

External Program Review Committee (EPRC) agenda

Date of meeting: 2-4 p.m. Dec. 6, 2018

DSD liaison: Stacie Enders

Type: Whole committee

Location: Minnesota Department of Human Services, Room 3146, 444 Lafayette Road, St. Paul 55155. Most members of the committee, however, will participate through an online video conference line.

Common acronyms used by the committee

We ask committee members to avoid the use of acronyms. Here are common acronyms:

- RA or Request: DHS form 6810D: Request for Authorization of the Emergency use of Procedures
- FBA: Functional behavior assessment
- PSTP: DHS form 6810: Positive Support Transition Plan
- DHS: Minnesota Department of Human Services
- DSD: Disability Services Division
- EUMR: Emergency use of manual restraint
- BIRF: DHS form 5148: Behavioral intervention report form
- IRP: Interim Review Panel (Predecessor to the EPRC)
- CABC: Context, antecedent, behavior, consequence
- PS Manual: DHS form 6810C: Guidelines for Positive Supports in DHS-Licensed Settings
- MDH: Minnesota Department of Health
- CCM: County case manager
- HCBS: Home and community-based services

Agenda items

- Technology
 - We will dedicate the first few minutes to addressing any connectivity issues.
- Public comments
 - We encourage public participants to share their thoughts and ask questions about committee activities at the beginning of each meeting. The committee will continue on to the next agenda item when either 1) 30 minutes have passed or 2) when there are no additional comments or questions, whichever comes first.
- General reminders
 - Before speaking, please state your name.
 - Committee members are expected to:
 - Read the minutes, agenda and supporting documents before each meeting
 - Participate in ideas and conversations, as well as pause to allow others to share input
 - Commit to spending the whole meeting time present and not engage in other activities during the meeting
 - Be on time.

- Discussion
 - The committee will discuss the minutes from November and vote.
 - The committee will review its 2018 Olmstead report. The recommended changes may be viewed on the following page.
 - Stacy Danov will lead a discussion on what's working and what's not working about procedures and protocols.
 - Stacy Danov completed a literature review and will share her findings on best practices for seatbelt guards and harnesses. Additional members will share their thoughts and research on the seatbelt guard and harness topic.
 - Committee members will have the opportunity to share items for information.
 - Committee members will have the opportunity to bring up items for discussion or action.
 - What is going well? What should we change? What have we learned?
- Presentation
 - Sarah Knoph and Vanessa Vogel will present.
- Subcommittees
 - Each group will provide an update on the work it has completed recently.
- Closing
 - The committee will list out action steps and topics that members would like to discuss for the next meeting.

Recommended changes to Olmstead report

Deletions are crossed out and additions are bolded. Notes from the committee coordinator are in brackets.

- The Positive Supports Rule ensures DHS-licensed services and facilities that serve people with developmental disabilities or related conditions ([Begin add] **excluding certain child care providers** [End add]), follow the prohibitions and limits in Chapter 245D.
- If the person displays self-injurious behavior that could cause serious harm and the care team determines a prohibited procedure is necessary to [Begin delete] ~~safeguard the person and others~~ [End delete] [Begin add] **protect the person from imminent risk of serious injury** [End add], the commissioner may grant approval for a limited time while the care team develops effective positive support strategies to phase out the procedure. [Begin add] **The commissioner may also grant limited approvals when necessary to protect the person's health and safety under certain circumstances.** [End add]
- [Title change because that does not accurately describe column 4 – begin delete] ~~Phased-out~~ [End delete] [Begin add] **Approval ended** [End add]
- One [Begin delete] ~~explanation for this observed~~ [End delete] difference is the contrast between the type of [Begin delete] ~~self-injurious~~ [End delete] behavior that requires a seat belt harness/guard vs. the type of [Begin delete] ~~self-injurious~~ [End delete] behavior that requires the use of mitts, arm splints or helmets. Specifically, seat belt harnesses/guards typically address self-endangerment behaviors (behaviors that increase the potential for harm) whereas mitts, arm splints and helmets address [Begin add] **self-injurious behaviors** [End add] [Begin delete] ~~(behaviors that result in immediate harm).~~ [End delete]
- In January 2018, the committee assigned itself [Begin delete] ~~the following~~ [End delete] [Begin add] **three** [End add] tasks: [Begin add]
 - **The committee will provide additional technical assistance to teams for cases that have had little movement toward phasing out mechanical restraints. The committee encourages evidence-based practices and places an emphasis on quality-of-life measures that align with the person's values.**
 - **The committee has met with every care team in person and provides feedback to all service providers with active approval on a quarterly basis (or more often when needed). All the teams have achieved some progress, such as reducing the use of restraint, improving quality of life factors, documented skill acquisition, or the development of new communication strategies.**
 - **The committee will continue conversations with teams and help them improved their data collection and analysis methods.**
 - **The committee regularly reviews quarterly Positive Support Transition Plan Reviews, [DHS Form 6810A](#), and other data such as charts and graphs submitted by service providers. All reviews result in feedback, which is sometimes acknowledgment of quality work and other times recommendations for improvement. The committee also offers support to other members of the care team as needed, such as case managers and behavior professionals.** [End add]
 - The committee will track data for seatbelt harnesses/guards separately from other types of mechanical restraints (e.g., mitts, arm splints, helmets). The committee will review this data in fall 2018 to identify similarities and differences between the two groups.
 - The committee collected the following data and reviewed it in October 2018. [Begin add] **The results showed no discernable differences between staffing ratios, ages, staff turnover, licensed settings, staff training, and policies and procedures. The remaining data points could not be evaluated. See details below.** [End add]

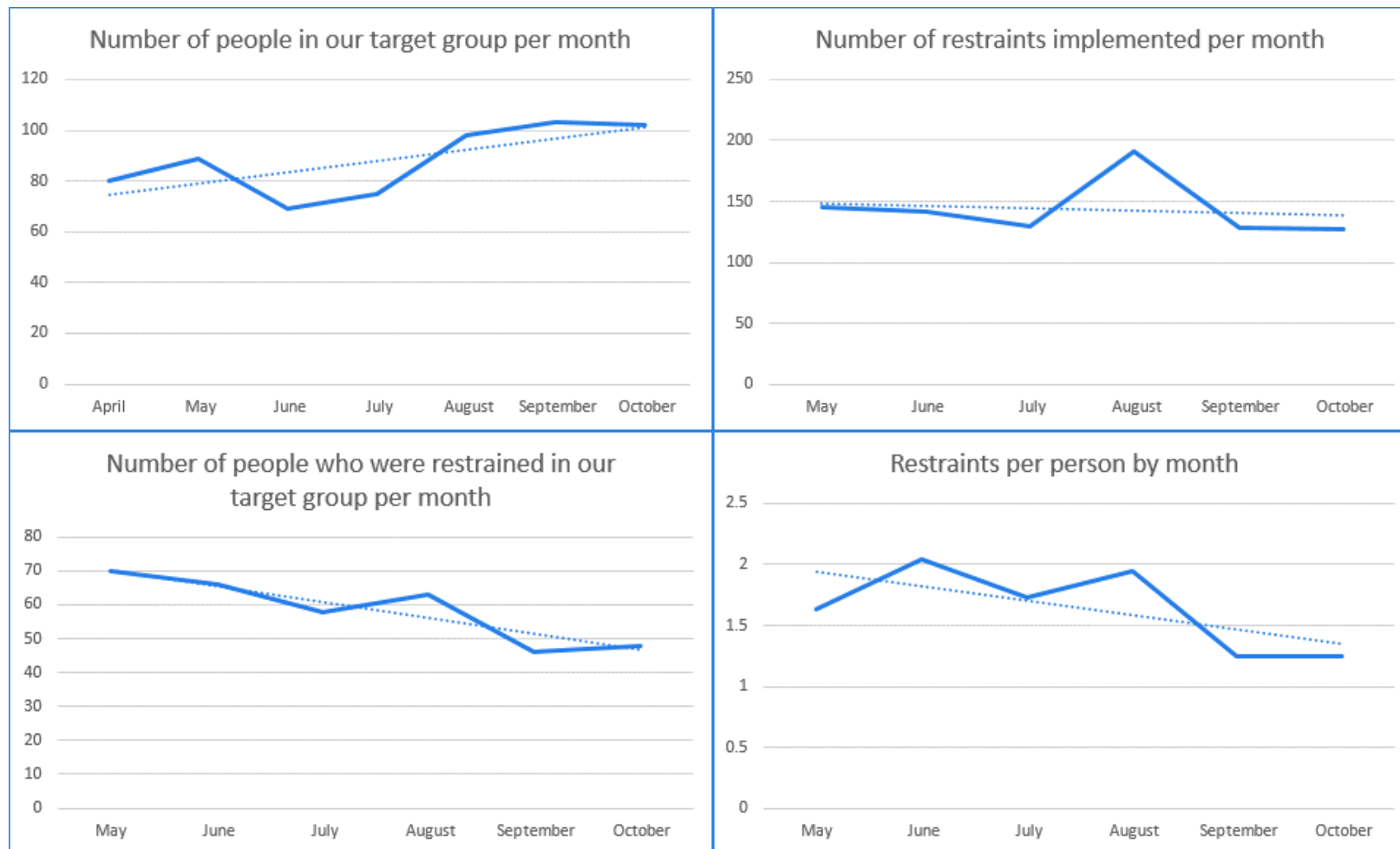
- [There was a recommendation to separate the bullets into two sections on the last page – the following are heading #3 additions]
 - **Future recommendations for the EPRC to implement**
 - **Future recommendation for DHS** [End add]

Data collected by the External Program Review Committee (EPRC)

The following graphs show an approximation of trends in the emergency use of manual restraint for people who had been restrained four or more times in the past 180 days and were not being followed by a different Department of Human Services group other than the EPRC.

The data are only an approximation and include some error, such as the possible exclusion of reports where the person's name was spelled incorrectly. Additionally, some errors are the result of corrections, such as the significant increase for August in the chart titled "Number of restraints implemented per month": the increase reflects a manual search of reports for errors. We also conducted a manual search in the following months and found a decrease in the use of restraint, though readers should keep in mind that a manual search of hundreds of data points likely contains error.

Starting around the middle of 2019, this data should become much more reliable as we modify the behavior incident tracking system called BIRF. Some of the new features will include the requirement to verify the accuracy of identifying information and automated data reporting functions.





Rulemaking and the Positive Supports Rule

Vanessa Vogl | Rulemaking Attorney | Administrative Law Office- General Counsel's Office

- How the Positive Supports Rule came to be
- What the rulemaking process looks like
- Understanding of the differences between statutes, rules, cases, and policies
- How the Positive Supports Rule is different from other rules

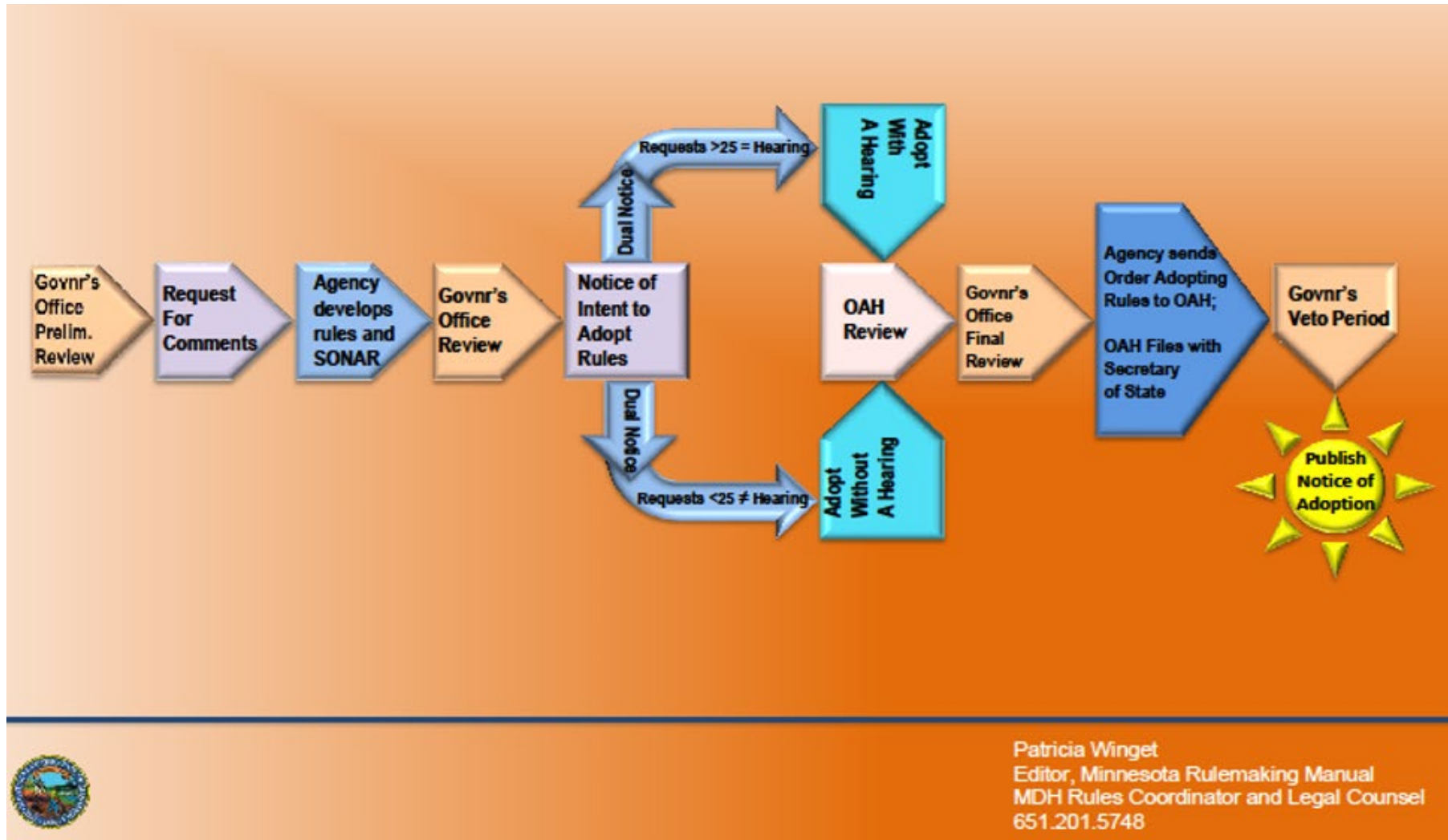
Positive Supports Rule

- Part of the Jensen Settlement
 - Rule 40 Advisory Committee
 - Modernization of Rule 40 (and why we don't call it Rule 40 anymore)
- Statutory authority for rule
 - [Minnesota Statutes, section 245.8251, subdivision 1](#)
 - Requirement to include EPRC in the Positive Supports Rule (subdivision 3)

Rulemaking process

- Governed by Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400
- Underlying principles
 - Public participation
 - Flexibility
 - Independent oversight (Office of Administrative Hearings)
 - Agency (and public) expertise

Rulemaking progress chart



Request for comments

- First formal step in rulemaking process
- First opportunity for public input
- Published in the State Register
 - Three requests for comments were published for the Positive Supports Rule
- Sent to other “affected persons,” for instance: program recipients, regulated parties, advocates, counties, tribes, other state agencies, people who have signed up to receive DHS rulemaking announcements
- Sent to the Legislature

- Consider while drafting:
 - Necessary
 - Reasonable
 - Within statutory authority
- Advisory Committee review



Draft SONAR (Statement of Need and Reasonableness)

- Provides background
- Identifies affected persons
- Identifies alternative ways of achieving purpose of rules
- Explains why alternatives were rejected in favor of rules
- Discusses any differences from federal regulations
- Assesses total effect of rule with other federal or state regulations
- Analyzes costs
- Includes sources and citations

Advisory Committee

(Minnesota Statutes, section 14.101, subdivision 2)

- Advise: inform and persuade, make suggestions and recommendations
- Review drafts of rules and SONAR
- Commissioner/agency makes final decisions
- Membership- appointed by agency



Notice of Hearing/Intent to Adopt Rules

- Second opportunity for public input
- Content of Notice
 - Hearing
 - No hearing
 - Dual notice
- Draft rules and draft SONAR must be complete
- Track comments and respond to any policy issues raised
- Hearing if necessary

Publish in State Register

- Rules take effect after 5 days
- CELEBRATE!



- Statutes
 - Enacted by the Legislature
 - Enforceable
- Rules
 - Established by a state agency under authority from the Legislature
 - Enforceable

- Policy
 - Implemented solely by agency
 - Establishes practices and procedures to carry out statutes and rules
 - Enforceability is uncertain
- Policy as unpromulgated rulemaking
 - Not supported by rule or statute
 - Inconsistent application
 - Public input required

- EPRC shall:
 - 1) monitor implementation of [the Positive Supports Rule],
 - 2) make recommendations to the commissioner about policy changes related to the requirements in [the Positive Supports Rule], and
 - 3) make recommendations to the commissioner to approve or deny requests for emergency use of procedures.” ([Minnesota Rules, part 9544.0130, subpart 3](#))
 - Dr. Schiff as commissioner’s delegee

Cases and *Jensen Settlement*

- Contested cases
 - Affected party appeals a decision of the agency
 - Order come from Commissioner of agency
 - Focus on individuals and specific facts
 - Application of existing law or policy to facts of a particular case
- Court cases and the *Jensen Settlement*
 - Affected party sues the agency (*Jensen* case)
 - Order comes from court or judge
 - May set precedent and have wider policy implications
 - *Jensen Settlement*: DHS is still under the jurisdiction of the court
 - Impact on making changes to the PSR rule

- 1) [Minnesota Statutes, Chapter 14 \(Administrative Procedure Act\)](#)
- 2) [Minnesota Rules, Chapter 1400](#)
- 3) [Minnesota Rulemaking Manual](#)
- 4) [Rulemaking in Minnesota: A Guide](#)
- 5) [Minnesota Administrative Procedure, Chapters 16-22](#)
- 6) [*Jensen Settlement* and related materials](#)
- 7) [Minnesota Rules, Chapter 9544 \(Positive Supports Rule\)](#)



Questions??

Thank you!

Vanessa Vogl

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External Program Review Committee Determination Process

Sarah Knoph | Associate General Counsel

Learning Objectives

- Apply legal standard and document recommendations.
- Gain a broader understanding of case law considerations.

PSR EPRC Duties and Responsibilities: Recommendations

- Positive Supports Rule (PSR) Applies to most DHS-licensed facilities.

Note, as of August 2018, child care providers are not covered by the rule.

- “The external program review committee shall monitor implementation of this chapter, make recommendations to the commissioner about policy changes related to the requirements in this chapter, and make recommendations to the commissioner to approve or deny requests for **emergency use of procedures** in accordance with Minnesota Statutes, section 245.8251, subdivision 4. The committee shall...”

Minn. R. 9544.0130

Minn. Stat. § 245D.06, subd. 8

“The commissioner has limited authority to grant approval for the emergency use of procedures identified in subdivision 6 that had been part of an approved positive support transition plan when a person is at imminent risk of serious injury as defined in section 245.91, subdivision 6, due to self-injurious behavior and the following conditions are met:

(1) the person's expanded support team approves the emergency use of the procedures; and

(2) the interim review panel established in section 245.8251, subdivision 4, recommends commissioner approval of the emergency use of the procedures...”

You Received an Application: Initial Questions

DHS Staff Reviews Application and screens issues, e.g.:

- The procedure is part of a positive support transition plan, which must be informed by a functional behavior assessment (FBA) and person-centered plan or description.
- The person's expanded support team approves of the use of the procedure.

Requested Procedure

- What is the actual procedure?
- Does the requested procedure require approval?

How is the procedure being used?

- Emergency use in a PSTP? Or another use? What is the difference?
- Do you need more information to reach your decision?

Types of Prohibited Procedures

The provider should describe the proposed use so you have an understanding of what it is you are approving or denying. This is where asking for additional documentation or meeting with the provider is key.

For example:

- Mechanical restraints
- Seclusion
- Time-Out

Prohibitions Checklist Applies

The license holder is prohibited from using chemical restraints, mechanical restraints, manual restraints, time out, seclusion, or any other aversive or deprivation procedure, as:

- a substitute for adequate staffing,
- for a behavioral or therapeutic program to reduce or eliminate behavior,
- as punishment, or
- for staff convenience.

Minn. Stat. § 245D.06, subd. 5; Minn. R. 9544.0060, subp. 2

Subpart 3A

“[R]eview requests made in accordance with the requirements of [Minn. Stat. § 245D.06, subd. 8b], for **emergency** use of procedures that have been part of an approved **positive support transition plan when necessary** to protect a person from **imminent risk of serious injury** as defined in [Minn. Stat. § 245.91, subd. 6], due to **self-injurious behavior**, and make a recommendation to the commissioner to approve or deny these requests.

Minn. R. 9544.0130, subp. 3A

Subpart 3A

The committee must base its recommendation upon the determination that the provider has:

- Made a **good faith effort to reduce** the need for the procedure
and
- That the **emergency use** of procedures is **necessary** to protect the person from **imminent risk of serious injury**.

Minn. R. 9544.0130, Subp. 3A

Self-injurious behavior

"Self-injurious behavior" means behavior of a person which results in damage to the person's own body.

Minn. R. 9544.0020

Serious injury

- “**Serious injury**” is defined in statute at [Minn. Stat. § 245.91](#), subd. 6.
- Examples include: “(1) fractures; (2) dislocations; (3) evidence of internal injuries; (4) head injuries with...[additional requirements]; (5) ...(14)...”
- Review the listed requirements to ensure the approval addresses “serious injury.”

Minn. Stat. § 245.91, subd. 6

Subp. 3A: Documentation (Minn. Stat. § 245D.06, Subd. 8)

- (1) a copy of the person's current positive support transition plan and copies of each positive support transition plan review containing data on the progress of the plan from the previous year;
- (2) documentation of a **good faith effort to eliminate** the use of the procedures that had been part of an approved positive support transition plan;
- (3) justification for the continued use of the procedures that **identifies the imminent risk of serious injury due to the person's self-injurious behavior** if the procedures were eliminated;
- (4) documentation of the clinicians consulted in creating and maintaining the positive support transition plan; and
- (5) documentation of the expanded support team's approval and the recommendation from the interim panel required under paragraph (b).

Subpart 3B: Scope of Review

- “[R]eview requests for use of a prohibited procedure that is not specifically permitted by part 9544.0050, or specifically prohibited by part 9544.0060...”

Subpart 3B: Legal Standard

The committee must base its recommendation upon the determination that:

- The provider has made a **good faith effort to reduce the need** for a restrictive intervention
- and
- That the prohibited procedure is **necessary to protect the person's health and safety** for a limited time while positive support strategies are developed and implemented.

Minn. R. 9544.0130, Subp. 3B

Subp. B: Documentation

Requests for use of a prohibited procedure must include the following:

- (1)** a copy of the person's current positive support transition plan, copies of each positive support transition plan review, if any, and data on the interfering behavior;
- (2)** documentation of methods the provider has tried to reduce and eliminate the incidence of interfering behavior that have not been successful;
- (3)** documentation of the assessments performed to determine the function of the behavior for which the interventions have been developed;
- (4)** documentation of a good faith effort to eliminate the use of restrictive interventions currently in use;
- (5)** documentation that the interfering behavior is unlikely to be prevented in the immediate future by a reasonable increase in staffing or the provision of other positive supports...

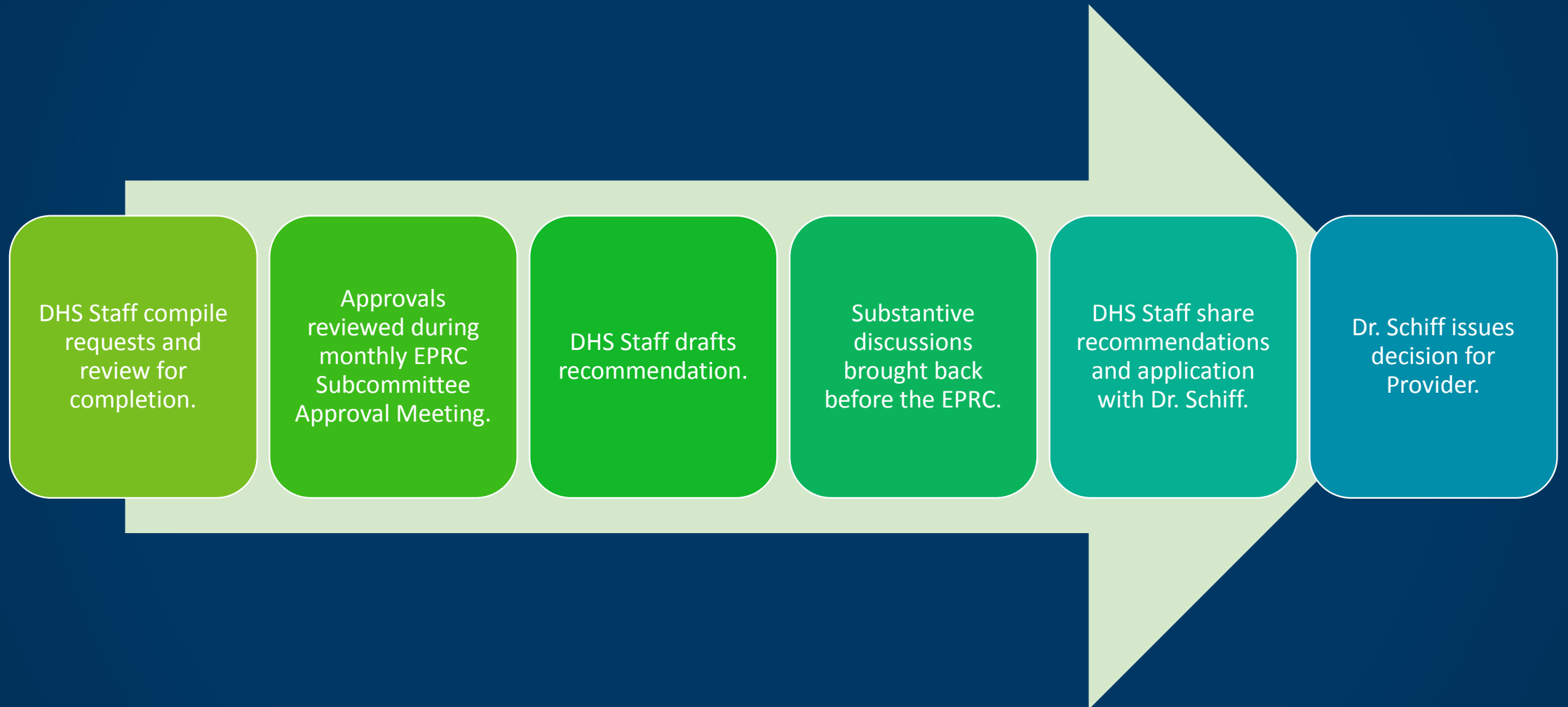
Subp B: Documentation Cont.

- (6) justification for the use of the procedure that **identifies the imminent risk of serious injury due** to the person's interfering behavior if the procedure were not utilized;
- (7) documentation of the persons consulted in creating and maintaining the current positive support transition plan;
- (8) documentation of approval by the person's expanded support team of the submission to the committee of the request for use of a prohibited procedure; and
- (9) additional documentation as requested by the committee.

The committee must base its determination upon the documentation provided in accordance with this chapter. The committee must include in an approval the additional terms or conditions that the license holder must meet specific to that approval, if any...

Minn. R. 9544.0130

Process



Legal Considerations & Good Stakeholder Engagement

- Are we applying the language of the rule and its definitions?
- What issues are necessary for your determination?
- Is the process reasonable in terms of timing and opportunity to be heard?
- Can a provider understand the rationale for the determination and the duration of approvals? What is your written record?
- What discretion do members (clinicians) have and how is it applied to specific facts and according to the legal standards?

Resources

- [The Positive Supports Rule, Chapter 9544](#)
- [Department of Administration: Open Meeting Law](#)
- [Department of Administration: Data Practices](#)
- [The Office of the Revisor of Statutes](#)

Thank You!

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