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SENATE BILL NO. 268

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 25, 2022)

(Patrons Prior to Substitute—Senators Favola, Peake [SB 176], Hanger [SB 650], and Deeds [SB 682])

*A BILL to amend and reenact §§ 37.2-809, 37.2-809.1, and 37.2-810 of the Code of Virginia, relating to emergency custody and temporary detention; transportation; transfer of custody; alternative custody.***Be it enacted by the General Assembly of Virginia:****1. That §§ 37.2-809, 37.2-809.1, and 37.2-810 of the Code of Virginia are amended and reenacted as follows:****§ 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, clinical psychologist, or clinical social worker 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, if available, (a) information provided by the person who initiated emergency custody and (b) the recommendations of any treating or examining physician licensed in Virginia 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, psychologist, or clinical social worker 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 employee or a designee of the local community services board or (ii) there is a significant physical, psychological, or medical risk to the person or to others associated with conducting such evaluation.

E. An employee or a designee of the local community services board shall determine the facility of temporary detention in accordance with the provisions of § 37.2-809.1 for all ~~individuals~~ *persons* detained pursuant to this section. An employee or designee of the local community services board may change the facility of temporary detention and may designate an alternative facility for temporary detention at any point during the period of temporary detention if it is determined that the alternative

60 facility is a more appropriate facility for temporary detention of the ~~individual person~~ given the specific
61 security, medical, or behavioral health needs of the person. In cases in which the facility of temporary
62 detention is changed following transfer of custody to an initial facility of temporary custody,
63 transportation of the ~~individual person~~ to the alternative facility of temporary detention shall be provided
64 in accordance with the provisions of § 37.2-810. The initial facility of temporary detention shall be
65 identified on the preadmission screening report and indicated on the temporary detention order; however,
66 if an employee or designee of the local community services board designates an alternative facility, that
67 employee or designee shall provide written notice forthwith, on a form developed by the Executive
68 Secretary of the Supreme Court of Virginia, to the clerk of the issuing court of the name and address of
69 the alternative facility. Subject to the provisions of § 37.2-809.1, if a facility of temporary detention
70 cannot be identified by the time of the expiration of the period of emergency custody pursuant to
71 § 37.2-808, the ~~individual person~~ shall be detained in a state facility for the treatment of ~~individuals~~
72 ~~persons~~ with mental illness and such facility shall be indicated on the temporary detention order. Except
73 as provided in § 37.2-811 for inmates requiring hospitalization in accordance with subdivision A 2 of
74 § 19.2-169.6, the person shall not be detained in a jail or other place of confinement for persons charged
75 with criminal offenses ~~and~~. *Except as provided in § 37.2-811 for inmates requiring hospitalization in*
76 *accordance with subdivision A 2 of § 19.2-169.6, the person* shall remain in the custody of law
77 enforcement until (i) the person is either detained within a secure facility or (ii) custody has been
78 accepted by the appropriate personnel designated by either the initial facility of temporary detention
79 identified in the temporary detention order or by the alternative facility of temporary detention
80 designated by the employee or designee of the local community services board pursuant to this
81 subsection. The person detained or in custody pursuant to this section shall be given a written summary
82 of the temporary detention procedures and the statutory protections associated with those procedures.

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

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

97 H. The duration of temporary detention shall be sufficient to allow for completion of the examination
98 required by § 37.2-815, preparation of the preadmission screening report required by § 37.2-816, and
99 initiation of mental health treatment to stabilize the person's psychiatric condition to avoid involuntary
100 commitment where possible, but shall not exceed 72 hours prior to a hearing. If the 72-hour period
101 herein specified terminates on a Saturday, Sunday, legal holiday, or day on which the court is lawfully
102 closed, the person may be detained, as herein provided, until the close of business on the next day that
103 is not a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed. The person may
104 be released, pursuant to § 37.2-813, before the 72-hour period herein specified has run.

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

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

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

to intercept the email.

L. If the employee or designee of the community services board who is conducting the evaluation pursuant to this section recommends that the person should not be subject to a temporary detention order, such employee or designee shall (i) inform the petitioner, the person who initiated emergency custody if such person is present, and an onsite treating physician of his recommendation; (ii) promptly inform such person who initiated emergency custody that the community services board will facilitate communication between the person and the magistrate if the person disagrees with recommendations of the employee or designee of the community services board who conducted the evaluation and the person who initiated emergency custody so requests; and (iii) upon prompt request made by the person who initiated emergency custody, arrange for such person who initiated emergency custody to communicate with the magistrate as soon as is practicable and prior to the expiration of the period of emergency custody. The magistrate shall consider any information provided by the person who initiated emergency custody and any recommendations of the treating or examining physician and the employee or designee of the community services board who conducted the evaluation and consider such information and recommendations in accordance with subsection B in making his determination to issue a temporary detention order. The individual person who is the subject of emergency custody shall remain in the custody of law enforcement or a designee of law enforcement and shall not be released from emergency custody until communication with the magistrate pursuant to this subsection has concluded and the magistrate has made a determination regarding issuance of a temporary detention order.

M. For purposes of this section, "person who initiated emergency custody" means any person who initiated the issuance of an emergency custody order pursuant to § 37.2-808 or a law-enforcement officer who takes a person into custody pursuant to subsection G of § 37.2-808.

§ 37.2-809.1. Facility of temporary detention.

A. In each case in which an employee or designee of the local community services board as defined in § 37.2-809 is required to make an evaluation of an individual pursuant to subsection B, G, or H 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 if no other facility of temporary detention can be identified by the time of the expiration of the period of emergency custody pursuant to § 37.2-808. Upon completion of the evaluation, the employee or designee of the local 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.

B. A state facility may, following the notice in accordance with subsection A, 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 notified in accordance with subsection A is unable to provide temporary detention and appropriate care for the individual. Under no circumstances shall a state facility fail or refuse to admit an individual who meets the criteria for temporary detention pursuant to § 37.2-809 unless an alternative facility that is able to provide temporary detention and appropriate care agrees to accept the individual for temporary detention and the individual shall not during the duration of the temporary detention order be released from custody except for purposes of transporting the individual to the state facility or alternative facility in accordance with the provisions of § 37.2-810. 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 an employee or designee of the community services board shall designate the alternative facility on the prescreening report.

C. A state facility may conduct a search for an alternative facility that is able and willing to provide temporary detention and appropriate care to the individual in accordance with subsection B if the individual is in the custody of an alternative transportation provider designated by the state facility pursuant to § 37.2-810.

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

§ 37.2-810. 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.

183 B. The magistrate issuing the temporary detention order shall (i) specify the law-enforcement agency
184 to execute the order and ~~provide~~ (ii) *designate a transportation provider. However, In determining the*
185 *transportation provider*, the magistrate shall consider any request to authorize transportation by an
186 alternative transportation provider in accordance with this section, whenever an alternative transportation
187 provider is identified to the magistrate, which may be a person, facility, or agency, including a family
188 member or friend of the person who is the subject of the temporary detention order, a representative of
189 the community services board, *an employee of or person providing services pursuant to a contract with*
190 *the Department*, or other transportation provider with personnel trained to provide transportation in a
191 safe manner ~~upon~~. *Upon* determining, following consideration of information provided by the petitioner;
192 the community services board or its designee; the local law-enforcement agency, if any; the person's
193 treating physician, if any; or other persons who are available and have knowledge of the person, and,
194 when the magistrate deems appropriate, the proposed alternative transportation provider, either in person
195 or via two-way electronic video and audio or telephone communication system, that ~~the proposed an~~
196 *alternative transportation provider is available to provide transportation, willing to provide transportation,*
197 *and able to provide transportation in a safe manner, the magistrate shall designate such alternative*
198 *transportation provider to provide transportation of the person. If no alternative transportation provider*
199 *is available to provide transportation, willing to provide transportation, and able to provide*
200 *transportation in a safe manner, the magistrate shall designate the primary law-enforcement agency and*
201 *jurisdiction designated to execute the temporary detention order to provide transportation of the person.*

202 When transportation is ordered to be provided by an alternative transportation provider, the
203 magistrate shall order the specified law-enforcement agency to execute the order, to take the person into
204 custody, and to transfer custody of the person to the alternative transportation provider identified in the
205 order. *The primary law-enforcement agency may transfer custody of the person to the alternative*
206 *transportation provider immediately upon execution of the temporary detention order based on the*
207 *availability of alternative transportation providers. The alternative transportation provider shall*
208 *maintain custody of the person from the time custody is transferred to the alternative transportation*
209 *provider by the primary law-enforcement agency until such time as custody of the person is transferred*
210 *to the temporary detention facility, including during any period prior to the initiation of transportation*
211 *of the person from the facility to which he was transported pursuant to § 37.2-808 and while*
212 *transportation is being provided pursuant to this section.*

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

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

225 C. If an alternative transportation provider providing transportation *or maintaining custody* of a
226 person who is the subject of a temporary detention order becomes unable to continue providing
227 transportation *or maintaining custody* of the person at any time after taking custody of the person, the
228 primary law-enforcement agency for the jurisdiction in which the alternative transportation provider is
229 located at the time he becomes unable to continue providing transportation *or maintaining custody* shall
230 take custody of the person and shall transport the person to the facility of temporary detention. In such
231 cases, a copy of the temporary detention order shall accompany the person being transported and shall
232 be delivered to and returned by the temporary detention facility in accordance with the provisions of
233 subsection B.

234 D. In cases in which an alternative facility of temporary detention is identified and the
235 law-enforcement agency or alternative transportation provider identified to provide transportation in
236 accordance with subsection B continues to have custody of the person, the local law-enforcement agency
237 or alternative transportation provider shall transport the person to the alternative facility of temporary
238 detention identified by the employee or designee of the community services board. In cases in which an
239 alternative facility of temporary detention is identified and custody of the person has been transferred
240 from the law-enforcement agency or alternative transportation provider that provided transportation in
241 accordance with subsection B to the initial facility of temporary detention, the employee or designee of
242 the community services board shall request, and a magistrate may enter an order specifying, an
243 alternative transportation provider or, if no alternative transportation provider is available, willing, and
244 able to provide transportation in a safe manner, the local law-enforcement agency for the jurisdiction in

which the person resides or, 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, to provide transportation.

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

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

G. 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.

2. That the Department of Behavioral Health and Developmental Services shall amend its existing contract for the provision of alternative transportation of a person who is subject to a temporary detention order or enter into new contracts for alternative transportation of a person who is subject to a temporary detention order to ensure the sufficient availability of alternative transportation providers to retain sufficient licensed security staff to take custody of and provide transportation for persons for whom alternative transportation is ordered immediately upon execution of a temporary detention order, until all state funds for alternative transportation have been expended, as provided in this act.