

Act No. 27 (2023)

An act relating to establishing a forensic facility

**Commitment to the Custody of the
DAIL Commissioner under “Act 248”**

Competency and Commitment

- Any court before which a criminal prosecution is pending may order that a defendant be examined to determine competency to stand trial.
- The examination must be conducted by a psychiatrist or by a doctorate-level psychologist trained in forensic psychology. 13 V.S.A. § 4814
- A competency evaluation for an individual thought to have a developmental disability shall include a current evaluation by a psychologist skilled in assessing individuals with developmental disabilities. 13 V.S.A. § 4816(b)
- 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 and, as applicable, the Department of Disabilities, Aging, and Independent Living shall be entitled to appear and call witnesses at the commitment proceeding. 13 V.S.A. § 4820(b)

Competency and Commitment

- Under Vermont law, an individual who commits an act of extreme physical or sexual violence, and who cannot be held criminally responsible for that conduct due to Intellectual Disability, can be ordered into the custody, care and supervision of the Commissioner of Disabilities, Aging, and Independent Living for an indefinite or limited period if the Commissioner agrees that s/he is able to assemble a “designated program” of treatment and supervision for the person.

13 V.S.A. § 4823; 18 V.S.A. § 8839(3).

- This mechanism of custody and supervision is commonly referred to as “Act 248,” after the 1987 act which created the system.

Act 248

- Prior to 1995, Title 18, Chapter 206 provided a separate court process by which people with Intellectual Disability could be institutionalized through an entirely civil procedure, even if they had not been charged with a crime. In 1995, Vermont enacted a significant policy change and repealed this civil commitment regime.
- Currently, an individual with an intellectual disability who presents a danger of harm to others can only be initially committed to the custody of the DAIL commissioner by the Criminal Division upon a finding that the individual is “a person in need of care custody, and habilitation.”
- Currently, Vermont serves individuals with Intellectual Disability, who are committed to the custody of the DAIL Commissioner, solely in community-based settings.
- Title 18, Chapter 206, Subchapter 3, “Judicial Proceeding; Persons With Intellectual Disability Who Present A Danger Of Harm To Others,” (a/k/a “Act 248”) remains intact.

Criteria for Initial Commitment

To be eligible for initial commitment to the custody of the Commissioner under Act 248, an individual must be “a person in need of custody, care, and habilitation,” as that term is defined at 18 V.S.A. 8839(3).

This means that the individual must be a person:

1. with Intellectual Disability;
2. who presents a danger of harm to others; and
3. for whom appropriate custody, care, and habilitation can be provided by the Commissioner in a designated program.

Criteria for Initial Commitment

Defendant must have Intellectual Disability

To be clinically eligible for Act 248 supervision, an offender must have an Intellectual Disability, as that term is defined in 18 V.S.A. § 8839(3)(A). The clinical components of Intellectual Disability, as set out in statute and as interpreted by the Vermont Supreme Court, include:

- manifestation before age 18;
- IQ of 70 or below (or up to 75 when taking into account the standard error of measurement (SEM)); and
- significant deficits in adaptive behavior.

Thus, the exact medical diagnosis or condition that a person has is irrelevant. The only pertinent analysis is whether the person's condition results in Intellectual Disability. For example, a person with ASD is eligible for Act 248 supervision only if the person has Intellectual Disability, as defined above.

Criteria for Initial Commitment

Defendant must have Intellectual Disability

In order to meet the criteria for Intellectual Disability, the finding of an I.Q. of 70 or below (or, applying the SEM, up to 75) must occur along with concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two (2) of the following areas: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; functional academic skills; work; leisure; health; and safety.

Criteria for Initial Commitment

Defendant must present a danger of harm to others

This means that “the person has inflicted or attempted to inflict serious bodily injury to another or has committed an act that would constitute a sexual assault or lewd and lascivious conduct with a child.” (18 V.S.A. §8839(1)).

In cases in which the Defendant does not so stipulate, the state must prove dangerousness.

Criteria for Initial Commitment

The Commissioner must be able to provide appropriate custody, care, and habilitation for the person in a designated program

- The Commissioner provides all services and supports to individuals under Act 248 supervision through partnerships with the Designated Agencies. The developmental services divisions of the Designated Agencies are charged with designing and implementing individualized plans of services for people on Act 248, and each of these “designated programs” must be tailored to meet the person’s needs, ensure public safety, and monitor the person’s compliance with the specific provisions of his/her Act 248 order.
- The Commissioner is required by statute to place the person committed in the least restrictive environment, consistent with the need to protect public safety. 18 V.S.A. §8843(c).

Assessing Risk

The specific needs and circumstances of the individual—and the associated public safety implications—drive the development of a designated program. Homes, neighborhoods and job sites are screened to avoid situations which could present risks to the public. The level of supervision provided, and the specific activities, therapies, and services offered, all depend on the specific needs and risks associated with the individual. Many designated programs provide 24/7 supervision, education and day activities, employment support, and individual and group therapy.

On rare occasions, the current system of care has been unable to meet the needs of the individual and protect the public.

Orders of Commitment

After the Criminal Division has determined that a defendant is a “person in need of custody, care and habilitation,” it issues an order committing the defendant to the custody of the Commissioner. Every order requires the person to comply with his/her treatment plan and behavior support plan, as those plans are developed by the treatment team. Additionally, all orders authorize law enforcement and hospital staff to arrest the person and return him/her to the Designated Program in case of elopement.

Act 248 orders also contain specific conditions that the person must follow, which are tailored to the specific risks associated with the individual. For example, most orders include conditions prohibiting violent or threatening behavior and the possession/use of weapons, and sexual offenders will have conditions tailored to those specific concerns.

The Commissioner has the authority to determine, for any individual under commitment and in accordance with the court order, the extent of supervision and restrictions. If restrictions appear insufficient to protect public safety, the Commissioner has the authority to increase the restrictions.

Judicial Review

- After initial commitment by the Criminal Division, however, subsequent reviews of a person's need for commitment, and a person's discharge from commitment, are provided for in 18 V.S.A. § 8845.

See also, 13 V.S.A. § 4823(b).

- Based on statute and long-standing practice, these reviews have always been held in the Family Division of the Superior Court in the unit in which the person resides.

See 4 V.S.A. § 33(a)(13)

- “A person committed under this subchapter shall be entitled to a judicial review annually. If no such review is requested by the person, it shall be initiated by the Commissioner.”

18 V.S.A. § 8845(c)

Judicial Review

- To continue commitment, the Commissioner must be able to demonstrate by clear and convincing evidence that the person is still a “person in need of custody, care and habilitation.” Absent agreement, the Commissioner must prove that the person still:
 - has Intellectual Disability;
 - presents a danger of harm to others; and
 - is a person for whom appropriate custody, care, and habilitation can be provided by the Commissioner in a designated program.
- The standard for continued “dangerousness” is not prescribed by statute, but courts have consistently applied a standard similar to that used in proceedings under Title 18, Chapter 181 (commitment to DMH custody):
 - If the person were discharged from custody and disengaged from services, would s/he be likely to reoffend?
- “If the court finds at the time of the hearing that the person is no longer in need of custody, care, and habilitation, it shall discharge the person from the custody of the Commissioner. An order of discharge may be conditional or absolute and may have immediate or delayed effect.” 18 V.S.A. § 8845(d)

Discharge from Custody

- In addition to discharge following judicial review, the Commissioner has the authority to discharge a person from custody if she believes that the person no longer poses a threat to public safety.
- The Commissioner has used this authority on occasion. Statute does not place limits on the Commissioner's discretion to discharge a person or provide any guidelines regarding how safe the person must be to be released.
- As a matter of practice, and after consulting with the case managers, treatment team and Department staff assigned to work with the offender, the Commissioner seeks continued commitment for offenders she determines pose any significant potential to reoffend.

Questions?