

# **WEST VIRGINIA LEGISLATURE**

**2024 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 442**

BY SENATORS TAKUBO, TRUMP, DEEDS, AND HAMILTON

[Originating in the Committee on the Judiciary;

reported January 23, 2024]



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

*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  
3 the individual to be examined has a substance use disorder as defined by the ~~most recent~~ fifth  
4 edition of the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental  
5 Disorders, inclusive of substance use withdrawal, or is mentally ill and because of his or her  
6 substance use disorder or mental illness, the individual is likely to cause serious harm to himself,  
7 herself, or to others if allowed to remain at liberty while awaiting an examination and certification  
8 by a physician, psychologist, licensed professional counselor, licensed independent social  
9 worker, an advanced nurse practitioner, or physician assistant as provided in subsection (e) of  
10 this section: *Provided*, That a diagnosis of dementia, epilepsy, or intellectual or developmental  
11 disability alone may not be 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~~ shall include the additional statement that the correctional  
16 facility itself cannot reasonably provide treatment and other services necessary to treat the  
17 individual's 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 judge, mental hygiene commissioner, or magistrate may enter an  
28 order for the individual named in the application to be detained and taken into custody as provided  
29 in §27-5-1 and §27-5-10 of this code for the purpose of holding a probable cause hearing as  
30 provided in this section. An examination of the individual to determine whether the individual  
31 meets involuntary hospitalization criteria shall be conducted in person unless an in person  
32 examination would create a substantial delay in the resolution of the matter in which case the  
33 examination may be by video conference, and shall be performed by a physician, psychologist, a  
34 licensed professional counselor practicing in compliance with §30-31-1 *et seq.* of this code, a  
35 licensed independent clinical social worker practicing in compliance with §30-30-1 *et seq.* of this  
36 code, an advanced nurse practitioner with psychiatric certification practicing in compliance with  
37 §30-7-1 *et seq.* of this code, a physician assistant practicing in compliance with §30-3-1 *et seq.*  
38 of this code, or a physician assistant practicing in compliance with §30-3E-1 *et seq.* of this code:  
39 *Provided*, That a licensed professional counselor, a licensed independent clinical social worker,  
40 a physician assistant, or an advanced nurse practitioner with psychiatric certification may only  
41 perform the examination if he or she has previously been authorized by an order of the circuit  
42 court to do so, the order having found that the licensed professional counselor, the licensed  
43 independent clinical social worker, physician assistant, or advanced nurse practitioner with  
44 psychiatric certification has particularized expertise in the areas of mental health and mental  
45 hygiene or substance use disorder sufficient to make the determinations required by the

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

72 matter is pending, and the state hospital to which the individual may be involuntarily hospitalized,  
73 the results of the examination on the form provided for this purpose by the Supreme Court of  
74 Appeals for entry of an order reflecting the lack of probable cause.

75 (2) A mental health service provider authorized under this subsection who performs an  
76 involuntary custody examination shall not be civilly liable to any party or non-party to the  
77 proceeding regardless of the examination results unless the mental health service provider acted  
78 with negligence demonstrated by clear and convincing evidence or in bad faith in performing the  
79 examination or rendering his or her opinion.

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

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

98 of mental illness or substance use disorder, is likely to cause serious harm to himself or herself  
99 or to others. Any such order entered shall be provided to the state hospital to which the individual  
100 may or will be involuntarily hospitalized within 60 minutes of filing absent good cause.

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

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

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



150 circuit court judge where the individual may seek to have the order canceled or modified. Nothing  
151 in this section affects the appellate and habeas corpus rights of any individual subject to any  
152 commitment order.

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

161 (†) (j) If the certifying professional determines that an individual requires involuntary  
162 hospitalization for a substance use disorder as permitted by subsection (a) of this section which,  
163 due to the degree of the disorder, creates a reasonable likelihood that withdrawal or detoxification  
164 will cause significant medical complications, the person certifying the individual shall recommend  
165 that the individual be closely monitored for possible medical complications. If the magistrate,  
166 mental hygiene commissioner, or circuit court judge ~~presiding~~ orders involuntary hospitalization,  
167 he or she shall include a recommendation that the individual be closely monitored in the order of  
168 commitment.

169 (†) (k) The Supreme Court of Appeals and the Secretary of the Department of ~~Health and~~  
170 ~~Human Resources~~ Human Services shall specifically develop and propose a statewide system  
171 for evaluation and adjudication of mental hygiene petitions which shall include payment schedules  
172 and recommendations regarding funding sources. Additionally, the Secretary of the Department  
173 of ~~Health and Human Resources~~ Human Services shall also immediately seek reciprocal  
174 agreements with officials in contiguous states to develop interstate/intergovernmental

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175 agreements to provide efficient and efficacious services to out-of-state residents found in West  
176 Virginia and who are in need of mental hygiene services.