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SENATE BILL NO. 268

Offered January 12, 2022

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A BILL to amend and reenact §§ 37.2-808 and 37.2-810 of the Code of Virginia, relating to emergency custody and temporary detention; transportation; transfer of custody.

Patrons—Favola, Deeds, Hanger, Boysko, Mason and McClellan

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-808 and 37.2-810 of the Code of Virginia are amended and reenacted as follows:

§ 37.2-808. Emergency custody; issuance and execution of order.

A. Any magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion, or a court may issue pursuant to § 19.2-271.6, an emergency custody order when he has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) 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 (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment. Any emergency custody 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.

When considering whether there is probable cause to issue an emergency custody order, the magistrate may, in addition to the petition, or the court may pursuant to § 19.2-271.6, consider (1) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (2) any past actions of the person, (3) any past mental health treatment of the person, (4) any relevant hearsay evidence, (5) any medical records available, (6) any affidavits submitted, if the witness is unavailable and it so states in the affidavit, and (7) any other information available that the magistrate or the court considers relevant to the determination of whether probable cause exists to issue an emergency custody order.

B. Any person for whom an emergency custody order is issued shall be taken into custody and transported to a convenient location to be evaluated to determine whether the person meets the criteria for temporary detention pursuant to § 37.2-809 and to assess the need for hospitalization or treatment. The evaluation shall be made by a person designated by the community services board who is skilled in the diagnosis and treatment of mental illness and who has completed a certification program approved by the Department.

C. The magistrate or court issuing an emergency custody order shall specify the primary law-enforcement agency and jurisdiction to execute the emergency custody order and provide transportation. However, the magistrate or court shall consider any request to authorize transportation by an alternative transportation provider in accordance with this section, whenever an alternative transportation provider is identified to the magistrate or court, which may be a person, facility, or agency, including a family member or friend of the person who is the subject of the order, a representative of the community services board, *an employee of or person providing services pursuant to a contract with the Department*, or other transportation provider with personnel trained to provide transportation in a safe manner, upon determining, following consideration of information provided by the petitioner; the community services board or its designee; the local law-enforcement agency, if any; the person's treating physician, if any; or other persons who are available and have knowledge of the person, and, when the magistrate or court deems appropriate, the proposed alternative transportation provider, either in person or via two-way electronic video and audio or telephone communication system, that the proposed alternative transportation provider is available to provide transportation, willing to provide transportation, and able to provide transportation in a safe manner.

When transportation is ordered to be provided by an alternative transportation provider, the magistrate or court shall order the specified primary law-enforcement agency to execute the order, to take the person into custody, and to transfer custody of the person to the alternative transportation provider identified in the order. *The alternative transportation provider shall maintain custody of the person from the time custody is transferred to the alternative transportation provider by the primary law-enforcement agency until such time as an evaluation is conducted and custody is transferred*

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SB268

59 *pursuant to a temporary detention order or the person is released upon determination the person does*
60 *not meet the criteria for temporary detention or custody of the person is transferred to the community*
61 *services board or its designee that is responsible for conducting the evaluation, including during any*
62 *period prior to the initiation of transportation of the person and while transportation is being provided.*

63 In such cases, a copy of the emergency custody order shall accompany the person being transported
64 pursuant to this section at all times and shall be delivered by the alternative transportation provider to
65 the community services board or its designee responsible for conducting the evaluation. The community
66 services board or its designee conducting the evaluation shall return a copy of the emergency custody
67 order to the court designated by the magistrate or the court that issued the emergency custody order as
68 soon as is practicable. Delivery of an order to a law-enforcement officer or alternative transportation
69 provider and return of an order to the court may be accomplished electronically or by facsimile.

70 Transportation under this section shall include transportation to a medical facility as may be
71 necessary to obtain emergency medical evaluation or treatment that shall be conducted immediately in
72 accordance with state and federal law. Transportation under this section shall include transportation to a
73 medical facility for a medical evaluation if a physician at the hospital in which the person subject to the
74 emergency custody order may be detained requires a medical evaluation prior to admission.

75 D. In specifying the primary law-enforcement agency and jurisdiction for purposes of this section,
76 the magistrate or court shall order the primary law-enforcement agency from the jurisdiction served by
77 the community services board that designated the person to perform the evaluation required in
78 subsection B to execute the order and, in cases in which transportation is ordered to be provided by the
79 primary law-enforcement agency, provide transportation. If the community services board serves more
80 than one jurisdiction, the magistrate or court shall designate the primary law-enforcement agency from
81 the particular jurisdiction within the community services board's service area where the person who is
82 the subject of the emergency custody order was taken into custody or, if the person has not yet been
83 taken into custody, the primary law-enforcement agency from the jurisdiction where the person is
84 presently located to execute the order and provide transportation.

85 E. The law-enforcement agency or alternative transportation provider providing transportation
86 pursuant to this section may transfer custody of the person to the facility or location to which the person
87 is transported for the evaluation required in subsection B, G, or H if the facility or location (i) is
88 licensed to provide the level of security necessary to protect both the person and others from harm, (ii)
89 is actually capable of providing the level of security necessary to protect the person and others from
90 harm, and (iii) in cases in which transportation is provided by a law-enforcement agency, has entered
91 into an agreement or memorandum of understanding with the law-enforcement agency setting forth the
92 terms and conditions under which it will accept a transfer of custody, provided, however, that the
93 facility or location may not require the law-enforcement agency to pay any fees or costs for the transfer
94 of custody.

95 F. A law-enforcement officer may lawfully go or be sent beyond the territorial limits of the county,
96 city, or town in which he serves to any point in the Commonwealth for the purpose of executing an
97 emergency custody order pursuant to this section.

98 G. A law-enforcement officer who, based upon his observation or the reliable reports of others, has
99 probable cause to believe that a person meets the criteria for emergency custody as stated in this section
100 may take that person into custody and transport that person to an appropriate location to assess the need
101 for hospitalization or treatment without prior authorization. A law-enforcement officer who takes a
102 person into custody pursuant to this subsection or subsection H may lawfully go or be sent beyond the
103 territorial limits of the county, city, or town in which he serves to any point in the Commonwealth for
104 the purpose of obtaining the assessment. Such evaluation shall be conducted immediately. The period of
105 custody shall not exceed eight hours from the time the law-enforcement officer takes the person into
106 custody.

107 H. A law-enforcement officer who is transporting a person who has voluntarily consented to be
108 transported to a facility for the purpose of assessment or evaluation and who is beyond the territorial
109 limits of the county, city, or town in which he serves may take such person into custody and transport
110 him to an appropriate location to assess the need for hospitalization or treatment without prior
111 authorization when the law-enforcement officer determines (i) that the person has revoked consent to be
112 transported to a facility for the purpose of assessment or evaluation, and (ii) based upon his
113 observations, that probable cause exists to believe that the person meets the criteria for emergency
114 custody as stated in this section. The period of custody shall not exceed eight hours from the time the
115 law-enforcement officer takes the person into custody.

116 I. Nothing herein shall preclude a law-enforcement officer or alternative transportation provider from
117 obtaining emergency medical treatment or further medical evaluation at any time for a person in his
118 custody as provided in this section.

119 J. A representative of the primary law-enforcement agency specified to execute an emergency
120 custody order or a representative of the law-enforcement agency employing a law-enforcement officer

who takes a person into custody pursuant to subsection G or H shall notify the community services board responsible for conducting the evaluation required in subsection B, G, or H as soon as practicable after execution of the emergency custody order or after the person has been taken into custody pursuant to subsection G or H.

K. The person shall remain in custody until (i) a temporary detention order is issued in accordance with § 37.2-809, (ii) an order for temporary detention for observation, testing, or treatment is entered in accordance with § 37.2-1104, ending law enforcement custody, (iii) the person is released, or (iv) the emergency custody order expires. An emergency custody order shall be valid for a period not to exceed eight hours from the time of execution.

L. Nothing in this section shall preclude the issuance of an order for temporary detention for testing, observation, or treatment pursuant to § 37.2-1104 for a person who is also the subject of an emergency custody order issued pursuant to this section. In any case in which an order for temporary detention for testing, observation, or treatment is issued for a person who is also the subject of an emergency custody order, the person may be detained by a hospital emergency room or other appropriate facility for testing, observation, and treatment for a period not to exceed 24 hours, unless extended by the court as part of an order pursuant to § 37.2-1101, in accordance with subsection C of § 37.2-1104. Upon completion of testing, observation, or treatment pursuant to § 37.2-1104, the hospital emergency room or other appropriate facility in which the person is detained shall notify the nearest community services board, and the designee of the community services board shall, as soon as is practicable and prior to the expiration of the order for temporary detention issued pursuant to § 37.2-1104, conduct an evaluation of the person to determine if he meets the criteria for temporary detention pursuant to § 37.2-809.

M. Any person taken into emergency custody pursuant to this section shall be given a written summary of the emergency custody procedures and the statutory protections associated with those procedures.

N. If an emergency custody order is not executed within eight hours of its issuance, the order shall be void and shall be returned unexecuted to the office of the clerk of the issuing court or, if such office is not open, to any magistrate serving the jurisdiction of the issuing court.

O. In addition to the eight-hour period of emergency custody set forth in subsection G, H, or K, if the individual is detained in a state facility pursuant to subsection E of § 37.2-809, the state facility and an employee or designee of the community services board as defined in § 37.2-809 may, for an additional four hours, continue to attempt to identify an alternative facility that is able and willing to provide temporary detention and appropriate care to the individual.

P. Payments shall be made pursuant to § 37.2-804 to licensed health care providers for medical screening and assessment services provided to persons with mental illnesses while in emergency custody.

Q. No person who provides alternative transportation pursuant to this section shall be liable to the person being transported for any civil damages for ordinary negligence in acts or omissions that result from providing such alternative transportation.

§ 37.2-810. Transportation of person in the temporary detention process.

A. In specifying the primary law-enforcement agency and jurisdiction for purposes of this section, the magistrate shall specify in the temporary detention order the law-enforcement agency of the jurisdiction in which the person resides, or any other willing law-enforcement agency that has agreed to provide transportation, to execute the order and, in cases in which transportation is ordered to be provided by the primary law-enforcement agency, provide transportation. However, if the nearest boundary of the jurisdiction in which the person resides is more than 50 miles from the nearest boundary of the jurisdiction in which the person is located, the law-enforcement agency of the jurisdiction in which the person is located shall execute the order and provide transportation.

B. The magistrate issuing the temporary detention order shall specify the law-enforcement agency to execute the order and provide transportation. However, the magistrate shall consider any request to authorize transportation by an alternative transportation provider in accordance with this section, whenever an alternative transportation provider is identified to the magistrate, which may be a person, facility, or agency, including a family member or friend of the person who is the subject of the temporary detention order, a representative of the community services board, *an employee of or person providing services pursuant to a contract with the Department*, or other transportation provider with personnel trained to provide transportation in a safe manner upon determining, following consideration of information provided by the petitioner; the community services board or its designee; the local law-enforcement agency, if any; the person's treating physician, if any; or other persons who are available and have knowledge of the person, and, when the magistrate deems appropriate, the proposed alternative transportation provider, either in person or via two-way electronic video and audio or telephone communication system, that the proposed alternative transportation provider is available to provide transportation, willing to provide transportation, and able to provide transportation in a safe manner.

182 When transportation is ordered to be provided by an alternative transportation provider, the
183 magistrate shall order the specified law-enforcement agency to execute the order, to take the person into
184 custody, and to transfer custody of the person to the alternative transportation provider identified in the
185 order. *The primary law-enforcement agency may transfer custody of the person to the alternative*
186 *transportation provider immediately upon execution of the temporary detention order. The alternative*
187 *transportation provider shall maintain custody of the person from the time custody is transferred to the*
188 *alternative transportation provider by the primary law-enforcement agency until such time as custody of*
189 *the person is transferred to the temporary detention facility, including during any period prior to the*
190 *initiation of transportation of the person from the facility to which he was transported pursuant to*
191 *§ 37.2-808 and while transportation is being provided pursuant to this section.*

192 In such cases, a copy of the temporary detention order shall accompany the person being transported
193 pursuant to this section at all times and shall be delivered by the alternative transportation provider to
194 the temporary detention facility. The temporary detention facility shall return a copy of the temporary
195 detention order to the court designated by the magistrate as soon as is practicable. Delivery of an order
196 to a law-enforcement officer or alternative transportation provider and return of an order to the court
197 may be accomplished electronically or by facsimile.

198 The order may include transportation of the person to such other medical facility as may be
199 necessary to obtain further medical evaluation or treatment prior to placement as required by a physician
200 at the admitting temporary detention facility. Nothing herein shall preclude a law-enforcement officer or
201 alternative transportation provider from obtaining emergency medical treatment or further medical
202 evaluation at any time for a person in his custody as provided in this section. Such medical evaluation
203 or treatment shall be conducted immediately in accordance with state and federal law.

204 C. If an alternative transportation provider providing transportation of a person who is the subject of
205 a temporary detention order becomes unable to continue providing transportation of the person at any
206 time after taking custody of the person, the primary law-enforcement agency for the jurisdiction in
207 which the alternative transportation provider is located at the time he becomes unable to continue
208 providing transportation shall take custody of the person and shall transport the person to the facility of
209 temporary detention. In such cases, a copy of the temporary detention order shall accompany the person
210 being transported and shall be delivered to and returned by the temporary detention facility in
211 accordance with the provisions of subsection B.

212 D. In cases in which an alternative facility of temporary detention is identified and the
213 law-enforcement agency or alternative transportation provider identified to provide transportation in
214 accordance with subsection B continues to have custody of the person, the local law-enforcement agency
215 or alternative transportation provider shall transport the person to the alternative facility of temporary
216 detention identified by the employee or designee of the community services board. In cases in which an
217 alternative facility of temporary detention is identified and custody of the person has been transferred
218 from the law-enforcement agency or alternative transportation provider that provided transportation in
219 accordance with subsection B to the initial facility of temporary detention, the employee or designee of
220 the community services board shall request, and a magistrate may enter an order specifying, an
221 alternative transportation provider or, if no alternative transportation provider is available, willing, and
222 able to provide transportation in a safe manner, the local law-enforcement agency for the jurisdiction in
223 which the person resides or, if the nearest boundary of the jurisdiction in which the person resides is
224 more than 50 miles from the nearest boundary of the jurisdiction in which the person is located, the
225 law-enforcement agency of the jurisdiction in which the person is located, to provide transportation.

226 E. The magistrate may change the transportation provider specified in a temporary detention order at
227 any time prior to the initiation of transportation of a person who is the subject of a temporary detention
228 order pursuant to this section. If the designated transportation provider is changed by the magistrate at
229 any time after the temporary detention order has been executed but prior to the initiation of
230 transportation, the transportation provider having custody of the person shall transfer custody of the
231 person to the transportation provider subsequently specified to provide transportation. For the purposes
232 of this subsection, "transportation provider" includes both a law-enforcement agency and an alternative
233 transportation provider.

234 F. A law-enforcement officer may lawfully go to or be sent beyond the territorial limits of the
235 county, city, or town in which he serves to any point in the Commonwealth for the purpose of executing
236 any temporary detention order pursuant to this section. Law-enforcement agencies may enter into
237 agreements to facilitate the execution of temporary detention orders and provide transportation.

238 G. No person who provides alternative transportation pursuant to this section shall be liable to the
239 person being transported for any civil damages for ordinary negligence in acts or omissions that result
240 from providing such alternative transportation.