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SENATE BILL NO. 568

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 10, 2016)

(Patron Prior to Substitute—Senator Barker)

*A BILL to amend and reenact §§ 37.2-804.2, 37.2-814, and 37.2-817 of the Code of Virginia, relating to involuntary admission procedures.***Be it enacted by the General Assembly of Virginia:****1. That §§ 37.2-804.2, 37.2-814, and 37.2-817 of the Code of Virginia are amended and reenacted as follows:****§ 37.2-804.2. Disclosure of records.**

Any health care provider, as defined in § 32.1-127.1:03, or other provider who has provided or is currently providing services to a person who is the subject of proceedings pursuant to this chapter shall, upon request, disclose to a magistrate, the court, the person's attorney, the person's guardian ad litem, the examiner identified to perform an examination pursuant to § 37.2-815, the community services board or its designee performing any evaluation, preadmission screening, or monitoring duties pursuant to this chapter, or a law-enforcement officer any information that is necessary and appropriate for the performance of his duties pursuant to this chapter. Any health care provider, as defined in § 32.1-127.1:03, or other provider who has provided or is currently evaluating or providing services to a person who is the subject of proceedings pursuant to this chapter shall disclose information that may be necessary for the treatment of such person to any other health care provider or other provider evaluating or providing services to or monitoring the treatment of the person. Health records disclosed to a law-enforcement officer shall be limited to information necessary to protect the officer, the person, or the public from physical injury or to address the health care needs of the person. Information disclosed to a law-enforcement officer shall not be used for any other purpose, disclosed to others, or retained.

Any health care provider providing services to a person who is the subject of proceedings under this chapter ~~may notify the person's~~ shall (i) inform the person that his family member or personal representative, including any agent named in an advance directive executed in accordance with the Health Care Decisions Act (§ 54.1-2981 et seq.), will be notified of information that is directly relevant to such individual's involvement with the person's health care, which may include the person's location and general condition, in accordance with subdivision D 34 of § 32.1-127.1:03, and (ii) make a reasonable effort to so notify the person's family member or personal representative, unless the provider has actual knowledge that the family member or personal representative is currently prohibited by court order from contacting the person. No health care provider shall be required to notify a person's family member or personal representative pursuant to this section if the health care provider has actual knowledge that such notice has been provided.

Any health care provider disclosing records pursuant to this section shall be immune from civil liability for any harm resulting from the disclosure, including any liability under the federal Health Insurance Portability and Accountability Act (42 U.S.C. § 1320d et seq.), as amended, unless the person or provider disclosing such records intended the harm or acted in bad faith.

§ 37.2-814. Commitment hearing for involuntary admission; written explanation; right to counsel; rights of petitioner.

A. The commitment hearing for involuntary admission shall be held after a sufficient period of time has passed to allow for completion of the examination required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-816, and initiation of mental health treatment to stabilize the person's psychiatric condition to avoid involuntary commitment where possible, but shall be held within 72 hours of the execution of the temporary detention order as provided for in § 37.2-809; however, if the 72-hour period herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the person may be detained, as herein provided, until the close of business on the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed.

B. At the commencement of the commitment hearing, the district court judge or special justice shall inform the person whose involuntary admission is being sought of his right to apply for voluntary admission for inpatient treatment as provided for in § 37.2-805 and shall afford the person an opportunity for voluntary admission. The district court judge or special justice shall advise the person whose involuntary admission is being sought that if the person chooses to be voluntarily admitted pursuant to § 37.2-805, such person will be prohibited from possessing, purchasing, or transporting a firearm pursuant to § 18.2-308.1:3. The judge or special justice shall ascertain if the person is then willing and capable of seeking voluntary admission for inpatient treatment. In determining whether a

person is capable of consenting to voluntary admission, the judge or special justice may consider evidence regarding the person's past compliance or noncompliance with treatment. If the judge or special justice finds that the person is capable and willingly accepts voluntary admission for inpatient treatment, the judge or special justice shall require him to accept voluntary admission for a minimum period of treatment not to exceed 72 hours. After such minimum period of treatment, the person shall give the facility 48 hours' notice prior to leaving the facility. During this notice period, the person shall not be discharged except as provided in § 37.2-837, 37.2-838, or 37.2-840. The person shall be subject to the transportation provisions as provided in § 37.2-829 and the requirement for preadmission screening by a community services board as provided in § 37.2-805.

C. If a person is incapable of accepting or unwilling to accept voluntary admission and treatment, the judge or special justice shall inform the person of his right to a commitment hearing and right to counsel. The judge or special justice shall ascertain if the person whose admission is sought is represented by counsel, and, if he is not represented by counsel, the judge or special justice shall appoint an attorney to represent him. However, if the person requests an opportunity to employ counsel, the judge or special justice shall give him a reasonable opportunity to employ counsel at his own expense.

D. A written explanation of the involuntary admission process and the statutory protections associated with the process shall be given to the person, and its contents shall be explained by an attorney prior to the commitment hearing. The written explanation shall describe, at a minimum, the person's rights to (i) retain private counsel or be represented by a court-appointed attorney, (ii) present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, (iii) be present during the hearing and testify, (iv) appeal any order for involuntary admission to the circuit court, and (v) have a jury trial on appeal. The judge or special justice shall ascertain whether the person whose involuntary admission is sought has been given the written explanation required herein.

E. To the extent possible, during or before the commitment hearing, the attorney for the person whose involuntary admission is sought shall interview his client, the petitioner, the examiner described in § 37.2-815, the community services board staff, and any other material witnesses. He also shall examine all relevant diagnostic and other reports, present evidence and witnesses, if any, on his client's behalf, and otherwise actively represent his client in the proceedings. A health care provider shall disclose or make available all such reports, treatment information, and records concerning his client to the attorney, upon request. The role of the attorney shall be to represent the wishes of his client, to the extent possible.

F. The petitioner shall be given adequate notice of the place, date, and time of the commitment hearing. The petitioner shall be entitled to retain counsel at his own expense, to be present during the hearing, and to testify and present evidence. The petitioner shall be encouraged but shall not be required to testify at the hearing, and the person whose involuntary admission is sought shall not be released solely on the basis of the petitioner's failure to attend or testify during the hearing.

G. *Any individual, including any individual who is notified of the time and location of the hearing by the community services board pursuant to subsection B of § 37.2-817 may testify and present evidence during the hearing.*

§ 37.2-817. Involuntary admission and mandatory 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 the report required by § 37.2-815, and after the community services board that serves the county or city where the person resides or, if impractical, where the person is located has presented a preadmission screening report 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. The examiner, if not physically present at the hearing, and the treating physician at the facility of temporary detention shall be available whenever possible for questioning during the hearing through a two-way electronic video and audio or telephonic communication system as authorized in § 37.2-804.1.

B. Any employee or designee of the local community services board, as defined in § 37.2-809, representing the community services board that prepared the preadmission screening report shall attend the hearing in person or, if physical attendance is not practicable, shall participate in the hearing through a two-way electronic video and audio or telephonic communication system as authorized in § 37.2-804.1. Where a hearing is held outside of the service area of the community services board that prepared the preadmission screening report, and it is not practicable for a representative of the board to attend or participate in the hearing, arrangements shall be made by the board for an employee or designee of the board serving the area in which the hearing is held to attend or participate on behalf of the board that prepared the preadmission screening report. The employee or designee of the local community services board, as defined in § 37.2-809, representing the community services board that prepared the preadmission screening report or attending or participating on behalf of the board that prepared the preadmission screening report shall not be excluded from the hearing pursuant to an order of

sequestration of witnesses. The community services board that prepared the preadmission screening report shall remain responsible for the person subject to the hearing and, prior to the hearing, shall send the preadmission screening report through certified mail, personal delivery, facsimile with return receipt acknowledged, or other electronic means to the community services board attending the hearing. Where a community services board attends the hearing on behalf of the community services board that prepared the preadmission screening report, the attending community services board shall inform the community services board that prepared the preadmission screening report of the disposition of the matter upon the conclusion of the hearing. In addition, the attending community services board shall transmit the disposition through certified mail, personal delivery, facsimile with return receipt acknowledged, or other electronic means.

At least 12 hours prior to the hearing, the court shall provide to the community services board that prepared the preadmission screening report the time and location of the hearing. If the representative of the community services board will be present by telephonic means, the court shall provide the telephone number to the board. *As soon as practicable after being provided with the time and location of the hearing by the court, the community services board shall make a reasonable effort to notify the person's personal representative, including any agent named in an advance directive executed in accordance with the Health Care Decisions Act (§ 54.1-2981 et seq.), if known, and any other interested person. Such notification may be made by telephone or electronic mail. However, the community services board is not required to notify any personal representative or other interested person if the representative of the community services board reasonably determines that providing such notice would be detrimental to the physical or mental health of the person who is the subject of the petition for involuntary admission or is likely to cause such person to cause physical harm to himself or others.*

For purposes of this section, "interested person" means the spouse, parent, or adult child of a person who is the subject of a petition for involuntary admission who provides care to, helps obtain care for, or is directly involved in monitoring the well-being of the person who is the subject of a petition for involuntary admission.

C. After observing the person and considering (i) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (ii) *any testimony of or evidence presented by the person's personal representative, including any agent named in an advance directive executed in accordance with the Health Care Decisions Act (§ 54.1-2981 et seq.), or any interested person, if available,* (iii) any past actions of the person, ~~(iii)~~ (iv) any past mental health treatment of the person, ~~(iv)~~ (v) any examiner's certification, ~~(v)~~ (vi) any health records available, ~~(vi)~~ (vii) the preadmission screening report, and ~~(vii)~~ (viii) any other relevant evidence that may have been admitted, including whether the person recently has been found unrestorably incompetent to stand trial after a hearing held pursuant to subsection E of § 19.2-169.1, if the judge or special justice finds by clear and convincing evidence that (a) the person has a mental illness and there is a substantial likelihood that, as a result of mental illness, the person will, in the near future, (1) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (2) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, and (b) all available less restrictive treatment alternatives to involuntary inpatient treatment, pursuant to subsection D, that would offer an opportunity for the improvement of the person's condition have been investigated and determined to be inappropriate, 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 30 days from the date of the court order. Such involuntary admission shall be to a facility designated by the community services board that serves the county or city in which the person was examined as provided in § 37.2-816. If the community services board does not designate a facility at the commitment hearing, the person shall be involuntarily admitted to a facility designated by the Commissioner. Upon the expiration of an order for involuntary admission, the person shall be released unless he is involuntarily admitted by further petition and order of a court, which shall be for a period not to exceed 180 days from the date of the subsequent court order, or such person makes application for treatment on a voluntary basis as provided for in § 37.2-805 or is ordered to mandatory outpatient treatment pursuant to subsection D. Upon motion of the treating physician, a family member or personal representative of the person, or the community services board serving the county or city where the facility is located, the county or city where the person resides, or the county or city where the person receives treatment, a hearing shall be held prior to the release date of any involuntarily admitted person to determine whether such person should be ordered to mandatory outpatient treatment pursuant to subsection D upon his release if such person, on at least two previous occasions within 36 months preceding the date of the hearing, has been (A) involuntarily admitted pursuant to this section or (B) the subject of a temporary detention order and voluntarily admitted himself in accordance with subsection B of § 37.2-814. A district court judge or special justice shall hold the hearing within 72 hours after receiving the motion for a mandatory outpatient treatment order;

183 however, if the 72-hour period expires on a Saturday, Sunday, or legal holiday, the hearing shall be held
184 by the close of business on the next day that is not a Saturday, Sunday, or legal holiday.

185 C1. In the order for involuntary admission, the judge or special justice may authorize the treating
186 physician to discharge the person to mandatory outpatient treatment under a discharge plan developed
187 pursuant to subsection C2, if the judge or special justice further finds by clear and convincing evidence
188 that (i) the person has a history of lack of compliance with treatment for mental illness that at least
189 twice within the past 36 months has resulted in the person being subject to an order for involuntary
190 admission pursuant to subsection C; (ii) in view of the person's treatment history and current behavior,
191 the person is in need of mandatory outpatient treatment following inpatient treatment in order to prevent
192 a relapse or deterioration that would be likely to result in the person meeting the criteria for involuntary
193 inpatient treatment; (iii) as a result of mental illness, the person is unlikely to voluntarily participate in
194 outpatient treatment unless the court enters an order authorizing discharge to mandatory outpatient
195 treatment following inpatient treatment; and (iv) the person is likely to benefit from mandatory
196 outpatient treatment. The duration of mandatory outpatient treatment shall be determined by the court
197 based on recommendations of the community services board, but shall not exceed 90 days. Upon
198 expiration of the order for mandatory outpatient treatment, the person shall be released unless the order
199 is continued in accordance with § 37.2-817.4.

200 C2. Prior to discharging the person to mandatory outpatient treatment under a discharge plan as
201 authorized pursuant to subsection C1, the treating physician shall determine, based upon his professional
202 judgment, that (i) the person (a) in view of the person's treatment history and current behavior, no
203 longer needs inpatient hospitalization, (b) requires mandatory outpatient treatment at the time of
204 discharge to prevent relapse or deterioration of his condition that would likely result in his meeting the
205 criteria for involuntary inpatient treatment, and (c) has agreed to abide by his discharge plan and has the
206 ability to do so; and (ii) the ordered treatment will be delivered on an outpatient basis by the community
207 services board or designated provider to the person. In no event shall the treating physician discharge a
208 person to mandatory outpatient treatment under a discharge plan as authorized pursuant to subsection C1
209 if the person meets the criteria for involuntary commitment set forth in subsection C. The discharge plan
210 developed by the treating physician and facility staff in conjunction with the community services board
211 and the person shall serve as and shall contain all the components of the comprehensive mandatory
212 outpatient treatment plan set forth in subsection G, and no initial mandatory outpatient treatment plan set
213 forth in subsection F shall be required. The discharge plan shall be submitted to the court for approval
214 and, upon approval by the court, shall be filed and incorporated into the order entered pursuant to
215 subsection C1. The discharge plan shall be provided to the person by the community services board at
216 the time of the person's discharge from the inpatient facility. The community services board where the
217 person resides upon discharge shall monitor the person's compliance with the discharge plan and report
218 any material noncompliance to the court in accordance with § 37.2-817.1.

219 D. After observing the person and considering (i) the recommendations of any treating or examining
220 physician or psychologist licensed in Virginia, if available, (ii) *any testimony of or evidence presented*
221 *by the person's personal representative, including any agent named in an advance directive executed in*
222 *accordance with the Health Care Decisions Act (§ 54.1-2981 et seq.), or any interested person, if*
223 *available, (iii) any past actions of the person, (iii) (iv) any past mental health treatment of the person,*
224 *(iv) (v) any examiner's certification, (v) (vi) any health records available, (vi) (vii) the preadmission*
225 *screening report, and (vii) (viii) any other relevant evidence that may have been admitted, if the judge or*
226 *special justice finds by clear and convincing evidence that (a) the person has a mental illness and that*
227 *there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future,*
228 *(1) cause serious physical harm to himself or others as evidenced by recent behavior causing,*
229 *attempting, or threatening harm and other relevant information, if any, or (2) suffer serious harm due to*
230 *his lack of capacity to protect himself from harm or to provide for his basic human needs; (b) less*
231 *restrictive alternatives to involuntary inpatient treatment that would offer an opportunity for improvement*
232 *of his condition have been investigated and are determined to be appropriate; (c) the person has agreed*
233 *to abide by his treatment plan and has the ability to do so; and (d) the ordered treatment will be*
234 *delivered on an outpatient basis by the community services board or designated provider to the person,*
235 *the judge or special justice shall by written order and specific findings so certify and order that the*
236 *person be admitted involuntarily to mandatory outpatient treatment. Less restrictive alternatives shall not*
237 *be determined to be appropriate unless the services are actually available in the community.*

238 E. Mandatory outpatient treatment may include day treatment in a hospital, night treatment in a
239 hospital, outpatient involuntary treatment with anti-psychotic medication pursuant to Chapter 11
240 (§ 37.2-1100 et seq.), or other appropriate course of treatment as may be necessary to meet the needs of
241 the person. Mandatory outpatient treatment shall not include the use of restraints or physical force of
242 any kind in the provision of the medication. The community services board that serves the county or
243 city in which the person resides shall recommend a specific course of treatment and programs for the
244 provision of mandatory outpatient treatment. The duration of mandatory outpatient treatment shall be

determined by the court based on recommendations of the community services board, but shall not exceed 90 days. Upon expiration of an order for mandatory outpatient treatment, the person shall be released from the requirements of the order unless the order is continued in accordance with § 37.2-817.4.

F. Any order for mandatory outpatient treatment entered pursuant to subsection D shall include an initial mandatory outpatient treatment plan developed by the community services board that completed the preadmission screening report. The plan shall, at a minimum, (i) identify the specific services to be provided, (ii) identify the provider who has agreed to provide each service, (iii) describe the arrangements made for the initial in-person appointment or contact with each service provider, and (iv) include any other relevant information that may be available regarding the mandatory outpatient treatment ordered. The order shall require the community services board to monitor the implementation of the mandatory outpatient treatment plan and report any material noncompliance to the court.

G. No later than five days, excluding Saturdays, Sundays, or legal holidays, after an order for mandatory outpatient treatment has been entered pursuant to subsection D, the community services board where the person resides that is responsible for monitoring compliance with the order shall file a comprehensive mandatory outpatient treatment plan. The comprehensive mandatory outpatient treatment plan shall (i) identify the specific type, amount, duration, and frequency of each service to be provided to the person, (ii) identify the provider that has agreed to provide each service included in the plan, (iii) certify that the services are the most appropriate and least restrictive treatment available for the person, (iv) certify that each provider has complied and continues to comply with applicable provisions of the Department's licensing regulations, (v) be developed with the fullest possible involvement and participation of the person and his family, with the person's consent, and reflect his preferences to the greatest extent possible to support his recovery and self-determination, (vi) specify the particular conditions with which the person shall be required to comply, and (vii) describe how the community services board shall monitor the person's compliance with the plan and report any material noncompliance with the plan. The community services board shall submit the comprehensive mandatory outpatient treatment plan to the court for approval. Upon approval by the court, the comprehensive mandatory outpatient treatment plan shall be filed with the court and incorporated into the order of mandatory outpatient treatment. Any subsequent substantive modifications to the plan shall be filed with the court for review and attached to any order for mandatory outpatient treatment.

H. If the community services board responsible for developing the comprehensive mandatory outpatient treatment plan determines that the services necessary for the treatment of the person's mental illness are not available or cannot be provided to the person in accordance with the order for mandatory outpatient treatment, it shall notify the court within five business days of the entry of the order for mandatory outpatient treatment. Within two business days of receiving such notice, the judge or special justice, after notice to the person, the person's attorney, and the community services board responsible for developing the comprehensive mandatory outpatient treatment plan shall hold a hearing pursuant to § 37.2-817.2.

I. Upon entry of any order for mandatory outpatient treatment entered pursuant to subsection D, the clerk of the court shall provide a copy of the order to the person who is the subject of the order, to his attorney, and to the community services board required to monitor compliance with the plan. The community services board shall acknowledge receipt of the order to the clerk of the court on a form established by the Office of the Executive Secretary of the Supreme Court and provided by the court for this purpose within five business days.

J. The court may transfer jurisdiction of the case to the district court where the person resides at any time after the entry of the mandatory outpatient treatment order. The community services board responsible for monitoring compliance with the mandatory outpatient treatment plan or discharge plan shall remain responsible for monitoring the person's compliance with the plan until the community services board serving the locality to which jurisdiction of the case has been transferred acknowledges the transfer and receipt of the order to the clerk of the court on a form established by the Office of the Executive Secretary of the Supreme Court and provided by the court for this purpose. The community services board serving the locality to which jurisdiction of the case has been transferred shall acknowledge the transfer and receipt of the order within five business days.

K. Any order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.