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To: House Committee on Appropriations
Senate Committee on Appropriations
From: Monica Hutt, DAIL Commissioner
Re: Recent VT Supreme Court Decision re: DAIL Eligibility

Issue: On April 26, 2019, the Vermont Supreme Court recently issued a decision on the eligibility of a young man for developmental services. In that decision, the Court concluded that the plain language of the Department's *Regulations Implementing the Developmental Disabilities Act of 1996* ("DD Regs.") incorporates a standard error of measurement (SEM) of +/- 5 points for an IQ test. Accordingly, the Court concluded that the individual's IQ score of 75, along with other criteria, made him eligible for services.

Our current eligibility system is built on the requirement for at least one IQ score in the history of the individual to be a 70 or below. Allowing for a SEM of +/- 5 points means that all individuals with an IQ score of up to 75 would now be potentially eligible for developmental services. It was DAIL's intent, with the recently-amended DD Regs., to base eligibility for one with an intellectual disability on an IQ score of 70 or below, and this has been the Department's historical practice.

Based on national data in relation to the spread of IQ scores within the population, the practical reality of the expansion of eligibility criteria through imposition of the SEM would lead to a very real possibility of more than doubling the population who might be considered eligible for services. That would lead, over time, to an increased fiscal need of \$293 million annually in developmental services. We currently spend two hundred twenty million dollars to serve the current population. ¹

The estimated increase is based exclusively on the budget implications of a larger HCBS population and does not include the associated expansion of the public guardianship case load (funded with general fund dollars) or the need for greater spending on administering the program.

¹ On average, each DS consumer represents a budget impact of approximately \$63,137 (average annual per person cost; see page 49 of DAIL's 2018 Annual Report)

Solution: It is the Department's intention to clarify the 'plain language' issue in our Regulations through rulemaking, returning us to our historical and consistent practice and reflecting the Department's long-standing intent, as recently expressed during the rulemaking process to amend the DD Regs. in 2017.

In the meantime (i.e., during the gap of time between the finalization of the VT Supreme Court decision and the adoption of an amended rule), DAIL envisions an upsurge in individuals with IQ's over 70 requesting and being found eligible for services. Language through legislation would ensure that our eligibility criteria are not changed prior to the Department's adoption of an amended rule, thereby maintaining consistency in eligibility for all and ensuring that the proposed DS budget for FY 2020 remains adequate for services and supports for the current and existing population.

Draft language to be included in the FY2020 budget (H.542):

(a)Notwithstanding any current regulations to the contrary, the Department of Disabilities, Aging, and Independent Living shall not provide services pursuant to Chapter 204A of Title 18 to any individual on the basis of an intellectual disability who has not received at least one score of 70 or below without application of any standard error of measure, on the Weschler Adult Intelligence Scale or a comparable norm referenced assessment unless the aforementioned test is not an appropriate test for the applicant or is otherwise modified due to the applicant's disability.

(b)Following the effective date of this section, the Department may, in its discretion, by rule, adopt application of a standard error of measure, but no such rule shall be valid in the absence of a numerical value being assigned to the applicable error of measure. To the extent any rule adopts a standard error but does not include a numerical value for such measure, it shall have no force and effect.

(c)On or before January 15, 2020, the Commissioner of The Department of Disabilities, Aging, and Independent Living shall pre-file rules with the Interagency Committee on Administrative Rules in accordance with the rulemaking requirements of Chapter 25, Subchapter 3 of Title 3. The pre-filed rules shall set forth the Department's criteria and with respect to the decision to apply or not apply any standard error of measure when assessing eligibility for services provided pursuant to Chapter 204A of Title 18.

(d) this section is effective on passage.