

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

Senate Health & Welfare Committee

DAIL Testimony

January 25, 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 it would establish a forensic facility in Vermont 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, the placement options are limited. 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 FF that is available as an alternative, when a court deems it to be necessary based on a review of clinical and dangerousness 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.

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. 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.

Before I turn it over to Dr. Pat Frawley, who is prepared to address the question as to what type of programming would be appropriate in a FF for individuals with ID, I wanted to comment on a few specific provisions of the bill.

Sec. 3 (page3); 13 V.S.A. § 4821

- (a) states that procedures for persons with ID shall be provided in 18 V.S.A. chapter 206, subchapter 3. As discussed later, however, those procedures in 18 V.S.A. § 8845 appear to apply exclusively to proceedings in which an individual is being considered for commitment to, or discharge from, the **custody** of the DAIL Commissioner, not to those proceedings involving **placement** in, or discharge from, the FF.
- (b) and (c) identify the clinical factors that the Human Services Community Safety Panel (HSCSP) is to consider in determining whether placement in the FF is appropriate; however, these subsections fail to clearly address the legal standard to be applied by a court in determining whether such a placement should be ordered.

Sec. 12 (page 19); 13 V.S.A. § 4823

- (a) speaks **generally** to an "order of commitment," not to a **specific** setting in which the individual will reside.
- (b) then says that when an individual is being considered for an Act 248 commitment, or the court is considering a discharge from an order of commitment, the review procedures in 18 V.S.A. § 8845 shall be followed. This section, however, is silent as to what procedures are to be followed if the issue being considered is placement in, or discharge from, the FF, not from the Act 248 commitment itself. As such, it is unclear whether the courts are to follow the procedures set out in § 8845 when considering placement in, or discharge from, the FF.
- (c) speaks to the Commissioner's request for FF placement but is silent as to the content/form of the court's order, the legal standards governing the court's determination, the duration of an order for placement in the FF, or the right to review such a placement.

Sec. 19 (page 24); 18 V.S.A. § 8845

- (a) & (b), as noted earlier, appear to speak exclusively to procedures to be followed when considering commitment (or continued commitment) to, or discharge from, the Commissioner's custody, not to an individual's placement in the FF.

(c) provides that the Commissioner may seek to place a person in a FF subsequent to the date on which the Criminal division commits the person to the custody of the DAIL Commissioner. DAIL supports this option, recognizing that individuals who were originally placed in a community-based setting may later engage in dangerous/assaultive behavior or elopements that make the setting unsafe for the public. DAIL believes that the FF would be a useful option to help stabilize the individual and return them to the community.

DAIL notes, however, that under such circumstances, the court would need a contemporaneous recommendation of the HSCSP. As written, (c) could be read to mean that the original recommendation of the HSCSP would be reviewed and considered by the court. Such a recommendation could be outdated and no longer instructive as to the individual's current needs.

Finally, in support of the assertion that 8845, as written, may not clearly and adequately apply to proceedings concerning the placement of individuals in the FF...

(f) speaks to a "clear and convincing" standard, but the standard applies to determinations of "continued custody" not continued placement in the FF.

Thank you again for your consideration. I can turn it over to Dr. Frawley if you would like, and I am available to answer any questions you may have.
