



# Mental health treatment: a civil rights perspective

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# Involuntary (“assisted”) outpatient treatment

- Court order directing an individual with mental illness to receive specified treatments or services
- Civil proceeding, not criminal
- Some New Mexico history:
  - Current state law is result of years of debate – enacting this wasn’t quick
    - First introduced 2006
    - Long hearings with extensive personal testimony from both sides
    - Finally enacted 2016 – after extensive debate and changes
- Only one functional program in New Mexico to date
- Primary obstacle: lack of providers and service system

# What's the argument for AOT?

- Proponents of AOT say it's needed because:
  - Some people with mental illness don't recognize that they're ill
  - So they have to be forced into treatment because won't do it voluntarily
- Belief that medication solves the problem
- Belief that having court order treatment is effective because of judge's authority – “black robe” effect

# The myth of the “black robe effect”

- Proponents of AOT claim impact of judge's authority -- but it's largely a myth.

“While the ... ‘black robe effect’ is thought to be a part of what makes AOT programs effective [citation omitted], **there is no existing research that empirically examines this phenomenon.**” (Hancq et al. , 4/2024, emphasis added)
- Testimony to this committee about Doña Ana County program tends to undermine the argument.
  - Participants appreciated judge's supportiveness and caring. That's the effect of a supportive atmosphere, not fear or respect for judicial authority.
  - It takes a certain kind of judge – attributes associated with social workers, not judges.
- Black robe effect may be more important with providers
  - BUT nothing in governor's draft bill about ensuring providers (when available) are doing their job

# Concerns about AOT

- Deprivation of liberty
  - Violates person's right to make own life decisions, including on health care
    - No requirement of finding person lacks capacity to make those decisions
    - We don't force treatment for physical illnesses, why allow for mental illnesses?
- Traumatizing
  - Forced judicial proceedings and forced treatment
  - Interferes with therapeutic relationships, reduces trust
- Can order extensive control over person's life – medications, periodic blood/urine tests, "supervision of living arrangements", specified day activities
- Equity: disproportionately used against people of color, who are less likely to be able to access services in the first place
- Violating autonomy and forcing treatment on person who hasn't even been accused – much less convicted – of crimes

# Constitutional and legal issues

- Court-ordered mental health treatment is a serious violation of bodily autonomy, personal freedom
- Due process: Involuntary commitment permissible only on finding of dangerousness.
- AOT survives constitutional challenge because no penalty for failure to comply with AOT order
- Federal rule under Rehabilitation Act §504
  - Bars discrimination based on disability in medical treatment; recognizes that involuntary mental health treatment may constitute such discrimination

## Is AOT effective?

- Studies show positive effects – but are they measuring impact of court involvement or impact of receiving services?
- Before-and-after comparison for the same person, or comparing people getting services pursuant to court order vs. people getting them voluntarily?
- Positive effects often exaggerated – e.g., reduction from 7% to 5% of people engaging in a certain behavior is touted as 29% reduction

## Current New Mexico law requires:

- a demonstrated history of noncompliance with treatment that has led to either
  - repeated hospitalization/incarceration, or
  - serious violent behavior
- the person is unwilling or unlikely as the result of mental disorder to participate voluntarily in treatment
- AOT is least restrictive alternative, and
- person will likely benefit from and it's in person's best interests to get AOT

## Doña Ana County program isn't AOT within the meaning of state law.

- Offers services and the person agrees, so doesn't meet "unwilling or unlikely" standard.
- Claim that embodying the provisions in a court order makes it "involuntary". But if the person agrees to it, there's no grounds for order under the statute.
- Is court order truly "least restrictive alternative" if person agrees?
- Doña Ana program actually pretty good because it IS voluntary – they offer people extensive array of services and help people get them
  - But is judicial involvement necessary – or appropriate?

# Governor's proposal (June 17 discussion draft)

## largely removes current criteria for AOT

- Eliminates requirements to show:
  - history of noncompliance
  - person unlikely or unwilling to participate voluntarily in treatment
  - attempts to engage person in voluntary treatment before going to court
  - finding of best interests; just “likely benefit” (with no standard)
- New criteria vague and overbroad
- Proposal is a radical departure from “traditional” AOT

## Governor proposes to make it easier to seek AOT

- Draft bill strikes existing requirement for memorandum of understanding between court and county/municipality before AOT can be implemented
  - Included in statute because courts wanted THEIR costs covered
  - Though statutory provision covers only court costs, it means the locality has a PROGRAM available to provide services – providers, attorneys, etc.
    - Without a program, may not be anyone to pursue the court process OR provide the services.
    - Court can't just order non-parties who haven't agreed to do so to provide services.

## Governor's proposal to make it easier to seek AOT (continued)

- Adds categories of people who can file a petition
  - First responders
  - Designees
  - The respondent! (We'll get back to that.)
- Who would actually be pursuing the court proceedings?
  - Draft bill calls for form petition
  - Having a form to make filing a petition easier doesn't address the rest of the proceedings once the petition is filed.
  - E.g., if first responder files petition, would they have to do all tasks required of petitioner?
    - Attorney?
    - Arrange for behavioral health professional(s) to evaluate, prepare treatment plan, provide services?
    - Examine and cross-examine witnesses?
  - Does simplified process make process too easy, subject to abuse?

## Right to receive behavioral health services

- Governor's proposal would allow the person who would be subject to the order to file a petition for AOT
  - Admission that services are not available/accessible
  - Creates a private right of action to sue for behavioral health services and force providers to give them (and insurers to cover them?)
  - Is the Legislature ready to go that far?

# People should get services they're eligible for without a court order/judicial involvement

- Medicaid managed care organizations (MCOs)
  - Most people who would be subject to AOT orders are enrolled in or eligible for Medicaid
  - Governor taking steps to lean on MCOs to make services available
  - Where's the accountability?
  - Nothing in governor's draft bill mentions MCOs' role
- If providers not available, can't wave magic wand and have them magically appear
  - Provider shortage nationwide; can't just lure them here from other states
  - "Growing our own" takes a while
- In view of shortage of providers/services, does ordering someone into AOT deprive someone else of those services?

# The big question: Why are we doing this now?

- Governor offered nothing on AOT during regular session – why is this suddenly an emergency?
- Special session intended to address “public safety” issues
  - To “reduce the danger and risk New Mexico communities face every day [and] mak[e] our state safer” (Governor’s Press Release, 4/17/2024)
  - Perpetuates myth that people with mental illness are dangerous
  - What we heard about during session were minor “nuisance” crimes

- “May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.”  
*O'Connor v. Donaldson*, 422 US 563, 575 (1975)

## This isn't something that should be rammed through in brief special session

- Issues complex
- No consensus
- Bill needs a lot of work
- Still not clear how AOT will tie into criminal proceedings, competency, diversion

## What we propose

- Build up behavioral health delivery system so services actually available/accessible
- Provide services on voluntary basis whenever possible:
  - Make services available and accessible
  - Outreach and attempts to engage, offer and connect to services
- Explore Medicaid waiver for homeless with mental illness
- If expanding who's eligible for AOT, do in specific and focused way – e.g., person arrested X times in past year – and work with stakeholders to do in thoughtful and informed way
- Require that any AOT order include:
  - Robust package of services provided – a typical client will need housing, counseling, peer support and other services
  - Limit to places where MOU in place between court and city/county to ensure services are available (not just covering court costs)
  - Retain best interests standard as criterion for ordering AOT
  - Engage the person in developing any AOT plan – person-centered approach rather than “medical model”