F I S C A L I M P A C T R E P O R T

SPONSOR Papen / Pacheco **ORIGINAL DATE** 1/28/16 **LAST UPDATED** 2/4/16 **HB**

SHORT TITLE Assisted Outpatient Treatment Act **SB** 113/aSPAC/aSJC

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	*Indeterminate	*Indeterminate	*Indeterminate	*Indeterminate	Recurring	General Fund

*Reference is made to AOC and HSD concerns in Fiscal Implications.

Relates to Appropriation in the General Appropriation Act
SB113 is similar to House Bill 198

SOURCES OF INFORMATION

Responses Received From
Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
New Mexico Corrections Department (NMCD)
University of New Mexico (UNM)
Human Services Department (HSD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 113 strikes the provision for penalties for intentionally releasing records closed to the public. The amendment also makes minor technical adjustments such as adding "including legal fees" to the definition participating municipality or county.

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 113 includes changes such as removing the requirement for the court to order assisted outpatient treatment if certain criteria are met, redefines "surrogate decision-maker", sets the requirement that no later than the date of the hearing a qualified professional shall provide a treatment plan, requires the written proposed treatment plan to include an advanced directive if the respondent has one, in Section 8 deletes Subsection F, G, and H and compiles them into one, strikes the provision requiring educational materials be provided, and strikes AOC reporting requirements.

Synopsis of Bill

Senate Bill 113, modeled after Kendra's Law in New York State, creates the authority for a district court judge in New Mexico to order people diagnosed with mental illnesses who meet certain criterion into mandatory "Assisted Outpatient Treatment" programs for up to one year. "Assisted Outpatient Treatment" is defined by the bill as categories of outpatient treatment ordered by a district court which include: case management or assertive community treatment services; medication; periodic blood tests or urinalysis; individual or group therapy; and day or partial day programming activities etc.

The bill defines terms such as "advance directive for mental health treatment", "assertive community treatment" and "assisted outpatient treatment." Additionally the bill develops criteria for when a person may be ordered by a court to participate in assisted outpatient treatment. Criteria include: having a primary diagnosis of mental disorder, having a history of a lack of compliance with treatment for a mental disorder, and unwilling or unlikely to participate voluntarily in outpatient treatment.

The bill allows for a petition for assisted outpatient treatment by relatives and others, criteria for the petition to be filed, and requirements for qualified professionals to examine the patient. The bill allows for a party or the respondent's surrogate to apply to stay, vacate, modify, or enforce an order.

The bill provides for treatment proceedings, sequestration, and confidentiality of records. The bill provides criteria for a hearing and when the hearing can be held after an examination by a qualified professional.

The bill requires a written proposed treatment plan to accompany the petition, to be developed by a qualified professional that states all treatment services recommended for the respondent with specifications regarding who will provide each service. The bill provides for additional written proposed treatment plan requirements such as case management services or an assertive community treatment team to provide care coordination and assisted outpatient treatment services.

Additionally, the court order for assisted outpatient treatment is required to: not exceed one year, specify the services respondent is to receive, and direct service providers to provide or arrange for all assisted outpatient treatment throughout the period of the order. Nothing in the court order shall require payment, not otherwise a covered benefit, by health maintenance organizations, managed healthcare plans, health insurance companies, group health plans, or the state Medicaid program.

FISCAL IMPLICATIONS

HSD observed that:

> The bill does not make an appropriation to cover the cost of court-ordered services. Many of the services listed as the types of services that can be court-ordered are covered by Medicaid for those individuals who are enrolled. Medicaid covers only those services that are deemed "medically necessary" and Medicaid managed care organizations (MCOs) may have restrictions on non-formulary medications. Services listed in the bill that are not covered in the Medicaid benefit include: case management, drug testing for illegal drug use, educational and vocational services and supervision of living arrangement.
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> HSD is unable to estimate the cost to provide the services contemplated in the bill with the current information available.
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> While the bill requires further court review of material changes to the treatment plan, the bill is unclear regarding when changes in medication constitute material changes and when the court must hear additional evidence regarding beneficial and detrimental effects of ordered medication.

AOC provided the following:

> The bill permits AOT only where a municipality or county has entered into an MOU with its respective District Court to address the funding of the court's administrative expenses for proceedings pursuant to the AOTA. The AOC will study the cost of providing court appointed attorney services potentially required by the AOTA, as well as personnel costs, training and education costs, data compilation and reporting costs, and other associated costs. The AOC anticipates that these costs would be covered by the participating municipality or county under an MOU.
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> Court personnel, including judges and staff, will require education and training to approach petition proceedings with the necessary deep understanding of issues surrounding mental illness. Although the bill does not provide for delayed implementation of the law subsequent to the creation of or consolidation of required AOT programs and services, the MOU requirement may result in gradual implementation of AOT as communities commit necessary programs and services. At this point in time, a full range of necessary services may not yet be available to those in rural areas of New Mexico and to those who are not already receiving services paid for by private insurance, as there is concern that essential services will not be covered by Medicaid.

The following budget information was provided by Bexar County, Texas, with identifiable costs to a program that is comparable to the program discussed in this bill. The budget is for year one of the program,

Table: Bexar County Assisted Outpatient Treatment Program-Judge Oscar Kazem

Position	FTE	Salary and Benefits
Psychiatrist	.5	$126,190
RN	1.0	$76,975
Court Liaison	1.0	$50,372
BSW Discharge Caseworker	1.0	$42,904
Clinical Practitioner (caseload 1:18)	1.0	$50,372
Clinical Practitioner (caseload 1:18)	1.0	$50,372
Clinical Practitioner (caseload 1:18)	1.0	$50,372
Clinical Practitioner (caseload 1:18)	1.0	$50,372
Clinical Practitioner (caseload 1:18)	1.0	$50,372
Total Year One Estimated Budget		**$548,301**

AOT census: 90
Average cost per respondent: $6,092

The following information was received from Judge Oscar Kazen of Bexar County Texas. After studying 100 participants there was a combined lifetime bed utilization of 67,301.

In the year prior to the court order

- Total admission for the year prior to the court order: 164
- Total bed day utilizations: 8,873

During the year of the court order

- Total admissions during the year of court order: 61
- Total bed day utilizations: 4,577

During the year after the court order expired

- Total admission after completion of the court order: 38
- Total bed day utilizations: 3,418

Agnes Zacarias, LPC, NCC is the Clinical Programs Director, Mental Health Outpatient and Specialty Court Programs for the Texas AOT program reports that a snapshot of 10 clients the hospital saved approximately $1.3 to $1.4 million in state hospital bed day dollars.

A New York State AOT program evaluation of June 30, 2009 notes that the probability of hospital admission was reduced from 14% to 11% per month during the first six months of AOT and to 9% during the 7 to 12 month period of AOT. Another evaluation published in the American Journal of Psychiatry (2013) noted significant net cost decreases of 43% in the first year and an additional 13% in the second year in the New York program.

These reports provide positive outcome data for the respective AOT programs and should be taken into account. However, information on program structure was not addressed and this is being noted.

It should be noted that UNM commented on the similar 2015 legislation that the implementation of Assisted Outpatient Treatment (AOT) would require dedicated resources from providers to assure access to needed services and compliance with treatment plans as mandated.

UNM noted that in Pima County Arizona (Tucson), which has extensive experience with AOT and a well-developed system of care, there are currently around 600 patients annually managed under this status. The number of patients in need of AOT services could approach this number over the long-term in Bernalillo County. However, unlike Arizona's law, this legislation would require more specific criteria for ordering AOT that could impact the number of people managed through this approach.

UNM suggested that in order to manage this population in Bernalillo County a dedicated treatment team consisting of community support workers, peer specialists, therapists, nursing and physician services be developed. In addition, it would be important for the team to have other resources that would allow for mobile crisis response for patients similar to those found with Assertive Community Treatment (ACT).

The following estimated budget was provided by UNM. The budget is for year one of the program, assumes a phased in AOT population with a maximum of 300 patients in year one. This model would need to be scaled going forward to account for growth in the program.

Table: Estimated Budget for Bernalillo County

Position	FTE	Salary and Benefits
Community Support Worker	10.0	$550,368
Peer Specialist	4.0	$165,739
Clinical Counselor/Clinical Social Worker	4.0	$282,522
Psychiatric RN	3.0	$238,309
Advanced Practice Provider (NP)	1.0	$126,000
Physician Provider	.25	$62,500
Total Staffing	22.25	**$1,425,438**
Vehicles and Fuel Year One (3 vehicles)		$67,200
Computers/Other Supplies/ Other Expenses		$106,000
Total Year One Estimated Budget		**$1,598,638**

AOT census: 300

Average cost per respondent (excluding vehicles and computers): $4,751

However, the intention of this legislation is not to provide for a dedicated treatment team for this program. The legislation establishes court proceeding for the AOT program to be supported by current treatment providers. Therefore, the Bexar County budget has been provided as an alternative.

If the bill results in fewer individuals sentenced to prison there may be savings to the state. According to the New Mexico Corrections Department (NMCD), the average cost per day to house an inmate in a state prison is $123, or about $45,250 per year. However, costs can range from as high as $148 per day, or $54,020 per year, to a low of $80 per day, or $29,200 per year, depending on which prison offenders are placed in. A longer length of stay would increase the cost to house the offender in prison. In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions. The NMCD general fund budget, not including supplemental appropriations, has grown $5 million, or 7 percent, since FY11 as a result of growing prison population.

Court-ordered assisted outpatient treatment for certain probationers and parolees could help prevent these individuals from committing new crimes or otherwise violating their supervision conditions, preventing these individuals from having to be revoked by the Parole Board or sentencing judge and sent back to prison for violating their supervision conditions.

Additionally, the New York State evaluation indicates that arrests in any given month were reduced from 3.7 % to 1.9%, which supports the above statement.
AOC, provided the following:

> If enacted, the constitutionality of the proposed AOTA may be challenged. The United States Supreme Court has not heard a case concerning AOT. Some lower courts have, particularly concerning New York's Kendra's Law. In *Matter of K.L.,* 1 NY 362 (2004), the New York Court of Appeals found Kendra's law to provide sufficient due process protections under the NY and U.S. Constitutions.
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> Additionally, the court found no equal protection violation, nor a violation of the constitutional protection against unreasonable searches and seizures. The court examined the due process and equal protection arguments of the respondent with regard to the law's lack of a requirement to find incapacity before the issuance of an order to comply with AOT. The court held that since the NY law did not permit forced medical treatment, a showing of incapacity is not required. Rather, the court held, if the statute's existing criteria satisfy due process, as the court concluded they did, then even psychiatric patients capable of making decisions about their treatment may be constitutionally subject to its mandate. The court also rejected respondent's equal protection argument in finding that the NY statute in no way treats similarly situated persons differently (see *City of Cleburne, Tex., v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985).
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> The *Matter of K.L.* court also rejected respondent's claim that the failure of the statute to provide for notice and a hearing prior to the temporary removal of a noncompliant patient to a hospital violates due process. The court noted that
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> > When the state seeks to deprive an individual of liberty, it must provide effective procedures to guard against an erroneous deprivation. A determination of the process that is constitutionally due thus requires a weighing of three factors: the private interest affected; the risk of erroneous deprivation through the procedures used and the probable value of other procedural safeguards; and the government's interest (*see Mathews v Eldridge*, 424 US

> 319, 335 [1976]). The court held that the patient's significant liberty interest was outweighed by the other *Mathews* factors.

It is important to note that the *Matter of K.L.* court was analyzing New York's AOT law, which does differ from NM's law in perhaps some important respects, as well as the protections provided by New York's formalized treatment team approach in application of AOT and the availability of representation by New York's Mental Hygiene Legal Services.

SIGNIFICANT ISSUES

UNM mentioned that one of largest single issues impacting the implementation of AOT in New Mexico is the lack of provider resources in many areas of the state and the service gaps in needed levels of care. Over time the behavioral health infrastructure in New Mexico has degraded significantly, which has created significant challenges for behavioral health patients being able to access needed services. In order for AOT to work, patients must be able to access needed treatment services in a timely and efficient manner. Currently there are large infrastructure gaps in need levels of care for patients in Bernalillo County, and more so in other parts of New Mexico. In order for AOT to be successful it is equally as important for services to be developed to meet the needs of patients.

DOH stated that the courts may only be able to initiate AOT for individuals that are already tied into a provider system, who have a payor source, who have interested parties in their life that can access the courts and who have treatment services available in their community; as such the program may not be equally accessible for all New Mexicans and perhaps the least accessible to individuals in rural areas of the state and / or those that are indigent.

DOH comments in response to the similar 2015 legislation included the following:

- Some services allowed in an AOT order outlined under the definition of "assisted outpatient treatment" may not all be billable services, which could lessen or eliminate their availability or the practical application of this legislation. A study of the New York state AOT Program found that, to be successful in reducing inpatient hospitalization and reducing violence, an AOT program was dependent on the availability of high –quality services in the community. (Duke University School of Medicine Study, American Journal of Psychiatry, 2013)
- With an AOT order, there is not a routine review of a person's capacity to make mental health treatment decisions built into the process as there is with civil commitment (See NMSA 43-1-11 F.). This review would be helpful to identify if the person has capacity to make decisions or if they need an alternate decision maker. That would benefit further treatment and give context and information about their "voluntariness" and could ultimately assist in the provision of services given the need for informed consent.

AOC provided the following:

> Senate Joint Memorial 4 was passed by the legislature during the 2015 legislative session, requiring the convening and reporting of a task force to study appropriate housing for the serious mentally ill who are in custody. The SJM 4 Task Force reported to the legislature

in December. The report recommends judicial, court personnel, provider and community education on mental health issues and the mentally ill. Additionally, the report recommends an improved, online, consistently-revised listing of community services and providers, as well as ways to make services technologically available to those in rural areas of New Mexico, and the institution and creation of regional facilities where necessary services may be housed – facilities that might be ideal locations for AOT teams that would allow for a successful implementation of AOT treatment statewide.

TECHNICAL ISSUES

The AGO stated that:

The bill imposes several short time requirements in regard to scheduling hearings and issuing decisions. Several of these time requirements could be better clarified to avoid any confusion in implementing procedures. For example Section 6 requires a court to fix a date for a hearing "no sooner than three or later than seven days after the date of service." It is what is the initiating date is and the subsequent timeline because the term service may be problematic without further clarification. If "service" is the date of service of the notice of hearing, it is impossible to determine when the hearing must be scheduled because an actual service date cannot be guaranteed unless using electronic service methods. Instead, the hearing could be set a number of days from the date of filing the petition, and require the court to issue a notice of hearing within a certain number of days after the petition is filed.

The bill mandates that a respondent shall be represented by counsel at all stages of the proceeding without providing further details. It is not clear who would provide counsel if respondent is pro se. This role may be served by contract attorney services through the administrative office of the courts, but it should be made clear and financial obligations should be considered. Furthermore, securing an attorney, whether appointed or privately obtained, may take time. Consideration should be given to how obtaining counsel would affect the short time requirements for holding a hearing (currently 3-7 days after notice of the hearing).

The bill provides a "right to an expeditious appeal" of a final order. It is not clear how this would be applied to the judicial system or if more specific time requirements could be included.

The bill Section 11 limits assisted outpatient treatment for a period not to exceed one year, but it is not entirely clear whether applications for continued periods of treatment can extend treatment for an additional period of one year or if there is an absolute limit to one year of treatment, regardless of any extensions granted.

The bill allows for a qualified provider to appear telephonically (or by other remote means) in a hearing regarding the petition for an order to require treatment. Consideration should be given to confrontation clause issues in the event the respondent was ordered to a type of confinement.

EC/jo/jle/jo/jle/jo/jle/jo