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SENATE BILL NO. 370

Offered January 8, 2014

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A *BILL to amend and reenact §§ 37.2-808, 37.2-809, and 37.2-817.2 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 37.2-809.1, relating to emergency custody and temporary detention.*

Patron—Favola

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That §§ 37.2-808, 37.2-809, and 37.2-817.2 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 37.2-809.1 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, 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, 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 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 issuing an emergency custody order shall specify the primary law-enforcement agency and jurisdiction to execute the emergency custody order and provide transportation. However, in cases in which the emergency custody order is based upon a finding that the person who is the subject of the order 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, suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs but there is no substantial likelihood that the person will cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, 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 order, a representative of the community services board, 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. When transportation is ordered to be provided by an alternative transportation provider, the magistrate shall order the specified primary law-enforcement agency to execute the order, to take the person into

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

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

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

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

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

95 G. A law-enforcement officer who, based upon his observation or the reliable reports of others, has
96 probable cause to believe that a person meets the criteria for emergency custody as stated in this section
97 may take that person into custody and transport that person to an appropriate location to assess the need
98 for hospitalization or treatment without prior authorization. A law-enforcement officer who takes a
99 person into custody pursuant to this subsection or subsection H may lawfully go or be sent beyond the
100 territorial limits of the county, city, or town in which he serves to any point in the Commonwealth for
101 the purpose of obtaining the assessment. Such evaluation shall be conducted immediately. The period of
102 custody shall not exceed ~~four~~ eight hours from the time the law-enforcement officer takes the person
103 into custody. However, upon a finding by a magistrate that good cause exists to grant an extension, the
104 magistrate shall issue an order extending the period of emergency custody one time for an additional
105 period not to exceed ~~two~~ four hours. Good cause for an extension includes the need for additional time
106 to allow (i) the community services board to identify a suitable facility in which the person can be
107 temporarily detained pursuant to § 37.2-809 or (ii) a medical evaluation of the person to be completed
108 if necessary.

109 H. A law-enforcement officer who is transporting a person who has voluntarily consented to be
110 transported to a facility for the purpose of assessment or evaluation and who is beyond the territorial
111 limits of the county, city, or town in which he serves may take such person into custody and transport
112 him to an appropriate location to assess the need for hospitalization or treatment without prior
113 authorization when the law-enforcement officer determines (i) that the person has revoked consent to be
114 transported to a facility for the purpose of assessment or evaluation, and (ii) based upon his
115 observations, that probable cause exists to believe that the person meets the criteria for emergency
116 custody as stated in this section. The period of custody shall not exceed ~~four~~ eight hours from the time
117 the law-enforcement officer takes the person into custody. However, upon a finding by a magistrate that
118 good cause exists to grant an extension, the magistrate shall issue an order extending the period of
119 emergency custody one time for an additional period not to exceed ~~two~~ four hours. Good cause for an
120 extension includes the need for additional time to allow (a) the community services board to identify a

suitable facility in which the person can be temporarily detained pursuant to § 37.2-809, or (b) a medical evaluation of the person to be completed if necessary.

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

J. The person shall remain in custody until a temporary detention order is issued, until the person is released, or until the emergency custody order expires. An emergency custody order shall be valid for a period not to exceed ~~four~~ *eight* hours from the time of execution. However, upon a finding by a magistrate that good cause exists to grant an extension, the magistrate shall extend the emergency custody order one time for a second period not to exceed ~~two~~ *four* hours. Good cause for an extension includes the need for additional time to allow (i) the community services board to identify a suitable facility in which the person can be temporarily detained pursuant to § 37.2-809 or (ii) a medical evaluation of the person to be completed if necessary. Any family member, as defined in § 37.2-100, employee or designee of the local community services board as defined in § 37.2-809, treating physician, or law-enforcement officer may request the two-hour extension.

K. If an emergency custody order is not executed within ~~six~~ *12* 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.

L. 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.

§ 37.2-809. Involuntary temporary detention; issuance and execution of order.

A. For the purposes of this section:

"Designee of the local community services board" means an examiner designated by the local community services board who (i) is skilled in the assessment and treatment of mental illness, (ii) has completed a certification program approved by the Department, (iii) is able to provide an independent examination of the person, (iv) is not related by blood or marriage to the person being evaluated, (v) has no financial interest in the admission or treatment of the person being evaluated, (vi) has no investment interest in the facility detaining or admitting the person under this article, and (vii) except for employees of state hospitals and of the U.S. Department of Veterans Affairs, is not employed by the facility.

"Employee" means an employee of the local community services board who is skilled in the assessment and treatment of mental illness and has completed a certification program approved by the Department.

"Investment interest" means the ownership or holding of an equity or debt security, including shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments.

B. A magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion and only after an evaluation conducted in-person or by means of a two-way electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or a designee of the local community services board to determine whether the person meets the criteria for temporary detention, a temporary detention order if it appears from all evidence readily available, including any recommendation from a physician or clinical psychologist treating the person, that the 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. The magistrate shall also consider the recommendations of any treating or examining physician licensed in Virginia if available either verbally or in writing prior to rendering a decision. Any temporary detention 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.

C. When considering whether there is probable cause to issue a temporary detention order, the magistrate may, in addition to the petition, consider (i) the recommendations of any treating or examining physician or psychologist licensed in Virginia, if available, (ii) any past actions of the person, (iii) any past mental health treatment of the person, (iv) any relevant hearsay evidence, (v) any medical records available, (vi) any affidavits submitted, if the witness is unavailable and it so states in the affidavit, and (vii) any other information available that the magistrate considers relevant to the determination of whether probable cause exists to issue a temporary detention order.

D. A magistrate may issue a temporary detention order without an emergency custody order proceeding. A magistrate may issue a temporary detention order without a prior evaluation pursuant to subsection B if (i) the person has been personally examined within the previous 72 hours by an

182 employee or a designee of the local community services board or (ii) there is a significant physical,
183 psychological, or medical risk to the person or to others associated with conducting such evaluation.

184 E. An employee or a designee of the local community services board shall determine the facility of
185 temporary detention *in accordance with the provisions of § 37.2-809.1* for all individuals detained
186 pursuant to this section. ~~The facility of temporary detention shall be one that has been approved~~
187 ~~pursuant to regulations of the Board.~~ The facility shall be identified on the preadmission screening report
188 and indicated on the temporary detention order. Except as provided in § 37.2-811 for inmates requiring
189 hospitalization in accordance with subdivision A 2 of § 19.2-169.6, the person shall not be detained in a
190 jail or other place of confinement for persons charged with criminal offenses and shall remain in the
191 custody of law enforcement until the person is either detained within a secure facility or custody has
192 been accepted by the appropriate personnel designated by the facility identified in the temporary
193 detention order.

194 F. Any facility caring for a person placed with it pursuant to a temporary detention order is
195 authorized to provide emergency medical and psychiatric services within its capabilities when the facility
196 determines that the services are in the best interests of the person within its care. The costs incurred as a
197 result of the hearings and by the facility in providing services during the period of temporary detention
198 shall be paid and recovered pursuant to § 37.2-804. The maximum costs reimbursable by the
199 Commonwealth pursuant to this section shall be established by the State Board of Medical Assistance
200 Services based on reasonable criteria. The State Board of Medical Assistance Services shall, by
201 regulation, establish a reasonable rate per day of inpatient care for temporary detention.

202 G. The employee or the designee of the local community services board who is conducting the
203 evaluation pursuant to this section shall determine, prior to the issuance of the temporary detention
204 order, the insurance status of the person. Where coverage by a third party payor exists, the facility
205 seeking reimbursement under this section shall first seek reimbursement from the third party payor. The
206 Commonwealth shall reimburse the facility only for the balance of costs remaining after the allowances
207 covered by the third party payor have been received.

208 H. The duration of temporary detention shall be sufficient to allow for completion of the examination
209 required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-816, and
210 initiation of mental health treatment to stabilize the person's psychiatric condition to avoid involuntary
211 commitment where possible, but shall not exceed 48 hours prior to a hearing. If the 48-hour period
212 herein specified terminates on a Saturday, Sunday, or legal holiday, the person may be detained, as
213 herein provided, until the close of business on the next day that is not a Saturday, Sunday, or legal
214 holiday. The person may be released, pursuant to § 37.2-813, before the 48-hour period herein specified
215 has run.

216 I. If a temporary detention order is not executed within 24 hours of its issuance, or within a shorter
217 period as is specified in the order, the order shall be void and shall be returned unexecuted to the office
218 of the clerk of the issuing court or, if the office is not open, to any magistrate serving the jurisdiction of
219 the issuing court. Subsequent orders may be issued upon the original petition within 96 hours after the
220 petition is filed. However, a magistrate must again obtain the advice of an employee or a designee of
221 the local community services board prior to issuing a subsequent order upon the original petition. Any
222 petition for which no temporary detention order or other process in connection therewith is served on
223 the subject of the petition within 96 hours after the petition is filed shall be void and shall be returned
224 to the office of the clerk of the issuing court.

225 J. The Executive Secretary of the Supreme Court of Virginia shall establish and require that a
226 magistrate, as provided by this section, be available seven days a week, 24 hours a day, for the purpose
227 of performing the duties established by this section. Each community services board shall provide to
228 each general district court and magistrate's office within its service area a list of its employees and
229 designees who are available to perform the evaluations required herein.

230 K. For purposes of this section a health care provider or designee of a local community services
231 board or behavioral health authority shall not be required to encrypt any email containing information or
232 medical records provided to a magistrate unless there is reason to believe that a third party will attempt
233 to intercept the email.

234 L. The employee or designee of the community services board who is conducting the evaluation
235 pursuant to this section shall, if he recommends that the person should not be subject to a temporary
236 detention order, inform the petitioner and an onsite treating physician of his recommendation.

237 **§ 37.2-809.1. Facility of temporary detention.**

238 A. *An individual for whom a temporary detention order is issued in accordance with the provisions*
239 *of § 37.2-809 shall be detained in a state facility for the treatment of individuals with mental illness*
240 *unless an employee or designee of the community services board or an employee of the state facility to*
241 *which the individual would be admitted in accordance with this subsection is able, prior to the issuance*
242 *of the temporary detention order, to locate an alternative facility that is able to provide temporary*
243 *detention and appropriate care for the individual and that alternative facility agrees to accept the*

individual for temporary detention.

B. In each case in which an employee or designee of the local community services board is required to make an evaluation of a person who is subject to an emergency custody order pursuant to subsection B of § 37.2-808, an employee or designee of the local community services board shall, upon being notified of the need for such evaluation, contact the state facility for the area in which the community services board is located and notify the state facility that the individual will be transported to the facility upon issuance of a temporary detention order. Upon completion of the evaluation, the employee or designee of the community services board shall convey to the state facility information about the individual necessary to allow the state facility to determine the services the individual will require upon admission.

C. A state facility may, following the notice in accordance with subsection B, conduct a search for an alternative facility that is able and willing to provide temporary detention and appropriate care to the individual, which may include another state facility if the state facility is unable to provide temporary detention and appropriate care for the individual. If an alternative facility is identified and agrees to accept the individual for temporary detention, the state facility shall notify the community services board, and the community services board shall designate the alternative facility on the prescreening report.

D. An employee or designee of a community services board shall continue, following notice to the state facility pursuant to subsection B, to make good faith efforts to identify a facility other than the state facility that is able and willing to provide temporary detention and appropriate care for an individual who meets the criteria for temporary detention, until such time as an alternative facility is identified or the individual is admitted to the state facility. If an alternative facility is identified, the community services board shall notify the state facility and designate the alternative facility on the prescreening report. If an alternative facility is not identified prior to the expiration of the initial period of emergency custody, the community services board shall petition the magistrate for an extension of the emergency custody order, in accordance with the provisions of § 37.2-808.

E. The facility of temporary detention designated in accordance with this section shall be one that has been approved pursuant to regulations of the Board.

§ 37.2-817.2. Court review of mandatory outpatient treatment plan or discharge plan.

A. The district court judge or special justice shall hold a hearing within five days after receiving the petition for review of the mandatory outpatient treatment plan or discharge plan; however, if the fifth day is a Saturday, Sunday, or legal holiday, the hearing shall be held by the close of business on the next day that is not a Saturday, Sunday, or legal holiday. If the person is being detained under a temporary detention order, the hearing shall be scheduled within the same time frame provided for a commitment hearing under § 37.2-814. The clerk shall provide notice of the hearing to the person, the community services board, all treatment providers listed in the comprehensive mandatory outpatient treatment order or discharge plan, and the original petitioner for the person's involuntary treatment. If the person is not represented by counsel, the court shall appoint an attorney to represent the person in this hearing and any subsequent hearings under §§ 37.2-817.3 and 37.2-817.4, giving consideration to appointing the attorney who represented the person at the proceeding that resulted in the issuance of the mandatory outpatient treatment order or order authorizing discharge to mandatory outpatient treatment following inpatient treatment. The same judge or special justice that presided over the hearing resulting in the mandatory outpatient treatment order or order authorizing discharge to mandatory outpatient treatment following inpatient treatment need not preside at the noncompliance hearing or any subsequent hearings. The community services board shall offer to arrange the person's transportation to the hearing if the person is not detained and has no other source of transportation.

B. If requested by the person, the community services board, a treatment provider listed in the comprehensive mandatory outpatient treatment plan or discharge plan, or the original petitioner for the person's involuntary treatment, the court shall appoint an examiner in accordance with § 37.2-815 who shall personally examine the person and certify to the court whether or not he has probable cause to believe that the person meets the criteria for involuntary inpatient admission or mandatory outpatient treatment as specified in subsections C, C1, C2, and D of § 37.2-817. The examination shall include all applicable requirements of § 37.2-815. The certification of the examiner may be admitted into evidence without the appearance of the examiner at the hearing if not objected to by the person or his attorney. If the person is not detained in an inpatient facility, the community services board shall arrange for the person to be examined at a convenient location and time. The community services board shall offer to arrange for the person's transportation to the examination, if the person has no other source of transportation and resides within the service area or an adjacent service area of the community services board. If the person refuses or fails to appear, the community services board shall notify the court, or a magistrate if the court is not available, and the court or magistrate shall issue a mandatory examination order and *capias* directing the primary law-enforcement agency in the jurisdiction where the person

305 resides to transport the person to the examination. The person shall remain in custody until a temporary
306 detention order is issued or until the person is released, but in no event shall the period exceed ~~four~~
307 *eight* hours.

308 C. If the person fails to appear for the hearing, the court shall, after consideration of any evidence
309 from the person, from the community services board, or from any treatment provider identified in the
310 mandatory outpatient treatment plan or discharge plan regarding why the person failed to appear at the
311 hearing, either (i) reschedule the hearing pursuant to subsection A, (ii) issue an emergency custody order
312 pursuant to § 37.2-808, or (iii) issue a temporary detention order pursuant to § 37.2-809.

313 D. After hearing the evidence regarding the person's material noncompliance with the mandatory
314 outpatient treatment order or order authorizing discharge to mandatory outpatient treatment following
315 inpatient treatment and the person's current condition, and any other relevant information referenced in
316 subsection C of § 37.2-817, the judge or special justice shall make one of the following dispositions:

317 1. Upon finding by clear and convincing evidence that the person meets the criteria for involuntary
318 admission and treatment specified in subsection C of § 37.2-817, the judge or special justice shall order
319 the person's involuntary admission to a facility designated by the community services board for a period
320 of treatment not to exceed 30 days;

321 2. Upon finding that the person continues to meet the criteria for mandatory outpatient treatment
322 specified in subsection C1, C2, or D of § 37.2-817, and that a continued period of mandatory outpatient
323 treatment appears warranted, the judge or special justice shall renew the order for mandatory outpatient
324 treatment, making any necessary modifications that are acceptable to the community services board or
325 treatment provider responsible for the person's treatment. In determining the appropriateness of
326 outpatient treatment, the court may consider the person's material noncompliance with the previous
327 mandatory treatment order; or

328 3. Upon finding that neither of the above dispositions is appropriate, the judge or special justice shall
329 rescind the order for mandatory outpatient treatment or order authorizing discharge to mandatory
330 outpatient treatment following inpatient treatment.

331 Upon entry of an order for involuntary inpatient admission, transportation shall be provided in
332 accordance with § 37.2-829.