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SENATE BILL NO. 18

Offered January 11, 2006

Prefiled December 12, 2005

A BILL to amend and reenact §§ 37.2-505, 37.2-802, 37.2-817, 37.2-820, and 37.2-821 of the Code of Virginia, and to amend the Code of Virginia by adding in Chapter 8 of Title 37.2 an article numbered 5.1, consisting of sections numbered 37.2-828.10 through 37.2-828.17, relating to mandatory outpatient treatment.

Patron—Marsh

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-505, 37.2-802, 37.2-817, 37.2-820 and 37.2-821 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 8 of Title 37.2 an article numbered 5.1 , consisting of sections numbered 37.2-828.10 through 37.2-828.17 as follows:

§ 37.2-505. Coordination of services for preadmission screening and discharge planning.

A. The community services board shall fulfill the following responsibilities:

1. Be responsible for coordinating the community services necessary to accomplish effective preadmission screening and discharge planning for persons referred to the community services board. When preadmission screening reports are required by the court on an emergency basis pursuant to Article 5 (§ 37.2-814 et seq.) of Chapter 8, the community services board shall ensure the development of the report for the court. To accomplish this coordination, the community services board shall establish a structure and procedures involving staff from the community services board and, as appropriate, representatives from (i) the state hospital or training center serving the board's service area, (ii) the local department of social services, (iii) the health department, (iv) the Department of Rehabilitative Services office in the board's service area, (v) the local school division, and (vi) other public and private human services agencies, including licensed hospitals.

2. Provide preadmission screening services prior to the admission for treatment pursuant to § 37.2-805 or Article 5 (§ 37.2-814 et seq.) of Chapter 8 of any person who requires emergency mental health services while in a city or county served by the community services board.

3. Provide, in consultation with the appropriate state hospital or training center, discharge planning for any person who, prior to admission, resided in a city or county served by the community services board or who chooses to reside after discharge in a city or county served by the board and who is to be released from a state hospital or training center pursuant to § 37.2-837. The discharge plan shall be completed prior to the person's discharge. The plan shall be prepared with the involvement and participation of the consumer or his representative and must reflect the consumer's preferences to the greatest extent possible. The plan shall include the mental health, mental retardation, substance abuse, social, educational, medical, employment, housing, legal, advocacy, transportation, and other services that the consumer will need upon discharge into the community and identify the public or private agencies that have agreed to provide these services.

4. Provide a written plan and petition for mandatory outpatient treatment for any person who requires such mental health services pursuant to Article 5.1 (§ 37.2-828.10 et seq.) of Chapter 8 of this title.

No person shall be discharged from a state hospital or training center without completion by the community services board of the discharge plan described in this subdivision. If state hospital or training center staff identify a consumer as ready for discharge and the community services board that is responsible for the person's care disagrees, the community services board shall document in the treatment plan within 30 days of the person's identification any reasons for not accepting the person for discharge. If the state hospital or training center disagrees with the community services board and the board refuses to develop a discharge plan to accept the person back into the community, the state hospital or training center or the community services board shall ask the Commissioner to review the state hospital's or training center's determination that the person is ready for discharge in accordance with procedures established by the Department in collaboration with state hospitals, training centers, and community services boards. If the Commissioner determines that the person is ready for discharge, a discharge plan shall be developed by the Department to ensure the availability of adequate services for the consumer and the protection of the community. The Commissioner also shall verify that sufficient state-controlled funds have been allocated to the community services board through the performance contract. If sufficient state-controlled funds have been allocated, the Commissioner may contract with a

private provider, another community services board, or a behavioral health authority to deliver the services specified in the discharge plan and withhold allocated funds applicable to that consumer's discharge plan from the community services board in accordance with subsections C and E of § 37.2-508.

B. The community services board may perform the functions set out in subdivision A 1 in the case of children by referring them to the locality's family assessment and planning team and by cooperating with the community policy and management team in the coordination of services for troubled youths and their families. The community services board may involve the family assessment and planning team and the community policy and management team, but it remains responsible for performing the functions set out in subdivisions A 2 and A 3 in the case of children.

§ 37.2-802. Interpreters in admission or certification proceedings.

A. In any proceeding pursuant to § 37.2-806 ~~or~~, §§ 37.2-809 through 37.2-820*, or Article 5.1 (§ 37.2-828.10 et seq.) of this chapter* in which a person who is deaf is alleged to have mental retardation or mental illness, an interpreter for the person shall be appointed by the district court judge or special justice before whom the proceeding is pending from a list of qualified interpreters provided by the Department for the Deaf and Hard-of-Hearing. The interpreter shall be compensated as provided for in § 37.2-804.

B. In any proceeding pursuant to § 37.2-806 ~~or~~, §§ 37.2-809 through 37.2-820*, or Article 5.1 (§ 37.2-828.10 et seq.) of this chapter* in which a non-English-speaking person is alleged to have mental retardation or mental illness or is a witness in such proceeding, an interpreter for the person shall be appointed by the district court judge or special justice, or in the case of §§ 37.2-809 through 37.2-813 a magistrate, before whom the proceeding is pending. Failure to appoint an interpreter when an interpreter is not reasonably available or when the person's level of English fluency cannot be determined shall not be a basis to dismiss the petition or void the order entered at the proceeding. The compensation for the interpreter shall be fixed by the court in accordance with the guidelines set by the Judicial Council of Virginia and shall be paid out of the state treasury.

§ 37.2-817. Involuntary admission and outpatient treatment orders.

A. The district court judge or special justice shall render a decision on the petition for involuntary admission after the appointed examiner has presented his report, orally or in writing, pursuant to § 37.2-815 and after the community services board or behavioral health authority that serves the county or city where the person resides or, if impractical, where the person is located has presented a preadmission screening report, orally or in writing, with recommendations for that person's placement, care, and treatment pursuant to § 37.2-816. These reports, if not contested, may constitute sufficient evidence upon which the district court judge or special justice may base his decision.

B. After observing the person and obtaining the necessary positive certification and considering any other relevant evidence that may have been offered, if the judge or special justice finds by clear and convincing evidence that (i) the person presents an imminent danger to himself or others as a result of mental illness or has been proven to be so seriously mentally ill as to be substantially unable to care for himself and (ii) alternatives to involuntary inpatient treatment have been investigated and deemed unsuitable and there is no less restrictive alternative to involuntary inpatient treatment, the judge or special justice shall by written order and specific findings so certify and order that the person be admitted involuntarily to a facility for a period of treatment not to exceed 180 days from the date of the court order. Such involuntary admission shall be to a facility designated by the community services board or behavioral health authority that serves the city or county in which the person was examined as provided in § 37.2-816. If the community services board or behavioral health authority does not designate a facility at the commitment hearing, the person shall be involuntarily admitted to a facility designated by the Commissioner. The person shall be released at the expiration of 180 days unless he is involuntarily admitted by further petition and order of a court or such person makes application for treatment on a voluntary basis as provided for in § 37.2-805.

C. After observing the person and obtaining the necessary positive certification and considering any other relevant evidence that may have been offered, if the judge or special justice finds by clear and convincing evidence that ~~(i) the person~~ *the criteria for mandatory outpatient treatment set forth in § 37.2-828.11 have been met, the judge or special justice shall order mandatory outpatient treatment pursuant to Article 5.1 (§ 37.2-828.10 et seq.) of this chapter*. ~~presents an imminent danger to himself or others as a result of mental illness or has been proven to be so seriously mentally ill as to be substantially unable to care for himself, (ii) less restrictive alternatives to involuntary inpatient treatment have been investigated and are deemed suitable, (iii) the person (a) has the degree of competency necessary to understand the stipulations of his treatment, (b) expresses an interest in living in the community and agrees to abide by his treatment plan, and (c) is deemed to have the capacity to comply with the treatment plan, and (iv) the ordered treatment can be delivered on an outpatient basis and be monitored by the community services board, behavioral health authority or designated provider, the judge or special justice shall order outpatient treatment, which may include day treatment in a hospital,~~

~~night treatment in a hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to Chapter 11 (§ 37.2-1100 et seq.), or other appropriate course of treatment as may be necessary to meet the needs of the person. The community services board or behavioral health authority that serves the city or county in which the person resides shall recommend a specific course of treatment and programs for the provision of involuntary outpatient treatment. The community services board, behavioral health authority, or designated provider shall monitor the person's compliance with the treatment ordered by the court under this section, and the person's failure to comply with involuntary outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held pursuant to the provisions of this section. Upon failure of the person to adhere to the terms of the outpatient treatment order, the judge or special justice may revoke it and, upon notice to the person and after a commitment hearing, order involuntary admission to a facility.~~

§ 37.2-820. Place of hearing.

The hearing provided for pursuant to §§ 37.2-814 through 37.2-819 *or pursuant to Article 5.1 (§ 37.2-828.10 et seq.) of this chapter* may be conducted by the district court judge or a special justice at the convenient facility or other place open to the public provided for in § 37.2-809, if he deems it advisable, even though the facility or place is located in a county or city other than his own. In conducting such hearings in a county or city other than his own, the judge or special justice shall have all of the authority and power that he would have in his own county or city. A district court judge or special justice of the county or city in which the facility or place is located may conduct the hearing provided for in §§ 37.2-814 through 37.2-819 *or Article 5.1 (§ 37.2-828.10 et seq.) of this chapter*.

§ 37.2-821. Appeal of involuntary admission or certification order.

Any person involuntarily admitted pursuant to §§ 37.2-814 through 37.2-819, ~~or~~ certified as eligible for admission pursuant to § 37.2-806, *or ordered to obtain mandatory outpatient treatment pursuant to Article 5.1 (§ 37.2-828.10 et seq.) of this chapter* shall have the right to appeal the order to the circuit court in the jurisdiction where he was involuntarily admitted, ~~or~~ certified, *or ordered to obtain mandatory outpatient treatment,* or where the facility to which he was admitted, *or the outpatient facility in which he was treated,* is located. Choice of venue shall rest with the party noting the appeal. The court may transfer the case upon a finding that the other forum is more convenient. An appeal shall be filed within 30 days from the date of the order and shall be given priority over all other pending matters before the court and heard as soon as possible, notwithstanding § 19.2-241 regarding the time within which the court shall set criminal cases for trial. The clerk of the court from which an appeal is taken shall immediately transmit the record to the clerk of the appellate court. The clerk of the circuit court shall provide written notification of the appeal to the petitioner in the case in accordance with procedures set forth in § 16.1-112. No appeal bond or writ tax shall be required, and the appeal shall proceed without the payment of costs or other fees. Costs may be recovered as provided for in § 37.2-804.

The appeal shall be heard de novo in accordance with the provisions set forth in § 37.2-806 or this article. An order continuing the involuntary admission, *or continuing the mandatory outpatient treatment order,* shall be entered only if the criteria in § 37.2-817 *or § 37.8-828.11, respectively,* are met at the time the appeal is heard. The person so admitted, ~~or~~ certified, *or ordered* shall be entitled to trial by jury. Seven persons from a panel of 13 shall constitute a jury.

If the person is not represented by counsel, the judge shall appoint an attorney to represent him. Counsel so appointed shall be paid a fee of $75 and his necessary expenses. The order of the court from which the appeal is taken shall be defended by the attorney for the Commonwealth.

Article 5.1.

Mandatory Outpatient Treatment.

§ 37.2-828.10. Purpose.

The purpose of this article is to create a mandatory outpatient treatment program so that those mentally ill persons who are capable of being maintained safely in the community with the help of such a program can receive those services. The procedures set forth in this article may be used only in those jurisdictions served by a community services board designated by the Commissioner as having adequate and appropriate resources for the provision of mandatory outpatient treatment. In determining whether a community services board has adequate and appropriate resources for the provision of mandatory outpatient treatment, the Commissioner shall consider, among other things, the community services board's working relationships with judicial and law-enforcement agencies.

§ 37.2-828.11. Criteria for mandatory outpatient treatment.

A court may order a person to obtain mandatory outpatient treatment if the court finds that (i) the person is suffering from a mental illness; (ii) on one or more previous occasions, the person's failure to comply with prescribed psychiatric treatment has necessitated hospitalization for the person's mental illness; (iii) in view of the person's treatment history and current behavior, the person now needs treatment in order to prevent a relapse or deterioration that would ultimately result in the person

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becoming either an imminent danger to himself or others or substantially unable to care for himself; (iv) as a result of the person's mental illness, the person is unlikely to seek or comply with needed treatment unless the court enters an order for mandatory outpatient treatment; (v) a written treatment plan has been prepared that sets forth the specific type, amount, duration, and frequency of treatment and services the person is to obtain; (vi) the proposed treatment is in the person's best medical interest and constitutes the least restrictive appropriate treatment for the person, taking into consideration all relevant circumstances, including any reasonably possible alternative treatments preferred by the person, as expressed in an advance directive or otherwise; (vii) the treatment and services providers are identified in and have agreed to the treatment plan; and (viii) the community services board that serves the jurisdiction where the person resides has been designated by the Commissioner as having adequate and appropriate resources for the provision of mandatory outpatient treatment, and has agreed to monitor the person's compliance with the treatment plan.

§ 37.2-828.12. Contents of petition for mandatory outpatient treatment.

A petition for mandatory outpatient treatment of a person may be filed by the community services board that serves the jurisdiction where the person resides. The petition shall allege each of the criteria of § 37.2-828.11, and shall allege the facts on which the allegations as to criteria in clauses (i) through (iii) of § 37.2-828.11 are based. The proposed written treatment plan shall be attached to the petition, or shall be filed and served at least 24 hours before the hearing. In developing the treatment plan, the community services board shall seek the active participation of the person who is the subject of the petition and shall consider the person's treatment preferences, as expressed in an advance directive or otherwise. Additionally, the community services board shall consult and consider the views of any relative, friend, advisor or advocate who either has been identified in an advance directive as someone the person wishes to be consulted, or who is otherwise so identified by the person. The petition may be supported by an affirmation or affidavit of a mental health professional who is licensed in Virginia through the Department of Health Professions and qualified in the diagnosis of mental illness.

§ 37.2-828.13. Hearing procedures.

A. The hearing shall be held within five days of the filing of the petition; however, if the fifth day is a Saturday, Sunday, or legal holiday, the hearing may be held on the next day that is not a Saturday, Sunday, or legal holiday. The petition and notice of the hearing shall be served on the person who is the subject of the petition, and notice of the hearing shall be provided to the petitioner. The community services board shall offer to transport the person who is the subject of the petition to the hearing. If the person fails or refuses to attend, the hearing may proceed in the person's absence.

B. No person shall be ordered to receive mandatory outpatient treatment unless a mental health professional who is licensed in Virginia through the Department of Health Professions and qualified in the diagnosis of mental illness testifies at the hearing to establish the criteria in clauses (i), (iii), (iv), and (vi) of § 37.2-828.11, and to explain the rationale for the recommended mandatory outpatient treatment. If the recommended mandatory outpatient treatment includes medication, the petition must be supported by the affidavit or testimony of a psychiatrist who is licensed in Virginia by the Board of Medicine, and this affidavit or testimony must describe the types or classes of medication that should be authorized, describe the beneficial and detrimental physical and mental effects of such medication, and establish that there is no appropriate less restrictive alternative treatment reasonably possible for the person. If the person or his attorney objects to proof by affidavit, the judge shall require the psychiatrist to testify and submit to cross-examination, in person or, at his discretion, electronically, pursuant to § 37.2-804.1. The person who is the subject of the petition shall be given an opportunity to state and explain any objections to the recommended mandatory outpatient treatment, to suggest alternatives, and to present expert and other testimony in support thereof.

C. The person who is the subject of the petition shall have the right to a hearing, to retain private counsel or be represented by a court-appointed attorney, to present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, to be present during the hearing and testify, to appeal any order for mandatory outpatient treatment to the circuit court, and to have a jury trial on appeal. A written explanation of the mandatory outpatient treatment process and the statutory protections associated with the process shall be given to the person and its contents explained by an attorney prior to the hearing. The judge shall ascertain whether the person has been given the written explanation required herein and shall ascertain if the person is represented by counsel, and if he is not represented by counsel, the judge shall appoint an attorney to represent him. However, if the person requests an opportunity to employ counsel, the court shall give him a reasonable opportunity to employ counsel at his own expense.

D. The attorney for the person who is the subject of the petition shall actively represent his client. Judges and appointed counsel shall be compensated in the same manner as proceedings held pursuant to § 37.2-814.

E. A recording of the hearing shall be made, submitted to the appropriate district court clerk, and retained in a confidential file for at least three years from the date of the hearing, to be used solely to

document and to answer questions concerning the judge's conduct of the hearing. All relevant medical records, reports, and court documents pertaining to the hearing provided for in this section shall be confidential if so requested by such person or his counsel, with access provided only upon court order for good cause shown. Such records, reports, and documents shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

§ 37.2-828.14. Disposition.

If the court finds that each of the criteria for mandatory outpatient treatment set forth in § 37.2-828.11 has been established by clear and convincing evidence, the court shall enter an order setting forth its findings, granting the petition, and directing the person and the treatment and service providers to comply with the treatment plan approved by the court for a period of 180 days or less, and in that event the community services board shall monitor such compliance. Otherwise, the court shall dismiss the petition.

§ 37.2-828.15. Noncompliance with order for mandatory outpatient treatment.

A. If a person subject to an order for mandatory outpatient treatment fails to comply with the order, the community services board or treatment provider shall make reasonable efforts to contact the person and to secure the person's compliance with the order. If the community services board or treatment provider determines that such reasonable efforts have been made, and that the person without good cause has substantially failed to comply with the order, the community services board or treatment provider may request that a law-enforcement officer accompany a treatment provider to the place the person may be found, or transport the person to the provider's office or to a treatment facility, for the purpose of enabling the provider or other responsible mental health professional to assess the person's present condition and to secure the person's compliance with the order. Except as otherwise authorized by law, the person may not be detained for more than three hours, including transportation time, and may not be forced to take prescribed medication.

B. If a person subject to an order for mandatory outpatient treatment has substantially failed to comply with the order without good cause, and the community services board or treatment provider has been unable after reasonable efforts to secure the person's compliance with the order, the community services board shall report to the judge promptly in writing and shall recommend an appropriate disposition. Copies of the report shall be sent to the person and the person's attorney. The judge shall schedule a supplemental hearing to occur within five days after receiving the report; however, if the fifth day is a Saturday, Sunday, or legal holiday, the hearing may be held on the next day that is not a Saturday, Sunday, or legal holiday. The hearing shall be conducted in accordance with the procedures set forth in § 37.2-828.13, and the person and his attorney shall be given at least 48 hours' notice of the hearing. The community services board shall offer to transport the person to the hearing. If the person fails or refuses to attend, the hearing may proceed in the person's absence. After hearing evidence of the person's current condition and compliance with the order for mandatory outpatient treatment, the judge shall make whichever of the following dispositions is appropriate:

1. Upon finding that the person meets the criteria for involuntary admission and treatment specified in § 37.2-817, the judge shall order that the person be placed in a hospital or other facility for a period of treatment not to exceed 180 days from the date of the order.

2. Upon finding that the person continues to meet the criteria for mandatory outpatient treatment specified in § 37.2-828.11, and that a continued period of mandatory outpatient treatment appears warranted, the judge shall renew the order for mandatory outpatient treatment, making any necessary modifications that are acceptable to the treatment provider or facility responsible for the person's treatment.

3. Upon finding that neither of these dispositions is appropriate, the judge shall rescind the order for mandatory outpatient treatment. Under no circumstances may noncompliance with the order be punished as contempt of court.

C. The fact that a person is subject to an order for mandatory outpatient treatment does not displace or modify the authority conferred by § 37.2-809 to detain the person if he is believed to be mentally ill and in need of hospitalization or to initiate new proceedings for involuntary admission thereunder.

§ 37.2-828.16. Petition to terminate or extend order for mandatory outpatient treatment.

At any time at least 45 days after the most recent hearing, a person who is subject to an order for mandatory outpatient treatment may petition the court to terminate the order. A petition to terminate the order must allege that at least one of the criteria of § 37.2-828.11 is not met and allege the facts on which this allegation is based. At any time within 30 days before the expiration of an order for mandatory outpatient treatment, the community services board that is monitoring the person's compliance with the order may petition the court to extend the order for a period of 180 days or less. A petition to extend the order must comply with the requirements of § 37.2-828.12. If both the community services board and the person who is subject to the order join in the petition, the court shall grant the petition and enter an appropriate order. Otherwise, the court shall schedule the hearing to occur within

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10 days of receiving the petition, and shall provide at least five days' notice of the hearing to the person, the person's attorney, and the community services board. The hearing shall be conducted in accordance with the procedures set forth in § 37.2-828.13. Upon finding that the criteria for mandatory outpatient treatment specified in § 37.2-828.11 are met, and that a continued period of mandatory outpatient treatment in accordance with the treatment plan approved by the court appears warranted, the judge shall renew the order for mandatory outpatient treatment for a period of 180 days or less. Otherwise, the judge shall rescind the order for mandatory outpatient treatment.

§ 37.2-828.17. Appeal of a mandatory outpatient treatment order.

Any person who is the subject of an order for mandatory outpatient treatment shall have the same right of appeal as an appeal of admission or certification order pursuant to § 37.2-821. The order for mandatory outpatient treatment shall be affirmed only if the criteria of § 37.2-828.11 are met at the time the appeal is heard.