To: Legislative Committee on Administrative Rules
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Subject: Rule 26-E03, Vermont Homelessness Response Continuum Emergency Rules
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Dear Chair Squirrell and Members of the Committee:

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The Legislative Committee on Administrative Rules has heard extensive testimony identifying the myriad ways in which the Department for Children and Families' (DCF) rules for the Vermont Homelessness Response Continuum (VHRC) are failing to live up to Act 143's legislative intent and are creating arbitrary results. Specifically, the testimony identified the ways the rules:

- create administrative barriers that leave eligible households without shelter;
- do not provide clear eligibility standards that are consistent with the Act;
- create inefficiencies that are adding to the capacity strain on service providers;
- limit access to services by eliminating VT 211's after-hours interim authorization and placement system;
- fail to make the program meaningfully accessible to people with disabilities; and
- sharply reduced due process protections that we have relied on for forty years.

The committees of jurisdiction agree that the rules do not meet legislative intent. In their October 12 memo to this Committee, Chair Wood and Chair Lyons raised their concerns as well.

This Committee expressed concern at the close of its October 15 meeting addressing the VHRC rules and urged DCF and advocates to work together to reach a higher level of agreement. Advocates and DCF came together in good faith to discuss problems with the rules as drafted and opportunities to amend the rules, including concepts not previously incorporated by DCF, like protections for survivors of domestic violence, dating violence, sexual assault, stalking, and human trafficking. The ACLU of Vermont provided the Department with proposed amended rules for their consideration. We expect discussions to continue in November.

But in the meantime, Vermonters experiencing homelessness need this Committee's help. The VHRC's Level 4 hotel and motel program provides

emergency housing. It is an emergency benefit. Getting to a resolution on the problems we have identified in the rules is an emergency that cannot wait.

Section 3 of Act 143 identifies "establish clear eligibility criteria" as one of the purposes of the law. Another purpose is to provides services with some degree of flexibility to meet people where they are. For eligibility criteria to be clear, they need to have ascertainable standards set out either in statute or in rules. This is a basic due process concept. And for applicants and participants in the Program, for service providers, and for the Department's staff, too, rules that accurately reflect applicant and participant rights and obligations—the way the legislature intended—is absolutely essential for this program to feel fair and manageable.

The Department has expressed willingness to make some positive changes but nothing has been committed to revised rules or other writings. The ACLU of Vermont is asking this Committee to advise the Department to immediately establish those positive changes through the appropriate process: adopting a new emergency rule, filing it with the Secretary of State, and filing it with LCAR. That can happen now while we continue our collaborative work.

It is also fair to say that it is extremely unlikely that DCF and advocates will overcome some disputes that are particularly time-sensitive.

We are asking LCAR to take action related to the following:

1. The lack of a variance or waiver for the cap on the number of rooms to promote maximum flexibility;
2. Due process problems related to fair hearings;
3. Compliance with the Americans with Disabilities Act and Act 143's promise of meaningful access for people with disabilities;
4. Standards for extensions;
5. Prioritization beyond what was authorized by the legislature via the HOU-SING needs assessment;
6. Housing plan expectations;
7. VT 211 reinstatement; and
8. Rights of survivors of domestic violence, dating violence, sexual assault, stalking, human trafficking.

I. Variance & Waiver

As I noted in my previous testimony, Rule 3.00 of Part 8 incorporates Act 143's caps on the number of motel rooms that can be used to serve eligible households without any possibility of waiver or variance even though the other components of the Continuum have yet to be implemented. Outside of the winter period, which commences on December 1, that cap is 700 rooms. As of October 26, 665 rooms were occupied. I think it's safe to assume that DCF will fill the remainder

within days or the next couple of weeks – just as temperatures drop below freezing at night. And then what?

When I review files of the applicants for emergency housing, I see doctor's notes that say things like:

"Without housing patient is at risk of death."

I was talking to a person who is unsheltered on Tuesday night, and he kept saying:

"I'm going to die out here."

He said he's waiting to hear back from the Department about a fair hearing. I can't tell you how many times I hear people say those words:

"I'm going to die out here."

And the harder it becomes for people to access services, the more I hear words like this:

"I have no hope left."

We are going to run out of room. We are going to run out of room for the people who we know are going to die out there, for the families with children, for people who have already been subjected to unspeakable harms because they can't protect themselves when they have no shelter.

Section 3 of Act 143 states that the Continuum is supposed to promote maximum flexibility. The Commissioner should have the flexibility to waive the cap on the number of rooms or institute a variance process to protect the health, safety, or welfare of people at severe risk. To provide a bit of hope. The ACLU of Vermont is asking LCAR to clearly communicate to DCF that the Commissioner does have that discretion—that flexibility—to save lives. It is written right into Section 3 of the statute.

Please object to the room cap to the extent that it does not recognize a variance or waiver process to communicate to the Commissioner that she has the power to exercise discretion.

II. Due Process

As noted in the joint memo from Chair Lyons and Chair Wood, the Department has eliminated several longstanding practices that are now interfering with VHRC participants' fundamental due process rights. The chairs recommended that DCF reinstate its prior guidance and amend its procedures, but so far, DCF has declined to do so.

There are several problems at issue. First, the Department is refusing to provide "expedited" fair hearings for VHRC services. DCF's General Assistance Procedure P-2127B stated that the pre-Continuum emergency housing hearings were to be "expedited," consistent with the way that courts consider access to shelter to be an emergency need. Further, pursuant to General Assistance interpretive memo 2606, for the last forty years, hearing officers' recommended orders were put into effect pending final decisions from the Human Services Board—offering interim relief, similar to a temporary restraining order or preliminary injunction, until a petitioner's case could be heard by the Human Services Board. But the Department has declined to implement that practice for the VHRC, rendering the administrative fair hearing process procedurally inadequate for anyone in need of immediate relief. Lastly, the Department is not providing continuing aid during the fair hearing process, contrary to 33 V.S.A. § 2215(d), which clearly states that services must be continued without interruption.

The purpose of an administrative hearing process is to ensure that disputes related to the administration of agency rules are handled by hearing officers with special expertise and knowledge of the details of the agency's rules, to expand access to justice by providing a simplified and expedited process to resolve disputes outside of court, and to reduce the likelihood that our court system will be bogged down by hundreds (or thousands) of cases challenging administrative agency decisions. Imagine the waste of resources if every petitioner in need of expedited relief had no choice but to file a complaint in superior court to seek a temporary restraining order against the Department to access benefits.

It is our understanding that the Department is not willing to make the three changes proposed we have proposed: to treat VHRC hearings as "expedited," to follow hearing officer recommendations pending final resolution of the case by the Human Services Board, and to provide continuing placement in a motel pending resolution of the hearing in accordance with 33 V.S.A. § 2215(d). I urge LCAR to object to the Department's rule in favor of adopting the alternative language the ACLU of Vermont has proposed to the Department.

III. Accessibility and the Americans with Disabilities Act

The emergency rules do not reflect the Department's affirmative obligations under the Americans with Disabilities Act and Act 143's promise of meaningful accessibility to program services for people with disabilities.

Commissioner Hoffman indicated that the Department is looking for more ADA-compliant wheelchair-accessible motel rooms. But DCF's lack of compliance with the ADA goes far beyond the Department's failure to secure accessible rooms for people who use wheelchairs, and that noncompliance with the ADA is longstanding. People with disabilities are experiencing harm every day they are denied access to benefits because of their disabilities or denied reasonable accommodations.

The Agency of Human Services' accessibility policy correctly notes that accessibility "requires flexibility and creativity wherever possible."[1] And that flexibility, according to Second Circuit and Vermont Supreme Court precedent, includes modifying program rules—even rules in statutes that aren't fundamental to the nature of the benefit—to make accessibility a reality. The fundamental nature of Level 4 benefits is shelter in a motel room. If motels charge more than $80 for a wheelchair-accessible room, paying more than $80 is a reasonable modification to ensure that we're not leaving unhoused Vermonters in wheelchairs outside. It is also consistent with longstanding DCF practices prior to the pandemic period, specifically, the interpretive memo dated October 18, 2014, for the General Assistance emergency housing rule 2852.2 ("If no room is available for the recipient at a motel on the [Department's list of the least expensive motels in the district], the Department will authorize payment for an accessible room, or room otherwise reasonably accommodating the disability, at a motel within the district at the least expensive rate available.")

The accessibility policy also indicates that the Agency (and its departments) must take steps to:

- Clearly define how to request accommodations and promote what accommodations are readily available to people who need them;
- Communicate options clearly and with as much notice as possible;
- Remain as flexible as possible when considering reasonable accommodation requests; and
- Ensure communications, training, and information comply with the Agency of Human Services' minimum accessibility requirements.

The VHRC does not comply with the Agency's accessibility policy. For example, when a reasonable accommodation request is denied, some applicants are provided with nothing more than notice that the benefit is denied rather than a response to their reasonable accommodation request. Even when applicants receive notice that a reasonable accommodation request is denied, they are not informed of their right to file an Americans with Disabilities Act grievance through the Secretary's office. Further, when a specific request is denied, applicants are not informed of what accommodations may be available as an alternative. This is not the flexibility necessary to ensure that this program is meaningfully accessible to people with disabilities.

We urge LCAR to object to the emergency rules itemized in Section 1b of our written testimony from October 15 and have already provided alternative rule language to the Department.

[1] Agency of Human Services, Policy 1.06 Accessible and Inclusive Communications Policy (Sept. 1, 2022), available at https://humanservices.vermont.gov/sites/ahsnew/files/doc_library/AHS_Accessibility_Policy_Final_Approved_9-1-2022%20tt.pdf.

IV. Extensions

Rather than setting out clear criteria with ascertainable standards for participants in need of extensions to the 70-day durational limit on motel services in the Continuum—what was clearly the legislature's intent—the Department's extension rule only parrots the bare statutory extension language. It is my understanding that, although not spelled out in the Rules, the Department is willing to make some households eligible for extensions as a matter of course, including families with children, people with disabilities at imminent risk of experiencing serious harm to their health, and so forth, while retaining discretion to consider other extension requests as well. I urge LCAR to ask the Department to immediately amend its emergency rules to reflect these changes. Clear and ascertainable standards in the rules are needed now to reduce the stress on vulnerable program participants and the service providers supporting them, and to reduce disputes and uncertainty related to eligibility for extended shelter services.

V. Prioritization in the HOU-SING Assessment

The HOU-SING Assessment continues to create an insurmountable barrier for many applicants to the VHRC and applicants' risk levels are regularly miscategorized due to the irrationality of the assessment tool itself. Unless the Department agrees to immediate repeal of the non-statutory prioritization of applicants and needs assessment in Part 1, Rules 5.01 to 5.03, we ask the Committee to object to those rules now.

VI. Housing Plan Expectations

The rules related to housing plans should be immediately modified to reflect the Legislature's intent to meet participants in the Continuum where they are, to reflect their abilities, and to promote flexibility and person-centered services without mandating treatment or setting arbitrary and impossible deadlines. We provided language in our written testimony from October 15 and in proposed amendments to the rules submitted to the Department for its consideration. We urge this Committee to reject the rule in its current format.

VII. VT 211

The ACLU of Vermont encourages the Committee to advise the Department to immediately implement an emergency rule to reinstate Vermont 211 service, including placement of eligible households in motels. We have submitted proposed rule language to the Department for consideration.

VIII. Rights of survivors of domestic violence, dating violence, sexual assault, stalking, human trafficking.

Lastly, working collaboratively with the Network to End Domestic Violence, we have proposed amended rules to DCF to offer protections to survivors of domestic violence, dating violence, sexual assault, stalking, and human trafficking. The

language largely mirrors the Violence Against Women Act's housing title and the Office of Economic Opportunity's longstanding VAWA compliance policies and procedures. I encourage the Committee to ask the Department to immediately implement emergency rules to codify those protections for participants in the VHRC.

IX. Conclusion

The ACLU of Vermont respectfully asks the Legislative Committee on Administrative Rules to object to the VHRC emergency rules as outlined in this memorandum.