

SENATE BILL NO. 268

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on \_\_\_\_\_)

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

A BILL to amend and reenact §§ 37.2-809, 37.2-809.1, and 37.2-810 of the Code of Virginia, relating to emergency custody and temporary detention; transportation; transfer of custody; alternative custody.

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

**1. That §§ 37.2-809, 37.2-809.1, and 37.2-810 of the Code of Virginia are amended and reenacted as follows:**

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

A. For the purposes of this section:

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

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

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

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

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

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

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

56 E. An employee or a designee of the local community services board shall determine the facility  
57 of temporary detention in accordance with the provisions of § 37.2-809.1 for all ~~individuals~~ persons  
58 detained pursuant to this section. An employee or designee of the local community services board may  
59 change the facility of temporary detention and may designate an alternative facility for temporary  
60 detention at any point during the period of temporary detention if it is determined that the alternative  
61 facility is a more appropriate facility for temporary detention of the ~~individual~~ person given the specific  
62 security, medical, or behavioral health needs of the person. In cases in which the facility of temporary  
63 detention is changed following transfer of custody to an initial facility of temporary custody, transportation  
64 of the ~~individual~~ person to the alternative facility of temporary detention shall be provided in accordance  
65 with the 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 identified  
71 by the time of the expiration of the period of emergency custody pursuant to § 37.2-808, the ~~individual~~  
72 person shall be detained in a state facility for the treatment of ~~individuals~~ persons 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 not  
75 be detained in a jail or other place of confinement for persons charged with criminal offenses ~~and~~. Except  
76 as provided in § 37.2-811 for inmates requiring hospitalization in accordance with subdivision A 2 of §  
77 19.2-169.6, the person shall remain in the custody of law enforcement until (i) the person is either detained  
78 within a secure facility or (ii) custody has been accepted by the appropriate personnel designated by either  
79 the initial facility of temporary detention identified in the temporary detention order or by the alternative  
80 facility of temporary detention designated by the employee or designee of the local community services

81 board pursuant to this subsection. The person detained or in custody pursuant to this section shall be given  
82 a written summary of the temporary detention procedures and the statutory protections associated with  
83 those procedures.

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

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

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

106 I. If a temporary detention order is not executed within 24 hours of its issuance, or within a shorter  
107 period as is specified in the order, the order shall be void and shall be returned unexecuted to the office of

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

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

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

124 L. If the employee or designee of the community services board who is conducting the evaluation  
125 pursuant to this section recommends that the person should not be subject to a temporary detention order,  
126 such employee or designee shall (i) inform the petitioner, the person who initiated emergency custody if  
127 such person is present, and an onsite treating physician of his recommendation; (ii) promptly inform such  
128 person who initiated emergency custody that the community services board will facilitate communication  
129 between the person and the magistrate if the person disagrees with recommendations of the employee or  
130 designee of the community services board who conducted the evaluation and the person who initiated  
131 emergency custody so requests; and (iii) upon prompt request made by the person who initiated emergency  
132 custody, arrange for such person who initiated emergency custody to communicate with the magistrate as  
133 soon as is practicable and prior to the expiration of the period of emergency custody. The magistrate shall  
134 consider any information provided by the person who initiated emergency custody and any

135 recommendations of the treating or examining physician and the employee or designee of the community  
136 services board who conducted the evaluation and consider such information and recommendations in  
137 accordance with subsection B in making his determination to issue a temporary detention order. The  
138 ~~individual~~ person who is the subject of emergency custody shall remain in the custody of law enforcement  
139 or a designee of law enforcement and shall not be released from emergency custody until communication  
140 with the magistrate pursuant to this subsection has concluded and the magistrate has made a determination  
141 regarding issuance of a temporary detention order.

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

145 **§ 37.2-809.1. Facility of temporary detention.**

146 A. In each case in which an employee or designee of the local community services board as defined  
147 in § 37.2-809 is required to make an evaluation of an individual pursuant to subsection B, G, or H of §  
148 37.2-808, an employee or designee of the local community services board shall, upon being notified of  
149 the need for such evaluation, contact the state facility for the area in which the community services board  
150 is located and notify the state facility that the individual will be transported to the facility upon issuance  
151 of a temporary detention order if no other facility of temporary detention can be identified by the time of  
152 the expiration of the period of emergency custody pursuant to § 37.2-808. Upon completion of the  
153 evaluation, the employee or designee of the local community services board shall convey to the state  
154 facility information about the individual necessary to allow the state facility to determine the services the  
155 individual will require upon admission.

156 B. A state facility may, following the notice in accordance with subsection A, conduct a search for  
157 an alternative facility that is able and willing to provide temporary detention and appropriate care to the  
158 individual, which may include another state facility if the state facility notified in accordance with  
159 subsection A is unable to provide temporary detention and appropriate care for the individual. Under no  
160 circumstances shall a state facility fail or refuse to admit an individual who meets the criteria for temporary  
161 detention pursuant to § 37.2-809 unless an alternative facility that is able to provide temporary detention

162 and appropriate care agrees to accept the individual for temporary detention and the individual shall not  
163 during the duration of the temporary detention order be released from custody except for purposes of  
164 transporting the individual to the state facility or alternative facility in accordance with the provisions of  
165 § 37.2-810. If an alternative facility is identified and agrees to accept the individual for temporary  
166 detention, the state facility shall notify the community services board, and an employee or designee of the  
167 community services board shall designate the alternative facility on the prescreening report.

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

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

174 **§ 37.2-810. Transportation of person in the temporary detention process.**

175 A. In specifying the primary law-enforcement agency and jurisdiction for purposes of this section,  
176 the magistrate shall specify in the temporary detention order the law-enforcement agency of the  
177 jurisdiction in which the person resides, or any other willing law-enforcement agency that has agreed to  
178 provide transportation, to execute the order and, in cases in which transportation is ordered to be provided  
179 by the primary law-enforcement agency, provide transportation. However, if the nearest boundary of the  
180 jurisdiction in which the person resides is more than 50 miles from the nearest boundary of the jurisdiction  
181 in which the person is located, the law-enforcement agency of the jurisdiction in which the person is  
182 located shall execute the order and provide transportation.

183 B. The magistrate issuing the temporary detention order shall (i) specify the law-enforcement  
184 agency to execute the order and provide (ii) designate a transportation provider. However, In determining  
185 the transportation provider, the magistrate shall consider any request to authorize transportation by an  
186 alternative transportation provider in accordance with this section, whenever an alternative transportation  
187 provider is identified to the magistrate, which may be a person, facility, or agency, including a family  
188 member or friend of the person who is the subject of the temporary detention order, a representative of

189 the community services board, an employee of or person providing services pursuant to a contract with  
190 the Department, or other transportation provider with personnel trained to provide transportation in a safe  
191 manner ~~upon~~. Upon determining, following consideration of information provided by the petitioner; the  
192 community services board or its designee; the local law-enforcement agency, if any; the person's treating  
193 physician, if any; or other persons who are available and have knowledge of the person, and, when the  
194 magistrate deems appropriate, the proposed alternative transportation provider, either in person or via two-  
195 way electronic video and audio or telephone communication system, ~~that the proposed~~ an alternative  
196 transportation provider is available to provide transportation, willing to provide transportation, and able  
197 to provide transportation in a safe manner, the magistrate shall designate such alternative transportation  
198 provider to provide transportation of the person. If no alternative transportation provider is available to  
199 provide transportation, willing to provide transportation, and able to provide transportation in a safe  
200 manner, the magistrate shall designate the primary law-enforcement agency and jurisdiction designated to  
201 execute the temporary detention order to provide transportation of the person.

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

213         In such cases, a copy of the temporary detention order shall accompany the person being  
214 transported pursuant to this section at all times and shall be delivered by the alternative transportation  
215 provider to the temporary detention facility. The temporary detention facility shall return a copy of the



216 temporary detention order to the court designated by the magistrate as soon as is practicable. Delivery of  
217 an order to a law-enforcement officer or alternative transportation provider and return of an order to the  
218 court may be accomplished electronically or by facsimile.

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

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

234 D. In cases in which an alternative facility of temporary detention is identified and the law-  
235 enforcement agency or alternative transportation provider identified to provide transportation in  
236 accordance with subsection B continues to have custody of the person, the local law-enforcement agency  
237 or alternative transportation provider shall transport the person to the alternative facility of temporary  
238 detention identified by the employee or designee of the community services board. In cases in which an  
239 alternative facility of temporary detention is identified and custody of the person has been transferred from  
240 the law-enforcement agency or alternative transportation provider that provided transportation in  
241 accordance with subsection B to the initial facility of temporary detention, the employee or designee of  
242 the community services board shall request, and a magistrate may enter an order specifying, an alternative

243 transportation provider or, if no alternative transportation provider is available, willing, and able to provide  
244 transportation in a safe manner, the local law-enforcement agency for the jurisdiction in which the person  
245 resides or, if the nearest boundary of the jurisdiction in which the person resides is more than 50 miles  
246 from the nearest boundary of the jurisdiction in which the person is located, the law-enforcement agency  
247 of the jurisdiction in which the person is located, to provide transportation.

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

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

260 G. No person who provides alternative transportation pursuant to this section shall be liable to the  
261 person being transported for any civil damages for ordinary negligence in acts or omissions that result  
262 from providing such alternative transportation.

263 **2. That the Department of Behavioral Health and Developmental Services shall amend its existing**  
264 **contract for the provision of alternative transportation of a person who is subject to a temporary**  
265 **detention order or enter into new contracts for alternative transportation of a person who is subject**  
266 **to a temporary detention order to ensure the sufficient availability of alternative transportation**  
267 **providers to retain sufficient licensed security staff to take custody of and provide transportation**  
268 **for persons for whom alternative transportation is ordered immediately upon execution of a**

**269 temporary detention order, until all state funds for alternative transportation have been expended,**  
**270 as provided in this act.**

**271 #**