



**Senate Committee on Judiciary  
Disability Rights Vermont Testimony**

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**March 2, 2026**

Honorable Chair, Vice Chair, and Senators,

Good afternoon, I am Laura Cushman, and I am an attorney at Disability Rights Vermont. If you are not familiar with us, Disability Rights Vermont is the Protection and Advocacy (P&A) agency for the State of Vermont. The Protection and Advocacy (P&A) system is a nationwide network of federally mandated non-profit legal organizations advocating for the rights of people with disabilities. The United States Congress established the P&A system in the 1970s after news media exposed the horrific and negligent treatment of people with disabilities at a New York State facility, called Willowbrook. P&As receive federal grants to investigate and remedy abuse, neglect, and serious rights violations impacting individuals with disabilities, whether perpetrated by state actors, private facilities, caregivers, employers, or others. Given our role as the P&A, Disability Rights Vermont is also designated by the Governor as Vermont's Mental Health Care Ombudsman. Disability Rights Vermont also filed a federal lawsuit against the Department of Children and Families over concerns of abuse and serious rights violations at the former juvenile detention facility at Woodside.

The proposed forensic facility is designed for those who do not require a hospitalization level of care and is essentially a specialized prison. Holding individuals with IDD or neurocognitive disorders like dementia in a correctional environment when they have not been convicted of a crime raises Cruel and Unusual Punishment concerns under the 8th Amendment<sup>1</sup> and Article 18 of the Vermont Constitution<sup>2</sup>.

Please consider the disabled people we are talking about. I have listened to much of the testimony on this bill presented to the Senate Committee on Judiciary, and it is surprising how often mental illness has been mentioned in the conversation. But even Karen Barber from the Department of Mental Health (DMH) has told you, this forensic facility is not for people with mental illness. This bill attempts to fill a "gap" in Vermont's mental health and criminal justice systems but will target individuals with intellectual disabilities (IDD) like autism spectrum disorder or neurocognitive disorders like

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<sup>1</sup> U.S. Const. amend. VIII.

<sup>2</sup> Vt. Const. ch. I, art. 18

dementia. When a person is found incompetent to stand trial (IST) or not guilty by reason of insanity (NGRI), for a crime carrying a life sentence, and that person presents a serious risk of harm to the community due to mental illness, that person remains the responsibility of DMH. DMH has both the Vermont Psychiatric Care Hospital and the secured River Valley facility for the treatment of those individuals. People who are found NGRI simply cannot be detained indefinitely, but their treatment and care, whether in a hospital or community setting must also not be neglected. If people with mental illness are appropriately placed, then only persons who are IST or NGRI due to something other than mental illness would be considered for this proposed forensic facility. If the person is committed to the care and custody of DMH, then our current system entrusts DMH to appropriately place them. In testimony provided by surviving family members of crimes that took the lives of their loved ones, the accused person was a person with mental illness. In some cases, they were a person with mental illness in the community on orders of non-hospitalization, who were not receiving sufficient DMH services or were refusing services. This is a criticism of DMH and how that department handles persons committed to their care. This forensic facility would not be appropriate even for those defendants.

By approving the proposed secure forensic detention this bill risks creating a system of "preventative detention" that targets those with permanent, non-restorable disabilities. People with IDD, TBI, and neurocognitive disorders like Alzheimer's disease fall under the care of the Department of Aging and Independent Living (DAIL). And, by creating a system that provides for placement in a forensic facility for an indeterminate period that shall not have a specified end date, we run the risk of violating *Jackson v. Indiana*, which says that a person who is IST cannot be held "more than the reasonable period of time necessary to determine whether there is a substantial probability" that they will attain competency in the foreseeable future.<sup>3</sup>

I will tell you the story of one individual, a person with no family support, left to the care of a public guardian once they reached the age of majority. A person with dual diagnoses, both mental illness, and an IDD. This person, who was not receiving appropriate services in the community, was charged with crimes in their early adulthood, mostly misdemeanor crimes. However, without appropriate care and treatment, without protections needed by a vulnerable person, the charges escalated to felony charges. When this person was deemed IST, the Department of Corrections (DOC) sent them to inpatient hospitalization, yet the psychiatrists and DMH believed that this person's needs were less psychiatric in nature, and being a person with IDD would be better served by DAIL. Because neither agency could provide

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<sup>3</sup> *Jackson v. Indiana*, 406 U.S. 715 (1972)

sufficient, appropriate services for this person, and because this person did not require an inpatient level of care, they were sent back to the DOC. This person could not be convicted of a crime, so holding them in DOC was not appropriate, resulting in this person being caught in a revolving door. DOC sent this person back to psychiatric inpatient care at VPCH, Brattleboro Retreat, and Rutland Psychiatric Hospital. DMH recognized that inpatient hospitalization was inappropriate and DAIL failed to provide services and had no appropriate residential setting for this person. This went on for nearly two years. The institutional failings caused this person to be isolated in corrections, where they completely decompensated, became despondent, and unreachable. How will DMH and DAIL resolve future issues of conflicting diagnoses? Were this person charged with life crimes, they would be the target client for the proposed forensic facility. We can see by the support of this bill that when neither DMH nor DAIL can agree which is responsible for a disabled person, they are content to pass the buck to the DOC. The DOC will not be providing truly appropriate care and treatment for people with disabilities in this proposed forensic facility. Had appropriate services been provided to this person they might have avoided being caught up in the criminal justice system and with agencies that perceive them as a someone's problem, but not their problem. Should a person with severe autism spectrum disorder or dementia really be indefinitely left in custody of the DOC? Again, we believe that the treatment and care of these individuals should be provided by DAIL, in a facility with an appropriate level of care and restriction. Disabled individuals should not be held and isolated indefinitely in a prison-run forensic facility. Even if they are criminal justice involved and accused of committing the worst of crimes, DAIL should be responsible for administering care and treatment for those justice-involved people with disabilities, not the Department of Corrections (DOC). This tiny target population of individuals can only be rightfully cared for in a residential treatment or nursing facility by DAIL, the State agency charged with the care and protection of people with IDD, TBI and neurocognitive disorders.

For several years Disability Rights Vermont has been focusing efforts on preventing the construction of more Vermont facilities at the highest levels of care and investing more on less-restrictive facilities and alternatives. We have also fought to end abuse by the DOC and to close facilities like Woodside. DRVT remains committed to holding the State accountable to comply with the legal mandates of the Americans with Disabilities Act<sup>4</sup>, the Integration Mandate<sup>5</sup> and the Supreme Court decision of *Olmstead v. LC*<sup>6</sup>, which

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<sup>4</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (1990)

<sup>5</sup> 28 C.F.R. § 35.130(d) (2024)

<sup>6</sup> *Olmstead v. L.C.*, 527 U.S. 581 (1999)

say that individuals with disabilities have the right to receive services in the most integrated setting appropriate to their needs. This bill ignores Vermont's obligations under the ADA and the Olmstead decision by suggesting yet another facility for less than a handful of potential Vermonters who likely could be served in the community, with the appropriate safety and security measures in place.

Where competency restoration is concerned, it is often achievable for those individuals who suffer from substance use disorder (SUD), once a person is off substances. There is also hope for a return to competency for individuals with mental health disorders once they receive and respond to appropriate treatment. So, if people whose competency is restorable were receiving appropriate and adequate care in our current system, then they would be returned to competency without need of a forensic facility or this bill to create new rules and parameters for competency restoration. Individuals with IDD, Alzheimer's, Demetia, and often those with TBI, cannot be restored to competency, and in some cases have never been competent. For these reasons and others, this bill is unnecessary. A more effective bill would be one that provides adequate treatment programs for individuals with SUD and mental illness who are falling through the cracks, and more residential treatment and supported living for people with IDD and neurocognitive disorders. At the very least this bill must be amended to strictly limit competency restoration to those individuals who can be restored to competency and should provide more clearly defined mechanisms for appropriate treatment for all whose competency is in question.

The bill attempts to limit the use of involuntary medication by using the *Sell v. United States* (2003) standard, requiring that medication be "substantially likely to render the defendant competent"<sup>7</sup>. However, applying this to a person with IDD or dementia is legally and medically suspect, as there is no medication that grants legal competency to someone with a permanent cognitive deficit. This bill does not go far enough to ensure that medication will not be inappropriately used on individuals for whom competency is unlikely.

Traditionally, in criminal and civil commitment, the State bears the burden of proving that it can limit a person's liberty. This bill dangerously proposes to shift that burden of proof onto the defendant, and by a clear and convincing standard. Requiring a person with a significant cognitive impairment to prove a negative (absence of future dangerousness) by the highest civil evidentiary standard is a massive hurdle that may

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<sup>7</sup> *Sell v. United States*, 539 U.S. 166 (2003)

violate Due Process protections under the 14th Amendment<sup>8</sup> and the Vermont Constitution<sup>9</sup>. In Vermont, a defendant asserting the defense of NGRI bears the burden of proof to establish it by a preponderance of the evidence standard. It is unfair and unreasonable therefore to have a higher standard of proof for competence and lack of future dangerousness.

Finally, this bill proposes amending Vermont Rule of Evidence 1101 to make the Rules of Evidence (except for privileges) inapplicable in proceedings concerning competency restoration and release from a forensic facility. This means hearsay and other potentially unreliable evidence could be used to justify the continued locked detention of a person with a disability. In a proceeding where a person does not have the ability to defend themselves, and their liberty is at stake for an "indeterminate period," the removal of these protections erodes a person's right to due process and a fair hearing. We also disagree that the criminal court is the appropriate venue for hearings on involuntary treatment, due to the sensitive and protected private information that will be shared in hearings on the public record.

You have an enormous amount of important work and proposals to consider before you. For this bill related to competency restoration and the creation of a DOC administered forensic facility, I ask that you consider it from a disability perspective and with a clear understanding how your decisions might impact Vermonters with disabilities, directly or indirectly. Over 25% of Vermonters live with disabilities. Every one of us is only one accident, or trauma away from being a person with disabilities. People with disabilities are not broken and they are not less than. Having listened closely to the Committee hearings on this bill, I have heard the subtle ways that ablism is embedded in the conversation. I ask you to please recognize and set aside any disability or mental illness bias when considering this bill. Also, please remember that each and every person who could be indefinitely detained if this bill passes is presumed innocent, or not guilty. If our policy makers ignore the effect of negative stereotypes and misconceptions about disability and mental illness, then the policies they create will fail to meet Vermont's Constitution's promise in Chapter I, Article 8<sup>10</sup> that our state government is instituted for the common benefit, protection and security of all the people, families, and communities, of Vermont. We must defend the rights of the most vulnerable among us, even if they have been charged with crimes.

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<sup>8</sup> U.S. Const. amend. XIV, § 1

<sup>9</sup> Vt. Const. ch. I, art. 10

<sup>10</sup> Vt. Const. ch. I, art. VIII



I appreciate your thoughtful consideration of our testimony and am available and happy to answer any questions or provide additional information.

Thank you,

Laura Cushman