

TO: House Committee on Human Services and House Judiciary Committee  
FROM: Alice Kennedy, General Counsel, DAIL  
RE: ACT 248  
DATE: February 7, 2014

Thank you for the opportunity to address you regarding Act 248.

## **“ACT 248” BACKGROUND AND PROCEDURES**

### **I. Act 248 Overview**

Vermont law, under specific circumstances, provides for civil commitment of persons with an intellectual disability<sup>1</sup>, commonly known as “mental retardation,” who have been judicially determined to present a danger of harm to others. The standards for committing a person to the custody of the Commissioner of the Department of Disabilities, Aging and Independent Living (“DAIL”) are contained in 18 V.S.A. §8839 et seq. The provisions are most frequently referred to simply as “Act 248.”

Act 248 cases are not commonplace. The program currently has approximately 30-35 individuals who have been civilly committed pursuant to Act 248 in Vermont.

Prior to 1988, Vermont law authorized civil commitment for people with mental illness, but not for people with an intellectual disability. As a result, when criminal proceedings were dismissed because a person was found incompetent to stand trial on the basis of an intellectual disability, the courts had no way to supervise or restrict the person. If the person did not agree to treatment, he or she could not be held, nor required to seek treatment; supervision could not be enforced to protect the public from repeat offenses. Following some high-profile cases involving violent crimes committed by individuals with an intellectual disability, the Vermont legislature enacted Act 248.

Title 13 contains the provisions regarding the need for a determination of competency to stand trial and the applicable procedures for initial commitment. This part of the process takes place in district court. 13 V.S.A. § 4814 et seq., 13 V.S.A. §4823). Once the court determines that a defendant is incompetent to stand trial for a serious criminal offense on the

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<sup>1</sup> “Intellectual Disability” replaces “mental retardation,” in accordance with the intent of respectful language. In order to be considered for civil commitment under Act 248, however, the person must be diagnosed “mentally retarded.” 18 V.S.A. §§8839-43. “Intellectual disability” herein means significantly sub-average intellectual functioning existing concurrently with deficits in adaptive behavior that were manifest before age 18. “Intellectual Disability” means the same as the term “mental retardation” in the Developmental Disabilities Act of 1996. See Vermont State System of Care Plan, FY 2014 Update, Attachment A.

basis of an intellectual disability, the district court is required to hold a hearing to determine whether the person should be placed under Act 248 civil commitment. 18 V.S.A. §8839 et seq.

After a criminal defendant has been deemed incompetent to stand trial on the basis of an intellectual disability and committed to the custody of the Commissioner of DAIL, the criminal case is concluded. Thereafter, any modifications or enforcement issues of the Act 248 order are family court actions. 4 V.S.A. §33(13).

## **II. Criteria for Initial Commitment**

### **a.) Defendant must have an intellectual disability and must have been found incompetent to stand trial.**

Act 248, the civil commitment procedure for persons with an intellectual disability, who have been judicially determined to present a danger of harm to others, does *not* apply to people who may be found incompetent as a result of other developmental disabilities, such as autism, traumatic brain injury or for any other cognitive impairment which is not diagnosed as “mental retardation.” The diagnosis must be made using standard diagnostic criteria by a physician or a psychologist. These criteria include: manifestation before age 18, IQ of 70 or below and significant deficits in adaptive behavior. See Vermont System of Care Plan, FY 2014 Update, Attachment A.

Those found incompetent to stand trial because of mental illness, who have not been diagnosed with an intellectual disability, are not subject to Act 248. The requirement that Act 248 be used to commit only persons with an intellectual disability, as opposed to any person with a cognitive impairment, is statutory.

An intellectual disability is understood to be a life-long condition. It does not result from injury or illness, like other cognitive impairments may, and it is not subject to change over a lifetime. It is for that reason that the diagnosis, to be reliable, must be made before the person’s 18<sup>th</sup> birthday.

In order to meet the criteria for an intellectual disability, the finding of a low I.Q. *must occur* along with concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two (2) of the following areas: “communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.” See Regulations Implementing The Developmental Disabilities Act of 1996, March 2011, Reg. 1.32.

### **b.) Defendant must have committed a serious crime that makes him a danger to others.**

In order to be committed under Act 248, the person must present a “danger of harm to others.” This means that “the person has inflicted or attempted to inflict serious bodily injury to

another or has committed an act that would constitute a sexual assault or lewd and lascivious conduct with a child.” (18 V.S.A. §8839(1)).

c.) **Dangerousness must be stipulated to by Defendant or Proved by the State.**

In most Act 248 cases, the parties stipulate that the Defendant did, in fact, commit the crime alleged. In cases in which the Defendant does not so stipulate, the state must prove that the person has, in fact, “inflicted or attempted to inflict serious bodily injury to another or committed or attempted sexual assault or lewd and lascivious conduct with a child.” (18 V.S.A. §8839(1)).

In order to be committed under Act 248, the above criteria must be met.

d.) **The Commissioner must be able to provide appropriate custody, care and habilitation for the person.**

The other statutory limitation on commitment is that the Commissioner of DAIL be able to provide appropriate “custody, care and habilitation” in a program the Commissioner finds adequate to provide it. 13 V.S.A. §4823(a). If the Commissioner were to state, or if a respondent were to argue successfully to the District Court that the Commissioner is unable to provide “appropriate custody, care and habilitation” for a particular person, the court would lack the authority to commit the person. Presumably, in that event, the person would have to be released and the charges dropped or not prosecuted.

However, since the passage of Act 248, the Commissioner has only challenged placement in Act 248 in one (1) case in which it was argued, due to the Defendant’s behavior set, DAIL was unable to provide appropriate “custody, care or habilitation.” No respondent has ever advanced that argument and no court has found that the Commissioner is unable to provide appropriate “custody, care and habilitation” for an adult not found competent to stand trial on the basis of an intellectual disability.

The Court, pursuant to a stipulation or after hearing, issues an order making specific findings of fact and stating conclusions of law (18 V.S.A. §8843; 13 V.S.A. §4823). This Order commits the individual to the custody of the Commissioner for placement in a designated program and ends the criminal case.

### **III. Act 248 Services and Post-Order Judicial Review**

All services and habilitation currently provided under Act 248 are in individualized settings and are developed and operated by community developmental services programs. The Commissioner is required by statute to place the person committed in the least restrictive environment, consistent with the need to protect public safety. 18 V.S.A. §8843(c).

Homes, neighborhoods and jobs sites are screened to avoid situations which could pose risks for the vulnerable. A typical program for a person under Act 248 provides 24/7 eyes-on supervision that typically includes education and day activities, employment support, and

individual and group therapy. Not all Act 248 participants are supervised at this level. The level of supervision is determined by the assessed level of risk.

The Commissioner has the authority to determine, for any individual under commitment and in accordance with the court order, the extent of supervision and restrictions. If restrictions appear insufficient to protect public safety, the Commissioner has the authority to increase the restrictions.

Act 248 gives individuals the right to seek judicial review of an order of commitment and requires the Commissioner to initiate a judicial review annually in family court. (18 V.S.A. §8845(c).) To continue commitment, the Commissioner must be able to demonstrate by clear and convincing evidence that the person is dangerous and in need of “custody, care and habilitation.” This means that they have an intellectual disability and continue to present a danger of harm to others . In a judicial review, the individual under commitment is represented by an attorney from the Vermont Disability Law Project. Judicial reviews are often settled by stipulation.

Act 248 gives the Commissioner the authority to discharge a person from custody if she believes that the person no longer poses a threat to public safety. The Commissioner has used this authority on occasion. The law does not specify how dangerous a person must be to be held, nor how safe he or she must be to be released. As a matter of practice, and after consulting with the case managers, treatment team and Department staff assigned to work with the offender, the Commissioner seeks continued commitment for offenders she judges pose any significant potential to reoffend.