

NYSBA Elder Law Journal – Kendra’s Law Authorizes Court-Ordered Assisted Outpatient Treatment for Mentally III

On August 9, 1999, Governor Pataki signed legislation which created assisted outpatient treatment programs and authorized certain individuals to seek court orders requiring persons with severe mental illness to obtain such assisted outpatient treatment. ¹ Kendra’s Law was enacted largely in response to the death of Kendra Webdale, a woman allegedly killed at the hands of a diagnosed schizophrenic who pushed her in front of an oncoming subway train in Manhattan in January 1999. The law was intended to provide the severely mentally ill with essential services and monitoring to promote continuity of care and the ability to live safely in the community. It is an important change in the state’s [mental health law](#) and the Legislature hoped that it would benefit the lives of all New Yorkers.

The term “assisted outpatient treatment” refers to categories of outpatient services which a court may order to “treat a person’s mental illness and to assist the person in living and functioning in the community, or to attempt to prevent a relapse or deterioration that may reasonably be predicted to result in suicide or the need for hospitalization.” Assisted outpatient treatment must include either case management or assertive community treatment team services to enable frequent contact with the subject. It may also include the following categories of service (among others): medication, periodic blood tests or urinalysis, individual or group therapy, day or partial day programming activities, educational and vocational training or activities, alcohol or substance abuse treatment and counseling, and supervision of living arrangements.

The creation of assisted outpatient treatment programs through Kendra’s Law was intended to enable care givers to coordinate the delivery of assisted outpatient treatment services to severely mentally ill persons, and to allow for their continuous evaluation and monitoring. Under the new law, a person with severe mental illness who is believed to be a risk to self or to others in the community and who meets all of the statutorily-defined criteria for assisted outpatient treatment may become the subject of an order requiring his/her participation in an assisted outpatient treatment program.

Oversight

Because of the importance of ensuring a subject’s compliance with court-ordered treatment, Kendra’s Law authorizes local directors of community services to receive and investigate reports of persons alleged to be in need of assisted outpatient treatment, and to file, when necessary, a petition for an order authorizing court-ordered treatment. Thereafter, a director of community services must ensure timely delivery of court-ordered assisted outpatient treatment, and must monitor and enforce a subject’s compliance with any such treatment.

To monitor the effectiveness of assisted outpatient treatment programs, Kendra's Law also requires the directors of such programs to submit periodic reports to regional program coordinators appointed by the Commissioner of Mental Health. Such reports include quarterly reports, as well as reports for each occasion on which a person is ordered to participate in assisted outpatient treatment. Additionally, if a program coordinator determines or receives notice that a subject is not receiving timely and adequate assisted outpatient treatment services, the program coordinator must require the program director to immediately commence corrective action, including, if necessary, involuntary hospitalization of the subject. If the program director fails to take corrective action, the director's failure will be reported to the program coordinator, who, in turn, must notify the Commissioner of Mental Health and the court.

Protective Provisions

Due to the obvious restrictive nature of assisted outpatient treatment, Kendra's Law also contains provisions to protect persons who may become the subject of a petition for assisted outpatient treatment. Petitions for an order to participate in assisted outpatient treatment may be filed by specified individuals only. As noted above, a director of community services may file a petition. Other individuals who may file a petition include any adult who resides with the subject, a relative (such as a parent, spouse, or adult sibling or child), certain mental health care providers (including a psychiatrist who is treating or supervising treatment of the subject, the director of a [hospital](#) in which the person is hospitalized, or the director of a public or charitable institution in which the person resides), a social services official in the city or county in which the person is present, or a parole or probation officer assigned to supervise the subject.

All petitions-regardless of by whom they are filed-must be accompanied by a physician's affirmation. The physician's affirmation must indicate that the physician examined the person (or attempted to examine the person) within 10 days prior to the filing of the petition, recommends assisted outpatient treatment, and is willing and able to testify at a hearing. At the time of the hearing, the physician must explain why the subject requires assisted outpatient treatment and why assisted outpatient treatment represents the least restrictive alternative for the subject. The physician must also explain the recommended treatment plan and its rationale. This treatment plan must be in writing and developed in conjunction with input from the subject, the subject's treating physician and, upon the subject's request, a relative or close friend.

As a further precaution, the court may not order an individual to participate in assisted outpatient treatment unless it finds by clear and convincing evidence that the subject meets all of the statutory criteria set forth in the law. For instance, the court must find that, among other things, the person is unlikely to survive safely in the community without supervision, and is unlikely to voluntarily participate in the recommended treatment. The evidence at the hearing must also demonstrate that the person has a history of lack of [compliance](#) with treatment for mental illness, and that such noncompliance has been a significant factor in necessitating hospitalization at least twice in the past 36 months or has resulted in one or more acts of serious violent behavior toward self or others (including threats of or attempts at serious physical harm) in the last 48 months. The court must also find that the person needs assisted outpatient treatment to prevent a relapse or deterioration which would likely result in serious harm to self or others, and that the person is likely to benefit from assisted outpatient treatment.

An initial order for assisted outpatient treatment may not extend for a period longer than six months. No material changes may be made to the terms of the order without prior court approval.

If the petitioner is the director of a hospital that operates an assisted outpatient treatment program, the court order must require the hospital director to provide or arrange for all categories of assisted outpatient treatment for the subject. For all other persons, the court order must require the director of community services of the appropriate local governmental unit to provide or arrange for all categories of assisted outpatient treatment for the subject.

Conclusion

According to the Office of Mental Health, between November 1999 (the statute's effective date) and February 2001, the courts have issued 684 orders for assisted outpatient treatment. During this time frame, the constitutionality of the statute has been upheld,² and it has been determined that it was the legislature's intent to waive the physician-patient privilege by permitting the treating psychiatrist to either file the petition or to actually participate in the formulation of the treatment plan.³

While the statute has been interpreted and upheld by the courts, the effectiveness of the law is still debated. The statute's proponents point to the increase of case management services and to the careful formulation of treatment plans for patients who are at risk in the community due to noncompliance. On the other hand, the statute's critics, such as Mental Hygiene Legal Service (MFILS),⁴ are appalled that an individual subject to an assisted outpatient treatment order can be hospitalized for up to 72 hours on a physician's order. To MIILS, a significant liberty interest has been placed at risk.

Only time will tell if Kendra's Law can provide continuity of care and allow the severely mentally ill to reside safely in the community without an undue threat of re-hospitalization.

Endnotes

¹Chapter 408 of the Session Laws of 1999 created New York Mental Hygiene Law § 9.60, entitled "Assisted Outpatient Treatment."

²In re Urcuyo, 185 Misc. 2d 836, 714 N.Y.S.2d 862 (Supreme Ct., Kings Co. 2000); In re Martin, N.Y.L.J., Jan. 9, 2001, p. 31, col. 6.

³Amin v. Rose F., N.Y.L.J., Dec. 7, 2000, p. 31, col. 1.

⁴Article 47 of the New York Mental Hygiene Law establishes MF1LS in each judicial department to provide legal assistance to patients or residents of facilities for the mentally disabled.