MEMORANDUM

TO: House Judiciary Committee

FROM: Stuart G. Schurr, General Counsel, Department of Disabilities, Aging, and Independent Living (DAIL) SGS

RE: S. 89, An act relating to establishing a forensic facility

DATE: April 20, 2023

DAIL has reviewed Draft 2.3 of the Bill, and, with one exception, supports the draft as written. I would like to address that provision, as well as respond to a few points raised in the written comments provided by Rachel Seelig of Vermont Legal Aid's Disability Law Project (DLP).

1. 18 V.S.A. § 8845(d), at Page 28, lines 3-8
   While the amended language makes it clear that the State's Attorney/Attorney General's Office (SA/AGO) and the victim may request a hearing on a pending administrative discharge from the forensic facility, and that hearing shall be held within 10 days after the SA/AGO or victim's request, it is silent as to how long after receiving notice of the pending administrative discharge the SA/AGO and victim have to request the hearing. More importantly, the proposed language suspends the Commissioner's administrative discharge from the forensic facility until the matter is reviewed by the Court. If the court begins its review but then continues the hearing for days of weeks, the discharge would be stayed, and the individual would need to remain in the facility, which may not constitute the least restrictive setting for that individual.
   At the Committee's request, DAIL will collaborate with the Department of Mental Health and the State's Attorneys, and, taking into consideration Judge Zonay's comments, will provide a single proposal to the Committee.
2. Turning to Ms. Seelig's comments, first I'd like to say that I am a bit disappointed that we are only now hearing from the DLP about concerns not only with the proposed facility but also with the proposed changes to the Act 248 process. Ms. Seelig noted that she had not been aware of this bill until Mr. McCullough brought it to her attention; however, DAIL had alerted DLP to the desired changes to the Act 248 process long before this session started.
   That said, DAIL asserts that there is a need for a non-community-based programming option for a small group of individuals with Intellectual Disability who present too great a risk of harm to the community, and we disagree with Ms. Seelig's argument that such a placement would necessarily violate *Olmstead* and the "integration mandate" of the ADA. Ms. Seelig's comments fail to recognize

that often community-based services cannot be reasonably accommodated, taking into account the available resources.

A. Definition of "person in need of continued custody, care, and habilitation" at page 22, lines 17-20 and page 23, lines 1-4.

DLP opposes the expansion of danger of harm criteria when, in subsequent annual reviews, the court needs to determine whether to continue the individual's Act 248 custody. The proposed definition of "a person in need of continued custody, care, and habilitation" includes text that is taken from the existing definition of a "person in need of treatment" (under 18 V.S.A. § 7101(17)) and reflects the longstanding practice in Act 248 judicial review proceedings as to how the Family Division assesses the individual's need for continued Act 248 custody.

In assessing the need for continued Act 248 custody, the court would, and currently does, assess the weight to be given any behavior exhibited or conduct committed since the original commitment or the last annual review.

B. Provision regarding commitment at page 25, line 9.

Ms. Seelig asserts that the responsibility for filing an annual review should lie with the Commissioner, while leaving in place the right of the individual to seek a review 90 days after the order is issued. While this section gives the person a right to request an annual judicial review, the responsibility for requesting the annual review lies exclusively with the Commissioner. In fact, this is the current law. I do not understand the objection.

Ms. Seelig then asserts that the DLP should be notified upon initial commitment and that current practice is to first notify DLP at the first annual review. Per 13 V.S.A. § 4820,

> "When a person is found to be incompetent to stand trial, has not been indicted by reason of insanity for the alleged offense, or has been acquitted by reason of insanity at the time of the alleged offense, *the person shall be entitled to have counsel appointed from Vermont Legal Aid to represent the person.* The Department of Mental Health and, if applicable, the Department of Disabilities, Aging, and Independent Living shall be entitled to appear and call witnesses at the proceeding."

Emphasis added. Based on the above, DLP gets notice of the commitment proceeding and represents the individual in that proceeding. Again, I do not understand the request.

C. Provision regarding administrative discharge at page 27, starting at line 13.

Ms. Seelig states that DLP could support an Administrative Discharge from Act 248 regardless of placement, provided there is no notice given to the SA/AGO or victim.

Under the current procedures outlined in 13 V.S.A. §§ 4822 and 4823, the SA or the AGO is a party to the original commitment proceedings, and they are required to provide notice of the action to the victim. Given the SA and AGO's interest in the particular matter, as well as ongoing interest in the protection of the public, it makes sense to DAIL that the SA or AGO be given notice of the proposed discharge and an opportunity to inform the Family Court of any concerns it may have with the proposed discharge. Again, the Family Division will determine the weight to be afforded to any testimony provided at the discharge hearing. With respect to annual reviews, the language added to 33 V.S.A. § 8845(b)(3) (page 27, line 1-2), would authorize the court to exclude persons not necessary for the conduct of the hearing.

Thank you for your consideration.