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CLIENT ADVISORY

June 26, 2014

Changes to ECO and TDO Laws Seek to Curb “Streeting” in the Wake of Deeds Incident

The country will never forget the events that unfolded on April 16, 2007, when an emotionally-disturbed student shot and killed a total of 32 students and teachers on the Virginia Tech campus in Blacksburg, Virginia, before eventually killing himself. However, it was the tragic incident that occurred in November 2013 between state Senator Creigh Deeds and his son Austin “Gus” Deeds that prompted the Virginia General Assembly to take a closer look at Virginia’s behavioral health laws related to psychiatric emergencies. Specifically, Senator Deeds, along with others from the House and Senate, introduced legislation that would amend laws related to Virginia’s Emergency Custody Orders (ECOs) and Temporary Detention Orders (TDOs) and create a new statewide psychiatric bed registry. Under old laws, when an ECO expired, and no facility could be identified to issue a TDO, psychiatric patients were released from hospitals, usually to outpatient programs; a practice that is generally referred to as “streeting.”¹

Omnibus bill [SB 260](#), sponsored by Senator Deeds, aimed at preventing outcomes such as the one that occurred with his son, was signed into law by the Governor on April 6, 2014. The key changes to Virginia’s ECO and TDO laws, which take effect July 1, 2014, include:

ECO Changes: Va. Code §§ 19.2-340 (minors) and 37.2-808 (adults)

- The time period during which a person can be held under an ECO was extended from its original four-hour time limit with a possible two hour extension totaling six hours to a new eight hour time limit. The new law does not include an opportunity for extension. The time period for law enforcement to execute an ECO was also extended to eight hours from when the ECO is issued.
- When an individual is brought to a hospital under an ECO, but also meets TDO criteria, the local Community Services Board (CSB) must now notify the state hospital in the region to inform the hospital that there is potential for the patient to be transferred to that hospital for the duration of any TDO. Beginning July 1, 2014, patients will no longer be released when an ECO expires simply because a TDO facility could not be identified. The new law makes the state psychiatric facility in the region where the patient is located the facility of last resort and mandates that the state facility admit the patient under a TDO if no other private facility to accept the patient can be identified. With this change, the intent and hope is that there will always be a bed for someone who needs admission and that no one will be turned away at the expiration of an ECO because there was not a facility that could take him/her.

TDO Changes: Va. Code §§ 19.2-340.1(minors) and 37.2-809 (adults)

- As mentioned above, the amendments to TDO laws require the state facility in the region where the patient is located to serve as the TDO facility if no other facility can be located that is able to admit the patient. This

¹ See, *Report No. 206-11, OIG Review of Emergency Services: Individuals meeting statutory criteria for temporary detention not admitted to a psychiatric facility for further evaluation and treatment*, dated February 28, 2012. Accessed June 26, 2014: <http://www.oig.virginia.gov/documents/SS-EmergencySvcReview206-11.pdf>.

means that CSB workers will always have a TDO facility at the expiration of an ECO and patients that meet TDO criteria will no longer be “streeted” because a facility could not be located.

- Although there is no process for extending the eight hour ECO time period, the CSB and state facility serving as the TDO facility are given an additional four hours once the ECO expires and the TDO is issued to locate an alternate TDO facility. If an alternate facility is found during the transport to the state TDO facility, the new amendments allow the patient to be taken directly to the alternate facility.
- Nearly every year since the Virginia Tech shooting in 2007, legislators have introduced laws seeking to extend the TDO period from 48 hours to as much as a week. Apparently concerned with the financial impact to the Commonwealth, the Department of Medical Assistance Services (the agency ultimately responsible for the cost of care during a TDO) has previously opposed extending the TDO time period.² This year, the TDO time period was successfully negotiated and extended from 48 hours (one of the shortest in the country) to 72 hours. This means that a patient can now be held under a TDO for up to three days (or the next day thereafter when the courts are legally open) before being discharged or attending an involuntary commitment hearing.

Other changes to ECO and TDO laws include patient notice requirements, changes to CSB qualifications, clarifications to patient transport obligations, and establishing state monitoring programs.

Creation of Psychiatric Bed Registry: Va. Code § 37.2-308.1

Although recent reports indicate that psychiatric beds were available to Gus Deeds at local hospitals, the Rockbridge CSB alleged that it was unable to locate a bed leading to Gus Deeds ultimately being sent home when the extended ECO time period expired. To help assist in locating available psychiatric beds, a new law, effective April, 6, 2014, establishes a statewide web-based psychiatric bed registry. The registry, maintained by the Virginia Department of Behavioral Health and Developmental Services (DBHDS), requires all state and private psychiatric facilities licensed by the DBHDS to provide real-time data on the availability of inpatient psychiatric beds. The information in the registry includes the acuity of patients who will be accepted and the levels of security and treatment available in those beds. Although the new state law does not require hospitals to accept a patient under a TDO, the registry is intended to assist CSB and hospital workers in locating an appropriate facility with available beds before an ECO expires.

EMTALA Considerations

It is important to note that the law changes noted above do not alter or amend a hospital's obligations under the federal Emergency Medical Treatment and Active Labor Act (EMTALA). As it always has, EMTALA requires a hospital to provide an appropriate medical screening to anyone who comes to an emergency department to determine if the patient is suffering from an emergency medical condition. Emergency medical conditions, as defined by federal regulations, specifically include psychiatric emergencies. When a patient suffers from a psychiatric emergency, every hospital has the obligation to either admit the patient (if the hospital has psychiatric services available) or provide treatment to stabilize the patient and effectuate an appropriate transfer to another hospital that can provide psychiatric treatment. A hospital that offers psychiatric treatment, and has an available bed, is required to accept the transfer. Failing to take any of these steps can result in an EMTALA violation.

A recent question and answer session with the DBHDS (found on the DBHDS's [website](#)) addresses other EMTALA considerations and provides guidance on the ECO and TDO changes outlined above. Of particular note, the DBHDS states that, “[t]ransferring an individual to a facility that has stated it cannot safely manage the individual's medical condition is taking a risk on the part of the sending hospital, which could be liable under

² Department of Planning and Budget Fiscal Impact Statement. Accessed June 26, 2014: <http://leg1.state.va.us/cgi-bin/legp504.exe?101+oth+SB85F122+PDF>.

EMTALA for an inappropriate transfer.” These cautionary words emphasize that, in addition to securing treatment for an acute psychiatric emergency, before transferring patients, ED physicians must ensure that a patient’s concurrent medical conditions are suitable for treatment at a state psychiatric hospital.

If you have questions about the recent changes to Virginia’s behavioral health laws, or if you have questions regarding your hospital’s EMTALA obligations related to psychiatric emergencies, please contact W. Scott Johnson, sjohnson@hdjn.com, Mary Malone, mmalone@hdjn.com, Molly Huffman, mhuffman@hdjn.com, or Thomas Miller tmiller@hdjn.com, or call HDJN at 804-967-9604. If you would like more information about other services offered at Hancock, Daniel, Johnson, and Nagle, P.C., please visit our website at www.hdjn.com.

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