

**MEMORANDUM**

TO: Senate Committee on Health and Welfare

FROM: Stuart G. Schurr, General Counsel, Department of Disabilities, Aging, and Independent Living (DAIL) *SGS*

RE: S.192, An act relating to forensic facility admissions criteria and processes; **DAIL's Response to the Proposal to Limit the Duration of Initial Commitment Orders to a Maximum of 90 Days**

DATE: February 12, 2024

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DAIL appreciates the interest of the Committee in creating parallel procedural structures for those considered for commitment to the custody of the commissioners of mental health and DAIL.

Nonetheless, the differences between these populations, as well as the circumstances under which each may come into the custody of the commissioners, justify having distinct processes that are tailored to the unique characteristics of each population.

First, whereas individuals may come into the custody of the commissioner of mental health regardless of the crime for which they have been charged, only those who have been charged with serious violent and/or sexual offenses are eligible for commitment to the custody of the DAIL commissioner. As such, it is necessary to ask what the purpose of a 90-day review would be for those committed to the custody of the DAIL commissioner. Is there an expectation that the individual with an intellectual disability will no longer need care, custody, and habilitation after 90 days? More specifically, is there an expectation that, after 90 days, the individual will no longer have an intellectual disability, or will no longer be dangerous (despite having been charged, no more than 90 days earlier, with a violent and/or sexual crime for which they would have faced significant criminal penalties but for the finding of incompetence to stand trial)? Is the purpose to see if the competency of the individual with an intellectual disability has been restored after just 90 days?

Whereas an individual with mental illness may benefit from the administration of psychiatric medications, and, as a result, their behaviors may improve and thereby obviate the need for further commitment, such circumstances do not exist for individuals with intellectual disabilities. Individuals with intellectual disabilities, who are committed to the custody of the DAIL commissioner, do not

receive psychiatric medications for their intellectual disability; rather, they receive behavioral supports and programming, which, over time will, hopefully, enable them to be discharged from custody.

As DAIL has presented from a clinical perspective (see Memorandum, dated, February 12, 2024, from Jacqueline Prue), the full-scale IQ of an individual with an intellectual disability will not change over time. There is no goal to “cure” a person of an intellectual disability, and, as we have heard, it is unlikely that the behavioral changes needed to release a violent offender from the DAIL commissioner’s custody will occur in a mere 90 days. Rather, the individual and their treatment team must work for many months to stabilize the individual, and only after this is accomplished can the individual’s criminogenic needs for treatment and a treatment modality be identified. Thereafter, strategies and methods to modify the behaviors must be implemented and applied, often for years, to effect positive behavioral change. As such, it is unreasonable to assume that, after a maximum of 90 days, the individual with intellectual disabilities will have modified their behaviors and no longer present a danger of harm to the community.

Second, the proposal to require that a hearing be held no more than 90 days after the date of the initial order, to continue the custody of an individual committed under Act 248, could result in significant and, perhaps, unintended consequences. If an initial commitment order must expire no more than 90 days after its issuance, the proposed language requires that a hearing be held at which DAIL must prove that the individual, on or before Day 90, is “a person in need of **continued** care, custody and habilitation.” Per 18 V.S.A. § 8846(a)(1)(B), DAIL would need to file a petition, which includes “a statement of the current and relevant facts upon which the person’s alleged need for **continued** custody, care, and habilitation is predicated.” (Emphasis added). As set forth in 18 V.S.A. § 8839(5), the proposed definition of “a person in need of continued custody, care, and habilitation” would require the Department to show that:

“...in the time since the last order of commitment was issued, the person:

- (A) has inflicted or attempted to inflict physical or sexual harm to another;
- (B) by the person’s threats or actions, has placed another person in reasonable fear of physical or sexual harm; or
- (C) has exhibited behavior demonstrating that, absent treatment or programming provided by the Commissioner, there is a reasonable likelihood that the person would inflict or attempt to inflict physical or sexual harm to another.”

If the Department cannot show that “in the time since the last order of commitment” (i.e., no more than 90 days earlier in the case of an initial order of commitment) that the person has committed or threatened an act of violence, or has exhibited sufficient concerning behavior, the individual would **not** be deemed to be “a person in need of continued custody, care, and habilitation,” and the court would be **required** to discharge them from the commissioner’s custody after just 90 days. In addition, if competency to stand trial of the individual with an intellectual disability has not been restored within those 90 days, the individual, who, only recently, had allegedly committed a violent and/or sexual crime, **must** be released from the commissioner’s custody, and could not face charges.

For each of these reasons, DAIL asserts that it would be inefficient and imprudent to require initial Act 248 commitment orders to expire after no more than 90 days and to require DAIL to demonstrate, at that time, that the committed individual is “a person in need of continued custody, care, and habilitation.” Nonetheless, notwithstanding the court and DAIL’s ongoing obligations to ensure that the environment is the least restrictive setting for the individual, DAIL would support giving the individual the right to request more frequent reviews of forensic facility placement orders for the purpose of determining whether the forensic facility remains the least restrictive environment to meet the needs of the individual and to protect the community.