

S.89, An act relating to establishing a forensic facility
DAIL Testimony re: Act 248; Senate Judiciary Committee
March 2, 2023

DAIL supports S.89 which will establish a forensic facility in Vermont, to address a current gap in the system of care as it pertains to persons served under Act 248. Act 248, named after the 1987 act that created the system, pertains to the commitment of individuals with an Intellectual Disability (ID) who have been deemed not competent to stand trial by the Criminal Division of the Superior Court; who present a danger of harm to others; and for whom appropriate custody, care, and habilitation can be provided by the Commissioner in a designated program.

Any program created for an individual pursuant to Act 248 must be approved by the judiciary to assure that the individual is served in the least restrictive environment, and there is annual judicial review of whether the individual is still in need of custody, care, and habilitation. A forensic facility would provide a secure facility for those individuals who present a level of dangerousness that cannot currently be met in an unsecured setting. DAIL is required to continually assess the individual's needs and step them down to a less restrictive setting when such a placement is appropriate, and the individual is further entitled to seek judicial review of their placement.

Many of the proposed legislative changes in S.89 are necessary for DAIL to be able to place a person in a forensic facility when a person's risk to the public requires a secure setting, and/or are intended to clean up statutory language that has become outdated due to prior revisions. A detailed explanation of those changes follows below.

DAIL is committed to working with the Department of Mental Health on the operation and administration of the forensic facility, and both departments are in agreement on using an MOU to provide a structure for the administration and operation of the forensic facility, as well as establishing criteria that must be considered for admission to the forensic facility.

Introduction and History of Act 248

- When first enacted, Act 248, which is set forth in Title 18, Chapter 206, provided a separate court process by which individuals with an Intellectual Disability could be institutionalized, even if they had not been charged with a crime.
- In 1995, Vermont enacted a significant policy change, repealing this civil commitment regime and replacing it with a process under which individuals with ID could only be committed to community-based settings. Much of **subchapters 1 and 2 of Chapter 206 (18 V.S.A. §§ 8821 through 8838)** allowed interested persons to petition for the commitment of individuals with an ID. Those subchapters were repealed in 1995.

- Despite the repeal of subchapters 1 and 2 of Chapter 206, **subchapter 3 of Chapter 206**, titled, “Judicial Proceedings; Persons with an Intellectual Disability Who Present a Danger of Harm to Others” (18 V.S.A. §§ 8839-8845) remains intact.
- But much of subchapter 3 references repealed sections of subchapters 1 and 2, which, as previously noted, provided a mechanism for an “interested person” to petition the court for state supervision of an individual with ID who presents a danger of harm to others. This is evidenced by several of the subchapter 3 sections that reference the “petition and procedures” for initiating a hearing.
- An individual with an ID who presents a danger of harm to others cannot be initially committed to the DAIL Commissioner’s custody by petition of an interested person; only the Criminal Division, pursuant to 13 V.S.A. § 4823, may do so, after a finding of incompetence or insanity.
- As such, and as more fully discussed below, DAIL is proposing that much of subchapter 3 of Chapter 206 be repealed.

Act 248 Today

- It is helpful to remember that Act 248 involves 2 separate processes.
 - **FIRST**: Initial commitment, which is provided for in 13 V.S.A. § 4823 and occurs in the Criminal Division; *and*
 - **SECOND**: Judicial reviews, which are provided for in Title 18, Chapter 206 of Vermont Statutes and occur annually in the Family Division.

1. INITIAL COMMITMENT

- The only way an individual may be placed **initially** in the custody of the DAIL Commissioner under Act 248 is through the process outlined in 13 V.S.A. § 4823, titled, “Findings and Order; Persons with an Intellectual Disability.”
- An individual cannot come into custody through the filing of a petition by an interested person. It can only occur when the Criminal Division finds, pursuant to 13 V.S.A. § 4823, that the defendant is “a person in need of custody, care, and habilitation,” as defined in 18 V.S.A. § 8839.
- DAIL supports the following changes to 13 V.S.A. § 4823, for the following reasons:
 - **Repealing** § 4823(b), as it refers to 18 V.S.A. § 8843, a vestige of the old civil commitment regime that no longer has practical effect. Further, § 4823(b) refers to the right “to be examined and discharged,” which are covered in the annual judicial review provisions in 18 V.S.A. § 8845, as proposed.
 - **Adding** to § 4823(b) a reference to 18 V.S.A. § 8845, which, as proposed, sets forth the procedures to be followed during annual judicial reviews of an Act 248 order and in connection with a discharge from such an order.

- **Repealing** § 4823(c), as it refers to 13 V.S.A. § 4822, which relates to orders of commitment for persons with mental illness. As proposed, procedures for discharge from Act 248 are addressed in 18 V.S.A. § 8845, and, therefore, § 4823(c) is unnecessary.
- **Adding** to § 4823(c) a process to be followed and criteria to be reviewed by the *Criminal Division* when the Commissioner seeks to have a person initially committed to the Commissioner’s custody placed in a forensic facility.

2. JUDICIAL (ANNUAL) REVIEW

- After an individual is found by the Criminal Division to be “a person in need of custody, care, and habilitation,” the individual’s Act 248 order is reviewed annually. These reviews currently occur in the Family Division and are required by 18 V.S.A. § 8845. And while this section is one of the sole remaining provisions of subchapter 3 of Chapter 206 that has practical effect, currently, it does not adequately speak to the annual judicial review or discharge processes.
- DAIL supports the following changes to 18 V.S.A. Chapter 206, subchapter 3 for the following reasons:
 - **18 V.S.A. § 8839:**
 - **Striking** the stand-alone definition of “Danger of harm to others” in § 8839(1) and **adding** its substance to the definition of “Person in need of custody, care, and habilitation” in § 8839(3)(B). As stated above, in initial commitments under 13 V.S.A. § 4823(a), the Criminal Division can commit a person to Act 248 upon finding them to be “a person in need of custody, care, and habilitation as defined in 18 V.S.A. § 8839.” The definition of “danger of harm to others” has little utility in annual reviews.
 - **Adding**, as § 8839(4), a definition of “Person in need of **continued** custody, care, and habilitation.” Much of this text is taken from an existing definition in the Mental Health statutes (see 18 V.S.A. § 7101(17)) and reflects the longstanding practice in Act 248 judicial review proceedings as to how the Family Division assesses an individual’s need for continued Act 248 custody.
 - **18 V.S.A. §§ 8840 through 8843:**
 - **Repealing.** As discussed above, these sections reference a defunct civil commitment regime that allowed for citizens to petition for the commitment of individuals with ID. Also, several of these the subchapter 3 sections cite to repealed sections from subchapters 1 and 2. (e.g., § 8841 references sections 8822-8826,

which were all repealed in 1995. Also, § 8842 references section 8827, which was repealed in 1995).

- **Moving** the content of § 8840 (“Jurisdiction and Venue”) and § 8843 (“Findings and Order”) into § 8845 (“Judicial Review”).

- 18 V.S.A. § 8845

- Since this is the section that provides for judicial review of, and discharge from, Act 248 supervision, it is arguably the only substantive provision in Title 18, Chapter 206 that has significant relevance to current Act 248 practice. It consolidates several relevant provisions from other statutes into this section and adds new material only where necessary to cure defects caused by the 1995 repeals of subchapters 1 and 2. DAIL supports the following:
 - **Adding** language giving notice to the courts and State’s Attorneys before the Commissioner’s administrative discharge of an individual from Act 248 custody. This mirrors the language in 13 V.S.A. § 4822, which relates to orders of commitment for persons with mental illness.
 - **Deleting** § 8845(b),
 - as it references procedures in § 8834, which was repealed in 1995; and
 - it places jurisdiction over judicial reviews with the Criminal Division, which is inconsistent with current practice as well as other statutes. See 4 V.S.A. § 33(a)(13) (giving the Family Division jurisdiction over proceedings under Chapter 206).
 - **Adding** to Section 8845(c), the process to be followed and criteria to be reviewed by the *Family Division* when the Commissioner seeks the continued commitment of an individual in a forensic facility.
 - **Adding** language regarding rules of evidence and procedure, and scheduling, and **clarifying** that the burden of proof is by “clear and convincing evidence.” To Sen. Hashim’s earlier question, these modifications merely codify existing practice for judicial reviews.

DAIL requests the following amendments:

- **Amending** 13 V.S.A. § 4823(a), after “Commissioner of Disabilities, Aging, and Independent Living for”, to read as follows:

“placement in a designated program in the least restrictive environment consistent with the person’s need for custody, care, and habilitation for an indefinite or a limited period.”

- **Striking** from the definition of “Person in need of continued custody, care, and habilitation” in 18 V.S.A. § 8839(4) the word, “still” on line 12.
- **Adding** to 18 V.S.A. § 8845(f), line 12, after “shall continue,” the following:

“in a designated program in the least restrictive environment consistent with the person’s need for custody, care, and habilitation for an indefinite or a limited period.”

- **Adding** subsection (g) to § 8845 that reads:

“In determining whether a person is in need of continued custody, care, and habilitation, the Court shall consider the degree to which the person has engaged in or complied with the treatment and supervision provided by the Commissioner.”

[This proposed language reflects a factor that is relevant in virtually all judicial reviews of Act 248 commitment. Courts very often weigh a person’s engagement in treatment when assessing the person’s need for further supervision, and such engagement (or lack thereof) can arguably be probative of dangerousness.]

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