Comments of Rachel Seelig, Esq.
Vermont Legal Aid, Inc.
House Committee on Judiciary
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Thank you for inviting me to speak with you all today about S. 89. an act relating to establishing a forensic facility. My name is Rachel Seelig, and I am the Disability Law Project Director at Vermont Legal Aid.

Vermont Legal Aid receives a grant from AHS each year, which is used to fund the work of the Mental Health Law Project, the Poverty Law Project, and a small part of my project, the Disability Law Project, for the work that we do as appointed counsel in Protective Services cases. These cases fall into two categories – public guardianship cases and Act 248 commitments, both for individuals with developmental disabilities.

Over the past decade, we have represented approximately 50 Vermonters in Act 248 cases, and successfully assisted a number of individuals in moving off of Act 248 and into voluntary Developmental Services.[1] Currently, there are around 25 Vermonters committed under Act 248.[2]

I am here today to ask that you reject the proposal for a forensic facility outright, but especially for individuals who are committed to the care of the Commissioner of the Department of Disabilities Aging, and Independent Living (DAIL) under Act 248.

Act 248 has almost always operated as a community-based treatment and habilitation program.

Act 248 is an effective tool for treatment and protecting public safety.

Act 248, while not placing individuals in incarceration, does, nonetheless, place significant limitations on the liberty of those committed. A person may be committed to Act 248 for more years than a criminal sentence would have been for the crime. And, although the individuals who are committed under Act 248 have not been found guilty of the crime because of incompetence, their restrictions are often as extensive, or more extensive, than probation or parole restrictions for those who have been convicted.

Treatment teams:

- Decide where the person lives
- Decide what services the person must accept
- Get confidential information about the person from others

Treatment teams can also:

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[1] Development Disabilities Services Annual Report, SFY22 at 20, *available at* https://legislature.vermont.gov/assets/Legislative-Reports/DDSD_Annual_Report_act_140.pdf.
[2] Development Disabilities Services Annual Report, SFY21 at 34, *available at* https://legislature.vermont.gov/assets/Legislative-Reports/DDS_Annual_Report_-FY2021_FINAL.pdf.

- Require counseling or other kinds of therapy
- Require attendance at medical appointments
- Require taking prescribed medications
- Limit activities
- Decide on contact with family and other people, with or without supervision
- Decide if the person must be under eyes-on supervision at all times and arms length, which may include tracking devices and personal and residential alarms.
- Search the person's home, including the bedroom
- Restrict social media and internet access
- Restrict social contacts
- Limit where people go in the community Decide if the person can have guns, knives, or other things that can be used as a weapon
- Restrict alcohol or non-prescription drugs
- Inform others about the person's past and circumstances if necessary ensure public safety

A forensic facility for people with developmental disabilities is contrary to the intent of the Americans with Disabilities Act

Creation of a forensic facility would be a significant and unnecessary step backward, and one that would violate the intent of the Americans with Disabilities Act, and the United States Supreme Court's decision in *Olmstead v. L.C.*.[3] This case, popularly known as *Olmstead* (after the defendant, rather than L.C., one of the two plaintiffs) is the landmark 1999 decision that clarified what is now known as the "integration mandate" of the ADA – that is, that individuals with disabilities have the right to live and work in the community with their non-disabled peers. This principle has been codified into the ADA regulations.[4]

Briefly, the *Olmstead* case involved two women who had multiple disabilities including mental illness and developmental disabilities who were admitted – voluntarily – to a psychiatric unit in a state-run hospital. After receiving treatment, they were ready to, and wanted to, move to community-based living and supports, but both remained institutionalized for several years, until they sued arguing that such a living setting was discrimination under the Americans with Disabilities Act. The court held that public entities *must* provide community-based services to people with disabilities when (1) such services are appropriate; (2) the affected people with disabilities do not oppose community-based treatment, and (3) community-based services can be reasonably accommodated, taking into account the public entity's available resources, and the needs of others receiving disability-related services from the entity.

[3] 527 U.S. 581 (1999).
[4] 28 C.F.R.§ 35.130(d) (requiring public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.")

In the case of individuals committed under Act 248, we know community-based services are appropriate, because they have been provided successfully since its inception. Individuals on Act 248 have never complained to us as their attorneys about having community based placements, though many, not surprisingly, have sought more autonomy, and found this with successful discharge from commitment. Such discharge was possible because they were able to learn and develop the skills needed to live safely in the community from within a supervised, community-based setting. And, we know community-based services can be reasonably accommodated considering state resources and the needs of others receiving developmental services from DAIL. We know this because we have been doing it for decades. We know it because we know that the cost of facility-based care exceeds community-based care.[5] And we know it because those served under Act 248 are eligible for the Public Safety Funds in the State System of Care for Developmental Disabilities, in order to meet our state philosophy and commitment to deinstitutionalization.[6]

Specific Problems in the Act 248 Section

<u>Competency/Underlying Criminal Case</u> (Page 19 / Page 24)

The new provision in 13 VSA 4823 would require a finding of not competent to stand trial or not guilty by reason of insanity, but this appears to conflict with Section 18 (18 VSA 8844) which is clear that Act 248 commitment is not a presumption of legal incompetence.

Rather than these two provisions, we recommend that any changes to Act 248 clarify what occurs with the underlying criminal case, or with any additional charges (see below regarding Judicial Review).

The relationship between a competency finding for the purpose of a criminal case, the capacity for the individual to consent to voluntary treatment (a less restrictive alternative to Act 248), and the need for guardianship or a less restrictive alternative is complex and merits further consideration, given ongoing and evolving understanding of capacity for people with disabilities, especially developmental disabilities.

<u>Findings and Order For 248 Commitment</u> (Pages 19-20)

DLP recommends against adding Section (a)(2) to 13 V.S.A. § 4823 because no individual subject to Act 248 commitment should be placed in a forensic facility, if such facility is established for the reasons stated above. If this recommendation is not adopted, DLP recommends against

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[5] Developmental Services Division Annual Report SFY2019 at 12, *available at* https://legislature.vermont.gov/assets/Legislative-Reports/DDS_Annual_Report_-FY2019_FINAL-all.pdf (showing the average cost of care at a six-bed Intermediate Care Facility was $188,701 per person per year, and the average cost for shared living, the predominant housing support model, was $38,199 per person, and that staffed living was also approximately $40,000 less expensive per year than the ICF).

[6] Developmental Services Division Annual Report SFY2021 at 34, *available at* https://legislature.vermont.gov/assets/Legislative-Reports/DDS_Annual_Report_-FY2021_FINAL.pdf (showing that the average cost of public safety programming, including for those individuals on Act 248 is $127,563).

placing the responsibility for deciding on the commitment to such a facility with the criminal division, and that, instead, this ought to be considered in the confidential family division case after transferring the case between divisions, because this is an issue of location of treatment, not incarceration or probation and is not within the subject matter expertise of the criminal division.

DLP recommends against the modifications to Section (b) because no individual subject to Act 248 commitment should be placed in a forensic facility, if such facility is established for the reasons stated above. And, as noted, DLP recommends that if this recommendation is not adopted, the process for placement in a facility should be assigned solely to the family division, not the criminal division, as contemplated by placing this process in Title 13.

If individuals committed under Act 248 are permitted by statute to be committed to a forensic facility by the court, the standard laid out in Section (b) (Draft No. 2.3, lines 4-9) sets out a standard for institutionalization that the individual is "clinically appropriate" for treatment in a forensic facility. As noted, this is the wrong standard for institutionalization as laid out in *Olmstead*. If Act 248 is included in a forensic facility, the appropriate standard for placement would need to align with the integration mandate. We would further recommend that this standard cannot be met if the Commissioner has not made at least a certain number of attempted designated programs over an extended period of time that have been unable to provide custody, care, and habilitation.

The standard proposed also leaves this decision to the complete discretion of the Commissioner, even if the treatment team or the proposed Human Service Community Safety Panel (which is addressed below) disagrees. The statute does not identify any standard for review of this determination or incorporate the important protections of the Americans with Disabilities Act against unnecessary segregation.

This is an issue that merits further exploration and discussion to determine if a meeting of the minds can be found between interested stakeholders. This topic is one of several that merits further discussion and consideration through a study committee.

DLP recommends against pursuing the Human Service Community Safety Panel as an additional structure. It offers less protection against unnecessary institutionalization that existed when the Brandon statute was passed in 1978. That ensured that there was a court process for independent judicial review, rather than giving to the same agency responsible for providing services the right to decide what the least restrictive environment is for the individuals committed to them. Moreover, it relies on a group of individuals who are not directly involved in the care or treatment of the individuals, who may not have any expertise in treatment for individuals with developmental disabilities – much less those who have been charged with a serious crime.

<u>Definitions</u> (Pages 21-23)

"Danger of harm to others" – DLP does not support the broadening of this terminology beyond the existing definition. The proposed modifications in Section 13 (18 V.S.A. 8839(1), (4), and (5) would extend Act 248 from those who have "inflicted or attempted to inflict serious bodily injury to another or committed an act that would constitute a sexual assault or lewd and lascivious conduct with a child" at the point of commitment to justifying ongoing commitment to *any* act of or attempt to inflict physical or sexual harm, any threat or action that puts person in a "reasonable fear" of such harm, or other behavior that suggests, absent programming, the person would commit or attempt such harm. DLP objects to making it harder to discharge from Act 248 than it is to be committed pursuant to Act 248. Under this broad standard, a mild "threat" in a moment of frustration to punch someone – even just once over the course of an entire year - could justify ongoing commitment.

This question of when a person is no longer in need of continued custody is perhaps the most important question not clearly answered by Act 248 in its current form. If a summer study committee is formed, determining whether a consensus opinion between DAIL and the DLP, as well as treating providers, ought to be a core charge of that committee.

<u>Judicial Review</u> (Pages 24-28)

DLP recommends a modification to section (b)(1) (beginning on line 9 of page 25). Specifically, to conform to actual practice, and because the responsibility for conducting an annual assessment of individuals under Act 248 commitment lies with DAIL, the default responsibility for filing an annual review ought to lie with the Commissioner, while leaving in place the right of the individual to seek review 90 days after the order of commitment or the continued commitment. DLP also recommends that, upon initial commitment, DLP be notified of the commitment and transfer to family division, rather than current practice, which is that notification of a new client under Act 248 does not occur until the first annual review.

DLP supports making the clear and convincing standard unambiguous by adding it to the statutory language in section (b)(2)(A) (page 26, line 6). DLP supports adding least restrictive environment language to this section as well (lines 8-10).

DLP opposes the addition of (b)(2)(A) (page 26, lines 15-18) because it adds a factor that is not relevant to the question of potential harm to others by demanding the court consider "degree of cooperation" with treatment. DLP opposes this for several reasons: (1) lack of available providers for some types of treatment; (2) no consideration that some teams determine that 'treatment' as conventionally understood (e.g. talk therapy) is not appropriate for the individual because the person will not be able to benefit; and (3) this is not an inherent factor that informs whether the person continues to pose a danger of harm to others.

DLP believes section (b)(4) is extraneous language (page 27 lines 3-5), as this is already addressed through the Vermont Rules of Family Procedure, Rule 6.2.

DLP does not support the addition of section (b)(5) because no individual subject to Act 248 commitment should be placed in a forensic facility, if such facility is established for the reasons stated above. However, should this recommendation not be adopted, DLP opposes notice to the State's Attorney or Office of the Attorney General or the victim , who are not, and should not be, parties to the case when it is transferred to the Family Division for oversight of treatment, and the case is no longer a criminal case, and because such discharge would not necessarily be co-extensive with Act 248 discharge.

DLP could support an Administrative Discharge process from Act 248 regardless of placement, with notice to the individual's counsel, but not notice to the State's Attorney or Office of the Attorney General, or the alleged victim for the reasons stated above. This discharge process would be the result of a determination that the individual no longer presents a danger to others, and return of the case to prosecutors through notification ignores the successful rehabilitation achieved through Act 248 treatment. DLP does not support individuals who have had no knowledge of or involvement in treatment having the opportunity to second guess a determination that a less restrictive alternative to involuntary treatment is now appropriate. Moreover, notice to the alleged victim would transform a confidential proceeding into a public one, which DLP cannot support given the nature of the case at that state - review of custody, care, and habilitative treatment.

Finally, DLP strongly opposes allowing the criminal division to retain jurisdiction over the underlying case as proposed in new section 18 V.S.A. 8845(e) (page 28, lines 9-16). This is too likely to lead to constitutional violations including denying the right to a speedy trial, as individuals may be committed under Act 248 for many years (more than a criminal conviction sentence), and to then be determined to no longer pose a danger of harm to others, be discharged from Act 248, and then returned to criminal court fails to recognize the successful rehabilitation achieved through Act 248 treatment.

Instead, DLP recommends that a summer study committee gather to make recommendations, as noted above, regarding the standard for continued commitment and discharge from Act 248, regardless of the location of placement for treatment.

Conclusion

It would be a tragedy, a giant legal leap backward to move forward with this bill. And, practically speaking, it will be a more difficult setting to enable the progress we see in our Act 248 clients, to move to a congregate facility-based model.

Please reject S. 89, or at least, for the time being remove Sections 12 - 19 that apply to Act 248, and create a study committee to make recommendations for Act 248 revisions and further assess of whether any facility commitment would be an appropriate revision to this program.

Thank you for your consideration.