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SENATE BILL NO. 546

Offered January 10, 2024

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A BILL to amend and reenact §§ 37.2-808 and 37.2-809 of the Code of Virginia, relating to emergency custody and temporary detention orders; evaluations; presence of others.

Patrons—Bagby and Aird

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:**1. That §§ 37.2-808 and 37.2-809 of the Code of Virginia are amended and reenacted as follows:****§ 37.2-808. Emergency custody; issuance and execution of order.**

A. Any magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion, or a court may issue pursuant to § 19.2-271.6, an emergency custody order when he has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment. Any emergency custody order entered pursuant to this section shall provide for the disclosure of medical records pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or permitted by law.

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

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

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

When transportation is ordered to be provided by an alternative transportation provider, the magistrate or court shall order the specified primary law-enforcement agency to execute the order, to take the person into custody, and to transfer custody of the person to the alternative transportation provider identified in the order. In such cases, a copy of the emergency custody order shall accompany the person being transported pursuant to this section at all times and shall be delivered by the alternative transportation provider to the community services board or its designee responsible for conducting the evaluation. The community services board or its designee conducting the evaluation shall return a copy

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59 of the emergency custody order to the court designated by the magistrate or the court that issued the
60 emergency custody order as soon as is practicable. Delivery of an order to a law-enforcement officer or
61 alternative transportation provider and return of an order to the court may be accomplished electronically
62 or by facsimile.

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

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

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

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

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

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

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

112 J. A representative of the primary law-enforcement agency specified to execute an emergency
113 custody order or a representative of the law-enforcement agency employing a law-enforcement officer
114 who takes a person into custody pursuant to subsection G or H shall notify the community services
115 board responsible for conducting the evaluation required in subsection B, G, or H as soon as practicable
116 after execution of the emergency custody order or after the person has been taken into custody pursuant
117 to subsection G or H.

118 K. The person shall remain in custody until (i) a temporary detention order is issued in accordance
119 with § 37.2-809, (ii) an order for temporary detention for observation, testing, or treatment is entered in
120 accordance with § 37.2-1104, ending law enforcement custody, (iii) the person is released, or (iv) the

emergency custody order expires. An emergency custody order shall be valid for a period not to exceed eight hours from the time of execution.

L. Nothing in this section shall preclude the issuance of an order for temporary detention for testing, observation, or treatment pursuant to § 37.2-1104 for a person who is also the subject of an emergency custody order issued pursuant to this section. In any case in which an order for temporary detention for testing, observation, or treatment is issued for a person who is also the subject of an emergency custody order, the person may be detained by a hospital emergency room or other appropriate facility for testing, observation, and treatment for a period not to exceed 24 hours, unless extended by the court as part of an order pursuant to § 37.2-1101, in accordance with subsection C of § 37.2-1104. Upon completion of testing, observation, or treatment pursuant to § 37.2-1104, the hospital emergency room or other appropriate facility in which the person is detained shall notify the nearest community services board, and the designee of the community services board shall, as soon as is practicable and prior to the expiration of the order for temporary detention issued pursuant to § 37.2-1104, conduct an evaluation of the person to determine if he meets the criteria for temporary detention pursuant to § 37.2-809. *The (i) facility at which an individual is being evaluated pursuant to subsection B and § 37.2-809 or (ii) hospital emergency department and treating physician or his designee shall allow a family member or legal guardian of the individual subject to evaluation, who may provide support and shared decision-making, to be present with the individual unless the individual objects or the presence of any such person would create a medical or safety risk.*

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

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

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

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

Q. An employee or contractor of an entity providing alternative transportation services pursuant to a contract with the Department who has completed training approved by the Department in the proper and safe use of restraint may use restraint (i) if restraint is necessary to ensure the safety of the person or others or prevent escape and (ii) if less restrictive techniques have been determined to be ineffective to protect the person or others from harm or to prevent escape.

R. 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.

S. For purposes of this section:

"Law-enforcement agency" includes an auxiliary police force established pursuant to § 15.2-1731.

"Law-enforcement officer" includes an auxiliary police officer appointed or provided for pursuant to §§ 15.2-1731 and 15.2-1733, except for the purposes of subsection G.

§ 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

182 electronic video and audio communication system as authorized in § 37.2-804.1 by an employee or a
183 designee of the local community services board to determine whether the person meets the criteria for
184 temporary detention, a temporary detention order if it appears from all evidence readily available,
185 including any recommendation from a physician, clinical psychologist, clinical social worker, or licensed
186 professional counselor treating the person, that the person (i) has a mental illness and that there exists a
187 substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause
188 serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or
189 threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of
190 capacity to protect himself from harm or to provide for his basic human needs; (ii) is in need of
191 hospitalization or treatment; and (iii) is unwilling to volunteer or incapable of volunteering for
192 hospitalization or treatment. The magistrate shall also consider, if available, (a) information provided by
193 the person who initiated emergency custody and (b) the recommendations of any treating or examining
194 physician licensed in Virginia either verbally or in writing prior to rendering a decision. Any temporary
195 detention order entered pursuant to this section shall provide for the disclosure of medical records
196 pursuant to § 37.2-804.2. This subsection shall not preclude any other disclosures as required or
197 permitted by law.

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

206 D. A magistrate may issue a temporary detention order without an emergency custody order
207 proceeding. A magistrate may issue a temporary detention order without a prior evaluation pursuant to
208 subsection B if (i) the person has been personally examined within the previous 72 hours by an
209 employee or a designee of the local community services board or (ii) there is a significant physical,
210 psychological, or medical risk to the person or to others associated with conducting such evaluation.

211 E. An employee or a designee of the local community services board shall determine the facility of
212 temporary detention in accordance with the provisions of § 37.2-809.1 for all persons detained pursuant
213 to this section. An employee or designee of the local community services board may change the facility
214 of temporary detention and may designate an alternative facility for temporary detention at any point
215 during the period of temporary detention if it is determined that the alternative facility is a more
216 appropriate facility for temporary detention of the person given the specific security, medical, or
217 behavioral health needs of the person. In cases in which the facility of temporary detention is changed
218 following transfer of custody to an initial facility of temporary custody, transportation of the person to
219 the alternative facility of temporary detention shall be provided in accordance with the provisions of
220 § 37.2-810. The initial facility of temporary detention shall be identified on the preadmission screening
221 report and indicated on the temporary detention order; however, if an employee or designee of the local
222 community services board designates an alternative facility, that employee or designee shall provide
223 written notice forthwith, on a form developed by the Executive Secretary of the Supreme Court of
224 Virginia, to the clerk of the issuing court of the name and address of the alternative facility. Subject to
225 the provisions of § 37.2-809.1, if a facility of temporary detention cannot be identified by the time of
226 the expiration of the period of emergency custody pursuant to § 37.2-808, the person shall be detained
227 in a state facility for the treatment of persons with mental illness and such facility shall be indicated on
228 the temporary detention order. Except as provided in § 37.2-811 for inmates requiring hospitalization in
229 accordance with subdivision A 2 of § 19.2-169.6, the person shall not be detained in a jail or other
230 place of confinement for persons charged with criminal offenses. Except as provided in § 37.2-811 for
231 inmates requiring hospitalization in accordance with subdivision A 2 of § 19.2-169.6 or in subsection C
232 of § 37.2-813 for persons prior to transfer to the facility of temporary detention, the person shall remain
233 in the custody of law enforcement until either (i) the person is detained within a secure facility or (ii)
234 custody has been accepted by the appropriate personnel designated by either the initial facility of
235 temporary detention identified in the temporary detention order or by the alternative facility of
236 temporary detention designated by the employee or designee of the local community services board
237 pursuant to this subsection. The person detained or in custody pursuant to this section shall be given a
238 written summary of the temporary detention procedures and the statutory protections associated with
239 those procedures.

240 F. Any facility caring for a person placed with it pursuant to a temporary detention order is
241 authorized to provide emergency medical and psychiatric services within its capabilities when the facility
242 determines that the services are in the best interests of the person within its care. The costs incurred as a
243 result of the hearings and by the facility in providing services during the period of temporary detention

shall be paid and recovered pursuant to § 37.2-804. The maximum costs reimbursable by the Commonwealth pursuant to this section shall be established by the State Board of Medical Assistance Services based on reasonable criteria. The State Board of Medical Assistance Services shall, by regulation, establish a reasonable rate per day of inpatient care for temporary detention.

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

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

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

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

K. For purposes of this section, a health care provider or designee of a local community services board or behavioral health authority shall not be required to encrypt any email containing information or 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 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.

N. In any case in which a person subject to an evaluation pursuant to this section is receiving services in a hospital emergency department, the treating physician or his designee and the employee or

305 designee of the local community services board shall disclose to each other relevant information
306 pertaining to the individual's treatment in the emergency department. *The (i) facility at which an*
307 *individual is being evaluated pursuant to subsection B of § 37.2-808 and the provisions of this section*
308 *or (ii) hospital emergency department and treating physician or his designee shall allow a family*
309 *member or legal guardian of the individual subject to evaluation, who may provide support and shared*
310 *decision-making, to be present with the individual unless the individual objects or the presence of any*
311 *such person would create a medical or safety risk.*