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

TO: Senate Judiciary Committee

FROM: John McCullough III, Project Director

SUBJECT: S. 287

DATE: January 28, 2014

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The Mental Health Law Project opposes the adoption of S. 287. If enacted the bill would diminish the rights of people in the involuntary mental health system, increase forced medication, and impose unreasonable and unjustified burdens on the Judiciary, the Mental Health Law Project, and the office of the Attorney General. Furthermore, it will not provide the benefits promised by its proponents.

S. 287 will increase forced medication. Since 1998 State policy has been to favor voluntary over involuntary treatment. "It is the policy of the general assembly to work towards a mental health system that does not require coercion or the use of involuntary medication. 18 V.S.A. § 7629(c). This recognition of patient autonomy and self-determination was a major advance in Vermont law, but the actions of the mental health system have not honored this policy.

Sections 2 and 4 of the proposed legislation would allow the immediate filing of an application for involuntary medication for any involuntary patient in any psychiatric hospital. Furthermore, Section 3 will also allow for a motion for expedited hearing for virtually every involuntary patient, with a hearing to be held on as little as five days' notice. As statistics already presented have demonstrated, the number of involuntary medication cases filed each year has more than doubled in four years and this trend shows no sign of abating. Together, these provisions will result in an explosion in the number of involuntary medications filed and pushed to a hearing on the merits.

S. 287 will deprive patients of the time needed to prepare an adequate defense. Involuntary commitment and medication proceedings implicate major liberty interests protected by the United States and Vermont Constitutions. Due process requires that the patient receive not just some type of hearing, but the opportunity to develop and present an adequate defense, which includes the review of hundreds of pages of medical records, interviewing of witnesses, and a review by an independent psychiatrist. The expedited hearing provision of S. 297 will enable the State to move for an expedited hearing in virtually every case, and will force involuntary commitment and involuntary medication cases to trial before the attorneys for the patient and the independent psychiatric examiner can fully complete their work and be prepared to address the complex factual and medical issues that these cases raise.

The protections promised by the probable cause review are illusory and the proposal will reduce protections now available to patients. Current law provides for a preliminary hearing whenever an involuntarily admitted patient requests one, and in a proper case the availability of a preliminary hearing is an opportunity for the patient to challenge the basis for his or her detention.

The bill provides for an automatic probable cause hearing for every one of the hundreds of involuntarily admitted patients, but it limits the review to the papers that form the basis for the detention. In cases in which MHLP has successfully challenged detention at a preliminary hearing it has often been because the live testimony of the witnesses has not supported the claims in the paperwork. Excluding the possibility of a challenge to the involuntary admission paperwork will ensure that even at an in-person hearing the court will have no opportunity to evaluate the basis of what may be unfounded allegations. Any change to this provision of the statute must preserve the right to a hearing at which the witnesses present live testimony in support of the involuntary detention.

By eliminating the automatic stay on appeal S. 287 will deprive patients of meaningful review of an involuntary medication decision. Section 8 of S. 287 would eliminate the automatic stay of an involuntary medication order not just during the appeal period, but even after an appeal has been filed. There was a brief period when the automatic stay before appeal caused delays in some cases, but the courts now routinely grant the State relief from the automatic stay, so this is no longer the issue it appeared to be last summer.

The question of automatic stay after an appeal has been filed is another matter. Appeals are extremely rare in involuntary medication cases, but when an appeal is filed the automatic stay is essential. As the Supreme Court explained in *In re L.A.*:

> By the same token, an exemption from an automatic stay would not necessarily be appropriate for involuntary-medication orders, considering the highly invasive nature of involuntarily medicating someone compared to the relatively low threat to the public posed by patients who will remain confined. Further, making involuntary-medication orders exempt from automatic stays would effectively defeat the substance of appeals from such orders. The appealing party would have already been medicated against their will notwithstanding the Legislature's avowed policy of moving towards a system that avoids involuntary medication, see 18 V.S.A. § 7629(c), or the merits of the patient's reasons for not wanting the medication.

In re: L.A., 2008 VT 5.

It is vital to preserve the patient's right to appeal an involuntary medication decision.