health care transactions electronically. HIPAA limits the use and disclosure of PHI without written authorization, but allows covered entities to share PHI with a patient's family member, other relative, close personal friend, or any other person identified by the patient, the information directly relevant to such person's involvement with the patient's health care or payment for health care.[61]

HIPAA also 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.[62] 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.[63]

Health care providers, such as receiving facilities and hospitals, are HIPAA covered entities and the fact that a person is receiving mental health treatment within such facilities is PHI.[64]

Emergency Contact Information

*Public Records Exemption - Confidentiality*

Under Florida law, there is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances.[65] If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in statute.[66]

*Motor Vehicle Records*

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

[59] Ss. 394.4615, 456.059, 490.0147, and 491.0147, F.S.
[60] 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.
[61] 45 CFR § 164.510(b).
[62] 45 CFR § 164.510(b)(1)(ii).
[63] 45 CFR § 164.510(b)(3).
[64] *See*, 45 CFR § 160.103.
[65] *See WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied* 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991).
[66] See Attorney General Opinion 85-62 (Aug. 1, 1985).

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 (e.g., emergency contact notification) commits a noncriminal infraction, punishable by a fine not exceeding $2,000.[67]

This means that, under current law, a receiving facility, hospital, or licensed detoxification or addictions receiving facility is prohibited from using such information, even for the limited purpose of informing listed emergency contacts of a patient's whereabouts.

**Telehealth**

Telehealth is the delivery of health care services using information and communication technologies to exchange valid information for diagnosis, treatment and prevention of disease and injuries, research and evaluation.[68]

Telehealth is used to address several problems in the current health care system. Inadequate access to care is one of the primary obstacles to obtaining quality health care.[69] This occurs in both rural areas and urban communities.[70] Telehealth increases access by providing a mechanism to deliver quality health care, irrespective of the location of a patient or a health care professional. Cost is another barrier to obtaining quality health care.[71] This includes the cost of travel to and from the health care facility, as well as related loss of wages from work absences. Costs are reduced through telehealth by decreasing the time and distance required to travel to the health care professional and increased efficiency for the provider. Two more issues addressed through telehealth are the reutilization of health care services and hospital readmission. These often occur due to a lack of proper follow-up care by the patient[72] or a chronic condition,[73] which may be more easily addressed via telehealth.

As of July 1, 2019, Florida-licensed health care professionals, registered out-of-state health professionals, and those licensed under a multistate health care licensure compact of which Florida is a member, are authorized to use telehealth to deliver health care services within their respective scopes of practice.[74]

Under current law, such practitioners may release patients from involuntary examination via telehealth. As such, in March 2021, DCF published guidance confirming that facility practitioners may release Baker Act patients from involuntary examination via telehealth.[75]

**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

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[67] S. 119.071(2)(e), F.S.
[68] World Health Organization, *Telemedicine: Opportunities and Developments in Member States, Global Observatory for Ehealth Series- Volume 2,* Section 1.2, page 9 (2010), available at http://www.who.int/goe/publications/goe_telemedicine_2010.pdf (last visited Mar. 7, 2022).
[69] American Telemedicine Association, *Telehealth Basics*, available at https://www.americantelemed.org/resource/why-telemedicine/ (last visited Mar. 7, 2022).
[70] *Id*.
[71] *Id.*
[72] Post-surgical examination subsequent to a patient's release from a hospital is a prime example. Specifically, infection can occur without proper follow-up and ultimately leads to a readmission to the hospital.
[73] For example, diabetes is a chronic condition which can benefit by treatment through telehealth.
[74] S. 456.47, F.S.
[75] DCF, *Telehealth and Florida's Baker Act: FAQs*, https://www.myflfamilies.com/service-programs/samh/crisis-services/laws/telehealthFAQ.pdf (last visited Mar. 7, 2022).

Health Care Administration and DCF, and specified members appointed by the Governor, President of the Senate, and Speaker of the House of Representatives.

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, effectively prohibiting in-person meetings.

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 reenacted by the Legislature.

## Effect of Proposed Changes

### Baker Act

Involuntary Examination

*Transportation*

Current law requires law enforcement officers to include detailed information on the circumstances under which an involuntary patient was transported to a facility in their reports. Facilities must then send these law enforcement reports to DCF for use in statutorily required annual reports. The bill requires DCF to use reports relating to a patient's transportation in its annual reports. This appears to be redundant, as current law already requires DCF to include law enforcement officers' reports, which include such transportation data, in its annual reports.

*Release*

The bill revises the current law restriction that requires 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. This means that 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, which will likely improve discharge efficiencies in such settings. The bill retains the current law 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.

*Discharge Planning*

The bill amends certain discharge and planning procedures under the Baker Act to better streamline the process, improve efficiencies, and provide patients with helpful post-discharge information that may assist in their care and recovery. With this, the bill requires a receiving or treatment facility to include and document consideration of the following in its discharge and planning procedures for a patient's release:

- Follow-up behavioral health appointments;
- Information on how to obtain prescribed medications; and
- Information pertaining to available living arrangements, transportation, and recovery support opportunities.

Additionally, 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.

*Telehealth*

The bill reiterates current law that authorizes facilities to release Baker Act patients from involuntary examination via telehealth.

Patient Rights – Communication

The bill revises conditions under which patient communication with people outside the facility 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. This means that a potentially unqualified staff person can no longer restrict a patient's communication solely because that staff person determined such communication would likely be generally harmful to the patient or others.

The bill further requires a qualified professional to document specified communication restrictions within 24 hours of the restriction determination and requires facilities to review a patient's communication restrictions every three days, instead of weekly. This may reduce the unnecessary prolongment of a patient's communication restriction.

False Information, False Pretenses, and Denial of Patient Rights

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 that person knowingly and willfully:

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

[76] S. 775.082(4)(a), F.S.

- Causes, or conspires with or assists another to cause, without lawful justification, the denial to any person of any right accorded pursuant to this chapter.

Adding criminal penalties under the Baker Act may have a deterrent effect on nefarious individuals seeking to involuntarily Baker Act someone who does not meet criteria.

Patient Information Privacy

*Clinical Records*

The bill requires a receiving facility to document that it has provided a patient who was admitted voluntarily the option to authorize the release of the 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. This requirement may be most helpful to a patient who wishes to release clinical records to a specified person, but mistakenly believes that the patient cannot or simply does not know how to.

Patient Information Privacy

*Emergency Contacts*

The bill requires a law enforcement officer taking an involuntary examination patient into custody to include in the incident report all readily accessible emergency contact information for the patient, including any information available through FDLE or FLHSMV electronic databases. To allow this, the bill creates an exception to the current public records confidentiality requirements so law enforcement officers may include it in the incident reports.

The bill retains the current requirement that a receiving facility give prompt notice to specified persons of the whereabouts 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 also creates an exception to allow a receiving facility to use this information (from the incident report) for this purpose.

However, if a patient's emergency contact is inconsistent with persons specifically authorized to receive such information under HIPAA, facilities will comply with the federal law instead.

**Marchman Act**

Voluntary Admissions

The bill requires a service provider to document that it has provided an individual admitted voluntarily the option to authorize the release of the individual's 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. As with the Baker Act, this requirement may be most helpful to individuals who wish to release their clinical records to a specified person, but mistakenly believe they cannot or simply do not know how to.

Patient Information Privacy – Emergency Contacts

The bill requires a law enforcement officer taking a person into protective custody for involuntary substance abuse treatment to include in the incident report all readily accessible emergency contact information for the patient, including any information available through FDLE or FLHSMV electronic databases. However, as in the Baker Act, without the express consent of the person to whom such emergency contact information applies, current law limits a law enforcement officer's use of this

information only for the purpose of contacting those listed in the event of an emergency. However, the statutory exception to this confidentiality requirement (discussed above) will allow a law enforcement officer in a Marchman Act case to also include this information in the incident report.

Unlike in the Baker Act, the bill requires a law enforcement officer to notify a known emergency contact of an adult taken into custody under the Marchman Act, if a nearest relative is unavailable, unless the adult requests that there be no notification. This broadens the current law requirement to only notify an adult's nearest relative. 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.

Unlike in the Baker Act, the Marchman Act does not require facilities to notify emergency contacts of a patient's whereabouts. However, if they choose to do so, the exception to the confidentiality requirement (discussed above) will permit a hospital or licensed detoxification or addictions receiving facility to use emergency contact information contained in motor vehicle records for this purpose (from the incident report).

However, if an individual's emergency contact is inconsistent with persons specifically authorized to receive such information under HIPAA, facilities will comply with HIPAA instead.

**Commission on Mental Health and Substance Abuse**

The bill grants the Commission access to any information or records necessary to carry out its duties, including confidential and exempt records that may be in the possession of state agencies. For instance, the Commission will now have access to confidential and exempt Baker Act records that are in the possession of DCF, if needed.

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. This means that members will no longer be restricted to meeting remotely and will be able to have in-person meetings with the assurance that they will receive reimbursement for travel-related expenses.

Finally, the bill extends the initial report due date to January 1, 2023. This will allow the Commission to more fully and effectively complete its duties.

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

The bill 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 will have an indeterminate, insignificant, negative 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 bill requires DCF to receive and maintain reports related to a patient's transportation to a receiving facility. Currently, DCF contracts with the University of South Florida 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 DCF'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 negative 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.

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