

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

Senate Bill 442

By Senators Takubo, Trump, and Deeds

[Introduced January 12, 2024; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §27-5-2 of the Code of West Virginia, 1931, as amended, relating to
2 removing liability for mental health professionals providing services in mental hygiene
3 cases involving possible involuntary hospitalization.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5. INVOLUNTARY HOSPITALIZATION.

**§27-5-2. Institution of proceedings for involuntary custody for examination; custody;
probable cause hearing; examination of individual.**

1 (a) Any adult person may make an application for involuntary hospitalization for
2 examination of an individual when the person making the application has reason to believe that the
3 individual to be examined has a substance use disorder as defined by the most recent edition of
4 the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders,
5 inclusive of substance use withdrawal, or is mentally ill and because of his or her substance use
6 disorder or mental illness, the individual is likely to cause serious harm to himself, herself, or to
7 others if allowed to remain at liberty while awaiting an examination and certification by a physician,
8 psychologist, licensed professional counselor, licensed independent social worker, an advanced
9 nurse practitioner, or physician assistant as provided in subsection (e) of this section: *Provided,*
10 That a diagnosis of dementia, epilepsy, or intellectual or developmental disability alone may not be
11 a basis for involuntary commitment to a state hospital.

12 (b) Notwithstanding any language in this subsection to the contrary, if the individual to be
13 examined under the provisions of this section is incarcerated in a jail, prison, or other correctional
14 facility, then only the chief administrative officer of the facility holding the individual may file the
15 application, and the application must include the additional statement that the correctional facility
16 itself cannot reasonably provide treatment and other services necessary to treat the individual's
17 mental illness or substance use.

18 (c) Application for involuntary custody for examination may be made to the circuit court,
19 magistrate court, or a mental hygiene commissioner of the county in which the individual resides,

20 or of the county in which he or she may be found. A magistrate before whom an application or
21 matter is pending may, upon the availability of a mental hygiene commissioner or circuit court
22 judge for immediate presentation of an application or pending matter, transfer the pending matter
23 or application to the mental hygiene commissioner or circuit court judge for further proceedings
24 unless otherwise ordered by the chief judge of the judicial circuit.

25 (d) The person making the application shall give information and state facts in the
26 application required by the form provided for this purpose by the Supreme Court of Appeals.

27 (e) (1) The circuit court, mental hygiene commissioner, or magistrate may enter an order
28 for the individual named in the application to be detained and taken into custody as provided in
29 §27-5-1 and §27-5-10 of this code for the purpose of holding a probable cause hearing as provided
30 in §27-5-2 of this code. An examination of the individual to determine whether the individual meets
31 involuntary hospitalization criteria shall be conducted in person unless an in person examination
32 would create a substantial delay in the resolution of the matter in which case the examination may
33 be by video conference, and shall be performed by a physician, psychologist, a licensed
34 professional counselor practicing in compliance with §30-31-1 *et seq.* of this code, a licensed
35 independent clinical social worker practicing in compliance with §30-30-1 *et seq.* of this code, an
36 advanced nurse practitioner with psychiatric certification practicing in compliance with §30-7-1 *et*
37 *seq.* of this code, a physician assistant practicing in compliance with §30-3-1 *et seq.* of this code,
38 or a physician assistant practicing in compliance with §30-3E-1 *et seq.* of this code: *Provided*, That
39 a licensed professional counselor, a licensed independent clinical social worker, a physician
40 assistant, or an advanced nurse practitioner with psychiatric certification may only perform the
41 examination if he or she has previously been authorized by an order of the circuit court to do so,
42 the order having found that the licensed professional counselor, the licensed independent clinical
43 social worker, physician assistant, or advanced nurse practitioner with psychiatric certification has
44 particularized expertise in the areas of mental health and mental hygiene or substance use
45 disorder sufficient to make the determinations required by the provisions of this section. The

46 examination shall be provided or arranged by a community mental health center designated by the
47 Secretary of the Department of Health and Human Resources to serve the county in which the
48 action takes place. The order is to specify that the evaluation be held within a reasonable period of
49 time not to exceed two hours and shall provide for the appointment of counsel for the individual:
50 *Provided, however,* That the time requirements set forth in this subsection only apply to persons
51 who are not in need of medical care for a physical condition or disease for which the need for
52 treatment precludes the ability to comply with the time requirements. During periods of holding and
53 detention authorized by this subsection, upon consent of the individual or if there is a medical or
54 psychiatric emergency, the individual may receive treatment. The medical provider shall exercise
55 due diligence in determining the individual's existing medical needs and provide treatment the
56 individual requires, including previously prescribed medications. As used in this section,
57 "psychiatric emergency" means an incident during which an individual loses control and behaves
58 in a manner that poses substantial likelihood of physical harm to himself, herself, or others. Where
59 a physician, psychologist, licensed professional counselor, licensed independent clinical social
60 worker, physician assistant, or advanced nurse practitioner with psychiatric certification has, within
61 the preceding 72 hours, performed the examination required by this subsection the community
62 mental health center may waive the duty to perform or arrange another examination upon
63 approving the previously performed examination. Notwithstanding this subsection, §27-5-4(r) of
64 this code applies regarding payment by the county commission for examinations at hearings. If the
65 examination reveals that the individual is not mentally ill or has no substance use disorder or is
66 determined to be mentally ill or has a substance use disorder but not likely to cause harm to
67 himself, herself, or others, the individual shall be immediately released without the need for a
68 probable cause hearing and the examiner is not civilly liable for the rendering of the opinion absent
69 a finding of professional negligence. The examiner shall immediately, but no later than 60 minutes
70 after completion of the examination, provide the mental hygiene commissioner, circuit court, or
71 magistrate before whom the matter is pending, and the state hospital to which the individual may

72 be involuntarily hospitalized, the results of the examination on the form provided for this purpose
73 by the Supreme Court of Appeals for entry of an order reflecting the lack of probable cause.

74 (2) Any mental health service provider authorized under §27-5-2(e) of this code to perform
75 such an examination shall be free from liability, regardless of the examination results determined
76 by the professional, unless clear evidence of negligence or deviation from the applicable standard
77 of care, legal causation, and a compensable injury are demonstrated to and affirmed by a court of
78 competent jurisdiction.

79 (f) A probable cause hearing shall be held promptly before a magistrate, the mental
80 hygiene commissioner, or circuit judge of the county of which the individual is a resident or where
81 he or she was found. If requested by the individual or his or her counsel, the hearing may be
82 postponed for a period not to exceed 48 hours. Hearings may be conducted via videoconferencing
83 unless the individual or his or her attorney object for good cause or unless the magistrate, mental
84 hygiene commissioner, or circuit judge orders otherwise. The Supreme Court of Appeals is
85 requested to develop regional mental hygiene collaboratives where mental hygiene
86 commissioners can share on-call responsibilities, thereby reducing the burden on individual
87 circuits and commissioners.

88 The individual shall be present at the hearing and has the right to present evidence,
89 confront all witnesses and other evidence against him or her, and examine testimony offered,
90 including testimony by representatives of the community mental health center serving the area.
91 Expert testimony at the hearing may be taken telephonically or via videoconferencing. The
92 individual has the right to remain silent and to be proceeded against in accordance with the Rules
93 of Evidence of the Supreme Court of Appeals, except as provided in §27-1-12 of this code. At the
94 conclusion of the hearing, the magistrate, mental hygiene commissioner, or circuit court judge
95 shall find and enter an order stating whether or not it is likely that deterioration will occur without
96 clinically necessary treatment, or there is probable cause to believe that the individual, as a result
97 of mental illness or substance use disorder, is likely to cause serious harm to himself or herself or

98 to others. Any such order entered shall be provided to the state hospital to which the individual
99 may or will be involuntarily hospitalized within 60 minutes of filing absent good cause.

100 (g) Probable cause hearings may occur in the county where a person is hospitalized. The
101 judicial hearing officer may: use videoconferencing and telephonic technology; permit persons
102 hospitalized for substance use disorder to be involuntarily hospitalized only until detoxification is
103 accomplished; and specify other alternative or modified procedures that are consistent with the
104 purposes and provisions of this article to promote a prompt, orderly, and efficient hearing. The
105 alternative or modified procedures shall fully and effectively guarantee to the person who is the
106 subject of the involuntary commitment proceeding and other interested parties due process of the
107 law and access to the least restrictive available treatment needed to prevent serious harm to self
108 or others.

109 (h) If the magistrate, mental hygiene commissioner, or circuit court judge at a probable
110 cause hearing or a mental hygiene commissioner or circuit judge at a final commitment hearing
111 held pursuant to the provisions of §27-5-4 of this code finds that the individual, as a direct result of
112 mental illness or substance use disorder is likely to cause serious harm to himself, herself, or
113 others and because of mental illness or a substance use disorder requires treatment, the
114 magistrate, mental hygiene commissioner, or circuit court judge may consider evidence on the
115 question of whether the individual's circumstances make him or her amenable to outpatient
116 treatment in a nonresidential or nonhospital setting pursuant to a voluntary treatment agreement.
117 At the conclusion of the hearing, the magistrate, mental hygiene commissioner, or circuit court
118 judge shall find and enter an order stating whether or not it is likely that deterioration will occur
119 without clinically necessary treatment, or there is probable cause to believe that the individual, as
120 a result of mental illness or substance use disorder, is likely to cause serious harm to himself or
121 herself or others. The agreement is to be in writing and approved by the individual, his or her
122 counsel, and the magistrate, mental hygiene commissioner, or circuit court judge. If the
123 magistrate, mental hygiene commissioner, or circuit court judge determines that appropriate

124 outpatient treatment is available in a nonresidential or nonhospital setting, the individual may be
125 released to outpatient treatment upon the terms and conditions of the voluntary treatment
126 agreement. The failure of an individual released to outpatient treatment pursuant to a voluntary
127 treatment agreement to comply with the terms of the voluntary treatment agreement constitutes
128 evidence that outpatient treatment is insufficient and, after a hearing before a magistrate, mental
129 hygiene commissioner, or circuit judge on the issue of whether or not the individual failed or
130 refused to comply with the terms and conditions of the voluntary treatment agreement and whether
131 the individual as a result of mental illness or substance use disorder remains likely to cause
132 serious harm to himself, herself, or others, the entry of an order requiring admission under
133 involuntary hospitalization pursuant to §27-5-3 of this code may be entered. Nothing in the
134 provisions of this article regarding release pursuant to a voluntary treatment agreement or
135 convalescent status may be construed as creating a right to receive outpatient mental health
136 services or treatment, or as obligating any person or agency to provide outpatient services or
137 treatment. Time limitations set forth in this article relating to periods of involuntary commitment to a
138 mental health facility for hospitalization do not apply to release pursuant to the terms of a voluntary
139 treatment agreement: *Provided*, That release pursuant to a voluntary treatment agreement may
140 not be for a period of more than six months if the individual has not been found to be involuntarily
141 committed during the previous two years and for a period of no more than two years if the
142 individual has been involuntarily committed during the preceding two years. If in any proceeding
143 held pursuant to this article the individual objects to the issuance or conditions and terms of an
144 order adopting a voluntary treatment agreement, then the circuit judge, magistrate, or mental
145 hygiene commissioner may not enter an order directing treatment pursuant to a voluntary
146 treatment agreement. If involuntary commitment with release pursuant to a voluntary treatment
147 agreement is ordered, the individual subject to the order may, upon request during the period the
148 order is in effect, have a hearing before a mental hygiene commissioner or circuit judge where the
149 individual may seek to have the order canceled or modified. Nothing in this section affects the

150 appellate and habeas corpus rights of any individual subject to any commitment order.

151 The commitment of any individual as provided in this article shall be in the least restrictive
152 setting and in an outpatient community-based treatment program to the extent resources and
153 programs are available, unless the clear and convincing evidence of the certifying professional
154 under subsection (e) of this section, who is acting in a manner consistent with the standard of care
155 establishes that the commitment or treatment of that individual requires an inpatient hospital
156 placement. Outpatient treatment will be based upon a plan jointly prepared by the department and
157 the comprehensive community mental health center or licensed behavioral health provider.

158 (i) If the certifying professional determines that an individual requires involuntary
159 hospitalization for a substance use disorder as permitted by §27-5-2(a) of this code which, due to
160 the degree of the disorder, creates a reasonable likelihood that withdrawal or detoxification will
161 cause significant medical complications, the person certifying the individual shall recommend that
162 the individual be closely monitored for possible medical complications. If the magistrate, mental
163 hygiene commissioner, or circuit court judge presiding orders involuntary hospitalization, he or she
164 shall include a recommendation that the individual be closely monitored in the order of
165 commitment.

166 (j) The Supreme Court of Appeals and the Secretary of the Department of Health and
167 Human Resources shall specifically develop and propose a statewide system for evaluation and
168 adjudication of mental hygiene petitions which shall include payment schedules and
169 recommendations regarding funding sources. Additionally, the Secretary of the Department of
170 Health and Human Resources shall also immediately seek reciprocal agreements with officials in
171 contiguous states to develop interstate/intergovernmental agreements to provide efficient and
172 efficacious services to out-of-state residents found in West Virginia and who are in need of mental
173 hygiene services.

NOTE: The purpose of this bill is to remove liability for mental health professionals

providing services in mental hygiene cases involving possible involuntary hospitalization.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.