Vermont Legal Aid, Inc. **MEMORANDUM**
Montpelier, Vermont

TO: Mental Health Oversight Committee

FROM: John McCullough III, Project Director
Ed Paquin, Executive Director, Disability Rights Vermont

SUBJECT: Emergency Involuntary Procedures

DATE: October 2, 2014

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From late 2013 through early 2014 the Legislative Committee on Administrative Rules conducted a series of hearings on regulations proposed by the Department of Mental Health on emergency involuntary procedures, culminating in an objection to those rules by the Committee. We believe that the Committee's objection is entirely mandated by the Administrative Procedure Act. We understand that the purpose of your review is to consider the legislative intent of the provision of Act 79 which led to the regulations under consideration and argue strongly for regulations significantly more protective of patients' rights than the regulations proposed by the Department.

It is important to point out the narrow scope of this Committee's review. Many members of the Administrative Rules Committee have pointed out that their review is not to the desirability of a proposed rule, but to the compliance of the proposed rule with the statutory requirements. As the advocates who opposed the proposed rule have pointed out, and in particular my colleagues at Disability Rights Vermont and Laura Ziegler, the proposed rule violated not only legislative intent but also the plain language of the legislative enactment authorizing this rulemaking.

The legislation is clear on its face:

> (9) Individuals with a mental health condition who are in the custody of the commissioner of mental health and who receive treatment in an acute inpatient hospital, intensive residential recovery facility, or a secure residential facility shall be afforded at least the same rights and protections as those individuals cared for at the former Vermont State Hospital. (Added 2011, No. 79 (Adj. Sess.), § 1a, eff. April 4, 2012.) 18 V.S.A. § 7251(9).

The rights protecting those individuals are set forth not only in the policies of the Vermont State Hospital, but fundamentally in the settlement agreement in *Doe v. Miller*, which the Department agreed to, and which provides in part that when a staff person believes an emergency exists, that staff person shall consult with a physician, and that only a physician is authorized to order involuntary medications.

The proposed regulations violate the statute in three important respects. First, by allowing staff persons who are not physicians to order involuntary medications, the proposed rules significantly reduce the protections that patients at the Vermont State Hospital enjoyed. Regardless of the changes we have seen in ordinary medical practice, the treatment to which involuntary patients can be subjected to without their consent is strikingly different from what a voluntary patient may voluntarily consent to: if this were not the case, these protections would not be needed. By lowering the standards of protection for individuals in the custody of the department, the proposed rules violated the mandate that those individuals "shall be afforded at least the same rights and protections as those individuals cared for at the former Vermont State Hospital".

In the process of promulgating rules the Department of Mental Health argued that allowing involuntary medications to be ordered by physicians' assistants or advance practice registered nurses provides the same level of protection because "advanced practice, nurse practitioners were not -- they didn't exist, and so that -- the medical world has evolved from that, and CMS reflects that in their ruling in 2007." Commissioner Paul Dupre, testimony before Legislative Committee on Administrative Rules, November 14, 2013. This argument is simply false. Vermont first licensed advance practice registered nurses in 1944. *Voices of Vermont Nurses: Nursing in Vermont, 1941-1996*, Vermont State Nurses' association, p. 406. In 1984 the parties could have agreed to allow involuntary medication orders by advance practice registered nurses, but they did not do so.

Similarly, the Department has argued that the interpretation of the phrase "at least the same rights and protections as those individuals cared for at the former Vermont State Hospital" should be frozen in time as of 1984, when the settlement of *Doe v. Miller* was reached. Again, this is misguided. As Legislative Council has pointed out, the VSH standards for emergency involuntary procedures went through seven revisions between 2003 and 2011, and an unknown number of revisions between 1984 and 2003, and throughout all those revisions and reenactments the policy retained the requirement that involuntary medications be ordered only by a physician who had personally examined the patient. At any time during those twenty-seven years the Department could have proposed to eliminate that requirement, or to revise the requirement to permit involuntary medication on the order of a nurse or physician's assistant if it believed that the physician order requirement had become outdated, but it did not do so.

Second, the standard that governed involuntary medication at VSH, as agreed by class counsel and the State, paragraph III(A)(2)(b) requires the physician to personally examine the patient before ordering involuntary medication, whereas the final rules proposed by the department would allow involuntary medication to be ordered after the patient's behavior is merely described over the telephone to a physician or licensed independent professional who had not examined the patient or observed his or her behavior. Assessment of behavior on a psychiatric unit by its very nature requires a personal interaction between the patient and the evaluator, and it is far more complicated than reciting vital signs, or other purely objective measures that might give rise to a treatment decision. There are important reasons that involuntary administration of these powerful drugs is strictly regulated, and allowing an order based on secondhand reports is not only bad policy, it violates the protections afforded patients at the Vermont State Hospital.

Finally, and perhaps most importantly, the statutory mandate is to provide the protection of the regulations to all individuals in the custody of the commissioner of mental health who are receiving treatment in an acute inpatient hospital or secure residential facility. The changes in Title 18 incorporated in Act 192 in this past legislative session remove the requirement that involuntary patients may be detained only at psychiatric hospitals, and affirming that all involuntary patients, regardless of whether they have been committed by court action, are in the temporary care and custody of the Commissioner of the Department of Mental Health. By excluding minors and patients in the custody of the commissioner who are not held in psychiatric units of a hospital the proposed rule wrongfully denies the protection of these rules to persons the Legislature determined were entitled to that protection.

We do have one other point that is worth mentioning. At the time Act 79 was adopted the Legislature included a statement that:

> The commissioner of mental health shall:
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> (1) Recommend whether any statutory changes are needed to preserve the rights afforded to patients in the Vermont State Hospital. In so doing, the commissioner shall consider 18 V.S.A. §§ 7705 and 7707, the Vermont Hospital Patient Bill of Rights as provided in 18 V.S.A. § 1852, the settlement order in Doe, et al. v. Miller, et al., docket number S-142-82-Wnc dated May 1984, and other state and federal regulatory and accreditation requirements related to patient rights.

Because the Department has not proposed any statutory changes we believe it is safe to conclude that the Department agrees that existing law, including *Doe v. Miller*, is adequate and appropriate to protect patients'

rights, and that any regulations it adopts should comply with the *Doe v. Miller* standards.

For these reasons, we agree that the Legislative Committee on Administrative Rules was right to object to the proposed rules as written. Provision of clear standards for emergency involuntary procedures is vital, and those standards must preserve the protections enjoyed by the patients of the Vermont State Hospital for decades.

Laura Ziegler and Michael Sabourin have reviewed this and agree with the positions we are taking here.