

Report to the General Assembly

Of

the State of Vermont

on

Offenders With

Developmental Disabilities:

Legislative and Programmatic

Recommendations

Agency of Human Services
Department of Developmental and Mental Health Services

Susan Besio, Commissioner

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EXECUTIVE SUMMARY

Most Vermonters with developmental disabilities are peaceful and law-abiding citizens. But, like the population as a whole, the population of people with developmental disabilities contains individuals who commit offenses.

During the 2000 Legislative session, the cases of two offenders with developmental disabilities attracted widespread media attention and public concern. The Legislature asked the Commissioner of Developmental and Mental Health Services (DDMHS) to study current laws and programs for offenders with developmental disabilities. This report pulls together information and recommendations generated by the work of two committees and by the staff of the Division of Developmental Services. The major findings of the report are as follows:

- ◆ Under well-established constitutional standards, some offenders with mental retardation are found competent to stand trial. Many others, though, are found incompetent to stand trial, and public protection is afforded by civil commitment of these people to the Commissioner of Developmental and Mental Health Services.
- ◆ Vermont's civil commitment law for people with mental retardation, commonly called Act 248, was enacted in the 1980's. In general, Act 248 has been effective in its primary purpose of protecting public safety.
- ◆ The overall statutory framework of Act 248 is sound. However, repeal of the Brandon Training School statutes has left a procedural void, and a decade of experience with implementation has revealed areas where clarification is needed. Amendments to Titles 13 and 18 are recommended with regards to
 - competency evaluations
 - purpose of civil commitment
 - standards for commitment
 - procedures for commitment hearings
 - confidentiality
 - noncompliance
 - annual review and notice of discharge
- ◆ The Developmental Services system has increasingly been expected to perform a correctional function. A survey in the summer of 2000 identified 125 individuals actively supported by Developmental Services who could pose a significant risk to public safety.
- ◆ This growing responsibility for public safety has significantly strained the Developmental Services system's resources and energies. The Developmental Services system must provide a correctional and public safety function for offenders with developmental disabilities, but should not be expected to do so at the expense of services for law-abiding individuals.
- ◆ To maintain its excellent record of treatment and public protection for offenders, the Developmental Services system urgently needs infrastructure strengthening in the form of an emergency bed, more secure individualized placements, earmarked funds for high risk offenders, advanced training and clinical supervision, and enhanced respite.

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INTRODUCTION

Most Vermonters with developmental disabilities are peaceful and law-abiding citizens. But, like the population as a whole, the population of people with developmental disabilities contains individuals who commit offenses.

The reasons why individuals with developmental disabilities offend are as varied and manifold as the reasons other citizens commit crimes. And, as with the population as a whole, the theories about why some individuals offend and others do not are also manifold, as are theories about the best ways to prevent recidivism. We do know that the vast majority of adult offenders with developmental disabilities are young males, just as the majority of non-disabled Vermont offenders are young adult males.

During the 2000 Legislative session, the cases of two offenders with developmental disabilities (State v. Hebert and State v. Cleary) received widespread media attention. Publicity about these two cases led to increased public concern about the adequacy of services and supports for offenders with developmental disabilities in Vermont, and about the adequacy of our statutes and resources to protect public safety. The Legislature asked the Commissioner of Developmental and Mental Health Services to study current laws and programs for offenders with developmental disabilities¹ and report back to the 2001 Legislature.

In response, the Department of Developmental and Mental Health Services (DDMHS) worked with two different committees to focus separately upon the programmatic and the legal issues involved. One committee, comprised primarily of attorneys, looked at the language of Vermont's civil commitment laws for people with developmental disabilities, and made recommendations about amendments to the law. We were fortunate to have a wealth of experience on this committee. It included representatives of Vermont Legal Aid, the

¹ Two terms are used in this report to refer to describe significant cognitive impairments: *developmental disability* and *mental retardation*.

Mental retardation has a well established and rather precise definition among psychologists and psychiatrists: it refers to cognitive impairments that arise before age 18, are reflected by an IQ score of 70 or below, and result in substantial impairments in functional skills of daily life.

Developmental disability is a term preferred by consumers with mental retardation because they consider it less stigmatizing. *Developmental disability* has a variety of meanings, depending upon the context in which it is used. For purposes of this report, we are using the term interchangeably with the term "mental retardation."

Disability Law Project, the Mental Health Law Project, the Defender General, the Office of the Attorney General, the Department of State's Attorneys, the Vermont League of Cities and Towns, and the Vermont Council of Developmental and Mental Health Services. A list of the committee members is contained in Appendix A. The committee represented many perspectives and did not reach consensus on every issue, but the knowledge and variety of perspectives of the participants led to a vigorous and productive dialogue. The Commissioner's recommendations for legislation, based upon the discussions and feedback of that committee, are described in Part IV; the recommended statutory language is in Appendix B.

The other committee consisted of developmental services program directors and staff from throughout Vermont who implement programs for offenders with developmental disabilities. This group worked in concert with Division of Developmental Services staff to answer basic questions about the relationship between state-funded services and offenders with developmental disabilities: How many offenders with developmental disabilities are served by state-funded developmental services? What is their legal status? What offenses have they committed? What is the cost of their services and supports? Are the services and supports they are receiving adequate to prevent them from reoffending? A list of the members of this committee is contained in Appendix C, and the Commissioner's recommendations for programmatic development arising from the discussions of that committee are contained in Part VII.

This report pulls together information generated by the two committees and by staff of the Division of Developmental Services about offenders with developmental disabilities who are served, or who should be served, by the Developmental Services or Correctional systems, or by a partnership between the two. The purpose of the report is to inform legislative and programmatic development.

This report was written by Gail Falk, J.D., of the Department of Developmental and Mental Health Services. We are grateful to many people who took the time to review the report and comment upon it: Robert McGrath, Tom Powell, Barbara Prine, Georgia Cumming, Neil Mickenberg, Marlys Waller, Jean Perry and Maryann Willson, Kathy Aiken, Anna Saxman and Robert Appel, Jennifer Myka, June Bascom, Wendy Beininger. The report is better for their suggestions.

II. Constitutional perspectives

The United States Supreme Court has long held that it is a violation of fundamental due process to put a person on trial for a crime if the person cannot understand and participate meaningfully in the trial process. The basic standard is set forth in Dusky v. United States, 362 U.S. 402, which established the fundamental test for incompetence to stand trial:

[T]he test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him. Dusky at 402.

This basic standard has been cited by the Vermont Supreme Court in several cases. See, for example, In Re Russell, 126 Vt. 240 (1966); State v. Davis, 165 Vt. 240 (1996); State v. Thompson, 162 Vt. 532 (1994); State v. Lockwood, 160 Vt. 547, 554 (1993).

Every adult is presumed to be competent. Thus, any person, regardless of diagnosis of mental retardation, may be charged with a crime and arrested. In general, the law gives each citizen the fundamental right to stand trial if accused of a crime, and the presumption of competence can be overcome only by evidence which proves that the person is incompetent to stand trial.

Some people with mental retardation are competent to stand trial; some are not. Incompetence to stand trial can arise from many disabilities, including mental illness, physical illness or disability, mental retardation or other developmental disability. American Bar Association (ABA) Criminal Justice Mental Health Standard 7-4.1 (c). No diagnostic label or I.Q. score standing alone proves that a person is competent or incompetent to stand trial.

In a recent case examining a defendant's competence to stand trial, the District Judge for Lamoille County wrote,

Impairments measured by an IQ test do not, however, necessarily correlate with competence to stand trial. In Thompson, the Vermont Supreme Court upheld a finding of competency for a defendant who had an IQ of 83. Thompson, 162 Vt. 532, 535. In State v. French, 4 Vt.Tr.Ct. Rep. 244 (Windsor 2000), a defendant was found competent with an IQ between 57 and 54. State v. Cleary, slip opinion, 21 (Lamoille 2000).

In the French case, the psychiatric experts disagreed, and the court relied upon letters written by the defendant and testimony of lay witnesses to decide whether the defendant was malingering or really didn't understand the legal process. The Court concluded,

Although the defendant suffers from mild mental retardation he has counsel to explain to him to more complex legal issues. Even the most intelligent persons hire counsel to explain complex legal issues. No defendant is required to know all of the complicated issues associated with trial. Although this may be more time consuming or difficult with the defendant in the instant case, counsel is free to request a cognitive interpreter, more frequent breaks in the trial and other help if he believes it necessary. French, slip opinion at 10.

In the Cleary case, the court held that a man with an IQ within a range of 65 to 70 demonstrated functional competence to stand trial because he conducted a logging business, borrowed money from the bank, paid monthly bills, bargained for a better price on a mobile home, qualified for a driver's license, and showed that he could weigh the opinions of others and make up his own mind. The defendant had been determined incompetent to stand trial earlier in his life, but the court found that, with time and experience, the defendant's functional capacity to understand court proceedings and consult with his attorney had improved:

The issue is functional competence. A person's functional capacity can change over time even though their IQ does not change. Cleary, at 10.

Functional competence to stand trial is defined in the ABA Criminal Justice Mental Health Standards (commentary to Standard 7-4.1) as consisting of the following components:

1. A perception of the process not distorted by mental illness or disability. This includes an understanding of the roles of the judge, the prosecutor, the defense attorney, and the jury.
2. An ability to consult rationally, giving and receiving information, with his attorney.
3. The ability to recall and relate facts relating to the alleged offense.
4. The capacity to testify.
5. An ability to consult with counsel and understand the proceedings in light of the severity of the charges and the complexity of the case.

Although the legal standard for determining whether or not a person with developmental disabilities is competent to stand trial is clear, the practical application of this standard varies widely, dependent in part upon the approaches taken by the state's attorney and the public defender, and in large measure upon which evaluator performs the competence evaluation. The present system does not produce similar results in similar cases. It is important to assure that the process is as fair and equitable as possible, given, on the one hand, the substantial due process concerns, and, on the other hand, the long term

and substantial public expenditures involved. An erroneous finding that an incompetent person is competent to stand trial can result in significant deprivations of due process. An erroneous decision that a competent person is incompetent can result in public endangerment, lack of closure for the victim, or expenditure of tens of thousands of dollars per year to supervise the person through the Developmental Services system.

In a recent case, a Vermont court held that a person with mental retardation was competent but needed the assistance of a cognitive interpreter to assure that he understood the proceedings and was able to express himself clearly. State v. Arnold Gardner, Docket No. 1096-9-97 FrCr J. Kilburn (December 1998). Vermont courts have considered other accommodations for people with cognitive impairments as well, such as more frequent breaks, intermittent inquiries to confirm a defendant's comprehension of the proceedings, involvement of support people, and careful phrasing of questions. Gardner, Cleary, *op. cit.*, French, *op. cit.*

During the past year, the Office of the Defender General, with a grant from the U.S. Department of Justice, studied and implemented accommodations, such as a system of trained cognitive interpreters, to assist individuals with cognitive impairments who are deemed competent to stand trial to participate fully in criminal proceedings. Once the grant ends, it will be important for this initiative to find long term sponsorship and for there to be continued study of the best ways for courts to accommodate to people with developmental disabilities.

Some people with developmental disabilities go to trial without seeking or needing any evaluation of their competence to stand trial. This occurs typically in minor cases, where the person clearly understands the charges against him and wants a prompt resolution of the case. Other people with developmental disabilities, such as the defendants in the French, Cleary and Lockwood cases, may be found competent to stand trial after an evaluation by experts and a hearing by the court; such individuals then go to trial or enter a plea. Still other people with developmental disabilities are found, after evaluation and hearing, to be incompetent to stand trial. The criminal proceedings against them cease; either their case is dismissed or the state seeks civil commitment under 18 V.S.A. Section 4439, commonly known as "Act 248."

III. Civil commitment for people with mental retardation who are dangerous

Vermont law provides, under certain specific circumstances, for civil commitment of people with mental retardation who are dangerous. The current standards for committing a person to the custody of the Commissioner of Developmental and Mental Health Services are contained in 18 V.S.A. Section 8839 et seq., frequently referred to as "Act 248." For simplicity of reference we will refer to this law as "Act 248."

Prior to 1988, Vermont law authorized civil commitment for people with mental illness, but not for people with mental retardation who were dangerous to others. Thus, when criminal proceedings were dismissed because a person was found incompetent to stand trial on the basis of mental retardation, the courts had no way to restrict the person. If the person did not agree to treatment, s/he could not be held or required to seek treatment, and supervision could not be enforced to protect the public from repeat offenses.

To address this gap in the law, the Legislature in 1988 adopted "Act 248," which established a statutory framework for civil commitment of people with mental retardation who are dangerous. Vermont thus became one of the first states in the country with a strong statutory framework for providing non-institutional supervision to offenders found incompetent to stand trial. Act 248 applies only to "persons with mental retardation;" it does not apply to people who may be found incompetent as a result of other disabilities, such as deafness or autism.²

Vermont law does not provide for civil commitment of every person who is found incompetent on the basis of mental retardation. People who have committed minor offenses are not subject to commitment under Act 248. One of the criteria for commitment is that a person "presents a danger of harm to others." 18 V.S.A. Section 8839 (3)(B). "Danger of harm to others" is defined to mean 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 or lascivious conduct with a child. 18 V.S.A. Section 8839 (1).

The other statutory limitation on commitment is that the Commissioner of Developmental and Mental Health Services must be able to provide "appropriate custody, care and habilitation" in a program the Commissioner finds is "adequate to provide in an individual manner appropriate custody, care and habilitation." If the Commissioner were to state, or if a respondent were to argue successfully to the District Court that the Commissioner is unable to provide

² People found incompetent to stand trial who have a developmental disability other than mental retardation could be committed under the procedures described in 13 V.S.A. Section 4820 – 4822 for individuals with a "mental disease or defect." Analysis of those procedures is beyond the scope of this report.

appropriate custody, care and habilitation for a particular person, the court would lack the authority to commit the person. Presumably, in that event, the person would have to be released from custody. However, in the twelve years since enactment of Act 248, neither the Commissioner nor a respondent has ever argued, and the court has never found, that the Commissioner is unable to provide appropriate custody, care and habilitation for a person found not competent to stand trial.³ (cf. Cleary, 159 Vt. 314 (1992), where the Commissioner argued that he was unable to provide custody, care and habilitation for a person who *was competent* to stand trial and was in prison awaiting trial).

All services and habilitation currently provided under Act 248 are in individualized settings, and are developed and operated by community developmental services programs. Homes, neighborhoods, and job sites are screened to avoid situations which could pose risks for vulnerable people. Staff are carefully trained to recognize danger signs and to support the person to gain control of his/her behavior. A typical program for a person under Act 248 provides 24-hour-a-day supervision and

- ◆ residential support
- ◆ arms-length or eyes-on supervision when the person is outside of his home
- ◆ education and day activities
- ◆ employment support and supervision
- ◆ respite
- ◆ individual therapy as needed
- ◆ group therapy as needed (alcohol treatment, sex offender therapy, anger management)
- ◆ psychiatric and other medical services
- ◆ family training and support
- ◆ a case manager who ties it all together

Some individuals' programs include training in the law and legal rights with the ultimate goal that the person will come to understand the legal process well enough to be determined competent to stand trial.

The Commissioner has the authority to determine, for any individual under commitment, the extent of supervision, and the restrictions to which the individual is subjected. If restrictions appear insufficient to protect public safety, the Commissioner has the authority to increase the restrictions. Examples of restrictions which have been added for the purpose of increasing public safety in individual situations are:

- ◆ alarms on residential windows and doors

³ There have been situations where several weeks or even months were required to develop the needed services.

- ◆ awake overnight supervision
- ◆ requiring the person to move from his own apartment to a staffed residence
- ◆ restricting the person's access to settings where children may be present

Court orders typically require the person to participate in therapy or treatment and authorize disclosure of risky behavior for the purpose of protecting public safety. However, if a person refuses to participate in therapy or treatment, there is no recourse except to increase restrictions or supervision to address any public safety risk.

The Department routinely notifies law enforcement officials for the jurisdiction where the individual is living of the address of the individual, and sends law enforcement officials a copy of the court order. In the event that a person leaves a residence or supervision without permission, the police are authorized to pick the individual up and return him or her to the designated program. There has been excellent cooperation from law enforcement officials in the few instances when an individual left a program without permission.

Act 248 gives an individual the right to seek judicial review of an order of commitment and requires the commissioner to initiate a judicial review annually in family court to continue a commitment for more than a year. To continue commitment, the Commissioner must be able to demonstrate that the person is still "dangerous." In a judicial review, the person is represented by an attorney from the Vermont Disability Law Project. To date, there have been no judicial reviews initiated by an individual. Judicial reviews are typically settled by stipulation, sometimes after negotiation of particular terms.

Act 248 gives the Commissioner the authority to discharge a person from custody if the Commissioner believes the person no longer poses a threat to public safety. The Commissioner has used this authority in a limited number of situations. (See Table 1) No one has been referred back to court or discharged on the grounds that s/he has become competent to stand trial. The law does not specify how dangerous a person must be to be held, or how safe he or she must be to be released. Current practice of the Commissioner is to seek continued commitment for anyone who poses any significant potential to reoffend. Commitment under Act 248 tends to be long-term, but hopefully it is not a life sentence for all but the most dangerous individuals.

Act 248 has been on the books for more than ten years. As of September 1, 2000, 21 people had been committed to the custody of the Commissioner pursuant to its provisions. Table 1 shows a year-by-year tabulation of the number of people committed under Act 248.

Table 1

Act 248 – Number Committed and Number Discharged
By Year

	newly committed	total on act 248 on12/31	discharged
1990	1	1	0
1991	2	3	0
1992	2	5	0
1993	0	4	1
1994	1	5	0
1995	4	7	2
1996	4	11	1
1997	0	10	0
1998	2	12	0
1999	2	12	2
2000	3	--	0
(thru 8/00)			
total	21		6

Table 1 shows that, to date, the year-by-year total of people committed under Act 248 has been stable (0-4 per year). However, the total number of people in custody increases every year, and is expected to continue to increase annually because the number of people newly committed will most probably continue to exceed the number of people released from custody.

Table 2 shows that a majority of people (12 of 21) committed under Act 248 were receiving no state funded developmental services at the time of commitment. Many were living independently in the community. Of those discharged from custody, half (3 of 6) chose to leave developmental services when they were no longer court-ordered to receive them.

Table 2

**People on Act 248 Served by DS System
Before and After Commitment**

	new to DS at time of commit- ment	left DS after discharge
1990	1	0
1991	2	0
1992	0	0
1993	0	0
1994	1	0
1995	2	1
1996	3	0
1997	0	0
1998	1	0
1999	1	2
2000	1	0
(thru 8/00)		
total	12	3

Most people are committed under Act 248 for seriously dangerous behaviors. Below is a list of the major charges which have led to people being committed under Act 248.

Table 3
Charges Leading to Act 248 Commitment
(through August 2000)

Sexual assault on minor female	7
Lewd & Lascivious with child	4
Arson	4
Domestic and simple assault	2
Sexual assault on adult female	2
Burglary and aggravated assault	1
Operating car without consent	1

Act 248 has been successful in its primary purpose of protecting public safety.

- ◆ *No person committed under Act 248 has been charged with a new crime of the type for which he or she was initially committed (for example, no person committed because of a sexual offense has been recharged with a sexual offense).*
- ◆ *Only one individual who was discharged from Act 248 commitment has been arrested for a new offense (domestic assault was the new charge)*
- ◆ *Only one individual has been charged with a new crime while under Act 248; this individual was charged with simple assault after throwing rocks at passing cars, and the charges were later dismissed.*
- ◆ *Eloperments have occurred, but the individual has been returned by staff or by police on every occasion, without charges of any new crimes. (except the one described in the preceding paragraph).*

This is not to say that Act 248 commitments go smoothly or that the experience of most offenders under commitment is incident-free. There have been fights involving other consumers, and incidents of assaultive behavior upon staff or family members providing supervision. Police have been called on occasion to respond to unmanageable behavior in public. There have been a few incidents of potentially risky behavior (being in the presence of a child without authorization, two incidents of stalking an adult female); however, none of these incidents resulted in significant harm to another person, and the intervention services in place worked well.

One reason for the low number of commitments under Act 248 is confusion by courts, defense attorneys, and state's attorneys about the procedures for commitment. The statutory scheme for commitment, particularly the relationship between Title 13 V.S.A. Sections 4820 et seq., and Title 18 V.S.A. Sections 8839 et seq. is not clearly spelled out and is difficult to follow, even for lawyers. The procedural scheme became all the more confusing after closure of Brandon Training School and the subsequent repeal of legislation relating to commitments to the Training School, because the procedural hearing requirements for Act 248 incorporate those repealed commitment procedures. The Commissioner strongly recommends that the Legislature amend Titles 13 and Title 18 to clear up the procedural confusion. (See Part IV Recommendations for Legislative Change).

An additional reason for the low number of commitments is the sense by courts and law enforcement personnel that public safety can be protected in other ways: specifically, through public guardianship by the Department of Developmental and Mental Health Services and through supervision and support by community developmental services programs. This is particularly likely to happen if the accused or the police officer perceive an offender with developmental disabilities as a person who is not responsible for his or her actions. The numbers and characteristics of people with potentially dangerous behavior served under these other auspices are described in Part VI, *infra*.

IV. Civil Commitment for People with Mental Retardation: Recommendations for Legislative Change

The overall statutory schema for civil commitment of people with mental retardation who are incompetent to stand trial is sound. However, repeal of the Brandon Training School statutes has left a procedural void in the laws, which needs to be filled. In addition, a decade of experience with implementation of Act 248 has revealed several areas where clarification will be helpful to all concerned with implementing the law. The recommendations for legislative change of Act 248 are summarized below. Appendix B contains recommended statutory language.

- ◆ **Competency evaluations.** Improve the accuracy, consistency, and quality of competency evaluations involving people thought to have mental retardation, by requiring a current psychological assessment by a licensed psychologist. The diagnosis of mental retardation is most accurately made by a psychologist who has specific training and experience in evaluating people with developmental disabilities. At present, forensic evaluations are often based on old and incomplete psychological reports or upon a psychiatrist's impression of the individual's cognitive functioning abilities based upon a brief interview. If a person with developmental disabilities is found competent to stand trial, the evaluation should include recommendations for accommodations in the pre-trial and trial proceedings.

- ◆ **Procedures.** Amend Title 13 to provide clear procedural guidelines for the steps to be followed after a person has been found incompetent to stand trial on the basis of mental retardation. Title 13 needs to describe two distinct paths: one for the procedures to be followed when a person is found incompetent to stand trial or to be convicted on the basis of mental illness; and another for the procedures to be followed when a person is found incompetent to stand trial on the basis of mental retardation. Procedures and standards for *initial* commitment should be located in Title 13. Procedures and standards for *continuing* commitment should be located in Title 18. The recommended procedures include
 - * evaluation to determine whether the person needs to be committed
 - * timelines for evaluations
 - * access to an independent evaluation
 - * representation by counsel
 - * participation by the state's attorney
 - * supervision of the person pending hearing
 - * sealing of evaluations and exclusion of the public from hearings by a court
 - * public access to the order of commitment

- ◆ **Court jurisdiction.** Clarify in the language of Title 13 and Title 18 which courts have jurisdiction: District Court has jurisdiction of an initial commitment following a determination of incompetence to stand trial, and Family Court has jurisdiction for all subsequent reviews of continuing commitment.

- ◆ **Limited purpose of commitment.** Make it clear that civil commitment for people with mental retardation is designed only for people who have been found incompetent to stand trial as a result of mental retardation after being charged with a crime involving significant risk to public safety. The civil commitment procedures are not to be used as an alternative to incarceration for a person who is *competent* to stand trial, nor are they to be used as an alternative to guardianship for people who are unable to make decisions to protect their own interests on the basis of mental retardation. Public guardianship for people with mental retardation who do not have a friend or family member to assist them make decisions is available under the Protective Services laws, 18 V.S.A. Sections 9301 et seq.

- ◆ **Standards for Commitment.** At present there are three requisites for commitment under Act 248:
 - The person must have mental retardation. No change is recommended in this requirement, but the Department is instructed to promulgate regulations defining how mental retardation will be defined. The Department intends to adopt the same criteria for diagnosing mental retardation which are now used to diagnose mental retardation under the Developmental Disabilities Act of 1996, 18 V.S.A. Section 8722.
 - The person must be dangerous. For the purposes of this statute, “dangerous” means that a person has committed an offense which would be a serious crime. No change, other than minor wording adjustments, is recommended.
 - There must be a program which can be provided by the commissioner. This last requirement has been the focus of great debate and controversy. Some people have worried that the Commissioner would say, in the case of a dangerous person, that no appropriate program was available, leaving the court with no alternative but to release the person. The Commissioner does not intend to state that there is no appropriate program for a dangerous person; on the contrary the Commissioner has consistently striven to develop effective and appropriate programs for persons committed under Act 248. As a standard for commitment, this requirement is no longer serving a purpose, and we recommend its deletion. In this way, the legislature and the courts can have confidence that full responsibility for supervision of a person who is incompetent to stand trial, who has mental retardation, and who is dangerous lies with the Department of Developmental and Mental Health Services.

- ◆ **Standard of Proof.** State that the standard of proof for commitment is "clear and convincing" evidence that the person is dangerous.
- ◆ **Placement of a Committed Person.** Require the Commissioner to place a person committed because of mental retardation in the least restrictive environment consistent with ensuring public safety where the person will receive habilitation and supervision.
- ◆ **Confidentiality and Limited Release of Information.** Client information maintained by the Commissioner or by a developmental services agency providing supports to a person is confidential, and, in general, cannot be released without the consent of the person. However, the Commissioner should be authorized to release information to local law enforcement about the whereabouts of person under commitment, and to disclose confidential information to neighbors, employers, the victim or victims, or the public where necessary for public safety.
- ◆ **Noncompliance.** Define the procedures to be followed if a person subject to an Act 248 order refuses to comply with the order, or if the order is insufficient to protect public safety.
- ◆ **Annual judicial review.** Clarify procedures and due process protections in annual judicial review of commitment by the family court.
- ◆ **Notice to state's attorney.** Require 30 days notice to the state's attorney for the county where the charges were filed before the Commissioner grants an administrative discharge of a person from custody.

A. Offenders with Developmental Disabilities in Correctional Facilities

Less than one half of one per cent of the prison population in Vermont is identified as having mental retardation. The Division of Developmental Services and the Department of Corrections cooperated in surveys of the prison population in 1992 and 1998. In 1992, 12 prisoners with mental retardation were identified. In 1998, 6 prisoners with mental retardation were identified. As of August 2000, Vermont had a prison population of more than 1700. Of these, only eight (8) were identified as having mental retardation; all are male.⁴

Over the past decade, the proportion of prisoners with mental retardation in Vermont has remained steady or decreased slightly. We have identified no trends that would indicate the likelihood of this number increasing or decreasing; in general, the proportion of incarcerated individuals with mental retardation seems to follow general population trends.

Of the individuals with mental retardation presently incarcerated in Vermont, most are incarcerated for sexual offenses. Corrections personnel have identified the need for a prison-based sex offender and violent offender treatment programs adapted to the needs of men with cognitive impairments, including mental retardation, and have taken steps to implement such a program. Over the last decade, individuals with mental retardation have served their time, and been released on parole or furlough, or have maxed out of sentences. Some of these individuals choose to seek support from a developmental services agency upon release (See Part VI, *infra*). In some cases, Corrections has granted early release through furlough or parole under the condition that the person accepts supports from the developmental services system. For such individuals, primary responsibility for public safety remains with Corrections, and the developmental services system plays a supportive role, addressing needs related to the person's disability. These partnerships have generally proved beneficial to all parties, including the individual and the general public.

⁴ Based upon DDMHS interviews with Corrections officials and survey of all Developmental Services programs in the state. Summer 2000. The number of prisoners with a developmental disability other than mental retardation is unknown.

Probation and Parole

We do not know the number of individuals with developmental disabilities who are under Corrections supervision outside of a correctional facility (under probation, parole, or furlough). It is likely that there are a large number of individuals with developmental disabilities who are under probation or parole and who are unknown to the developmental services system, but neither Corrections nor the courts maintain statistics in terms of cognitive disabilities, and so it is impossible to know the number at this time. We have, however, surveyed developmental services agencies to determine the number of people who are on probation or parole and receiving supports from a developmental services agency; as of June 30, 2000, the agencies reported serving 12 such individuals. From the perspective of public safety on the one hand, and individual rehabilitation on the other, these partnerships tend to take advantage of the skills of Corrections and the skills of the Developmental Services agencies: Corrections takes responsibility for risk assessment and control, and Developmental Services provides training, supervision, and support. These individuals are among those described in the next section.

VI. Developmental Services for People Who Pose a Risk to Public Safety

Last summer, the Division of Developmental Services, in cooperation with the directors of developmental services programs in Vermont, surveyed every DS agency to determine how many people were being served who might be termed "dangerous." What we found was surprising. The number was considerably greater than most had expected, and, more surprising, most people who had committed known dangerous acts were not under any court or correctional supervision, but instead were being supervised by the Developmental Services system.

For adults considered to pose a risk to public safety⁵ the status of those served by the developmental services system was as follows:

Table 3
Legal Status of Individuals Served by Developmental Services
Who Pose a Public Safety Risk⁶
June 30, 2000

Act 248 or other civil commitment	16
Probation/parole	12
Awaiting trial	10
Case dismissed with plan for services	10
Maxed out of criminal sentence	7
Restraining order	4
SRS or APS substantiation	38
Known offense but no adjudication	40

From this table it can be seen that the Developmental Services system is involved with protecting public safety for people with widely varying legal status. Noteworthy are the large number (78) who are known to have committed an offense but were never prosecuted.

⁵ A person was counted as posing a risk of public safety based upon past known behavior. The survey counted individuals who were

- a. arrested for a serious offense and awaiting trial;
- b. arrested for a serious offense, but case dismissed with agreement that person would have developmental services;
- c. under supervision of Probation or Parole;
- d. convicted of a crime, served time, and maxed out sentence;
- e. convicted and released to developmental services
- f. civilly committed to DDMHS for dangerous behavior, under Act 248 or otherwise;
- g. substantiated or adjudicated by SRS for sexual abuse;
- h. substantiated by APS for sexual abuse or other act against an elder that would be a crime;
- i. known to have committed an act that is a crime and considered to pose a risk of re-offending;
- j. under a restraining order because of dangerous conduct.

⁶ Note that the total number of dangerous adults was 125; some individuals were in more than one legal status.

There are several possible reasons why people with developmental disabilities are under-prosecuted in Vermont: a belief by many that people with developmental disabilities cannot or will not be held accountable by the courts; the fact that the victims in many of these cases are children or people with disabilities who may not wish to or be able to testify; a belief that people with disabilities should not be sent to jail because they will be victimized in jail; and a belief by many courts and law enforcement personnel that the developmental services system, rather than the correctional system, can and should be responsible for preventing crime by people with developmental disabilities.

Individuals served by developmental services agencies have committed a variety of offenses, but they tend to cluster in a few general areas:

Table 4
Types of Offenses⁷

Sexual offense with child or adult	80
Non-sexual violence	42
Domestic assault	7
Arson	8
Larceny, theft, breaking & entering	5
Drugs	3
Property destruction	1
Other	2

People with developmental disabilities who pose a risk to public safety receive a range of services in Vermont depending upon the degree of perceived risk, their level of cooperation with services, their capacity for independent living, and their legal status. Very frequently, courts put individuals who have done something dangerous under public guardianship through the Guardianship Services program in the expectation that the guardian will assure that the person does not re-offend. In recent years an increasing number of youths who are known offenders have aged out of SRS custody, and have been placed directly under public guardianship with the expectation that the guardian will assure that the person continues to have 24-hour supervision. This approach works well for young adults who are willing to accept 24-hour supervision, and who need assistance in making decisions. It creates many dilemmas in the case of young adults who are determined to make their own life decisions once they turn 18.

⁷ Type of offense of individuals served by Developmental Services agencies as of June 30, 2000. Note that the total number of dangerous adults was 125; some individuals have committed more than one type of offense.

Residential service options currently in use are the following:

Developmental home. This model is used throughout Vermont because of its flexibility and cost effectiveness. One or two offenders live with a contracted home provider, who holds basic responsibility for supervision and security. The home may be alarmed, and may have other security features, such as Plexiglas windows and fencing. Homes are selected to match the specific needs, interests, and challenges of the offender. Typically there is emphasis on development of social skills, daily living skills, and community participation skills. Residents have jobs and other activities during the day, and typically attend group therapy, supplemented in some cases by individual therapy and psychiatric services. Out of home respite is provided to give the home provider a regular break. This model permits the fading of supervision to give the person graduated periods of time alone. It also permits a "roommate" model, where the home provider functions as a supervisory roommate, rather than as a parent figure. The home provider may, depending upon training, support and interest, provide round-the-clock training and reinforcement of principles and skills the offender has learned in therapy.

Staffed home. This model is more intensive than the developmental home model because all supervision is provided by hourly staff. A staffed model may be needed if the individual poses such a high risk that awake overnight staff is needed, or if the individual's needs are so demanding that frequent staff changes are necessary to prevent burnout.

Supervised apartment. This model is used for people who are considered to be low risk to offend. The individual lives in his or her own home or apartment with periodic (ranging from daily to weekly) check-ins and support by case management staff. The model can be supplemented by phone check-ins and drop-in visits. The individual typically attends individual and/or group therapy and has employment.

Family support. This model can be used for an offender who is considered to be low risk to offend, or, in rare circumstances, for a high-risk offender where the family supervisor is extremely vigilant. In this model the offender typically attends weekly therapy, and has a job or activities outside the home. Support and training of family members who take on supervisory responsibility, together with frequent case management visits and respite for the family, is essential to this model.

The Summer, 2000 survey of developmental services agencies asked the agencies to address the adequacy of their programs and resources to protect public safety with respect to each offender they were serving. Most agencies reported they were comfortable with the level of supports and services for most offenders they

served. But all agencies reported some critical gaps in services that could endanger public safety. Agencies also reported a number of dilemmas and difficulties in being expected to serve a public safety function for a relatively small number of people (between 5 and 6 per cent of the total number of people served) in the context of a system designed to provide supports which promote self-determination and community participation for law-abiding Vermonters with developmental disabilities and their families.

First, there is a difference of mission. In general, developmental services programs are committed to enhancing maximum choice and self-determination by the people they serve. Developmental services staff receive substantial values training to sensitize them to individual rights, dignity of risk, autonomy, choice, and least restrictive alternatives. Yet communities expect developmental services agencies to inhibit the choices and restrict the activities of offenders when these may endanger public safety. Conflicts in values abound: the requirement of confidentiality conflicts with the duty to disclose potentially dangerous behavior. The goal of learning personal responsibility by practicing responsibility in independent settings conflicts with the community's desire to be assured that offenders are supervised at all times. The goal of honoring and supporting a person's dreams when a person has violent impulses or is sexually attracted to children can be dangerous and irresponsible. Staff who work with offenders may feel isolated and de-valued in a developmental services agency where most staff are dedicated to promoting full independence and rights for consumers.

Second, there is a shortage of sufficiently skilled staff and therapists. We have in Vermont some wonderfully talented and dedicated individuals working with offenders with developmental disabilities. But the need far outstrips the supply. There is an urgent need to attract additional therapists and to provide professional development support to staff who wish to make a professional commitment to this field. At the direct service level, recruitment for staff and contractors to work with offenders is in direct competition with recruitment for staff and contractors to work with people with developmental disabilities who have not offended. Working with high risk offenders in a community setting is demanding; it requires vigilance and flexibility together with humor and common sense. Individuals who do this work may be stigmatized along with the people they support. Programs must be able to offer adequate salaries, benefits, and career ladders to obtain and retain the qualified staff needed to assure public safety.

Third, the need for a sound crisis and emergency back-up system for developmentally disabled offenders was identified. Most agencies provide some level of emergency coverage and emergency respite for the people they serve, but virtually all felt that their emergency back-up or respite resources were insufficient to provide the intensity needed for some offenders.

Fourth, there is a perceived need to develop alternate treatment approaches for a small number of high risk individuals who are not responding to or cooperating with current residential and treatment models. These alternate treatment options are described in Part VII, Programmatic Recommendations.

Fifth, all constituencies, including agencies and consumers, are uncomfortable with the disproportionate share of resources required for individuals who pose a risk to public safety. Under current funding allocations, individuals who are graduating from school and need job support, families struggling to support a child at home, consumers who want support to live independently, must compete for the same resources that are spent on individuals who have committed offenses. The average waiver cost for individuals who have been identified as dangerous is approximately \$30,000 per year higher than the average annual waiver costs for other individuals with developmental disabilities. And among the 26 highest risk individuals, the average annual waiver is \$58,000 higher than the average waiver for other individuals with developmental disabilities.

Many people think that the Department of Corrections should play a greater role in providing for community safety from high risk offenders with developmental disabilities, but no practical way to accomplish this has been suggested. To these consumers and families, it seems unfair that people who have broken the law get a larger share of the resources than individuals who have worked hard to be law-abiding citizens. The developmental services system must provide a correctional and public safety function for offenders with developmental disabilities, but should not be expected to do so at the expense of services for law-abiding individuals.

VII. Programmatic recommendations

In order to continue to assure the public will be safe from new offenses by individuals who are placed with or committed to the developmental services system with the expectation that the public will be protected, the following additional resources were identified as needed:

- ◆ **Emergency/crisis bed.** Current programs and resources have a significant gap with the potential for creating a public safety problem. This gap is created because time is required to develop the individualized programs which have proved most effective for individuals committed under Act 248. It typically takes 90 to 120 days for a developmental services program to locate secure housing, recruit and train staff, and establish the services that a person committed under Act 248 will need. In the interim, the person may be waiting in jail, or may be at liberty in the community. To date, there have been no known adverse public safety consequences as the result of a person being without a program for this period of time. However, the potential exists for a danger to public safety if a person who has been found to be dangerous remains unsupervised while services are being developed.

To address this problem, the Department recommends development of a small, secure short-term stay facility for individuals who are awaiting evaluation after having been found not competent to stand trial, or who have been committed to the Commissioner under Act 248 but do not yet have a program to go to. Such a facility could also be used for crisis placement in the event that a community program cannot meet the staffing needs of a person under supervision

It has been proposed that Vermont State Hospital be used for short-term crisis and emergency custody of people committed under Act 248 and that the statute be amended specifically to identify that as an option. DDMHS believes that one or more crisis beds specifically designed to meet programmatic and security needs of offenders with developmental disabilities is a preferred response to the need for emergency custody of people committed under Act 248.

Program costs to house and treat a person at Vermont State Hospital currently approximate \$150,000, which must all be paid in general fund dollars. If offenders with developmental disabilities were housed at VSH, staffing and treatment oriented to persons with mental retardation would have to be developed, further raising the cost of institutional care. The cost of a community-based emergency facility would be comparable, but approximately 60% of the cost would be paid with federal Medicaid funds. In addition, programmatic needs can best be met in a non-facility setting that is designed specifically for someone with developmental disabilities.

Any short term emergency and crisis bed would be sited in a location that minimized risk to neighbors. This bed or beds would be available to take individuals once they have been found incompetent to stand trial while the individual's needs are being assessed and an individualized program is being developed, and would also serve for emergency backup in case of the unexpected loss of a respite provider or a residential home provider for a high risk offender. Without such a bed, it might be necessary to place high risk offenders in Vermont State Hospital, or release them without supervision pending program assessment and development; neither alternative is desirable.

- ◆ **More secure placements.** Funding to develop alternative placements to increase the security of supervision for 5 to 6 offenders whose placements are not thought to be sufficiently stable or secure to assure protection of public safety in the long run. One alternative placement models is a step-down apartment offering three levels of supervision and independence, fulltime trained respite staff, and one or more short-term stay beds for offenders new to the system or in temporary crisis. Another cost-effective alternative for offering enhanced security is a "DH-plus" home (a developmental home with extra staff and supports).

On behalf of the workgroup, two staff visited New Hampshire's secure group home for offenders with developmental disabilities in Laconia. This group home incorporates high security prison practices into the design and daily operation of a home for three men. The group considered whether such a home would be beneficial for Vermont, and concluded that, at this time, the costs and restrictiveness of such a home exceed our needs. Instead, we need to shore up existing programs, and create emergency crisis capacity.

- ◆ **Advanced training, clinical supervision and therapy options.** The depth of staff skills and professional resources needs to be improved in order to improve and expand risk assessments, security, and treatment. Specialized training for all staff who work with offenders is necessary and currently insufficient to meet the demand of new individuals being served. Additionally, new therapists and the clinical supervision they provide are necessary to support the team structure that is critical to maintaining the success of these services.
- ◆ **Enhanced respite.** Supervising and supporting offenders in a "prison without walls" needs vigilant, engaged staff. To remain fresh on the job staff and contractors need reliable respite. The statewide survey of providers revealed significant gaps in respite for offenders in most parts of the state. Additional funds to recruit, train, and compensate additional respite workers is essential to the soundness of the supervision system.

- ◆ **Earmarked funds for high risk offenders.** In each of the past few years, the entire developmental services system has been stressed by meeting the costs of a small number of high risk offenders for whom the developmental service system is playing a correctional function. This groups consists of young adults aging out of SRS custody who offended as juveniles (6 to 8 per year), individuals committed under Act 248 (3 to 5 per year anticipated) and individuals maxing out of prison (1 to 2 per year). The excess funds needed to provide for public safety for these high risk individuals should be provided in earmarked funds, separate from regular DS caseload funds.

APPENDIX A

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APPENDIX B

Proposed Amendments to Act 248 (Titles 13 and 18)

TITLE 13: Crimes and Criminal Procedure

PART II: Criminal Procedure Generally

CHAPTER 157: INSANITY AS A DEFENSE

§ 4801. Test of insanity in criminal cases

(a) The test when used as a defense in criminal cases shall be as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. The terms "mental disease or defect" shall include congenital and traumatic mental conditions as well as disease.

(b) The defendant shall have the burden of proof in establishing insanity as an affirmative defense by a preponderance of the evidence. (Amended 1983, No. 75.)

§ 4802. M'Naghten test abolished

The M'Naghten test of insanity in criminal cases is hereby abolished.

§§ 4803-4813. Repealed. 1969, No. 20, § 14.

§ 4814. Order for examination

(a) Any court before which a criminal prosecution is pending may order the department of developmental and mental health services to have the defendant examined by a psychiatrist at any time before, during or after trial, and before final judgment in any of the following cases:

(1) When the defendant enters a plea of not guilty, or when such a plea is entered in his behalf, and then gives notice of his intention to rely upon the defense of insanity at the time of the alleged crime, or to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged;

(2) When the defendant, the state, or an attorney, guardian or other person acting on behalf of the defendant, raises before such court the issue of whether the defendant is mentally competent to stand trial for the alleged offense;

(3) When the court believes that there is doubt as to the defendant's sanity at the time of the alleged offense; or

(4) When the court believes that there is doubt as to the defendant's mental competency to be tried for the alleged offense.

(b) Such order may be issued by the court on its own motion, or on motion of the state, the defendant, or an attorney, guardian or other person acting on behalf of the defendant. (Added 1969, No. 20, § 1; amended 1973, No. 118, § 16, eff. Oct. 1, 1973; 1991, No. 231 (Adj. Sess.), § 6; 1995, No. 174 (Adj. Sess.), § 3.)

§ 4815. Place of examination; temporary commitment

(a) It is the purpose of this section to provide a mechanism by which a defendant is examined in the least restrictive environment deemed sufficient to complete the examination and prevent unnecessary pre-trial detention and substantial threat of physical violence to any person, including a defendant.

(b) The order for examination may provide for an examination at any jail or correctional center, or at the state hospital, or at such other place as the court shall determine, after hearing a recommendation by the commissioner of developmental and mental health services.

(c) A motion for examination shall be made as soon as practicable after a party or the court has good faith reason to believe that there are grounds for an examination. An attorney making such a motion shall be subject to the potential sanctions of Rule 11 of the Vermont Rules of Civil Procedure.

(d) Upon the making of a motion for examination, the court shall order a mental health screening to be completed by a designated mental health professional while the defendant is still at the court.

(e) If the screening cannot be commenced and completed at the courthouse within two hours from the time of the defendant's appearance before the court, the court may forego consideration of the screener's recommendations.

(f) The court and parties shall review the recommendation of the designated mental health professional and consider the facts and circumstances surrounding the charge and observations of the defendant in court. If the court finds sufficient facts to order an examination, it may be ordered to be completed in the least restrictive environment deemed sufficient to complete the examination, consistent with subsection (a) of this section.

(g)(1) Examination at the state hospital. -- Before ordering the examination to take place at the state hospital, the court must determine that the state hospital is the least restrictive setting in which the examination may appropriately be conducted.

(2) Before ordering the examination to take place at the state hospital, the court shall also determine what terms, if any, shall govern the defendant's release from custody under sections 7553-7554 of this title once the examination has been completed.

(3) An order for examination at the state hospital shall provide for placement of the defendant in the custody and care of the commissioner of developmental and mental health services for not more than 30 days from the date of the order, and the defendant shall be returned to court for further appearance as soon as the examination has been completed, if ordered by the court. If a return to court is ordered, such return shall occur within 48 hours of the commissioner's request.

(4) If a return to court is not ordered and the defendant is not in the custody of the commissioner of corrections, the defendant shall be returned to the defendant's residence or such other appropriate place within the state of Vermont by the department of developmental and mental health services at the expense of the court.

(5) If it appears that an examination at the state hospital cannot reasonably be completed within 30 days, the court issuing the original order, on request of the commissioner and upon good cause shown may order placement at the state hospital extended for additional periods of 15 days in order to complete the examination, and the defendant on the expiration of the period provided for in such order shall be returned in accordance with this subsection.

(6) Persons committed to the state hospital for purposes of examination or examined elsewhere under this section shall be given medical care and treatment in accordance with accepted standards of medical care and practice, to the extent facilities and personnel are available for this purpose.

(h) Except upon good cause shown, defendants charged with misdemeanor offenses who are not in the custody of the commissioner of corrections shall be examined on an outpatient basis for mental competency. Examinations occurring in the community shall be conducted at a location within 60 miles of the defendant's residence or at another location agreed to by the defendant. (Added 1969, No. 20, § 2; amended 1987, No. 248 (Adj. Sess.), § 2; 1989, No. 187 (Adj. Sess.), § 5; 1991, No. 231 (Adj. Sess.), § 7; 1995, No. 134 (Adj. Sess.), § 1; 1995, No. 174 (Adj. Sess.), § 3.)

§ 4816. Scope of examination; report; evidence

(a) Examinations provided for in the preceding section shall have reference to:

- (1) Mental competency of the person examined to stand trial for the alleged offense;
- (2) Sanity of the person examined at the time of the alleged offense.

(b) If the psychiatrist has reason to believe that the person examined may have mental retardation, the report of the psychiatrist shall include a current assessment by a licensed psychologist of the person's cognitive skills and current functional abilities.

~~(b)~~ **(c)** As soon as practicable after the examination has been completed, the examining psychiatrist shall prepare a report containing findings in regard to each of the matters listed in subsection (a), **and containing, in the case of a person with mental retardation found competent to stand trial, recommendations as to accommodations in the trial or pre-trial process which may be needed as a result of the person's disability.** The report shall be transmitted to the court issuing the order for examination, and copies of the report sent to the state's attorney, and to the respondent's attorney if the respondent is represented by counsel.

~~(c)~~ **(d)** No statement made in the course of the examination by the person examined, whether or not he has consented to the examination, shall be admitted as evidence in any criminal proceeding for the purpose of proving the commission of a criminal offense or for the purpose of impeaching testimony of the person examined.

~~(d)~~ **(e)** The relevant portion of a psychiatrist's report shall be admitted into evidence as an exhibit on the issue of the person's mental competency to stand trial and the opinion therein shall be conclusive on the issue if agreed to by the parties and if found by the court to be relevant and probative on the issue.

~~(e)~~ **(f)** Introduction of a report under subsection ~~(d)~~ **(e)** of this section shall not preclude either party or the court from calling the psychiatrist who wrote the report as a witness or from calling witnesses or introducing other relevant evidence. Any witness called by either party on the issue of the defendant's competency shall be at the state's expense, or, if called by the court, at the court's expense. (Added 1969, No. 20, § 3; amended 1995, No. 134 (Adj. Sess.), § 2.)

§ 4817. Competency to stand trial; determination

(a) A person shall not be tried for a criminal offense if he is incompetent to stand trial.

(b) If a person indicted, complained or informed against for an alleged criminal offense, an attorney or guardian acting in his behalf, or the state, at any time before final judgment, raises before the court before which such person is tried or is to be tried, the issue of whether such person is incompetent to stand trial, or if the court has reason to believe that such person may not be competent to stand trial, a hearing shall be held before such court at which evidence shall be received and a finding made regarding his competency to stand trial. However, in cases where the court has reason to believe that such person may be incompetent to stand trial due to a mental disease or mental defect, such hearing shall not be held until an examination has been made and a report submitted by an examining psychiatrist in accordance with sections 4814-4816 of this title.

(c) A person who has been found incompetent to stand trial for an alleged offense may be tried for that offense if, upon subsequent hearing, such person is found by the court having jurisdiction of his trial for the offense to have become competent to stand trial. (Added 1969, No. 20, § 4.)

§ 4818. Failure to indict by reason of insanity

When a grand jury before which an indictment is heard returns the indictment as not found by reason of insanity of the person so charged at the time of the alleged offense, the grand jury shall so certify to the court. (Added 1969, No. 20, § 5.)

§ 4819. Acquittal by reason of insanity

When a person tried on information, complaint or indictment is acquitted by a jury by reason of insanity at the time of the alleged offense, the jury shall state in its verdict of not guilty that the same is given for such cause. (Added 1969, No. 20, § 6.)

§ 4820. Hearing regarding commitment

(A) When a person charged on information, complaint or indictment with a criminal offense:

(1) Is reported by the examining psychiatrist following examination pursuant to sections 4814-4816 of this title, to have been insane at the time of the alleged offense, **except where the determination of insanity is due to mental retardation;** or

(2) Is found upon hearing pursuant to section 4817 of this title to be incompetent to stand trial due to mental disease or defect- **disability other than mental retardation;** or

(3) Is not indicted upon hearing by grand jury by reason of insanity at the time of the alleged offense, duly certified to the court; or

(4) Upon trial by court or jury is acquitted by reason of insanity at the time of the alleged offense;

the court before which such person is tried or is to be tried for such offense, shall hold a hearing for the purpose of determining whether such person should be committed to the custody of the commissioner of developmental and mental health services. Such person may be confined in jail or some other suitable place by order of the court pending hearing for a period not exceeding fifteen days.

(B) **When a person charged on information, complaint or indictment with a criminal offense:**

(1) Is reported by the examining psychiatrist following examination pursuant to sections 4814-4816 of this title, to have been not responsible for criminal conduct on account of mental retardation; or

(2) Is found upon hearing pursuant to section 4817 of this title to be incompetent to stand trial due to mental retardation,

the court shall order an evaluation and proceed in accordance with Section 4823. (Added 1969, No. 20, § 7; amended 1987, No. 248 (Adj. Sess.), § 3; 1989, No. 187 (Adj. Sess.), § 5; 1995, No. 174 (Adj. Sess.), § 3.)

§ 4821. Notice of hearing; procedures

The person who is the subject of the proceedings, his or her attorney, the legal guardian, if any, the commissioner of the department of developmental and mental health services, and the state's attorney or other prosecuting officer representing the state in the case, shall be given notice of the time and place of a hearing under the preceding section. Procedures for hearings for persons who are mentally ill shall be as provided in chapter 181 of Title 18. Procedures for hearings for persons who are mentally retarded shall be as provided in **section 4823**, ~~subchapter 3 of chapter 206 of Title 18.~~ (Added 1969, No. 20, § 8; amended 1987, No. 248 (Adj. Sess.), § 4; 1989, No. 187 (Adj. Sess.), § 5; 1995, No. 174 (Adj. Sess.), § 3.)

§ 4822. Findings and order; mentally ill persons

(a) If the court finds that such person is a person in need of treatment or a patient in need of further treatment as defined in section 7101 of Title 18, the court shall issue an order of commitment directed to the commissioner of developmental and mental health services, which shall admit the person to the care and custody of the department of developmental and mental health services for an indeterminate period. In any case involving personal injury or threat of personal injury, the committing court may issue an order requiring a court hearing before a person committed under this section may be discharged from custody.

(b) Such order of commitment shall have the same force and effect as an order issued under sections 7611-7622 of Title 18, and persons committed under such an order shall have the same status, and the same rights, including the right to receive care and treatment, to be examined and discharged, and to apply for and obtain judicial review of their cases, as persons ordered committed under sections 7611-7622 of Title 18.

(c) Notwithstanding the provisions of subsection (b) of this section, at least 10 days prior to the proposed discharge of any person committed under this section the commissioner of developmental and mental health services shall give notice thereof to the committing court and state's attorney of the county where the prosecution originated. In all cases requiring a hearing prior to discharge of a person found incompetent to stand trial under section 4817 of this title, the

hearing shall be conducted by the committing court issuing the order under that section. In all other cases, when the committing court orders a hearing under subsection (a) of this section or when, in the discretion of the commissioner of developmental and mental health services, a hearing should be held prior to the discharge, the hearing shall be held in the Vermont district court, Waterbury circuit to determine if the committed person is no longer a person in need of treatment or a patient in need of further treatment as set forth in subsection (a) of this section. Notice of the hearing shall be given to the commissioner, the state's attorney of the county where the prosecution originated, the committed person and the person's attorney. Prior to the hearing, the state's attorney may enter an appearance in the proceedings and may request examination of the patient by an independent psychiatrist, who may testify at the hearing.

(d) The court may continue the hearing provided in subsection (c) of this section for a period of 15 additional days upon a showing of good cause.

(e) If the court determines that commitment shall no longer be necessary, it shall issue an order discharging the patient from the custody of the department of developmental and mental health services.

(f) The court shall issue its findings and order not later than 15 days from the date of hearing. (Added 1969, No. 20, § 9; amended 1977, No. 95, § 1, eff. May 5, 1977; No. 252 (Adj. Sess.), § 38; 1987, No. 248 (Adj. Sess.), § 5; 1989, No. 187 (Adj. Sess.), § 5; 1995, No. 174 (Adj. Sess.), § 3.)

§ 4823. Findings and order Evaluation and hearing; persons with mental retardation

~~(a) If the court finds that such person is a person in need of custody, care and habilitation as defined in section 8839 of Title 18, the court shall issue an order of commitment directed to the commissioner of developmental and mental health services for care and habilitation of such person for an indefinite or limited period in a designated program.~~ **Upon finding that a person is incompetent to stand trial or not responsible for criminal conduct because of his or her mental retardation, the court shall either dismiss the charges without prejudice, or order the commissioner of developmental and mental health services to conduct an evaluation to determine whether the person is “a person in need of custody, care and habilitation” as defined in subsection (b). The court may make such provisions regarding custody and supervision of the person pending evaluation and hearing as it deems necessary for protection of public safety, including a determination that public safety requires that the person be held in a correctional facility. If the person is held in a correctional facility, the court shall hold a hearing within fifteen days to determine whether the person is a “person in need of custody, care and habilitation” who should be committed to the custody of the commissioner of developmental and mental health services.**

(b) “Person in need of custody, care and habilitation” means a person who:

(1) Has mental retardation, as more fully defined in regulations of the department of developmental and mental health services promulgated pursuant to this Act; and

(2) Presents a danger of harm to others as evidenced by the fact that the person has recently inflicted or attempted to inflict serious bodily injury on another, or recently has committed an act that would constitute a sexual assault on another or lewd or lascivious conduct with a child.

(c) (i) If the court orders the person to be held in a correctional facility pending evaluation, the court shall provide a copy of the evaluation together with a notice of hearing to the person who is the subject of the proceedings, his or her attorney, the state's attorney, the legal guardian, if any, and the commissioner of developmental and mental health services at least seven days prior to the hearing.

(ii) In all other cases the court shall provide a copy of said evaluation together with a notice of hearing to the person who is the subject of the proceedings, his or her attorney, the legal guardian, if any, the commissioner of developmental and mental health services, and the state's attorney or other prosecuting officer representing the state in the case at least fifteen days prior to any hearing in the matter.

(iii) In all cases, the notice of hearing shall include a subpoena directed to the person conducting the evaluation, and the commissioner shall assure that the subpoena is served upon the person conducting the evaluation.

(d) Upon motion of the person, the person's attorney, or the state, or upon its own motion, the court shall authorize an independent evaluation of the respondent by a qualified evaluator other than the one who conducted the original evaluation. A motion for an independent evaluation shall be made within ten days of receipt of the notice of hearing. The costs of the independent evaluation shall be paid by the state of Vermont. The evaluator shall report his or her findings to the party requesting the report, or to the court, if the court requested the evaluation.

(e) At hearing, the state shall appear and be represented by the state's attorney for the county in which the charges were filed. The respondent shall be present and shall be represented by counsel as provided in Title 13, Section 5253(a)

(f) The state shall have the burden of proving by clear and convincing evidence that the respondent is a person in need of custody, care and habilitation. The state's attorney may, with the approval of the court, dismiss the proceedings at any stage.

(g) All persons to whom notice is given may attend the hearing and testify. All parties may subpoena, present and cross examine witnesses, and present oral arguments. The court may, at its discretion, receive the testimony of any other person. The court may exclude all persons not necessary for the conduct of the hearing. The hearing shall be conducted according to the rules of evidence applicable in civil court actions. Upon request, the court may seal the evaluation and/or the transcript of the hearing. Any order of the court shall be a matter of public record.

~~(b) Such order of commitment shall have the same force and effect as an order issued under section 8843 of Title 18 and persons committed under such an order shall have the same status, and the same rights, including the right to receive care and habilitation, to be examined and discharged, and to apply for and obtain judicial review of their cases, as persons ordered committed under section 8843 of Title 18.~~

~~(c) Section 4822 of this title shall apply to persons proposed for discharge under this section; however, judicial proceedings shall be conducted in the district court in which the person then resides, unless the person resides out of state in which case the proceedings shall be conducted in the original committing court. (Added 1987, No. 248 (Adj. Sess.), § 6; amended 1989, No. 187 (Adj. Sess.), § 5; 1995, No. 174 (Adj. Sess.), § 3.)~~

Section 4824. Findings and order; persons with mental retardation

(a) In all cases, the court shall make specific findings of fact and state its conclusions of law.

(b) If the court finds that the respondent is not a person in need of custody, care and habilitation, it shall dismiss the charges without prejudice and order the respondent released from custody, subject to the charges being reinstated pursuant to Section 4817(c).

(c) If the court finds that the respondent is a person in need of custody, care, and habilitation, it shall order the respondent committed for an indefinite period or for a limited period of less than one year to the custody of the commissioner of developmental and mental health services for placement in the least restrictive environment consistent with public safety and the respondent's need for custody, care and habilitation. "Habilitation" means treatment, training, practical experience, and supervision that are designed to improve the person's skills, independence, competence, and safety in a community setting. "Custody" means supervision and other measures that are designed to protect public safety.

(d) Judicial review of an order of commitment pursuant to section (c) of this section shall occur at least annually, pursuant to the provisions of Title 18, section 8845.

TITLE 18

Subchapter 3. ~~Judicial Proceedings~~; Persons with Mental Retardation Who Present a Danger of Harm to Others

§ 8839. Definitions

As used in this subchapter,

~~(1) "Danger of harm to others" means 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 or lascivious conduct with a child.~~

~~(2) "Designated program" means a program designated by the commissioner as adequate to provide in an individual manner appropriate custody, care and habilitation to persons with mental retardation receiving services under this subchapter. Placement in the Brandon Training School may only be accomplished through the procedures set forth in subchapter 1 of chapter 206 of this title~~

~~(3) "Person in need of custody, care and habilitation" means:~~

(A) a mentally retarded person; (B) who presents a danger of harm to others; and
(C) for whom appropriate custody, care and habilitation can be provided by the commissioner in a designated program. (Added 1987, No. 248 (Adj. Sess.), § 9.)
“Person in need of custody, care and habilitation” means a person who:

(1) Has mental retardation, as defined in regulations of the department of developmental and mental health services promulgated pursuant to this Act; and

(2) Presents a danger of harm to others as evidenced by the fact that the person has recently inflicted or attempted to inflict serious bodily injury to another, or recently has committed an act that would constitute a sexual assault on another or lewd or lascivious conduct with a child.

§ 8840. Jurisdiction and venue

Proceedings brought under this subchapter for commitment to the commissioner for custody, care and habilitation shall be commenced by petition in the district court for the unit in which the respondent resides. (Added 1987, No. 248 (Adj. Sess.), § 9.)

§ 8841. Petition; procedures

The filing of the petition and procedures for initiating a hearing shall be as provided in sections 8822-8826 of this title. (Added 1987, No. 248 (Adj. Sess.), § 9.)

§ 8842. Hearing

Hearings under this subchapter for commitment shall be conducted in accordance with section 8827 of this title. (Added 1987, No. 248 (Adj. Sess.), § 9.)

§ 8843. Findings and order

(a) In all cases, the court shall make specific findings of fact and state its conclusions of law.

(b) If the court finds that the respondent is not a person in need of custody, care and habilitation, it shall dismiss the petition.

(c) If the court finds that the respondent is a person in need of custody, care and habilitation, it shall order the respondent committed to the custody of the commissioner for placement in a designated program in the least restrictive environment consistent with the respondent's need for custody, care and habilitation for an indefinite or a limited period. (Added 1987, No. 248 (Adj. Sess.), § 9.)

Section 8840. Persons Subject to Commitment

A person is subject to the provisions of this subchapter if he or she has been committed to the custody of the commissioner of developmental and mental health services in accordance with the procedures in Title 13, Section 4823.

Section 8841. Noncompliance with Orders

If at any time during the period of an order issued pursuant to Title 13, Section 4824 or pursuant to Section 8845 of this subchapter, the commissioner or the state finds that the respondent is not complying with the order, or that the order is not adequate to meet the needs of public safety, the state may file a motion for modification or enforcement of the order. Any such motion shall be filed in family court for the unit where the person resides. Hearing on such motions shall be in accordance with the procedures for judicial review in Section 8845.

Section 8842. Confidentiality of information

(1) The commissioner may release any and all information regarding the person to an individual or program which is providing care, custody, or habilitation to the person.

(2) The commissioner and any program which is providing care, custody, or habilitation to the person shall maintain as confidential all information regarding any person subject to commitment under this subchapter, and shall not release it without the consent of the person, except that the commissioner or program may make or authorize disclosure of information as follows:

(A) To public safety officials in jurisdictions where the person resides or may be found: Provided, that public safety officials shall maintain disclosed information as confidential;

(B) Unless restricted by court order, to a person who may be at risk, or to a person who is responsible for the safety of a person who may be at risk of harm by the person without disclosure of confidential information;

(C) To a victim of the person.

In making any disclosure authorized by this subsection, the commissioner shall release only information necessary to assure public safety.

§ 8844. Legal competence

No determination that a person is in need of custody, care and habilitation and no order authorizing commitment shall lead to a presumption of legal incompetence. (Added 1987, No. 248 (Adj. Sess.), § 9.)

§ 8845. Judicial review

(ea) A person committed under ~~this subchapter~~ **Title 13, Section 4824** shall be entitled to a judicial review annually. If no such review is requested by the person, it shall be initiated by the commissioner. However, such person may initiate a judicial review under this subsection **at any time** after 90 days ~~initial commitment~~ **after the most recent order of commitment**, but before the end of the first year of the commitment.

(b) ~~Procedures~~ **Proceedings** for judicial review of persons committed under ~~this subchapter~~ **Title 13, Section 4824** shall be as provided in section 8834 of this title except that proceedings shall be brought in the district court **family court for the unit** in which

the person resides or, if the person resides out of state, in the unit which issued the original commitment order. **The parties to judicial review shall be the commissioner, who shall be represented by the attorney general, and the respondent, who shall be represented by counsel, as provided in Section 8846. Upon motion of any party, or upon request of the court, the state's attorney for the county where the charges were filed shall be notified of the proceedings, and may participate as a party. The procedures and standard of proof shall be the same as the procedures and standard of proof contained in Title 13, Section 4823 (d) – (g).**

(c) Upon motion of the person, the person's attorney, or upon its own motion, the court shall authorize an independent evaluation of the respondent by a qualified evaluator other than the one who conducted the original evaluation. A motion for an independent evaluation shall be made within ten days of receipt of the notice of hearing. The costs of the independent evaluation shall be paid for by the state of Vermont. The evaluator shall report his or her findings to the party who requested the report, or to the court, if the court requested the evaluation.

(d) If at the completion of the hearing and **after** consideration of the record, the court finds **that the state has shown** at the time of the hearing **by clear and convincing evidence** that the person is still in need of custody, care and habilitation, **it shall order the person committed for an indefinite period to the custody of the commissioner of developmental and mental health services for placement in the least restrictive environment consistent with public safety and the respondent's need for custody, care and habilitation.** ~~commitment shall continue for an indefinite or limited period.~~ **"Habilitation" means treatment, training, practical experience, and/or supervision that are designed to improve the person's skills, independence, competence, and safety in a community setting. "Custody" means supervision and other measures that are designed to protect public safety.**

(e) 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.

(~~a~~)**(f)** A person committed under this subchapter may be discharged from custody by a ~~district~~ **family court** judge after judicial review as provided herein or by administrative order of the commissioner. **The commissioner shall not grant an administrative discharge to a person without providing 30 days' notice of the proposed discharge to the state's attorney for the county where the charges were filed. Upon receipt of said notice, the state's attorney may, within 10 days, file a motion for judicial review of the need for continuing commitment as provided in subsection (b).** (Added 1987, No. 248 (Adj. Sess.), § 9.)

§ 8846. Right to counsel

Persons subject to ~~commitment~~ or judicial review under this subchapter shall have a right to counsel as provided in section 7111 of this title. (Added 1987, No. 248 (Adj. Sess.), § 9.)

TITLE 04: Judiciary

CHAPTER 010: FAMILY COURT

§ 454. Jurisdiction

Notwithstanding any other provision of law to the contrary, the family court shall have exclusive jurisdiction to hear and dispose of the following proceedings filed or pending on or after October 1, 1990. The family court shall also have exclusive jurisdiction to hear and dispose of any requests to modify or enforce any orders issued by the district or superior court relating to the following proceedings:

- (1) All desertion and support proceedings and all parentage actions filed pursuant to chapter 5 of TITLE 15:
- (2) All rights of married women proceedings filed pursuant to chapter 3 of TITLE 15:
- (3) All enforcement of support proceedings filed pursuant to TITLE 15B:
- (4) All annulment and divorce proceedings filed pursuant to chapter 11 of TITLE 15:
- (5) All parent and child proceedings filed pursuant to chapter 15 of TITLE 15:
- (6) All grandparents' visitation proceedings filed pursuant to chapter 18 of TITLE 15:
- (7) All uniform child custody proceedings filed pursuant to chapter 19 of TITLE 15:
- (8) All juvenile proceedings filed pursuant to chapter 55 of TITLE 33, including matters involving "youthful offenders" as that term is defined by 33 V.S.A. § 5502(18) whether the matter originated in the district or the family court.
- (9) All enforcement of support proceedings filed pursuant to chapter 39 of TITLE 33:
- (10) All protective services for mentally retarded persons proceedings filed pursuant to chapter 215 of TITLE 18:
- (11) All mental health proceedings filed pursuant to chapters 179, 181 and 185 of TITLE 18:
- (12) All involuntary sterilization proceedings filed pursuant to chapter 204 of TITLE 18:

(13) All ~~care for mentally retarded persons proceedings~~ petitions for judicial review of commitment filed pursuant to chapter 206 of TITLE 18:

(14) All abuse prevention proceedings filed pursuant to chapter 21 of TITLE 15: Any district or superior judge may issue orders for emergency relief pursuant to section 1104 of TITLE 15:

(15) All abuse and exploitation proceedings filed pursuant to subchapter 2 of chapter 69 of TITLE 33:

(16) All emancipation of minors proceedings filed pursuant to chapter 217 of TITLE 12:

(17) All proceedings relating to the dissolution of a civil union. (Added 1989, No. 221 (Adj. Sess.), § 1, eff. Oct. 1, 1990; amended 1991, No. 180 (Adj. Sess.), § 1; 1995, No. 145 (Adj. Sess.), § 2; 1997, No. 116 (Adj. Sess.), § 1; 1999, No. 91 (Adj. Sess.), § 4.)

APPENDIX C

Members of the Developmental Services Directors' Workgroup on Offenders

Kathy Aiken, Northeast Kingdom Human Services, Inc.

William Ashe, Upper Valley Services, Inc.

Gail Falk, Division of Developmental Services, DDMHS

Eric Grims, Northeast Kingdom Human Services, Inc.

Jean Perry, Health Care and Rehabilitation Services, Inc.

Marlys Waller, Council of Developmental and Mental Health Services

Maryann Willson, Health Care and Rehabilitation Services, Inc.