State of Connecticut
Department of Developmental Services

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**DEPARTMENT OF DEVELOPMENTAL SERVICES TESTIMONY
BEFORE THE PUBLIC HEALTH COMMITTEE**

March 16, 2018

Senators Gerratana and Somers, Representatives Steinberg and Betts and members of the Public Health Committee. I am Jordan A. Scheff, Commissioner of the Department of Developmental Services (DDS). Thank you for the opportunity to testify on **S.B. No. 463 AN ACT CONCERNING THE DEVELOPMENT OF A FACILITIES AND RESOURCES PLAN FOR PERSONS WITH INTELLECTUAL DISABILITY.**

While DDS appreciates the creativity of stakeholders who are trying to develop additional residential options for individuals with intellectual disability, DDS has many concerns about the study the proposed task force would undertake pursuant to this bill from a policy, fiscal and legal perspective. Across the nation and certainly within Connecticut, the policy direction has been against the use of congregate facilities for the purposes of serving individuals with intellectual disability. A move in the other direction or even an investigation into its potential benefits could be seen as violations of the Americans with Disabilities Act, the Olmstead Act, and the Centers for Medicare and Medicaid Services' (CMS) final settings rule.

Nationally, there has been a shift from institutional settings to settings that promote fuller community integration. CMS issued a Final Settings Rule that reflects its intention to ensure that individuals receiving funding and services through Medicaid's home and community-based services (HCBS) programs have access to community living and are able to receive services in the most integrated setting possible. The development of a model that separates individuals with ID from the general population would potentially invite the oversight of both CMS and the Department of Justice (DOJ).

In the guidance on new residential construction, CMS states, "It was CMS' expectation that after the publication of the final regulation, stakeholders would not invest in the construction of settings that are presumed to have institutional qualities, but would instead create options that promote full community integration, per the HCBS Settings regulatory requirements found in 42 CFR 441.301(c)(4)(i), 441.710(a)(1)(i), and 441.530(a)(1)(ii), respectively."

While nursing home costs are covered under Medicaid and not federal HCBS waivers, the national perspective is similar regarding what the federal government is willing to consider as appropriate services.

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I have visited other states where this idea been considered or implemented. In Massachusetts, such action triggered an investigation and oversight from the department of justice. Beyond that, its intent would violate the mission and vision of the department recognizing the inherent worth of individuals with intellectual disability and their right to live in the most integrated setting possible. In fact, Connecticut is recognized nationally for its efforts using Money Follows the Person (MFP) to move individuals out of nursing home settings and into the community.

Even though the provisions of the bill may be well intentioned, DDS cannot support a model that aims to segregate individuals with ID in any way from the general population. Recently, DDS chose to close two of its five regional centers which are congregate care settings. Admissions to Southbury Training School (STS) have been closed since 1986 and residents are encouraged to explore community placement in accordance with the federal court's Messier settlement agreement with DDS.

While individuals with ID currently can and do reside in nursing homes in Connecticut, the Money Follows the Person (MFP) demonstration program seeks to move individuals in nursing homes into community-based settings. This is a clear and well-established policy direction set and followed by the state. DDS will continue to promote community placements for individuals with ID at all levels of need and cannot support a model that seeks to segregate individuals with ID from the general population. According to the Department of Social Service, 4,950 individuals have transitioned from nursing homes to the community under MFP and, of those, 255 are individuals with intellectual disability who receive Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF/IID) level of care.

Another consideration is the fiscal implications of the model contemplated by this bill. The Social Security Act created an ICF/IID benefit as an optional Medicaid benefit to fund "institutions", of four (4) or more beds, for individuals with intellectual disability and specified that these institutions must provide "active treatment," as defined by the Secretary of Health and Human Services. States may not limit access to ICF/IID services or make these services subject to a waiting list as states currently are allowed to do for services provided through Home and Community-Based Services (HCBS) waivers. Therefore, in some cases, ICF/IID services would be more immediately available than HCBS or other long-term care options and require the state to provide funding for these unbudgeted ICF/IID costs.

It is important to note that there are several well-established legal protections for individuals with ID.

- Messier Settlement Agreement: The purpose of the Messier vs. Southbury Training School lawsuit that led to the settlement agreement was to integrate individuals with intellectual disability living at STS into the community. Admissions to STS were administratively closed in 1986 and subsequently the General Assembly enacted the closure of admissions in Public Act No. 97-8 of the June 18, 1997 Special Session. Placing individuals in a long-term care facility would fly in the face of this agreement and would trigger at a minimum injunctive relief if not another costly class action lawsuit and the possible return of federal involvement.

- Olmstead Decision: In Olmstead v. L.C., 527 U.S. 581 (1999), the Supreme Court held that Title II's integration mandate prohibits the unjustified segregation of individuals with disabilities. Furthermore, compliance with Title II's integration mandate requires that public entities reasonably modify their policies, procedures, or practices when necessary to avoid discrimination. The Supreme Court held that public entities are required to provide community-based services to persons with disabilities when (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.

- Americans with Disabilities Act: In 1990, Congress enacted the landmark Americans with Disabilities Act (ADA) "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" In passing this law, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social

problem." For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities.

- Preadmission Screening and Resident Review: Preadmission Screening and Resident Review (PASRR) is a federal requirement to help ensure that individuals with primary serious mental illness or intellectual disability are not inappropriately placed in nursing homes for long term care. PASRR requires that all applicants to a Medicaid-certified nursing facility (1) be evaluated for serious mental illness (SMI) and/or intellectual disability; (2) be offered the most appropriate setting for their needs (in the community, a nursing facility, or acute care settings); and (3) receive the services they need in those settings. PASRR is an important tool for states to use in rebalancing services away from institutions and toward supporting people in their homes, and to comply with the Supreme Court decision, Olmstead vs L.C. (1999), under the Americans with Disabilities Act, individuals with disabilities cannot be required to be institutionalized to receive public benefits that could be furnished in community-based settings. https://www.medicaid.gov/medicaid/ltss/institutional/pasrr/index.html

While DDS is currently exploring several opportunities to expand available residential options for individuals with intellectual disability through the ID Partnership and with new funding proposed by Governor Malloy as part of the FY19 mid-term budget adjustments that would be used to expand capacity in our current system, the department cannot support investing our limited staff resources in a task force with goals which we are opposed to for the reasons previously stated. It is important to note that multiple entities already charged with examining our current system and making recommendations on innovation to our continuum of supports including, but not limited to, the ID Partnership and the Medical Assistance Program Oversight Council's Developmental Disabilities Work Group.

Thank you again for the opportunity to testify on **S.B. No. 463 AN ACT CONCERNING THE DEVELOPMENT OF A FACILITIES AND RESOURCES PLAN FOR PERSONS WITH INTELLECTUAL DISABILITY.** If you have any questions, please contact Christine Pollio Cooney, DDS Director of Legislative and Executive Affairs at (860) 418-6066.