



---

**State of Vermont**  
**Agency of Human Services**  
280 State Drive  
Waterbury, VT 05671-1000  
[www.humanservices.vermont.gov](http://www.humanservices.vermont.gov)

*Jenney Samuelson, Secretary*  
*Todd Daloz, Deputy Secretary*

[phone] 802-241-0440  
[fax] 802-241-0450

**Date:** March 20, 2024

**Re:** Response to Public Comment on proposed Health Care Administrative Rule (HCAR) Methods, Standards, and Principles for Establishing Medicaid Payment Rates for Long-Term Care Facilities (5.101).

---

The Department received one comment on the proposed rule from the Vermont Health Care Association (VHCA), a trade association for Vermont long-term care facilities including nursing homes. A summary of comments received is included below along with responses to comments from the Agency of Human Services (AHS).

### **Response to Comments on Rule #24P006**

The Department of Vermont Health Access put this rule out for public comment on January 24, 2024. The comment period closed on February 15, 2024. The comment raised a few general themes and made specific suggestions about the text of the rule.

#### **1. General themes**

In general, the comment supported the main goal of this proposed rule: simplifying the Division of Rate Setting's Rules and transferring the details of the rate-setting process to a new reimbursement manual to allow for greater flexibility to respond to changing circumstances. The Division appreciates this positive comment.

VHCA also commented generally that it is "concerned that more substantive changes to the underlying rate structure are also needed" and that "the reimbursement structure, as proposed, does not fulfill" Vermont state policy regarding nursing home reimbursement. This proposed rule does not alter the basic reimbursement structure for Vermont nursing homes. The Division of Rate Setting will continue to set per diem rates for nursing homes based on each home's historically allowable costs. This comment therefore does not address issues raised in this rulemaking.

To the extent that this comment suggests significantly increasing reimbursement at Vermont nursing homes, this rule change is not the appropriate forum for doing so. The main goal of this proposed rule is to move the details of the rate-setting process to a new reimbursement manual. VHCA is currently advocating for increased reimbursements to nursing homes and other reforms to the rate setting process at the Legislature. That is the appropriate forum for this discussion.

The Division of Rate Setting, as well as partners across the Agency of Human Services, is currently working with VHCA to plan for an eventual transition to a new system for assessing resident acuity. The

state is happy to continue working with VHCA to identify appropriate reforms Vermont's nursing home rate setting process and ensure that any proposed changes are implemented with VHCA's full knowledge and opportunity to comment, as well as the Legislature's fiscal support. The state is committed to transparency in the reimbursement process.

## **2. Specific comments**

VHCA made numerous comments recommending specific changes to the Division's rate setting system and structure. The majority of these comments are not comments on the proposed rule because they deal with content in the draft reimbursement manual. VHCA will have the opportunity to comment on the draft reimbursement manual when it is actually proposed. Before then, VHCA will have the opportunity to advocate that the Agency's Choices for Care Budget be increased to fund its proposals, as it is currently doing at the Legislature.

Accordingly, the state has no response to VHCA's general comments advocating that the state reduce the number of years for costs to be fully rebased, that the state change how certain costs are included in existing cost categories, that the state reduce the minimum occupancy requirement to 80% from 90%, or that the state clarify the availability of financial relief or special rates. These matters are outside the scope of this rulemaking. If this rule is adopted as proposed, the state will be more easily able to accommodate any changes in these areas that are approved and funded by the Legislature in future rate-setting cycles.

VHCA also addressed comments to specific provisions of the Division's existing and proposed rules.

### *a. Comment on Rule 5.101.5.4: Interim Rates*

In this rule, the state proposed transitioning rule 5.4 of the Division of Rate Setting's existing rules unchanged to Rule 5.101.5.4 of the Agency of Human Services' unified rule chapters. These rules allow the Division to set an interim rate for facilities that have not yet received a final rate during the rate setting process.

In response to this proposed rule, VHCA argued that the state could use the interim rate process to increase facilities' rates while they await the next rebase for a given cost center. This comment does not propose a change to this rule; it merely recommends that the state interpret its existing rules differently.

Further, this comment misunderstands the purpose of interim rates. The Division sets an interim rate if it has not completed its review of a nursing home's cost reports and set a final rate. The Division may not set an interim rate for a facility that already has a final rate. The Division's goal each year is to quickly and efficiently review each facility's cost reports and set an accurate final rate as soon as possible. The state has made no change in response to this comment.

### *b. Comment on Rule 5.101.5.7: Occupancy Level*

In this rule, the state proposed removing the 90% minimum occupancy requirement, which penalizes nursing homes that fail to maintain that target occupancy, and transitioning the target amount to its proposed reimbursement manual. Reducing the minimum occupancy requirement has a large fiscal impact. Putting the target in a reimbursement manual would allow the state to change

this requirement more easily if the state has fiscal support to do so or if the Legislature orders the state to increase the requirement.

In response to this proposed rule, VHCA suggested granting the Director of the Division of Rate Setting greater authority to waive this requirement. The state did not propose expanding the Division's authority to waive this requirement. Further, waiving this requirement for homes outside the narrow situations where it is already waived could weaken its force, may be inequitable, and would require the state to incur a large cost in between budgeting cycles that the nursing home rate setting process is intended to avoid. The state has made no change in response to this comment.

*c. Comment on 5.101.8.2: Change in Law*

In this rule, the state proposed transitioning rule 8.2 of the Division of Rate Setting's existing rules unchanged to Rule 5.101.8.2 of the Agency of Human Services' unified rule chapters. The existing rule allows nursing homes to apply for a rate increase "for additional costs that are a necessary result of complying with changes in applicable federal and state laws and regulations, or the orders of a state agency that specifically requires an increase in staff or other expenditures."

In response to this proposed rule, VHCA argued that the state should remove the "specifically requires" clause to increase the state's ability to adjust rates in response to changes in state or federal law. VHCA believes that this rule is only applicable if any change in law "specifically requires an increase in staff or other expenditures." This comment misinterprets the existing rule. The existing rule sets out two justifications for applying for a rate increase: 1) to address costs "that are a necessary result" of changes to "federal and state laws," or 2) to address costs "that are a necessary result of complying with ... the orders of a state agency that specifically requires an increase in staff." Because the state interprets the rule in accordance with what VHCA already requests, the state has made no change in response to this comment.

VHCA further comments that if a "sweeping change causes a sector-wide impact," requiring facilities to apply for a rate increase on a case-by-case basis could "produce unequal results." The state disagrees. First, the basic purpose of the nursing home rate setting system is to set specific rates based on specific costs incurred by each facility on a case-by-case basis. Under bedrock federal Medicaid reimbursement principles, the state's per diem rates must be based on specific and allowable costs. Second, it would be more inequitable to adopt a one-size-fits-all rate adjustment for all facilities when any change, even a "sweeping change" with a "sector-wide impact," will fall on different facilities across the state differently according to their unique circumstances. The state has made no change in response to this comment.

*d. Comment on 5.101.10.1: Extraordinary Financial Relief*

In this rule, the state proposed transitioning rule 10 of the Division of Rate Setting's existing rules unchanged to Rule 5.101.10 of the Agency of Human Services' unified rule chapters. These rules allow facilities that are in danger of immediate failure to apply for extraordinary financial relief (EFR). EFR allows the state to stabilize a facility in the short term, protect the residents, and plan for the long-term future of the facility. It is funded generally out of unspent dollars in the Choices for Care budget.

In response to this proposed rule, VHCA comments that it generally supports the availability of EFR but hopes to return EFR to being an exception that is rarely used, as it was prior to the COVID-19 pandemic and attendant economic consequences for nursing homes. The state agrees with this sentiment, but this is not a comment on the text of the proposed rule.

Further, VHCA specifically recommends adding language to set specific timelines for when facilities should submit EFR applications, how long the state will take to respond, and options for “interim decisions.” The state disagrees with this comment. Each facility’s fiscal situation, and potential for failure, are unique, so EFR is necessarily a case-by-case analysis. There is no one-size-fits-all timeline for applying for, or receiving, EFR. The rule already grants the state broad discretion to grant interim relief, including Medicaid advances, as it frequently does if the facility is in danger of failing before the state can complete its review. Accordingly, the state has made no change in response to this comment.

*e. Comment on 5.101.6: Base Year Cost Categories for Nursing Facilities, and related comments on sections of the draft Reimbursement Manual*

In this rule, the state proposed removing specific details about which costs are included in the cost categories that it uses to construct the components of each facility’s rate and replacing this information in its new reimbursement manual. The state “rebases” the cost categories on a regular cycle of “base years.” In between base years, the growth of costs in each category is tightly controlled, but facilities also receive an annual inflation adjustment under state law. All costs are rebased at least every four years. Nursing costs, which are the largest category by far, are rebased every two years.

In response to this proposed rule, VHCA generally complains that the rebase cycle is too long and that costs rise higher than the pace of the inflation adjustments that all nursing homes receive. Further, VHCA suggests changing language in the proposed reimbursement manual to change which categories correspond to certain classes of employees at nursing homes, including changes to how the resident care, indirect, and director of nursing cost categories are calculated. These are not comments on the text of the proposed rule, but on the draft reimbursement manual. Adjusting the rebase cycle for any cost category, particularly for nursing costs, would have a substantial fiscal impact. Adjusting how the state calculates cost categories may also have a fiscal impact. VHCA will have the opportunity to comment on the draft reimbursement manual once it is actually proposed. Before then, VHCA will have the opportunity to advocate that the Agency’s Choices for Care Budget be increased to fund its proposals, as it is currently doing at the Legislature.

*f. Comment on 5.101.7: Calculation of Costs, Limits and Rate Components for Nursing Facilities*

In this rule, the state proposed removing the specific details about how the Division of Rate Setting calculates overall costs in each category and any limits that may apply and replacing this information in its new reimbursement manual.

In response to this proposed rule, VHCA noted that it generally supported moving the details of calculations to a reimbursement manual, but suggested that this rule could include “guidance on the

frequency of rebasing.” Specifically, VHCA suggested that the rules should require the state to mandate costs be rebased on their current cycle or more frequently.

The state disagrees with this comment. First, the overall goal of this rule change is to move details about the rate setting process such as this to the reimbursement manual to allow for greater flexibility. This change is value-neutral – it is not intended to help or harm nursing homes in general. Just as the state has proposed moving details about the minimum occupancy requirement or cost caps to a reimbursement manual, the state is also proposing that the pace of the rebase cycle be moved to a reimbursement manual. Second, the pace of the rebase cycle has significant fiscal implications. At the moment, the state does not intend to propose that rebases happen more or less frequently than their current cycle. If the state were to do so, it would do so first by proposing the change in the Legislature, which is best suited to balance the competing considerations implicit in this policy question. Because the state would, by necessity, seek fiscal authority from the Legislature to make any change to the rebase cycle, whether the “guidelines” VHCA suggests would exist in the rules or in a reimbursement manual is immaterial. Accordingly, the state has made no change in response to this comment.

### **3. Conclusion**

The state welcomes VHCA’s thoughtful comments on proposed rule #24P006 and VHCA’s further engagement in discussions on changes to the rate setting process. The state notes that VHCA generally supports its proposal to transition many details of the nursing home rate setting process to a reimbursement manual. The state has made no changes to its proposed rule in response to this comment.