
**Report to
The Vermont Legislature**

**First Report
on the status of the Department of Disabilities, Aging and Independent Living's
progress toward implementation of Act No. 158 of 2014**

In Accordance with 2014 Acts and Resolves No. 158, Sec. 13(c): An act relating to the commitment of a criminal defendant who is incompetent to stand trial because of a traumatic brain injury.

**Submitted to: Representative William Lippert, Chair,
House Committee on Judiciary**

**Senator Dick Sears, Chair,
Senate Committee on Judiciary**

**Representative Ann Pugh, Chair,
House Committee on Human Services**

**Senator Claire Ayer, Chair,
Senate Committee on Health and Welfare**

CC: Harry Chen, Interim Secretary, Agency of Human Services

**Submitted by: Susan Wehry, M.D., Commissioner
Department of Disabilities, Aging and Independent Living**

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Report Date: October 1, 2014



AGENCY OF HUMAN SERVICES

Department of Disabilities, Aging and Independent Living

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I. Executive Summary

This report is submitted pursuant to 2014 Acts and Resolves No. 158, Sec. 13(c):

“(c) On or before October 1, 2014 and on or before February 1, 2015, the Department of Disabilities, Aging, and Independent Living shall report to the House and Senate Committees on Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare on the status of the Department’s progress toward implementation of this act. The status reports shall include updates on the Department’s progress in evaluating best practices for treatment of persons with traumatic brain injuries who are unable to conform their behavior to the requirements of the law, and in identifying appropriate programs and services to provide treatment to enable those persons to be fully reintegrated into the community consistent with public safety. The status reports shall also include updates on the Department’s progress on the design of the programs and services needed to treat persons with traumatic brain injuries who have been found not guilty by reason of insanity or incompetent to stand trial as required by this act.”

<http://www.leg.state.vt.us/docs/2014/Acts/ACT158.pdf>

Act 158 required two initial reports that would inform the work of DAIL. As of September 9, 2014, a report from the Court Administrator had not been submitted to the Legislature. The report submitted by the Department of State’s Attorneys and Sheriffs was responsive to the legislative directive but was unable to provide meaningful data. Due to limitations in evaluations, data collection, and data reporting, the reports from the Court Administrator and the Department of State’s Attorneys and Sheriffs have not provided meaningful information to DAIL regarding the numbers of people with traumatic brain injury that might be diverted from the criminal justice system.

Act 158 authorized \$50,000 to research and design a program that meets the intended purposes of the Act. DAIL has distributed a request for proposals (RFP) based on this funding and anticipates entering into a contract for services in November 2014.

DAIL has begun the work of responding to Act 158. DAIL will proceed with work to research and design a program that meets the intended purposes of the Act. Anticipated activities and timeline are presented in the conclusions of this report.

II. Introduction

The mission of the Department of Disabilities, Aging and Independent Living is to make Vermont the best state in which to grow old or to live with a disability ~ with dignity, respect and independence. We strive to support quality, access, flexibility and choice in all of our programs. DAIL's strategic plan aligns to the Agency of Human Services priority goals that support individuals and families by 1) decreasing the lasting impacts of poverty and creating pathways out of poverty, 2) promoting health, wellbeing, and safety, 3) enhancing program effectiveness, accountability for outcomes, and workforce development and engagement, and 4) ensuring all Vermonters have access to high quality health care.

This report is submitted pursuant to 2014 Acts and Resolves No. 158, Sec. 13(c):

“Sec. 13. REPORTS

...

(c) On or before October 1, 2014 and on or before February 1, 2015, the Department of Disabilities, Aging, and Independent Living shall report to the House and Senate Committees on Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare on the status of the Department's progress toward implementation of this act. The status reports shall include updates on the Department's progress in evaluating best practices for treatment of persons with traumatic brain injuries who are unable to conform their behavior to the requirements of the law, and in identifying appropriate programs and services to provide treatment to enable those persons to be fully reintegrated into the community consistent with public safety. The status reports shall also include updates on the Department's progress on the design of the programs and services needed to treat persons with traumatic brain injuries who have been found not guilty by reason of insanity or incompetent to stand trial as required by this act.”

<http://www.leg.state.vt.us/docs/2014/Acts/ACT158.pdf>

This is consistent with DAIL's current roles in serving people with traumatic brain injuries and in serving people with developmental disabilities who are diverted from the criminal justice system.

Current Services for People with Traumatic Brain Injury

DAIL currently manages a program that serves people with Traumatic Brain Injury. Approximately 80 people receive services each month through this

program, with an annual budget of nearly \$5 million. The primary focus is rehabilitation following moderate to severe brain injury, helping people transition from hospitals and facilities to community-based settings. Services are intended to support individuals to achieve their optimum independence and help them return to work. Some people receive specialized long term support services.

<http://www.ddas.vermont.gov/ddas-programs/tbi/programs-tbi-default-page>

Developmental Disabilities: Commissioner Custody

Current statute (13 V.S.A. § 4801) provides a vehicle by which people with intellectual disabilities may be found not responsible for their conduct and diverted from the criminal justice system due to their disabilities. Under related statute (18 V.S.A. Chapter 206) such people may be committed to the custody of the DAIL Commissioner for custody, care, and habilitation for an indefinite or a limited period. As defined in statute, a "person in need of custody, care, and habilitation" is a person with an intellectual disability who presents a danger of harm to others and for whom appropriate custody, care, and habilitation can be provided by the Commissioner in a designated program.

<http://www.leg.state.vt.us/statutes/fullchapter.cfm?Title=18&Chapter=206>

This bears some similarity to the apparent intent of the new legislative language regarding people with traumatic brain injuries.

III. Court Administrator's Report

Act 158 required the Court Administrator to submit a report to the Legislature:

“Sec. 13. REPORTS

...

(a) On or before September 1, 2014 the Court Administrator shall report to the House and Senate Committees on Judiciary the House Committee on Human Services, and the Senate Committee on Health and Welfare on the number of cases from July 1, 2011 through June 30, 2013 in which the Court ordered the Department of Mental Health to examine a defendant pursuant to 13 V.S.A. § 4814 to determine if he or she was insane at the time of the offense or is incompetent to stand trial. The report shall include a breakdown indicating how many orders were based on mental illness, developmental disability, and traumatic brain injury, and shall include the number of persons who were found to be in need of custody, care, and habilitation under 13 V.S.A. § 4823. A copy

of the report shall be provided to the Department of Disabilities, Aging, and Independent Living.”

DAIL received this report on September 11, 2014. The report cited the work produced by the Department of State’s Attorneys and Sheriffs in a separate report. Highlights:

The Report to the Legislature from the Department of State’s Attorneys and Sheriffs contains the detailed findings based on the review of the sanity/competency evaluations in 242 files in Chittenden and Franklin counties. With respect to the specific categories of diagnoses requested by the Legislature for this report, a summary of the data reveals the following:

Diagnosis	# of Cases Chittenden	# of Cases Franklin	# of Cases Total	% of the 242 Cases Reviewed
Mental Illness	152	25	177	73%
Developmental Disability based on Mental Retardation or Intellectual Disability	42	13	55	22%
Traumatic Brain Injury	9*	0	9	3.7%

**Of the 9 cases where there was a diagnosis, 7 cases involved the same individual.*

The breakdown in terms of the competency/sanity findings between mental illness, developmental disability and traumatic brain injury, is as follows:

Diagnosis	Not Competent and/or Not Sane
Mental Illness - only	60
Developmental Disability - only	8
TBI – Only	0
Mental Illness and Developmental Disability	8
Mental Illness and TBI	2
Other	5*

**In four cases, the data provided by the Department of State’s Attorneys and Sheriffs do not indicate the reason for the finding that the defendant was not competent or not sane, or both.*

It is interesting to note that while there were 9 cases altogether involving a TBI diagnosis, there was a finding that defendant was not competent in only 2 of those cases. In the other seven cases, the defendant was determined to be competent and sane. As noted above, seven of the nine cases involved the same defendant. One could speculate that that was the same defendant who was also found competent and sane, but it would take a closer look at the data to confirm that conclusion. In both cases where the defendant was determined to have TBI, the defendants were also diagnosed with a mental illness.

While it would be unwise to extrapolate too much from a review of 242 cases from two counties which represent only one third of the total number of filings in the State, it is clear that the diagnosis of TBI as a result of a competency/sanity evaluation pursuant to 13 V.S.A. § 4823 is a relatively rare occurrence. One possible explanation is that competency and sanity evaluations are only ordered after the charge is brought and the defendant is arraigned. If the TBI condition is known to the State's Attorney at the time he/she decides to bring charges, he/she may opt to follow an alternative route such as pursuing a commitment to DAIL through the civil process rather than bringing a charge when there is a significant likelihood that the charge will eventually be dismissed based on a finding that the defendant is not competent to stand trial. With mental illness or a developmental disability, the condition may be known at the time of charging, but a finding of incompetency is less of a foregone conclusion. The issue will be the degree of impairment as a result of the diagnosis.

(COURT ADMINISTRATOR'S REPORT –ACT 158 LEGISLATIVE REPORT – SEPTEMBER 2014)

The report submitted by the Court Administrator was responsive to the legislative directive. However, due to current limitations in evaluations, data collection, and data reporting, the report is unable to provide predictive information regarding the specific numbers of people with traumatic brain injury who might be served under a proposed program.

IV. Department of State's Attorneys and Sheriffs Report

Act 158 required the Department of State's Attorneys and Sheriffs to submit a report to the Legislature:

“Sec. 13. REPORTS

...

(b)(1) On or before September 1, 2014, the Department of Sheriffs and State's Attorneys [*sic*] shall report to the House and Senate Committees on Judiciary regarding the charging practices of State's Attorneys for persons with traumatic brain injury.

(2) The report shall describe the number of cases from July 1, 2011 through June 30, 2013, broken down by the type of criminal charge, in which a person with traumatic brain injury was:

- (A) charged with a criminal offense, including the disposition of the offense;
- (B) charged with a criminal offense and the charges were dismissed because the person was suffering from a traumatic brain injury; and
- (C) arrested for, or otherwise believed to be responsible for, a crime and criminal charges were not brought because the person was suffering from a traumatic brain injury.

(3) A copy of the report shall be provided to the Department of Disabilities, Aging, and Independent Living.”

DAIL received this report on August 29, 2014. Highlights:

1. Chittenden- 248 cases

Of the 34,848 criminal cases filed in Vermont between July 1, 2011 and June 30, 2013, 8,950 (26%) were filed in Chittenden County. We examined 248 cases where the prosecutor, defense attorney or the court ordered a competency or sanity evaluation. Of those 248 cases, 39 (15.7%) could not be located. Of the remaining 209 cases, the business analyst collected data regarding the diagnoses, competency results and sanity findings. These results are reported below. Nearly every evaluation contained multiple diagnoses, and the sum totals and percentages below account for each diagnosis in each case.

CHITTENDEN COUNTY MENTAL HEALTH EVALUATION DIAGNOSES

Mental Illness	152 cases 72.72%
Substance Abuse	108 cases 51.67%
Traumatic Brain Injury	9 cases 4.31%
Intellectual Disability	23 cases 11%
Mild Mental Retardation	19 cases 9.09%
Personality Disorder	71 cases 33.97%
Not competent to stand trial	50 cases 23.92%
Insane at the time of the offense	50 cases 23.92%

1. Franklin- 41 cases

Of the 34,848 criminal cases filed in Vermont between July 1, 2011 and June 30, 2013, 2,622 (8%) were filed in Franklin County. We examined 41 cases where the prosecutor, defense attorney or the court ordered a competency or sanity evaluation. Of those 41 cases, 8 (19.5%) could not be located. Of the remaining 33 cases, the business analyst collected data regarding the diagnoses, competency

results and sanity findings. These results are reported below.

FRANKLIN COUNTY MENTAL HEALTH EVALUATION DIAGNOSES

Mental Illness	25 cases 75.6%
Substance Abuse	14 cases 42.4%
Traumatic Brain Injury	0 0%
Intellectual Disability	7 cases 21.2%
Mild Mental Retardation	6 cases 18.2%
Personality Disorder	7 cases 21.2%
Not competent to stand trial	14 cases 42.4%
Insane at the time of the offense	12 cases 36.3%

Of the TBI cases, one individual accounted for seven separate dockets. Those seven dockets include various charges for domestic assault, retail theft less than \$900, disorderly conduct and violation of conditions of release. The other two individuals diagnosed with TBI accounted for the remaining two dockets. One individual faced a retail theft (less than \$900) misdemeanor charge and the other faced a misdemeanor simple assault charge. Of the total number of TBI cases, six resulted in a dismissal and three resulted in either a plea of guilty or as an adjudication of guilty. One individual's evaluation resulted in a finding of both incompetency to stand trial and in a finding of insanity at the time of the alleged offense. Only one TBI case contained no co-occurring diagnosis. The remaining eight involved co-occurring diagnoses for both substance abuse and mental illness. Given the small number of cases with a TBI diagnosis, there is not enough data to extrapolate to predict with any degree of accuracy the potential number of TBI cases in the State.

(State's Attorneys and Sheriffs TBI Legislative Report September 2014)

The report submitted by the Department of State's Attorneys and Sheriffs was responsive to the legislative directive. However, due to current limitations in evaluations, data collection, and data reporting, the report is unable to provide predictive information regarding the specific numbers of people with traumatic brain injury who might be served under a proposed program.

V. DAIL Request for Proposals

Act 158 authorized \$50,000 in funding for DAIL to research and design a program that meets the intended purposes of the Act:

“Sec. 15. APPROPRIATION

The amount of \$50,000.00 is appropriated in fiscal year 2014 from the Global Commitment Fund to the Department of Disabilities, Aging, and Independent Living to research and design a program that satisfies this act’s requirement that the Department treat persons with traumatic brain injuries who have been found not guilty by reason of insanity or incompetent to stand trial. To the maximum extent possible, the Department shall design the program to be integrated into the Department’s existing framework of services.”

DAIL distributed a request for proposals (‘RFP’) for a contractor to perform this work on August 12, 2014. Proposals are due by September 12, 2014. The target date for the selection of a contractor is September 22, 2014, with an anticipated contract start date in November 2014.

Issues that have been identified and are expected to appear in future reports to the Legislature include:

1. A review of best practices for treatment of persons with traumatic brain injuries who are unable to conform their behavior to the requirements of the law, with the goal of enabling those persons to be fully reintegrated into the community consistent with public safety. Address the potentially competing interests of individual rehabilitation in the community and public safety. Address approaches for individuals who refuse to actively participate in rehabilitation goals and services.
2. A review of existing programs and services (in Vermont or elsewhere) that adhere to these treatment practices.
3. Recommendations for effective treatment practices, programs and services in Vermont. This is expected to include recommendations regarding:
 - a. Admission and discharge criteria, within the parameters established by statute.
 - b. Assessment procedures for the presence and severity of traumatic brain injury. This includes the challenge of diagnosing/identifying people with traumatic brain injuries long after injuries may have occurred. Ongoing assessment of individual functioning and recovery/rehabilitation, including risk to public safety.
 - c. Program/service design including provider standards, qualifications, and reimbursement. Address the existence of ‘designated’ agencies or programs for people with developmental disabilities, compared to the absence of designated agencies or programs for people with traumatic brain injuries.

- d. Estimates of the cost of implementing such programs and services in Vermont.

VI. Conclusions and Next Steps

DAIL has begun the work of responding to Act 158. Due to limitations in evaluations, data collection, and data reporting, the reports from the Court Administrator and the Department of State's Attorneys and Sheriffs have not provided meaningful information regarding the numbers of people with traumatic brain injury that might be diverted from the criminal justice system. DAIL will proceed with work to research and design a program that meets the intended purposes of the Act.

Anticipated future timeline/milestones:

September 12, 2014	RFP proposals due.
September 22, 2014	Selection of contractor.
November 2014	Contract start date.
February 1, 2015	DAIL report to the House and Senate Committees on Judiciary, the House Committee on Human Services, and the Senate Committee on Health and Welfare on the status of the Department's progress toward implementation of the act.
April 30, 2015	DAIL plan and funding request submitted to the Senate and House Committees on Judiciary and on Appropriations.
May 2015	If the DAIL plan and funding request is approved by a majority vote of the Senate and House Committees on Judiciary and funded by a majority vote of the Senate and House Committees on Appropriations, DAIL shall commence implementation of the plan, including requesting that it be included under the Global Commitment Waiver by the Centers for Medicare and Medicaid Services.
July 2017	Full implementation of the act, including new services.