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SENATE BILL NO. 119

Offered January 12, 2022

Prefiled January 7, 2022

A BILL to amend and reenact § 37.2-809 of the Code of Virginia, relating to involuntary temporary detention; disclosure of health records.

Patrons—Hanger and McClellan

Referred to Committee on Education and Health

Be it enacted by the General Assembly of Virginia:**1. That § 37.2-809 of the Code of Virginia is amended and reenacted as follows:****§ 37.2-809. Involuntary temporary detention; issuance and execution of order.**

A. For the purposes of this section:

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

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

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

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

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

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

E. An employee or a designee of the local community services board shall determine the facility of temporary detention in accordance with the provisions of § 37.2-809.1 for all individuals detained pursuant to this section. An employee or designee of the local community services board may change

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

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

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

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

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

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

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

121 medical records provided to a magistrate unless there is reason to believe that a third party will attempt
122 to intercept the email.

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

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

144 N. *In any case in which a person who has been evaluated pursuant to this section is receiving*
145 *services in a hospital emergency department pending a decision on the petition for a temporary*
146 *detention order or transportation to a facility of temporary detention, the employee or designee of the*
147 *local community services board who conducted the evaluation shall, upon request of the health care*
148 *provider providing services to the person at the hospital emergency department, disclose to the health*
149 *care provider any medical records and other relevant ancillary information obtained by the employee or*
150 *designee of the local community services board during the evaluation that may be necessary for the*
151 *treatment of the person.*