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## HOUSE BILL NO. 2339

Offered January 12, 2023

A *BILL to amend and reenact §§ 19.2-169.1, as it is currently effective and as it shall become effective, 37.2-803, 37.2-804, and 37.2-804.2 of the Code of Virginia and to amend the Code of Virginia by adding in Title 19.2 a chapter numbered 11.2, consisting of sections numbered 19.2-182.17 through 19.2-182.22, and by adding in Title 37.2 a chapter numbered 8.1, consisting of sections numbered 37.2-848 through 37.2-851, relating to expedited diversion to court-ordered treatment in lieu of criminal adjudication.*

Patron—Bell

Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 19.2-169.1, as it is currently effective and as it shall become effective, 37.2-803, 37.2-804, and 37.2-804.2 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 19.2 a chapter numbered 11.2, consisting of sections numbered 19.2-182.17 through 19.2-182.22, and by adding in Title 37.2 a chapter numbered 8.1, consisting of sections numbered 37.2-848 through 37.2-851 as follows:**

**§ 19.2-169.1. (Effective until July 1, 2023) Raising question of competency to stand trial or plead; evaluation and determination of competency.**

A. Raising competency issue; appointment of evaluators. — If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant, whether a juvenile transferred pursuant to § 16.1-269.1 or adult, lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who (i) has performed forensic evaluations; (ii) has successfully completed forensic evaluation training recognized by the Commissioner of Behavioral Health and Developmental Services; (iii) has demonstrated to the Commissioner competence to perform forensic evaluations; and (iv) is included on a list of approved evaluators maintained by the Commissioner. *In the event the defendant is charged with an offense listed in § 19.2-182.18 and may be eligible for expedited diversion to court-ordered treatment, the court may also order that an evaluation be performed pursuant to Chapter 11.2 (§ 19.2-182.17 et seq.).*

B. Location of evaluation. — The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless an outpatient evaluation has been conducted and the outpatient evaluator opines that a hospital-based evaluation is needed to reliably reach an opinion or unless the defendant is in the custody of the Commissioner of Behavioral Health and Developmental Services pursuant to § 19.2-169.2, 19.2-169.6, 19.2-182.2, 19.2-182.3, 19.2-182.8, 19.2-182.9, or Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2.

C. Provision of information to evaluators. — The court shall require the attorney for the Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) a copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the evaluation request. The court shall require the attorney for the defendant to provide any available psychiatric records and other information that is deemed relevant. The court shall require that information be provided to the evaluator within 96 hours of the issuance of the court order pursuant to this section.

D. The competency report. — Upon completion of the evaluation, the evaluators shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for treatment in the event he is found incompetent but restorable, or incompetent for the foreseeable future. If a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient or outpatient treatment (community-based or jail-based) is recommended. Outpatient treatment may occur in a local correctional facility or at a location determined by the appropriate community services board or behavioral health authority. In cases where a defendant is likely to remain incompetent for the foreseeable future due to an ongoing and irreversible medical condition, and where prior medical or educational records are available to support the diagnosis, or if the defendant was previously

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determined to be unrestorably incompetent in the past two years, the report may recommend that the court find the defendant unrestorably incompetent to stand trial and the court may proceed with the disposition of the case in accordance with § 19.2-169.3. In cases where a defendant has been charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128 and is incompetent, the report may recommend that the court direct the community services board or behavioral health authority for the jurisdiction in which the defendant is located to (a) conduct an evaluation of the defendant in accordance with subsection B of § 37.2-808 to determine whether the defendant meets the criteria for temporary detention and (b) upon determining that the defendant does meet the criteria for temporary detention, file a petition for issuance of an order for temporary detention of the defendant in accordance with § 37.2-809. No statements of the defendant relating to the time period of the alleged offense shall be included in the report. The evaluator shall also send a redacted copy of the report removing references to the defendant's name, date of birth, case number, and court of jurisdiction to the Commissioner of Behavioral Health and Developmental Services for the purpose of peer review to establish and maintain the list of approved evaluators described in subsection A.

E. The competency determination. — After receiving the report described in subsection D, the court shall promptly determine whether the defendant is competent to stand trial. A hearing on the defendant's competency is not required unless one is requested by the attorney for the Commonwealth or the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be hospitalized under § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right to personally participate in and introduce evidence at the hearing.

The fact that the defendant claims to be unable to remember the time period surrounding the alleged offense shall not, by itself, bar a finding of competency if the defendant otherwise understands the charges against him and can assist in his defense. Nor shall the fact that the defendant is under the influence of medication bar a finding of competency if the defendant is able to understand the charges against him and assist in his defense while medicated.

F. Finding. — If the court finds the defendant competent to stand trial, the case shall be set for trial or a preliminary hearing. If the court finds the defendant either incompetent but restorable or incompetent for the foreseeable future, the court shall proceed pursuant to § 19.2-169.2.

**§ 19.2-169.1. (Effective July 1, 2023) Raising question of competency to stand trial or plead; evaluation and determination of competency.**

A. Raising competency issue; appointment of evaluators. — If, at any time after the attorney for the defendant has been retained or appointed and before the end of trial, the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant, whether a juvenile transferred pursuant to § 16.1-269.1 or adult, lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who (i) has performed forensic evaluations; (ii) has successfully completed forensic evaluation training recognized by the Commissioner of Behavioral Health and Developmental Services; (iii) has demonstrated to the Commissioner competence to perform forensic evaluations; and (iv) is included on a list of approved evaluators maintained by the Commissioner. *In the event the defendant is charged with an offense listed in § 19.2-182.18 and may be eligible for expedited diversion to court-ordered treatment, the court may also order that an evaluation be performed pursuant to Chapter 11.2 (§ 19.2-182.17 et seq.).*

B. Location of evaluation. — The evaluation shall be performed on an outpatient basis at a mental health facility or in jail unless an outpatient evaluation has been conducted and the outpatient evaluator opines that a hospital-based evaluation is needed to reliably reach an opinion or unless the defendant is in the custody of the Commissioner of Behavioral Health and Developmental Services pursuant to § 19.2-169.2, 19.2-169.6, 19.2-182.2, 19.2-182.3, 19.2-182.8, 19.2-182.9, or Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2.

C. Provision of information to evaluators. — The court shall require the attorney for the Commonwealth to provide to the evaluators appointed under subsection A any information relevant to the evaluation, including, but not limited to (i) a copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the evaluation request. The court shall require the attorney for the defendant to provide any available psychiatric records and other information that is deemed relevant. The court shall require that information be provided to the evaluator within 96 hours of the issuance of the court order pursuant to this section.

D. The competency report. — Upon completion of the evaluation, the evaluators shall promptly

submit a report in writing to the court and the attorneys of record concerning (i) the defendant's capacity to understand the proceedings against him; (ii) his ability to assist his attorney; and (iii) his need for treatment in the event he is found incompetent but restorable, or incompetent for the foreseeable future. If a need for restoration treatment is identified pursuant to clause (iii), the report shall state whether inpatient or outpatient treatment (community-based or jail-based) is recommended. Outpatient treatment may occur in a local correctional facility or at a location determined by the appropriate community services board or behavioral health authority. In cases where a defendant is likely to remain incompetent for the foreseeable future due to an ongoing and irreversible medical condition, and where prior medical or educational records are available to support the diagnosis, or if the defendant was previously determined to be unrestorably incompetent in the past two years, the report may recommend that the court find the defendant unrestorably incompetent to stand trial and the court may proceed with the disposition of the case in accordance with § 19.2-169.3. No statements of the defendant relating to the time period of the alleged offense shall be included in the report. The evaluator shall also send a redacted copy of the report removing references to the defendant's name, date of birth, case number, and court of jurisdiction to the Commissioner of Behavioral Health and Developmental Services for the purpose of peer review to establish and maintain the list of approved evaluators described in subsection A.

E. The competency determination. — After receiving the report described in subsection D, the court shall promptly determine whether the defendant is competent to stand trial. A hearing on the defendant's competency is not required unless one is requested by the attorney for the Commonwealth or the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will be hospitalized under § 19.2-169.2. If a hearing is held, the party alleging that the defendant is incompetent shall bear the burden of proving by a preponderance of the evidence the defendant's incompetency. The defendant shall have the right to notice of the hearing, the right to counsel at the hearing and the right to personally participate in and introduce evidence at the hearing.

The fact that the defendant claims to be unable to remember the time period surrounding the alleged offense shall not, by itself, bar a finding of competency if the defendant otherwise understands the charges against him and can assist in his defense. Nor shall the fact that the defendant is under the influence of medication bar a finding of competency if the defendant is able to understand the charges against him and assist in his defense while medicated.

#### CHAPTER 11.2.

#### EXPEDITED DIVERSION TO COURT-ORDERED TREATMENT IN THE COMMUNITY.

##### § 19.2-182.17. Definitions.

As used in this chapter:

"Expedited diversion to court-ordered treatment" means a formal procedure authorizing the transfer from the criminal court to civil outpatient commitment of a person with a mental illness who was charged for criminal conduct but found eligible for dismissal of charges and commitment to court-ordered outpatient treatment pursuant to this chapter.

"Mental illness" means a disorder of thought, mood, emotion, perception, or orientation that significantly impairs judgment, behavior, capacity to recognize reality, or ability to address basic life necessities and requires care and treatment for the health, safety, or recovery of the individual or for the safety of others.

Wherever the term "community services board" or "board" appears, it includes the behavioral health authority.

##### § 19.2-182.18. Evaluation for expedited diversion to civil court-ordered treatment.

A. A defendant who is charged with a misdemeanor violation of Article 3 (§ 18.2-95 et seq.) of Chapter 5 of Title 18.2 or a misdemeanor violation of § 18.2-119, 18.2-137, 18.2-388, 18.2-415, or 19.2-128, appears to have a mental illness, and whose charged conduct appears to be associated with that mental illness, may be considered for transfer from criminal court to court-ordered treatment pursuant to this chapter.

B. A defendant may be identified as a candidate for eligibility at any time prior to or during a first court appearance, or any time before the end of trial, by a law-enforcement officer, jail officer, magistrate, pre-trial services staff, defense counsel, attorney for the Commonwealth, or judge. Diversion eligibility may be raised by representations to the court or by motion. The judge may consider (i) his observations of the defendant; (ii) available information about the defendant's criminal history and mental health history, if any; (iii) the charge report; (iv) representations made by the party or parties raising the issue; (v) previous orders for expedited diversion to court-ordered treatment pursuant to this chapter; or (vi) any other relevant evidence presented at the time the issue is raised. Upon finding that there is probable cause to believe that the defendant is charged with an eligible offense, has a mental illness, and his charged conduct is associated with the mental illness, the court may order that an evaluation be performed by a diversion case manager designated by the local community services board

who is a mental health professional and has at least a bachelor's degree in a mental health field, is skilled in the assessment and treatment of mental illness, is able to provide an independent examination of the person, and is not related by blood or marriage to the person being evaluated. The order for evaluation shall give notice of the place, date, and time of the evaluation. Nothing in this chapter shall preclude the court from arraigning the defendant, considering bond, or any other relevant procedures pursuant to this title. The court shall set a date for the criminal hearing, which shall proceed as scheduled unless, prior to the hearing date, the defendant is ordered into expedited diversion to court-ordered treatment as provided pursuant to this chapter.

C. The court shall not order evaluation for expedited diversion to court-ordered treatment over the objection of the attorney for the Commonwealth or the objection of a defendant who understands the nature and consequences of his decision, including the possibility of criminal prosecution for the eligible charges.

D. The evaluation shall be performed on an outpatient basis at a mental health facility or in a local correctional facility unless the defendant appears to meet criteria for emergency custody or temporary detention pursuant to Article 4 (§ 37.2-808 et seq.) of Chapter 8 of Title 37.2 or is in the custody of the Commissioner of Behavioral Health and Developmental Services pursuant to § 19.2-169.2, 19.2-169.6, 19.2-182.2, 19.2-182.3, 19.2-182.8, or 19.2-182.9 or Article 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2. A defendant shall not be detained solely for purposes of the diversion evaluation if he would otherwise be released in accordance with Chapter 9 (§ 19.2-119 et seq.). If the person is not incarcerated or receiving treatment 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.

E. The court shall require the attorney for the Commonwealth to provide to the evaluator appointed under subsection B any information relevant to the evaluation, including (i) a copy of the warrant or indictment; (ii) the names and addresses of the attorney for the Commonwealth, the attorney for the defendant, and the judge ordering the evaluation; (iii) information about the alleged crime; and (iv) a summary of the reasons for the evaluation request. The court shall require the attorney for the defendant to provide any available psychiatric records and other information that is deemed relevant. The court shall require that information be provided to the evaluator within 96 hours of the issuance of the court order pursuant to this section.

F. The diversion case manager shall complete an evaluation of the defendant and his service needs within two weeks of the order for evaluation. Upon completion of the evaluation, the diversion case manager shall promptly submit a report in writing to the court and the attorneys of record concerning (i) the defendant's mental illness, if any; (ii) the association, if any, between the defendant's mental illness and his behavior at the time of the alleged offense; (iii) the defendant's treatment needs; (iv) the defendant's risk of future offending in the absence of treatment; and (v) the likelihood that community-based services will reduce the defendant's risk of psychiatric deterioration and future offending. No statements of the defendant relating to the time period of the alleged offense shall be included in the report. If diversion is recommended, the report shall include an expedited diversion to court-ordered treatment plan pursuant to § 37.2-849.

#### **§ 19.2-182.19. Hearing on expedited diversion to court-ordered treatment.**

A. Upon receipt of a diversion evaluation report that includes an expedited diversion to court-ordered treatment plan, the court shall schedule the expedited diversion to court-ordered treatment hearing on an expedited basis, giving the matter priority over other civil matters before the court, to determine the appropriate disposition of the defendant. The defendant shall be provided with adequate notice of the hearing and a written explanation of his rights as set forth in subsection D. The attorney for the Commonwealth shall be provided notice of the hearing, and legal counsel shall be appointed to represent the defendant at the hearing, which shall be a civil proceeding. The defendant may retain legal counsel of his choosing, who shall promptly notify the court of such representation. Upon such notification, the court shall dismiss court-appointed counsel from the matter.

At the hearing, the court may consider (i) the diversion evaluation report, including the expedited diversion to court-ordered treatment plan; (ii) any past actions of the person; (iii) any past mental health treatment of the person; (iv) any health records available; and (v) any other relevant evidence that may have been admitted. The diversion case manager appointed pursuant to subsection B of § 19.2-182.18, if not physically present at the hearing, 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. At the conclusion of the hearing, the court shall dismiss the charges with prejudice and order that the defendant be admitted into expedited diversion to court-ordered treatment if it finds by clear and convincing evidence that (a) the defendant has a mental illness, (b) the defendant engaged in the alleged conduct, (c) the criminal conduct was caused by or had

a direct and substantial relationship to the defendant's mental illness, (d) there is a significant risk of future offending in the absence of treatment, and (e) there is a reasonable likelihood that community-based services will reduce the defendant's risk of psychiatric deterioration and future offending. If the court finds the defendant not eligible for expedited diversion to court-ordered treatment, the criminal case shall proceed as scheduled.

In the event the attorney for the Commonwealth and an eligible defendant whose competence to stand trial is not in question agree to expedited diversion to court-ordered treatment as recommended in the evaluation report, the court may find that the defendant meets the criteria and dismiss the charges and order the defendant into expedited diversion to court-ordered treatment. In the event that the competence of an eligible defendant to stand trial is in question, the court may dismiss the charges and order the defendant into expedited diversion to court-ordered treatment with or without the defendant's assent. The court shall not commit an eligible defendant over his objection if the defendant is competent to stand trial and capable of making a rational decision to refuse treatment.

The court shall not commit the defendant to emergency custody, temporary detention, or inpatient treatment unless the defendant meets criteria for such commitment pursuant to Article 4 (§ 37.2-808 et seq.) or 5 (§ 37.2-814 et seq.) of Chapter 8 of Title 37.2, in which case the court shall proceed in accordance with § 37.2-808 or 37.2-809 as applicable. If recommended in the evaluation report and treatment plan, the court may commit the defendant for a period not to exceed two days to an inpatient facility, crisis stabilization facility, or crisis receiving center for initial stabilization of his condition.

The duration of expedited diversion to court-ordered treatment shall be determined by the court based on recommendations of the diversion case manager, community services board, and attorney for the Commonwealth but shall not exceed 180 days unless extenuating circumstances exist, in which case the duration shall not exceed one year or the maximum sentence that would be available for the charge, whichever is shorter. In prescribing the terms of the order, including its length, the judge shall consider the impact on the person's opportunities and obligations, including education and employment. The order duration may be reduced, but not extended, and the treatment plan may be modified after jurisdiction is transferred to the civil court in accordance with § 37.2-849.

B. The attorney for the Commonwealth shall represent the Commonwealth in all proceedings held pursuant to this chapter. The attorney for the Commonwealth has absolute discretion to decline expedited diversion to court-ordered treatment for any eligible defendant. The attorney for the Commonwealth may stipulate to the findings in the diversion evaluation report.

C. Defense counsel shall recuse himself from all civil proceedings concerning expedited diversion to court-ordered treatment until the defendant is found not to be eligible and returned to the criminal process, at which point he shall return to representing the defendant, or the defendant is found to be eligible for diversion, at which point defense counsel shall meet with the defendant to explain the diversion process, confirm with the defendant that he is not objecting to expedited diversion to court-ordered treatment, and formally withdraw from the case. The court shall appoint counsel experienced in civil commitment practice for the defendant unless the defendant requests an opportunity to employ counsel. To the extent possible before the diversion hearing, the attorney for the defendant shall interview his client, the evaluator described in § 37.2-849, 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. The diversion case manager shall disclose the evaluation report to the attorney. 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.

D. A written explanation of the expedited diversion to court-ordered treatment process and the statutory protections associated with the process shall be given to the person, and its contents shall be explained by an attorney experienced in civil commitment practice prior to the diversion 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. The criminal court shall retain jurisdiction over the person until court-ordered treatment is initiated. Upon the person successfully attending initial appointments with the diversion case manager, community services board, or service providers, the diversion case manager shall notify the criminal court and the judge or special justice who will have civil jurisdiction. If the person fails to appear for initial appointments and cannot provide a reasonable explanation, the diversion case manager shall notify the criminal court and the attorney for the Commonwealth.

**§ 19.2-182.20. Fees and compensation.**

A circuit or district court that has transferred a person to court-ordered treatment pursuant to this chapter shall impose upon such person the costs of the proceedings. Additionally, such person shall be assessed the applicable fixed fee pursuant to § 16.1-69.48:1 or 17.1-275.7.

Any attorney appointed by the criminal court shall be compensated pursuant to § 19.2-163.

**§ 19.2-182.21. Orders for evaluation or commitment; duties of clerk; copies.**

A. Whenever a court orders an evaluation pursuant to this section, the clerk of the court shall provide a copy of the order to the diversion case manager and to the director of the community services board or, if the person is hospitalized, to the director of the hospital named in the order as soon as practicable but no later than the close of business on the next business day following entry of the order. The appointed evaluator and the director of the community services board or hospital shall acknowledge receipt of the order to the clerk of the court on a form developed by the Office of the Executive Secretary of the Supreme Court of Virginia as soon as practicable but no later than the close of business on the next business day following receipt of the order. The clerk shall also provide a copy of the order to the attorney for the Commonwealth and the Department of Behavioral Health and Developmental Services.

B. No person shall be liable for any act or omission relating to the performance of any requirement pursuant to subsection A unless the person was grossly negligent or engaged in willful misconduct.

**§ 19.2-182.21. Order of expedited diversion to court-ordered treatment forwarded to Central Criminal Records Exchange.**

A. The order from a hearing issued pursuant to this chapter for expedited diversion to court-ordered treatment shall be filed by the judge with the clerk of the district court for the county or city where the hearing took place as soon as practicable but no later than the close of business on the next business day following the completion of the hearing.

B. Upon receipt of any order from a diversion hearing issued pursuant to this chapter for expedited diversion to court-ordered treatment, the clerk of court shall, as soon as practicable but not later than the close of business on the next following business day, certify and forward a copy of the order to the Central Criminal Records Exchange, on a form provided by the Exchange.

C. Except as provided in subdivision A 1 of § 19.2-389, the copy of the forms and orders sent to the Central Criminal Records Exchange pursuant to subsection B shall be kept confidential in a separate file and used only to determine a person's eligibility to possess, purchase, or transfer a firearm. No medical records shall be forwarded to the Central Criminal Records Exchange with any form, order, or certification required by subsection B. The Department of State Police shall forward only a person's eligibility to possess, purchase, or transfer a firearm to the National Instant Criminal Background Check System.

**§ 19.2-182.22. Recordings and records.**

Except as provided in § 19.2-182.21, the court shall keep its copies of recordings made pursuant to this chapter, relevant medical records, reports, and court documents pertaining to the hearings provided for in this chapter confidential. The person who is the subject of the hearing may, in writing, waive the confidentiality provided herein. In the absence of such waiver, access to the dispositional order only may be provided upon court order. Any person seeking access to the dispositional order may file a written motion setting forth why such access is needed. The court may issue an order to disclose the dispositional order if it finds that such disclosure is in the best interest of the person who is the subject of the hearing or of the public. The Executive Secretary of the Supreme Court of Virginia and anyone acting on his behalf shall be provided access to the court's records upon request. Such recordings, records, reports, and documents shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

**§ 37.2-803. Special justices to perform duties of judge.**

The chief judge of each judicial circuit may appoint one or more special justices, for the purpose of performing the duties required of a judge by this chapter, Chapter 8.1 (§ 37.2-848 et seq.), Chapter 11 (§ 37.2-1100 et seq.), and §§ 16.1-69.28, 16.1-335 through 16.1-348, 19.2-169.6, 19.2-174.1, 19.2-182.9, 53.1-40.1, 53.1-40.2, 53.1-40.9, and 53.1-133.04. Each special justice shall be a person licensed to practice law in the Commonwealth or a retired or substitute judge in good standing and shall have all the powers and jurisdiction conferred upon a judge. The special justice shall serve under the supervision and at the pleasure of the chief judge of the judicial circuit for a period of up to six years. The special justice may be reappointed and may serve additional periods of up to six years, at the pleasure of the chief judge. Within six months of appointment, each special justice appointed on or after January 1, 1996, shall complete a minimum training program prescribed by the Executive Secretary of the Supreme Court. Special justices shall collect the fees prescribed in this chapter for their service and shall retain those fees, unless the governing body of the county or city in which the services are performed provides for the payment of an annual salary for the services, in which case the fees shall be collected and paid into the treasury of that county or city.

**§ 37.2-804. Fees and expenses.**

A. Any special justice, retired judge sitting by designation pursuant to § 16.1-69.35, or any district court substitute judge who presides over hearings pursuant to the provisions of §§ 37.2-809 through 37.2-820, *Chapter 8.1* (§ 37.2-848 *et seq.*), Article 16 (§ 16.1-335 *et seq.*) of Chapter 11 of Title 16.1, or § 19.2-169.6 shall receive a fee of \$86.25 for each hearing thereunder plus his necessary mileage, parking, tolls, and postage, and \$43.25 for each certification hearing and each order under Chapter 11 (§ 37.2-1100 *et seq.*) ruling on competency or treatment plus his necessary mileage, parking, tolls, and postage.

B. Any physician, psychologist or other mental health professional, or any interpreter, appointed pursuant to § 37.2-802 for persons who are deaf, who is not regularly employed by the Commonwealth and is required to serve as a witness or as an interpreter in any proceeding under this chapter, *Chapter 8.1* (§ 37.2-848 *et seq.*), or § 19.2-169.6 shall receive a fee of \$75 and his necessary expenses for each commitment hearing for involuntary admission in which he serves and \$43.25 and necessary expenses for each certification hearing in which he serves.

C. Other witnesses regularly summoned before a judge or special justice under the provisions of this chapter or *Chapter 8.1* (§ 37.2-848 *et seq.*) shall receive the compensation for their attendance and mileage that is allowed witnesses summoned to testify before grand juries.

D. Every attorney appointed under § 37.2-806 ~~or~~, §§ 37.2-809 through 37.2-820, or *Chapter 8.1* (§ 37.2-848 *et seq.*) shall receive a fee of \$75 and his necessary expenses for each hearing thereunder and \$43.25 and his necessary expenses for each certification hearing and each proceeding under Chapter 11 (§ 37.2-1100 *et seq.*).

E. Except as hereinafter provided, all expenses incurred, including the fees, attendance, and mileage aforesaid, shall be paid by the Commonwealth. When any such fees, costs, and expenses, incurred in connection with an examination or hearing for an admission pursuant to § 37.2-806 ~~or~~, §§ 37.2-809 through 37.2-820, or *Chapter 8.1* (§ 37.2-848 *et seq.*) to carry out the provisions of this chapter or in connection with a proceeding under *Chapter 8.1* (§ 37.2-848 *et seq.*), Chapter 11 (§ 37.2-1100 *et seq.*), or § 19.2-169.6, are paid by the Commonwealth, they shall be recoverable by the Commonwealth from the person who is the subject of the examination, hearing, or proceeding or from his estate. Collection or recovery may be undertaken by the Department. When the fees, costs, and expenses are collected or recovered by the Department, they shall be refunded to the Commonwealth. No fees or costs shall be recovered, however, from the person who is the subject of the examination or hearing or his estate when no good cause for his admission exists or when the recovery would create an undue financial hardship.

**§ 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 or *Chapter 8.1* (§ 37.2-848 *et seq.*) 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 *Chapter 8.1* (§ 37.2-848 *et seq.*), 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 or *Chapter 8.1* (§ 37.2-848 *et seq.*) 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 or *Chapter 8.1* (§ 37.2-848 *et seq.*) 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.

CHAPTER 8.1.

EXPEDITED DIVERSION TO COURT-ORDERED TREATMENT IN THE COMMUNITY IN LIEU OF  
CRIMINAL ADJUDICATION.

§ 37.2-848. *Definitions.*

As used in this chapter:

"Diversion case manager" means a community services board employee who is a mental health professional and (i) has a bachelor's degree or higher in a mental health field, (ii) is skilled in the assessment and treatment of mental illness, (iii) is able to provide an independent examination of a person who is the subject of a diversion hearing, and (iv) is not related by blood or marriage to the person being evaluated.

"Material nonadherence" means deviation from an expedited diversion to court-ordered treatment plan by a person who is subject to an order for expedited diversion to court-ordered treatment that it is likely to lead to the person's relapse or deterioration and for which the person cannot provide a reasonable explanation. The community services board and service providers identified in the expedited diversion to court-ordered treatment plan shall report any material nonadherence and any material changes in the person's condition to the diversion case manager.

Whenever the term "community services board" or "board" appears, it includes the behavioral health authority.

§ 37.2-849. *Evaluation of diversion eligibility, treatment needs; development of expedited diversion to court-ordered treatment plan.*

A. The presiding judge in a criminal case shall require an evaluation of the person who is the subject of the diversion hearing by a diversion case manager designated by the local community services board.

B. The evaluation conducted pursuant to this section shall be a comprehensive evaluation of the person conducted in-person or, if that is not practicable, by two-way electronic video and audio communication system as authorized in § 37.2-804.1. Translation or interpreter services shall be provided during the evaluation where necessary. The examination shall consist of (i) a clinical assessment that includes a mental status examination; determination of current use of psychotropic and other medications; a medical and psychiatric history; a substance use, abuse, or dependency determination; (ii) a substance abuse screening, when indicated; (iii) a review of treatment records, criminal records, if any, and records pertaining to the alleged conduct; (iv) an assessment of criminogenic risk factors; (v) an assessment of the person's capacity to consent to treatment, including his ability to maintain and communicate choice, understand relevant information, and comprehend the situation and its consequences; (vi) an assessment of the person's treatment needs, including housing needs and need for interim inpatient admission to stabilize symptoms, if any; (vii) a discussion of treatment preferences expressed by the person or contained in a document provided by the person in support of recovery; and (viii) an assessment of whether the person meets the criteria for expedited diversion to court-ordered treatment as set forth in § 19.2-182.18. No statements of the defendant relating to the time period of the alleged offense shall be included in the report.

C. All such evaluations shall be conducted in private. The judge shall summons the diversion case manager who shall certify that he has personally examined the person. The judge shall not render any decision until the diversion case manager has presented his report. The diversion case manager may report orally at the diversion hearing, but he shall provide a written report of his examination prior to the hearing. The diversion case manager's written certification may be accepted into evidence unless objected to by the person or his attorney, in which case the diversion case manager shall attend in person or by electronic communication. When the diversion case manager attends the hearing in person or by electronic communication, the diversion case manager shall not be excluded from the hearing pursuant to an order of sequestration of witnesses.

D. The diversion case manager and community services board shall file an expedited diversion to court-ordered treatment plan with the diversion evaluation report. The diversion case manager shall monitor the person's adherence with the expedited diversion to court-ordered treatment plan. The expedited diversion to court-ordered 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, including incorporating any preexisting crisis plan or advance directive of the



person; (vi) specify the particular conditions to which the person shall be required to adhere; and (vii) describe (a) how the community services board shall monitor the person's progress and adherence to the plan and (b) any conditions, including scheduled meetings or continued adherence to medication, necessary for expedited diversion to court-ordered treatment to be appropriate for the person. The diversion case manager shall submit the expedited diversion to court-ordered treatment plan to the court for approval. Upon approval by the court, the expedited diversion to court-ordered treatment plan shall be filed with the court and incorporated into the order for expedited diversion to court-ordered treatment. A copy of the expedited diversion to court-ordered treatment plan shall be provided to the person by the community services board upon approval of the treatment plan by the court.

E. Expedited diversion to court-ordered treatment may include day treatment in a hospital, night treatment in a hospital, outpatient involuntary treatment with antipsychotic medication pursuant to Chapter 11 (§ 37.2-1100 et seq.), or other appropriate course of treatment as may be necessary to meet the needs of the person. Expedited diversion to court-ordered treatment shall not include the use of restraints or physical force of any kind in the provision of the medication. The diversion case manager and community services board shall recommend a specific course of treatment and programs for the provision of expedited diversion to court-ordered treatment.

F. If the diversion case manager or community services board responsible for developing the expedited diversion to court-ordered treatment plan determine 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 expedited diversion to court-ordered treatment, he shall petition the court for rescission of the expedited diversion to court-ordered treatment order in accordance with the provisions § 37.2-851.

G. Upon entry of any order for expedited diversion to court-ordered treatment, 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 diversion case manager and community services board required to monitor the person's adherence with the expedited diversion to court-ordered treatment plan. The diversion case manager and 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 of Virginia and provided by the court for this purpose within five business days.

**§ 37.2-850. Monitoring adherence to expedited diversion to court-ordered treatment; court review of expedited diversion to court-ordered treatment.**

A. The diversion case manager shall monitor the person's adherence to the expedited diversion to court-ordered treatment plan prepared in accordance with § 37.2-849. Such monitoring shall include (i) contacting or making documented efforts to contact the person weekly regarding the comprehensive mandatory outpatient treatment plan and any support necessary for the person to adhere to the expedited diversion to court-ordered treatment plan, (ii) contacting the service providers at least once every two weeks to determine if the person is adhering to the comprehensive mandatory outpatient treatment plan, (iii) documenting all such contacts, and (iv) reporting in writing to the court every two weeks regarding the person's and the community services board's adherence to the provisions of the diversion mandatory outpatient treatment plan.

B. In the event of material nonadherence, the diversion case manager shall, as soon as practicable, meet with the person, the community services board, and service providers to identify the factors leading to material nonadherence and develop a remediation plan for addressing the factors. The diversion case manager shall report the meeting and remediation plan to the court within five business days. If the person fails or refuses to cooperate with efforts of the diversion case manager, community services board, and service providers to address the material nonadherence, the diversion case manager shall, as soon as practicable, petition for a review hearing pursuant to subsection F, to include a request for reevaluation in accordance with subsection H. If, in addition to material nonadherence, the diversion case manager determines that the condition or behavior of the person has deteriorated substantially, but not to the level of requiring emergency custody or temporary detention in accordance with subsection D, the diversion case manager may recommend to the court that the reevaluation take place in an inpatient mental health facility.

C. In the event that a person receiving court-ordered treatment is re-arrested, the diversion case manager shall determine as expeditiously as possible whether the person's behavior amounts to nonadherence to the treatment plan and, if so, shall immediately petition for a review hearing pursuant to this section.

D. If the diversion case manager or community services board determines that the deterioration of the condition or behavior of the person is such that there is a substantial likelihood that, as a result of the person's mental illness, the person will, in the near future, (i) 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 (ii) suffer serious harm due to his lack of capacity to protect himself from harm

551 or to provide for his basic human needs, the diversion case manager or community services board shall  
552 immediately request that the magistrate issue an emergency custody order pursuant to § 37.2-808 or a  
553 temporary detention order pursuant to § 37.2-809. Entry of an emergency custody order, temporary  
554 detention order, or involuntary inpatient treatment order shall suspend but not rescind an existing order  
555 for expedited diversion to court-ordered treatment.

556 E. The district court judge or special justice shall hold a hearing within seven days after receiving  
557 the petition for review of the expedited diversion to court-ordered treatment plan; however, if the  
558 seventh day is a Saturday, Sunday, legal holiday, or day on which the court is lawfully closed, the  
559 hearing shall be held by the close of business on the next day that is not a Saturday, Sunday, legal  
560 holiday, or day on which the court is lawfully closed. The clerk shall provide notice of the hearing to  
561 the person, the diversion case manager, the community services board, and all service providers listed  
562 in the expedited diversion to court-ordered treatment order. If the person is not represented by counsel,  
563 the court shall appoint an attorney to represent the person in this hearing and any subsequent hearing  
564 under this section, giving consideration to appointing the attorney who represented the person at the  
565 proceeding that resulted in the issuance of the order for expedited diversion to court-ordered treatment.  
566 The same judge that presided over the hearing resulting in the order for expedited diversion to  
567 court-ordered treatment need not preside at the nonadherence hearing or any subsequent hearings. The  
568 community services board shall offer to arrange the person's transportation to the hearing if the person  
569 is not detained and has no other source of transportation.

570 F. Any of the following may petition the court for a hearing pursuant to this subsection: (i) the  
571 person who is subject to the order for expedited diversion to court-ordered treatment; (ii) the diversion  
572 case manager; (iii) the community services board responsible for monitoring the person's adherence  
573 to the order for expedited diversion to court-ordered treatment; (iv) a treatment provider designated in the  
574 expedited diversion to court-ordered treatment plan; (v) any health care agent designated in the advance  
575 directive of the person who is the subject of the order for expedited diversion to court-ordered  
576 treatment; or (vi) if the person who is the subject of the order for expedited diversion to court-ordered  
577 treatment has been determined to be incapable of making an informed decision, the person's guardian  
578 or other person authorized to make health care decisions for the person pursuant to § 54.1-2986.

579 G. A petition filed pursuant to this subsection may request that the court do any of the following:

580 1. Enforce an order for expedited diversion to court-ordered treatment and require the person who is  
581 the subject of the order to adhere to the expedited diversion to court-ordered treatment plan, in the case  
582 of material nonadherence;

583 2. Modify an order for expedited diversion to court-ordered treatment or an expedited diversion to  
584 court-ordered treatment plan due to a change in circumstances, including changes in the condition,  
585 behavior, living arrangement, or access to services of the person who is the subject to the order; or

586 3. Rescind an order for expedited diversion to court-ordered treatment.

587 At any time after 30 days from entry of the order for expedited diversion to court-ordered treatment,  
588 the person may petition the court to rescind the order. The person shall not file a petition to rescind the  
589 order more than once during a 90-day period.

590 H. If requested in a petition filed pursuant to this section, or on the court's own motion, the court  
591 may direct the diversion case manager to reevaluate the person as to the considerations listed in  
592 subsection B of § 37.2-849. The diversion case manager shall certify to the court whether he has  
593 probable cause to believe that (i) the person has treatment needs and poses a risk of future offending in  
594 the absence of treatment and (ii) community-based services will reduce the person's risk of psychiatric  
595 deterioration and future offending. If the person is not incarcerated or receiving treatment in an  
596 inpatient facility, the community services board shall arrange for the person to be examined at a  
597 convenient location and time. The community services board shall offer to arrange for the person's  
598 transportation to the examination if the person has no other source of transportation and resides within  
599 the service area or an adjacent service area of the community services board.

600 If the person refuses or fails to appear for the evaluation, or if the evaluation was requested in  
601 accordance with subsection B, the diversion case manager or community services board shall notify the  
602 court, and the court shall issue a mandatory examination order and *capias* directing the primary  
603 law-enforcement agency in the jurisdiction where the person resides to transport the person to the  
604 examination. The person shall remain in custody until a temporary detention order is issued or until the  
605 person is released, but in no event shall the period exceed eight hours.

606 I. If the person fails to appear for the hearing, the court may, after consideration of any evidence  
607 regarding why the person failed to appear at the hearing, (i) dismiss the petition, (ii) issue an  
608 emergency custody order pursuant to § 37.2-808, or (iii) reschedule the hearing pursuant to subsection  
609 F and issue a subpoena for the person's appearance at the hearing and enter an order for mandatory  
610 examination, to be conducted prior to the hearing and in accordance with subsection H.

611 J. After observing the person and considering (i) the recommendations of any treating physician or  
612 psychologist licensed to practice in the Commonwealth, if available, (ii) the person's adherence with the

expedited diversion to court-ordered treatment plan, (iii) any past mental health treatment of the person, (iv) any evaluator's certification, (v) any health records available, (vi) any report from the diversion case manager or the community services board, and (vii) any other relevant evidence that may have been admitted at the hearing, the judge or special justice shall make one of the following dispositions:

1. In a hearing on any petition seeking enforcement of an order for expedited diversion to court-ordered treatment, upon finding that continuing court-ordered treatment is warranted, the court shall direct the person to fully adhere to the order for expedited diversion to court-ordered treatment and may make any modifications to such order or the expedited diversion to court-ordered treatment plan that are acceptable to the community services board or treatment provider responsible for the person's treatment. In determining the appropriateness of the outpatient treatment specified in such order and treatment plan, the court may consider the person's material nonadherence to the existing treatment order. The court may impose sanctions on the person, including reflective exercises such as writing an essay about his nonadherence, increased frequency of status hearings, and increased frequency of reporting to the diversion case manager. Sanctions for nonadherence shall not include contempt of court or criminal sanctions, including incarceration of any duration.

2. In a hearing on any petition seeking modification of an order for expedited diversion to court-ordered treatment or the expedited diversion to court-ordered treatment plan, upon a finding that (i) one or more modifications of the order would benefit the person and help prevent relapse or deterioration of the person's condition, (ii) the community services board and the treatment provider responsible for the person's treatment are able to provide services consistent with such modification, and (iii) the person is able to adhere to the modified treatment plan, the court may order such modification of the order for expedited diversion to court-ordered treatment or the expedited diversion to court-ordered treatment plan as the court finds appropriate.

3. In a hearing on any petition filed to enforce, modify, or rescind an order for expedited diversion to court-ordered treatment, upon finding that expedited diversion to court-ordered treatment is no longer appropriate, in accordance with the criteria set forth in § 37.2-851, the court may order that the order be rescinded upon the filing of a discharge treatment plan by the diversion case manager pursuant to § 37.2-851.

K. If at any time the court finds reasonable ground to believe that the person (i) has repeatedly been in material nonadherence with the expedited diversion to court-ordered treatment plan and (ii) requires inpatient hospitalization, it may order an evaluation of the person by a psychiatrist or clinical psychologist who is licensed in Virginia by the Board of Medicine or the Board of Psychology, qualified in the diagnosis of mental illness, and able to provide an independent clinical evaluation of the person and recommendations for his placement, care, and treatment. If the court, based on the evaluation and after hearing evidence on the issue, finds by clear and convincing evidence that the person (a) has repeatedly been in material nonadherence with the expedited diversion to court-ordered treatment plan and (b) has a mental illness and requires inpatient hospitalization, the court may suspend the order for expedited diversion to court-ordered treatment and order the person to be admitted involuntarily to a facility for a period of treatment not to exceed three days from the date of the court order.

At any hearing pursuant to this section, the person shall be provided with adequate notice of the hearing, of the right to be present at the hearing, the right to the assistance of counsel in preparation for and during the hearing, and the right to introduce evidence and cross-examine witnesses at the hearing. The hearing shall be scheduled on an expedited basis and shall be given priority over other civil matters before the court. The hearing is a civil proceeding.

L. The judge or special justice shall schedule a status hearing every 60 days while the order for expedited diversion to court-ordered treatment remains in effect for the purposes of obtaining information regarding the person's progress and the community services board's and service providers' provision of treatment. The judge or special justice may schedule additional status hearings upon its own motion, as recommended by the diversion case manager, or in response to the person's nonadherence to the expedited diversion to court-ordered treatment plan. The clerk shall provide notice of the hearing to the person who is the subject of the order, the diversion case manager, and the community services board responsible for monitoring the person's adherence with the plan. The person shall have the right to be represented by counsel at the hearing, and if the person does not have counsel the court shall appoint an attorney to represent the person. However, status hearings may be held without counsel present by mutual consent of the parties. 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. During a status hearing, the treatment plan may be amended upon mutual agreement of the parties. Contested matters shall not be decided during a status hearing, nor shall any decision regarding enforcement or rescission of the order be entered.

M. The court may transfer jurisdiction of the case to the district court where the person resides at any time after the entry of the order for expedited diversion to court-ordered treatment. The diversion

case manager and the community services board responsible for monitoring the person's adherence to the treatment plan shall remain responsible for monitoring the person's adherence to 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 of Virginia 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.

**§ 37.2-851. Rescission of order for expedited diversion to court-ordered treatment; discharge treatment plan upon rescission or expiration of order for expedited diversion to court-ordered treatment.**

A. If the diversion case manager or community services board determines at any time prior to the expiration of the order for expedited diversion to court-ordered treatment that the person has adhered to the order and no longer meets the criteria for expedited diversion to court-ordered treatment, or that continued expedited diversion to court-ordered treatment is no longer necessary for any other reason, the diversion case manager or community services board shall file a petition to rescind the order. The court shall schedule a review hearing and provide notice of the hearing in accordance with § 37.2-850. The diversion case manager shall prepare, in collaboration with the person, the community services board, and the service providers, a discharge plan in accordance with subsection D, to be submitted to the court before or during the review hearing.

B. At any time after 30 days from entry of the order for expedited diversion to court-ordered treatment, the person may petition the court to rescind the order on the grounds that he no longer meets the criteria for expedited diversion to court-ordered treatment as specified in § 19.2-182.18. The court shall schedule a review hearing and provide notice of the hearing in accordance with § 37.2-850. The diversion case manager required to monitor the person's adherence to the treatment order shall provide a reevaluation of the person as described in subsection H § 37.2-850. After observing the person and considering the person's current condition, any material nonadherence to the order for expedited diversion to court-ordered treatment on the part of the person, and any other relevant evidence referred to in subsection K of § 37.2-850, the court shall make one of the dispositions specified in subsection K of § 37.2-850. The person may not file a petition to rescind the order more than once during a 90-day period.

C. In the event the order for expedited diversion to court-ordered treatment is not rescinded before it is set to expire, the court shall schedule a review hearing prior to that date at which the diversion case manager shall submit a discharge plan in accordance with subsection D. Upon approval by the court, the discharge treatment plan shall be filed with the court and the judge or special justice shall rescind the order for expedited diversion to court-ordered treatment.

If the diversion case manager determines that a deterioration of the condition or behavior of the person is such that (i) there is a substantial likelihood that, as a result of the person's 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) less restrictive alternatives to involuntary inpatient treatment that would offer an opportunity for improvement of his condition have been investigated and are determined to be appropriate, as reflected in the initial outpatient treatment plan prepared in accordance with subsection F of § 37.2-817.01; (iii) the person has the ability to adhere to the mandatory outpatient treatment plan; and (iv) the ordered treatment will be delivered on an outpatient basis by the community services board or designated provider to the person, the diversion case manager may petition for the person's commitment to mandatory outpatient treatment in accordance with subsection B of § 37.2-817.01.

D. For all individuals for whom the order for expedited diversion to court-ordered treatment may be rescinded, a discharge plan shall be formulated by the diversion case manager in collaboration with the community services board and service providers. The discharge plan shall be prepared with the involvement and participation of the individual receiving services or his representative and must reflect the individual's preferences to the greatest extent possible. The discharge plan shall be contained in a uniform discharge document developed by the Department and used by all state hospitals, training centers, and community services boards or behavioral health authorities and shall identify (i) the services, including mental health, developmental, substance abuse, social, educational, medical, employment, housing, legal, advocacy, transportation, and other services that the individual will require upon discharge into voluntary treatment in the community and (ii) the public or private agencies that have agreed to provide these services. If the individual will be housed in an assisted living facility, as defined in § 63.2-100, the discharge plan shall identify the facility, document its appropriateness for housing and capacity to care for the individual, contain evidence of the facility's agreement to admit and care for the individual, and describe how the community services board or behavioral health authority will monitor the individual's care in the facility. Prior to discharging an individual who has

736 *not executed an advance directive, the expedited diversion to court-ordered treatment case manager*  
737 *shall give to the individual a written explanation of the procedures for executing an advance directive in*  
738 *accordance with the Health Care Decisions Act (§ 54.1-2981 et seq.) and an advance directive form,*  
739 *which may be the form set forth in § 54.1-2984.*

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