

S.192 An act relating to forensic facility admissions criteria and processes

House Committee on Human Services

DAIL Testimony

April 11, 2024

For the record, Stuart Schurr, General Counsel for the Department of Disabilities, Aging, and Independent Living (DAIL).

Please let me start by thanking the Committee for considering this important issue and to state that DAIL supports S.192, as passed by the Senate, with one exception, which I will address in a moment. DAIL's support for this bill is based upon the establishment of a forensic facility to address a current gap in the system of care as it pertains to persons with Intellectual Disability (ID) who are served under Act 248. Act 248, named after the 1987 act that created the system, pertains to the commitment of individuals with an ID who have been deemed not competent to stand trial by the Criminal Division of the Superior Court or have been adjudicated not guilty by reason of insanity, 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.

I want to specifically mention that DAIL's conclusion that a forensic facility (FF) is needed for a small subset of those committed to the DAIL Commissioner's custody was the conclusion reached by the majority of the members of the Act No. 27 Working Group, which was asked to opine on this issue. It is also important to note that the vast majority of individuals who are committed to the Commissioner's custody under Act 248 are successfully served in a community-based designated program. Currently, that includes 28 of the 29 individuals in Act 248.

When a community-based placement is not appropriate to meet the needs of the individual and places the public and the individual's support staff at an unreasonable risk of harm, there are currently no suitable alternatives for that individual under the Developmental Services System of Care. As noted in the Working Group's report, if community-based designated programming cannot be developed, or takes time to be tailored to meet the unique needs of the individual, the placement options are limited. The individual may linger in an environment that is not the most appropriate to meet

their needs. Most significantly, in the absence of a suitable placement, the individual may need to remain in jail, which is not an appropriate environment for, and presents a greater risk to, the individual with ID.

A forensic facility that is available as an alternative, when a court deems it to be necessary based on a review of clinical and risk of harm factors and the least restrictive setting for the individual, is a critical tool to have in the System of Care toolbox. The FF would be used as an environment to assess, treat, and stabilize the individual, through the provision of professional, on-site services and supports, with the goal of discharging the person to a community-based setting, when the FF is no longer the least restrictive setting for the individual based upon a clinical assessment and a judicial determination.

The programming needed to serve these most dangerous individuals in a community-based setting, while also keeping the public safe, would need to approximate the level of security contemplated at the FF, but the community-based setting still may not offer the level of professional services and supports the FF would be designed to provide. Further, it is likely that such a community-based option, to ensure public safety, would be in a more isolated location, and, unlike a facility-based placement, the person would be surrounded solely by individuals who are paid to support them.

Once an individual committed to the DAIL Commissioner's custody is placed in the FF, the individual's progress and needs would be constantly reviewed to ensure the FF is, in fact, the least restrictive setting for the individual, and this bill provides for an automatic review of the FF placement by the committing court 90 days after the placement is ordered for that purpose. With the support of the designated agencies, tasked with engaging with the individual and developing a discharge plan, starting at the time of the individual's admission to the FF, DAIL believes the FF can offer the needed stabilizing supports to assist in the successful transition to a community-based setting.

Turning to the language in the bill with which DAIL disagrees, DAIL respectfully asks the Committee to review 18 V.S.A. § 8847(b)(2)(B), which does not align with the discharge notice provisions applicable to those committed to the custody of the commissioner of Mental Health. DAIL seeks to align these provisions to the greatest extent possible, thereby also eliminating the ambiguity that exists in § 8847 of the bill. More specifically, as currently written, the prosecutor and the victim would have the right to "file a position with the court as an interested person concerning whether the person's discharge from placement at the forensic facility is appropriate." What does "appropriate" mean? What standard would the court apply in considering the position that discharge is not "appropriate?" Who bears what burden of proof? These same concerns apply to the language in § 8847(c)(2)(B).

Having consulted and collaborated with the Center for Crime Victim Services (CCVS), DAIL proposes to afford victims the same rights provided under 13 V.S.A. § 4822(c)(2)(B)(ii), which governs notice when an individual is to be discharged from the custody of the Commissioner of Mental Health. While such language could be inserted

into 13 V.S.A. § 4823, we propose, instead, to strike 18 V.S.A. §§ 8847(b)(2)(B), (c)(1)(A) (from, “At least 10 days prior” to the end), (c)(2)(A), and (c)(2)(B), and to amend 18 V.S.A. § 8847 as follows:

(d)(1) When a person is under an order of commitment for custody, care, and habilitation under 13 V.S.A. § 4823 or a commitment order for continued custody, care, and habilitation under this subchapter, the Commissioner shall provide notice to the State’s Attorney of the county where the prosecution originated or to the Office of the Attorney General if that office prosecuted the case:

(A) at least 10 days prior to discharging the person from:

(i) the care and custody of the Commissioner; or

(ii) a forensic facility,

(B) at least 10 days prior to the expiration of such commitment order issued under 13 V.S.A. § 4823 or this section, if the Commissioner does not seek an order for continued custody, care, and habilitation; or

(C) any time that the person elopes from the custody of the Commissioner and cannot be located, and there is reason to believe the person may be lost or poses a risk of harm to themselves or others.

(2) When the State’s Attorney or Attorney General receives notice under subdivision (1) of this subsection (d), the Office shall provide notice of the action to any victim of the offense for which the person has been charged who has not opted out of receiving notice. A victim receiving notice pursuant to this subdivision (2) has the right to submit a victim impact statement to [the Family Division of]¹ the Superior Court in writing or through the State’s Attorney or Attorney General’s office.

¹ Since the Criminal Division will have a role in reviewing the forensic facility placement within the first 90 days of placement, this subsection should account for that and provide a right to submit such a statement in connection with that review.