
**Report to
The Vermont Legislature**

Nursing Home Oversight Working Group

**In Accordance with Sec. 1 of Act 125 of 2018
An Act Relating to Nursing Home Oversight**

**Submitted to: House Committee on Human Services
Senate Committee on Health and Welfare**

Submitted by: The Nursing Home Oversight Working Group

Prepared by: Agency of Human Services

Report Date: January 31, 2019

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Executive Summary

In summary, the nursing home working group make the following observations and conclusions:

- **Transfer or Ownership.** The working group agreed that there should not be a Certificate of Need process for the transfer of ownership of nursing homes. However, the working group does believe there should be an Enhanced Licensing Process that includes a financial review of transfer of ownerships housed at the Agency of Human Services.
- **Ongoing Financial Stability.** The Division of Rate Setting (DRS) is in receipt of financial information from Nursing Homes as part of setting the Medicaid reimbursement rates. The available financial, quality, and resident experience information can be reviewed together to identify potential signals of financial distress. The working group did not find there to be any reason to change where the financial and quality monitoring currently lives today.
- **Rates.** After review of the various items within the Division of Rate Setting rules, the working group recommends that the occupancy limit be lowered to 85%.

Overview

Act 125 of 2018 established a nursing home oversight working group to “examine the oversight of nursing homes in Vermont, including financial stability and licensing criteria, in order to ensure the provision of high-quality services and a safe and stable environment for nursing home residents.”

The group met 9 times from July until January. The agendas, materials, and minutes for each of the meetings can be found on the Department of Disabilities, Aging and Independent Living’s website.¹ Membership, as prescribed in Act 125, was as follows:

Facilitator	Candace Morgan
Commissioner of DAIL or designee	Monica Hutt
Director of DLP or designee	Pam Cota
Director of Division of Rate Setting or designee	Lindsay Gillette
VT Attorney General or designee	Steve Monde
State LTC Ombudsman or designee	Sean Londergan
Rep: VT Health Care Association	Laura Pelosi
Member: DAIL Advisory Board	Diane Novak
Nursing Home Owner/Administrator	Judy Morton
Staff	Stuart Schurr
Staff	Liz Perreault
Staff	Camille George

¹ <https://dail.vermont.gov/resources/legislative/nursing-home-oversight-working-group>

Act 125 outlined six specific areas for the working group to address in this report. The six areas are outlined below, but for purposes of organizing the report, we'll discuss the recommendations for: 1) Transfer of Ownership; 2) Ongoing Financial Stability; and 3) Rates.

- 1) Identify procedures to monitor nursing homes' ongoing financial stability and to provide for early identification of nursing homes in financial distress, including:
 - (A) reviewing the types of frequency of the financial data currently reported by nursing homes, including data reported pursuant to statutes, rules, and procedures, as well as to whom the data are reported and how the recipient uses the information; and
 - (B) developing a process for addressing circumstances in which nursing homes are determined to be in financial distress;
- 2) Determine whether and what types of additional financial data may be necessary to evaluate nursing homes' ongoing financial stability, including cost data related to real estate lease agreements with related or other parties resulting from the separation of the entity owning the real estate from the entity operating the facility;
- 3) Review, in consultation with the Green Mountain Care Board, the criteria that the Board considers in its review of applications for transfers of nursing home ownership and determine how those criteria should be addressed in the future, by whom, and as part of what process;
- 4) Determine the appropriate regulatory entity or entities and the resources needed to monitor the quality of care and financial stability of nursing homes on an ongoing basis;
- 5) Review current nursing home application and licensure requirements and identify any necessary changes, including any changes that are needed to ensure that:
 - (A) for the transfer of ownership of a nursing home, the purchaser has obtained the necessary financing for the transaction prior to the issuance of a license;
 - (B) appropriate and objective criminal background, abuse registry, regulatory, and quality information are considered prior to issuance of initial and renewal licenses; and
 - (C) appropriate information is disclosed through the application process to enable the identification of the ownership, controlling, and management interests in both the real estate and operations components of the nursing home; and
- 6) Review the Division of Rate Setting's rules regarding Medicaid reimbursements to nursing homes, including whether current reimbursement amounts support ongoing financial stability and whether a 90 percent occupancy level requirement continues to be necessary and appropriate.

Transfer of Ownership

In addition to establishing the Nursing Home Oversight Working Group, Act 125 repealed the certificate of need process for the transfer of ownership for nursing homes. 18 V.S.A. § 9434. In its place, the Agency of Human Services (AHS) was directed to establish an interim process to “accept and review applications for transfers of ownership of nursing homes in lieu of the certificate of need process.” Specifically, the Secretary of AHS must examine the potential buyer’s “financial and administrative capacity to purchase and operate the nursing home in a manner that will provide high-quality services and a safe and stable environment for nursing home residents.” Sec. 3 of Act 125 of 2018.

To implement this interim process, AHS developed the Interim Agency of Human Services Process to Assess Transfer of Nursing Home Ownership (Interim Process).² To date, AHS has received four transfer applications which addressed transfers for 6 nursing homes.

The Interim Process served as a starting point for the Working Group to make long-term recommendations on requirements for a permanent Transfer of Ownership Process. Based on feedback from internal regulators, the Green Mountain Care Board (GMCB), external stakeholders, and the industry, we as a group agreed that there should not be a Certificate of Need process for the transfer of ownership of nursing homes. However, we do believe there should be an Enhanced Licensing Process that includes a financial review of transfers of ownership housed at the Agency of Human Services.

Transfer of Ownership – Financial Review

The work group proposes that there should be a process that provides the state an opportunity to examine the financial background of a proposed purchaser of a Vermont nursing home, specifically to evaluate that the purchaser has obtained the necessary financing for the transaction prior to the issuance of a license. The department or division that performs this financial review will need to develop clear objective standards or criteria by which to determine whether from a financial stability perspective a prospective purchaser of a Vermont nursing home is capable of providing “a safe and stable environment for nursing home residents.” Act 125 § 3(a)(1). To complete that evaluation, the Working Group identified pieces of information that it recommends to evaluate the financial strength of the applicant(s) in addition to assessing that financing has been secured. This process for financial review will work hand-in-hand with the Enhanced Licensing Process (ELP; discussed on page 6) and assist the Division of Licensing and Protection in the approval or denial of a license application.

Based on our work as a group, we would recommend that a Transfer of Ownership-Financial Review Committee be established to review the Transfer of Ownership of Nursing Homes. More specifically, recommendations from the working group include:

- The Review Committee would be housed within the Department of Vermont Health Access (DVHA)
- It would be supported by the Division of Rate Setting; beginning January 6, 2019, the Division of Rate Setting will be a part of DVHA

² <http://humanservices.vermont.gov/interim-ahs-process-to-assess-transfer-of-nursing-home-ownership.pdf>

- A complete application for Transfer of Ownership – Financial Review, would include the following (materials must clearly identify if there are any exemptions from public record disclosure):
 - a. Letter of intent/commitment for financing from financing entity (ability to purchase)
 - i. This would not include the documentation required by a financial institution to make their financing decision
 - b. Description of transaction
 - i. Copy of purchase and sale agreement
 - ii. Organization chart of the proposed ownership structure. Applicant shall provide:
 1. Documentation that outlines all purchasing and selling entities
 2. Documentation that outlines the purchase/sale agreement(s) including corresponding prices
 - iii. Table of Sources and Uses
 1. Table shall identify all transactional costs and types of funds to be used
 - c. Evidence of ability to provide adequate cash flow to operate
 - d. Documentation that applicant is in good standing with all taxing authorities (including other states)
 - i. The Good Standing verification shall come from applicable taxing authorities
 - e. Most recent year-end audited financial statements or internal financial statements for all nursing homes owned by the applicant (individually, as a group, or as part of a separate group) with a 5% or more ownership interest. The full set of audited financial statements must be submitted, including notes.
 - i. If audited statements are unavailable, internal financial statements may be submitted instead. These documents shall include profit and loss statements and balance sheets on all entities where applicant has 5% or more controlling interest
 - f. If the applicant is planning to utilize the services of a management group or company, provide the name(s) of the management group or individual
 - i. Applicant shall also provide all financial documentation related to the management agreement
 - g. If the applicant is planning to utilize companies, corporations or groups, related to or already affiliated with the potential buyers for any contracted services in the facility (for example: skilled therapy, dietary, housekeeping, etc.), provide the name(s) of the affiliated group or individual and identify the relation and correlating ownership interest.

The Working Group also recommends that the Transfer of Ownership-Financial Review Committee also conduct a court record review to include a review of court records in states where the purchaser's other healthcare or senior housing entities that are located and/or states where the owners operate other facilities. The purpose of the court record search is to identify whether there are legal actions against any of the businesses or principals to include, but not limited to bankruptcy, receivership actions, contempt of court, and vendor payment issues. The court record review will be conducted by legal resources within DVHA. The results of this search will be included in the recommendation to Division of Licensing and Protection.

The materials requested above and review process would be submitted and completed at the same time and as part of the process outlined in the Enhanced Licensing Process (ELP). The ELP asks for the purchasers to submit the materials at least ninety (90) days in advance of the proposed sale. Financial documents as outlined above shall be submitted to DVHA. DVHA will issue a written recommendation to the Division of Licensing and Protection (DLP), which will be a factor to be considered by DLP when granting a new license to a purchaser.

Within thirty (30) days of DVHA's receipt of an application for Transfer of Ownership-Financial Review, the DVHA Commissioner or designee shall determine whether the application is complete. If further materials are submitted or corrections need to be made to any of the application materials, the licensing agency will have thirty (30) days from the receipt of the revised information to review for completeness. Once a licensing application is considered complete, the licensing agency has sixty (60) days to complete the remainder of the process.

The thirty (30) day period for review may include a required meeting with DVHA staff as part of the meeting with DLP to review the application and respond to any questions or concerns.

Within sixty (60) days after an application for Transfer of Ownership-Financial Review is deemed complete, the DVHA Commissioner or designee shall issue a written notice of decision approving or denying the application. The written notice of decision will include enumerated findings of fact and conclusions of the DVHA Commissioner or designee.

Enhanced Licensing Process Proposal (ELP) for Changes in Ownership of Nursing Homes

The Enhanced Licensing Process (ELP) for Changes in Ownership is designed to provide a deeper examination of factors that may influence quality outcomes to residents at the time of a change in ownership of a licensed nursing home. It is also designed to provide independent monitoring by a qualified professional of the operation of the nursing home after the sale, should that be recommended by the licensing agency. The process includes an examination of the qualifications and compliance history of the purchasers, in addition to a review of other pertinent information that may provide insight on the purchasers' ability to run a high-quality nursing home. The process includes an onsite survey prior to the purchase, conducted by nurse surveyors, to evaluate the health and safety of residents and the current operation of the facility, which will assist to develop a monitoring plan that the licensing agency will oversee. This will ensure that the licensing agency can require specific monitoring to ensure the health and safety of the residents after the sale. The ELP will only be utilized at the time of change of ownership and will not be utilized upon regular re-licensing of nursing homes.

Process:

1. Purchasers' will be required to submit a licensing application and all materials required below at least ninety (90) days in advance of the proposed sale, directly to the licensing agency.
2. A complete application for a change in ownership will include the following (materials must clearly identify if there are any exemptions from public record disclosure):
 - a. Completed (revised) licensing application and accompanying forms. ****pending development of revised licensing application***
 - b. Curricula vitae from relevant principals

- c. Organizational chart of the proposed ownership structure
 - d. Administrator, Director of Nursing, and Medical Director information
 - e. For each nursing home owned by the applicant (individually, as a group, or as part of a separate group) with a 5% or more ownership interest:
 - i. The names and locations of each nursing home, including city/town and state;
 - ii. The CMS star rating at the time of purchase, for 3 most recent years (if ownership is less than 3 years, provide from time of sale to current day);
 - iii. Copies of recertification surveys or compliant investigations (including Health and Life Safety Code) – Provide copies of recertification surveys or complaint investigations resulting in actual enforcement action by CMS and/or the State Licensing entity, including any enforcement letters, during the most recent three years of ownership. Also include any letters indicating pending enforcement actions that have not yet been imposed.
 - iv. Identify whether any nursing home has been designated by CMS and/or applicable State Licensing entity as a “Special Focus Facility” during the period of ownership and provide an explanation for each.
 - v. Identify whether any nursing home has been decertified by CMS (voluntarily or involuntarily) during the period of ownership and provide an explanation for each.
 - vi. Identify whether any of the nursing homes have had their State license revoked or suspended and provide an explanation for each.
 - f. Identify whether any of the potential buyers (individually, as a group, or as part of a separate group) is, or has ever been, prohibited from purchasing or operating a Long-Term Care facility in any state.
 - g. Identify if any of the potential buyers (individually, as a group, or as part of a separate group) is under investigation for Medicaid or Medicare Fraud, or prohibited from participating in Medicare or Medicaid, in any state, at the time of application.
 - h. Identify if the potential buyers are planning to utilize the services of a management group or company. If so, provide the name(s) of the management group or individual (this does not include the Licensed Nursing Home Administrator who will be named on the license).
 - i. Identify if the potential buyers are planning to utilize companies, corporations or groups, related to or already affiliated with the potential buyers, to provide any contracted services in the facility (for example: skilled therapy, dietary, housekeeping, etc.). If so, provide the name(s) of the related entities and identify the relation and correlating ownership interest.
 - j. National criminal background and abuse registry checks on all principals.
 - k. Evidence of approval of the application for Transfer of Ownership-Financial Review by the DVHA Commissioner or designee including a court record review.
3. The licensing application will be reviewed for completeness within thirty (30) days of receipt. If further materials are submitted or corrections need to be made to any of the application materials, the licensing agency will have thirty (30) days from the receipt of the revised information to review for completeness. Once a licensing application is considered complete, the licensing agency has sixty (60) days to complete the remainder of the process.

4. Concurrently, the licensing agency will be soliciting information and/or comments from the Vermont Long Term Care Ombudsman and from the licensing entities in other states where the purchasers operate (if applicable). The licensing agency may request additional information from the purchasers at any time during the process and may review any publicly available information regarding the purchasers and/or other facilities they operate. Any delay in the receipt of additional requested information will extend the licensing agency's time-frames for process completion.
5. Once the licensing application is deemed complete, the licensing agency may require a face-to-face meeting with all principals at the licensing agency office, which may also include members of the Transfer of Ownership-Financial Review team within DVHA.
6. An onsite survey will be conducted at the facility by the licensing agency within sixty (60) days of the submission of a complete licensing application to assess the compliance of the nursing home.
7. The results of that survey will provide the licensing agency with information about the condition of the physical building, the care and services systems needing improvement and the ability of the nursing home to provide high-quality care. Based on the results and the information collected during the application review process, the licensing agency will either determine that no independent monitoring is needed or will mandate the use of an independent, qualified consultant.
 - a. The independent consultant, if applicable, will be mandated through the use of a clinical consent order, which shall address the number of hours per week the consultant shall be required to be in the building. ****pending development of a consent order template.*** The clinical consent order will require the purchaser(s) to hire an independent, qualified consultant to monitor the home's performance after the ownership transition for a period of months after the change occurs.
 - b. Criteria taken into consideration for the clinical consent order.
 - i. Onsite survey results;
 - ii. Application material review results;
 - iii. Results from the Transfer of Ownership-Financial Review;
 - iv. Information from LTC ombudsman;
 - v. Information from other State Survey Agencies.
8. The review process will proceed as follows:
 - a. Once the above steps have been successfully completed, including signing the clinical consent order, if applicable, the licensing agency will issue a notice of decision.
 - b. If the transfer of ownership is not approved, the notice of decision will state the reasons.
 - c. If the transfer of ownership is approved, the purchasers will complete the purchase of the nursing home and will send evidence of the completed purchase to the licensing agency. Thereafter, the licensing agency will issue the license to operate.
9. The purchasers shall be available to meet in-person with the licensing agency for a period of at least one year after the sale to discuss any concerns raised by the licensing agency.
10. Notwithstanding any statute or rule to the contrary, a final decision of the licensing agency to approve or deny the transfer of ownership, or to require the purchaser(s) to hire an independent, qualified consultant to monitor the home's performance after the transfer of

ownership, is not subject to review by the Human Services Board, pursuant to 3 V.S.A. § 3091. Rather, an applicant or purchaser who is aggrieved by the decision of the licensing agency on a licensing application for transfer of ownership may appeal the decision to the Vermont Superior Court in accordance with the provisions of Vermont Rule of Civil Procedure 75. The complaint shall be filed within thirty (30) days after the date of the licensing agency's written decision.

If the ELP and the financial review of the transfer of ownership are adopted, there may be necessary statutory and or regulatory changes to be considered. The following list includes those changes that we have considered to-date. It may not be a comprehensive list as more required changes may be identified as the process is adopted.

Statutory changes to be considered (still in development):

1. Fee collection for the transfer process, if there is going to be a fee charged.
2. Whether 33 V.S.A. § 7105 adequately addresses the licensing agency's authority to establish the above process or whether additional language is needed to address the unique requirements imposed upon purchasers involved in a transfer of ownership.
3. Whether amendments to 33 V.S.A. §§ 7110 and/or 7111 are needed to address the content of notices for violations of the established process, including the terms of the clinical consent order, as well as the grounds for the imposition of sanctions and the nature of those sanctions.
4. Whether additional enabling legislation is needed in 33 V.S.A. § 7117 to expand the scope of the existing Nursing Home Regulations, or whether the current statutory language is sufficiently broad.
5. Whether statutory change is needed to require national background checks.

Regulatory changes to be considered (still in development):

1. The current Regulations will need to be amended to include definitions of "transfer of ownership," "consultant," "clinical consent order," etc.
2. Licensing Processes will need to be revised to include the change of ownership process and requirements. (see Section 2)
3. A Regulation will be needed regarding sanctions for failure to follow the consent order.
4. Any statutory and regulatory changes that would be needed to give DVHA the authority to provide the financial review and recommendation to DLP.

Resources

The body of work related to approving transfer of ownership for nursing homes was formerly housed at the Green Mountain Care Board (GMCB). GMCB had access to staff and contracted support for analysis of any applications for transfers of ownerships. When the process moved, on an interim basis, to AHS, no staffing resources accompanied the shift in workload. The interim AHS review process has taken a significant amount of days/hours away from the regulation of health care facilities. The work DAIL/DLP is doing to implement the AHS interim review process during the development of a final process (to replace the Green Mountain Care Board's CON review) needs to be balanced with DLP's mission to protect individuals receiving care in Vermont health care facilities and by Vermont health care providers.

The statutory and regulatory changes required will require a significant amount of legal resources. The research for and development of a consent order template, as well as the development and implementation of the specific clinical consent orders will also require a significant amount of legal resources and a consideration should be made for more legal resources to be available to the licensing agency.

The Enhanced Licensing Process will bring with it a significantly increased work load and will require a new nurse position to be approved and funded in Survey and Certification. This process cannot be implemented using DLP's existing resources. This process will require a significant amount of licensing agency staff time for each transfer and to monitor the ongoing work of any consultant required by the licensing agency to ensure quality during a transfer process. It is reasonable to consider that enhanced quality and regulatory work on a state level may require more nurse surveyor and management resources to be available in the licensing agency at all times. If no additional resources are allotted and the licensing agency is required to absorb this work, it will result in less protection of residents/patients/clients of the 300+ Vermont health care providers DLP regulates. A rough estimate on costs for that, based on the average step and pay grade (step 10, PG25) would be \$132,000 for Salary and Fringe.

In the event that the financial review of transfers of nursing home ownership are assigned to DVHA, DVHA will need to more comprehensively evaluate the resources required to fulfill this regulatory function. Currently, DVHA's key responsibilities include enrolling members, paying providers for services, and investing in efforts that promote health. Additional resources (such as contractor support) would be required in order to ensure DVHA had access to the appropriate subject matter expertise to evaluate complex financial and legal documentation. Additional resources will also be needed to perform the necessary legal reviews, particularly to support the added costs of conducting nationwide court record searches.

Ongoing Financial Stability

Appropriate Regulatory Entity and the Resources Needed to Monitor the Quality of Care and Financial Stability of Nursing Homes on an Ongoing Basis

The Division of Rate Setting (DRS) is in receipt of financial information from Nursing Homes as part of setting the Medicaid reimbursement rates. To set the Medicaid rate, each provider submits an annual Medicaid cost report. The Medicaid cost report is due five months after the close of each providers' fiscal year. The cost report includes filing audited financial statements and the most recently filed Medicare Cost Report. The Division performs a preliminary check that the cost report filing is complete, and will note if there is a "going concern" on the audited financial statements. DRS also receives monthly census information from the nursing homes. The census data is used to monitor occupancy at each nursing facility. Adverse swings in occupancy levels may indicate that a nursing facility is having financial or quality issues.

DVHA also maintains an updated list of provider tax payments and CMS receives payroll-based journals. The list of that information is provided below.

Quality of Care for nursing homes is monitored by the Division of Licensing and Protection, Survey and Certification Unit in DAAL. The nurse surveyors regularly visit all the state’s nursing homes for survey visits and respond, additionally, to any complaints that they might receive.

Finally, the State Long Term Care Ombudsman, with regional representation across the state is directly available to the residents, staff and family members of nursing home residents to respond to concerns and to filter complains and quality of care or financial issues to the state.

The available financial, quality, and resident experience information can be reviewed together to identify potential signals of financial distress. The Working Group did not find there to be any reason to change where the financial and quality monitoring currently lives today.

Procedures to Monitor Nursing Homes Ongoing Financial Stability and to Provide for Early Identification of Nursing Homes in Financial Distress

There is a large quantity of data that is submitted to various parts of the Agency of Human Services. The table below captures the information that is submitted and how it is used. Other than an updated licensing application that would include indicators about a change in business structure for operations and property, the Working Group is not recommending any additional information be submitted to the state.

Submitted To	What	How Often	Why	How Used
Division of Rate Setting	Medicaid Cost Reports	Annually	To set the Medicaid reimbursement rate	As a tool to categorize nursing facilities costs and to determine which costs are eligible for Medicaid reimbursement.
Division of Rate Setting	Medicare Cost Reports	Annually	This is filed as part of the Medicaid cost report. This is information that helps with setting the reimbursement rate.	As a tool to help identify allowable costs for Medicaid reimbursement.
Division of Rate Setting	Audited Financial Statements	Annually	This is filed as part of the Medicaid cost report. This is information that helps with setting the reimbursement rate.	As a tool to help identify allowable costs for Medicaid reimbursement.

Division of Rate Setting	Census Information	Monthly	Population numbers can reveal how a facility is operating	Discussed at DAIL and DRS' monthly meeting
CMS	Payroll Based Journal			
DVHA	Provider Tax Reports			

a. Processes for addressing circumstances in which nursing homes are determined to be in financial distress

After much discussion, the committee agrees that the current Extraordinary Financial Relief (EFR) process is sufficient to address circumstances of financial distress for a nursing home. There have been less than five EFR requests over the last five years. EFR is only triggered when a nursing home is “in immediate danger of failure” and the facility applies to DRS for EFR. There are thirteen criteria that can be considered by DRS before making a recommendation to the Secretary of AHS:

1. The likelihood of the facility’s closing without financial assistance;
2. The inability of the applicant to pay bona fide debts;
3. The potential availability of funds from related parties, parent corporations, or any other source;
4. The ability to borrow funds on reasonable terms;
5. The existence of payments or transfers for less than adequate consideration;
6. The extent to which the applicant’s financial distress is beyond the applicant’s control;
7. The extent to which the applicant can demonstrate that assistance would prevent, not merely postpone the closing of the facility;
8. The extent to which the applicant’s financial distress has been caused by a related party or organization;
9. The quality of care provided at the facility;
10. The continuing need for the facility’s beds;
11. The age and condition of the facility;
12. Other factors found by the Director to be material to the particular circumstances of the facility, and;
13. The ration of individuals receiving care in a nursing facility to individuals receiving care in a nursing facility to individuals receiving home- and community-based services in the county in which the facility is located.³

As part of their role and authority, DRS can, at the behest of the AHS Secretary, request additional financial information from a nursing home to conduct a financial evaluation. 33. V.S.A. § 902(a).

³ <http://humanservices.vermont.gov/departments/office-of-the-secretary/ahs-drs/nursing-homes/adopted-rule-effective-6march2015.pdf>

b. What types of additional financial data may be necessary to evaluate ongoing financial stability including REIT arrangements

In addition to the ongoing financial data, the Working Group is recommending that a loss in critical services should be considered a triggering event to report to Survey and Certification.

Rate Setting

1) Review DRS rules regarding Medicaid reimbursement and whether 90% occupancy level continues to be necessary and appropriate

Act 85 of 2017 required the Commissioner of DAIR and Director of the Division of Rate Setting to undertake an analysis of the effectiveness and appropriateness of case-mix scores in reimbursing Vermont Nursing Facilities. The report that was submitted provides an overview of case-mix scores and options going forward.⁴ The Working Group concluded, consistent with the report on case-mix scores, that the State should focus on updating the occupancy rate to reflect current trends in the nursing home industry.

After review of the various items within the DRS rules, the committee recommends that the occupancy limit be lowered to 85%. Our preliminary analysis shows that this will be a cost to the state of \$2.2 million.

The 90% occupancy limit was initiated in the early 1990s in the DRS rules for nursing facility reimbursement. At that time, no facility had occupancy under 90%. The plan was to encourage occupancy over 90% so that facilities would be operated more economically by being full rather than having empty beds.

As occupancy has continued to decline year after year, based on the state's focus to offer choice and community-based care for individuals eligible for nursing home level of care, the providers are being penalized more and more by using a minimum 90% occupancy for the minimum number of resident days used to calculate the rate. This 90% occupancy limit continuously decreases reimbursement to the nursing homes as their occupancy levels drop.

In calendar 2005, there was an average of 3,107 residents in Vermont nursing homes. In the first nine months of calendar 2018, there was an average of 2,506 residents in Vermont nursing homes. This is a decrease of 601 residents per day in Vermont nursing homes. The most obvious reason for this decline is the Choices for Care initiatives that provide alternatives to nursing home use. This 19% decline in the total number of residents who make a Vermont nursing home their choice makes it difficult for most nursing homes to maintain occupancy above 90%.

506 Medicaid certified beds have been taken offline since 2005. Five nursing homes, with a combined total of 233 beds, have closed since July 1, 2005. The other 273 beds have been delicensed by nursing homes that continued their operations with fewer licensed beds. If these 506 beds were still online, the occupancy percentage would show a much steeper decline. The magnitude of the percentage decline in occupancy is concealed by the concurrent decline in licensed beds.

⁴ <https://legislature.vermont.gov/assets/Legislative-Reports/NF-Case-Mix-Scores.pdf>

If all the beds taken offline since July 1, 2005 were still licensed, occupancy would be 71.5%. As these beds have been taken offline, the current statewide average occupancy calculates to be 84%.

There are 38 total nursing homes in Vermont, 36 of which have Centers for Medicare and Medicaid Services (CMS) certification, 35 of which accept Medicaid. Of those, the 34 privately owned nursing homes in Vermont (excludes the Vermont Veterans' Home) have the following occupancy levels:

- 24 are currently below 90% occupancy
- 15 are below 85% occupancy
- 8 are below 80% occupancy as of September 2018.

The lowest occupancy is 63%.

The State's increase in payments associated with this change would be \$2.2 million to shift to a 85% occupancy limit. To decrease the occupancy limit to 80% would cost the state an additional \$3.7 million in payments to nursing home facilities.

Lowering the occupancy limit would not hurt any provider; it would only help those with somewhat low occupancy. Many homes have occupancy under 85% so they would still be penalized to some extent, even if the minimum occupancy was reduced to 85%. By retaining an artificially high minimum occupancy limit and ignoring the effect of Choices for Care on occupancy could endanger the viability of many nursing homes.

The intent of the 90% occupancy limit was to encourage homes to operate at maximum efficiency by staying full. In the last 25 years, the nursing home world has changed, in large part due to positive policy changes at the statewide level.