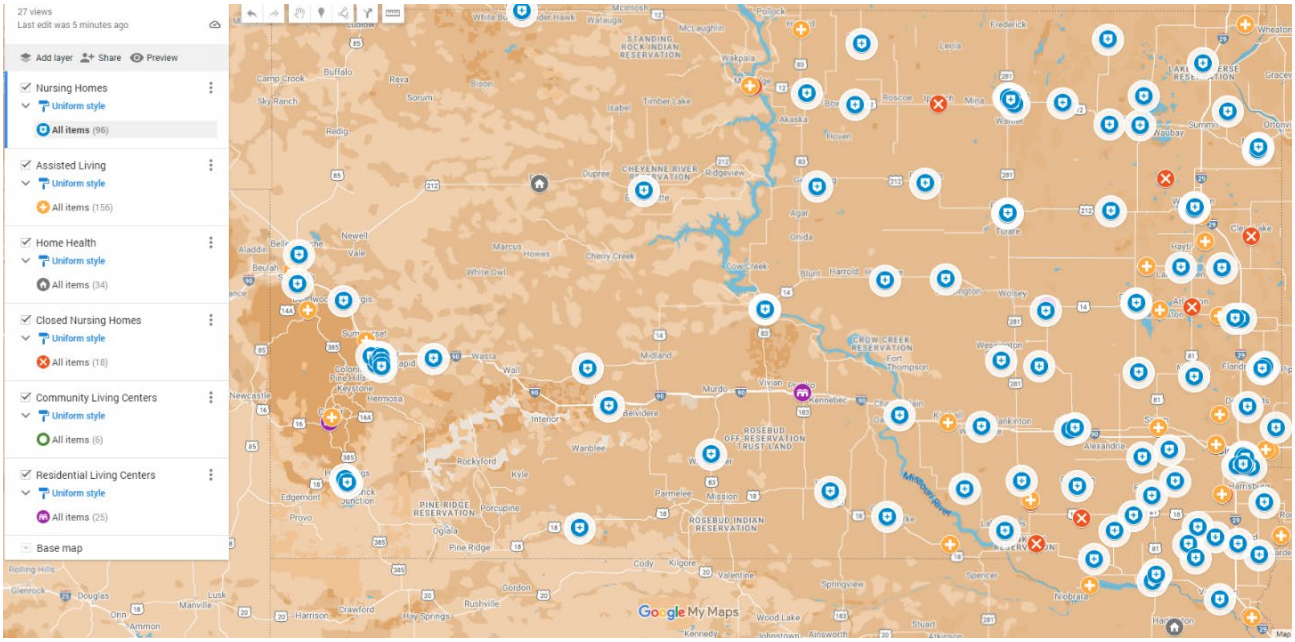
Long-Term Care in South Dakota

SOUTH DAKOTA LEGISLATURE
LEGISLATIVE RESEARCH COUNCIL

Background

A nursing facility moratorium was enacted in 1988, which caps the number of nursing facility beds per facility and in total. The moratorium limits the number of beds to 7,062 statewide and as of April 6, 2023, there were 6,038 licensed beds in the state.[1] The purpose of the moratorium was to help control the increasing cost of long-term health care; ensure the elderly received the most appropriate level of long-term care; and to spur further growth of home-based and community-based services such as home health care, assisted living centers, and residential living centers. The moratorium was indefinitely extended in 2005 per SDCL 34-12-35.4. The moratorium has proven effective in spurring the growth of alternative long-term care options.



An interactive map: https://www.google.com/maps/d/edit?mid=1TcwPEtRVmFhaBxKHXzReg0lHk6Ob5Y4&usp=sharing

Long-Term Care Options in South Dakota

Long-term care provides a variety of living arrangements and care for the elderly and disabled. There are different facilities within long-term care depending on the level of care needed. The above graphic and link provide a map showing the location of different facilities serving long-term care in South Dakota.

- **Nursing (homes) facilities** are license by the state and may be certified by Medicare and/or Medicaid. These facilities may admit and retain individuals requiring nursing care by licensed nurses. Nursing facilities provide the most intensive level of care. There are currently 95 licensed nursing facilities operating a total of 6,038 licensed beds.

- **Assisted living centers** are license by the state to provide personal care and services beyond basic food, shelter, and laundry. These centers may admit and retain only those who do not require more than intermittent nursing care[2] by a licensed nurse. The centers can also provide home health agency

[1] Nursing facilities occupancy report: https://dhs.sd.gov/docs/20230406.pdf

[2] Intermittent nursing care is skilled nursing care a person needs or gets less than 7 days each week or less than 8 hours each day over a period of 21 days (or less) with some exceptions in special circumstances.

services for short term skilled services for a specific medical reason. Assisted living centers can obtain special approvals to offer the following: medication administrations, care of the cognitively impaired, care of the physically impaired, oxygen administration, and therapeutic diets. Assisted living centers provide a lower level of care than nursing facilities. There are currently 156 licensed facilities operating a total of 5,005 beds.[3]

- **Adult foster care homes** are family residences licensed by the state where aged, blind, physically disabled, developmentally disabled, or socially-emotionally disabled adults can obtain personal care, health supervision services, and household services in a family atmosphere. There are currently 4 licensed facilities operating a total of 8 beds.

- **Residential living centers** are not licensed but have been required to register with the state since 1990 to provide services, for compensation, for two or more elderly or disabled persons not related to the owner. These centers may admit and retain persons who do not require more than meals, room, and daily living services. There are currently 25 centers registered with the state operating a total of 571 beds.

- **Congregate housing** is an assisted independent living environment to elderly or handicapped persons who may be functionally impaired or socially deprived, but in good health (not acutely physically ill). This option offers residential accommodations, central dining and related facilities, and support services required to achieve, maintain or return to a semi-independent lifestyle and prevent premature or unnecessary institutionalization as the individual ages.

- **Home health agencies** are certified by Medicare to provide nursing services in the home to persons who require intermittent nursing care. Home health may also provide therapies and other treatments. There are currently 35 home health agencies registered with the state.

- **Community living homes** are family-style residences licensed by the state since 2019 whose owner or operator is engaged in the business of providing individualized and independent residential community living supports for compensation to at least one unrelated adult, but no more than four adults, and provides one or more regularly schedule health relates services, either administered directly or in collaboration with an outside health care provider. They are 6 licensed homes operating a total of 13 beds.[4]

- **Structured family caregiving** provides personal care and support services to a consumer in the consumer's private home or the private home of the principal caregiver. The program includes routine intermittent personal care, supervision, cueing, meals, homemaker services, chore services, medication management (to the extent permitted under State law), other instrumental activities of daily living (e.g. transportation for necessary appointments, community activities, shopping, managing finances, and phone use), and other appropriate activities as described in the consumer's person-centered service plan.[5] For state fiscal year 2022, there were 248 participants.

- **Adult day services** provide care and supervision for part of the day outside of the home. This service enables caregivers to work or pursue other daytime activities while continuing to care for the care receiver at home. There are two active, standalone adult day providers – one in Sioux Falls and one

[3] Assisted living provisions: https://dhs.sd.gov/docs/FY23%20Assisted%20Living%20Provider%20Provisions.pdf
[4] Community living home provisions: https://dhs.sd.gov/docs/Community%20Living%20Home%20Provider%20Provisions%20Effective%206.1.2023.pdf
[5] Structure Family Caregiving provisions: https://dhs.sd.gov/docs/FY23%20Structured%20Family%20Caregiving%20Provider%20Provisions.pdf

in Rapid City. There are also 33 nursing facilities and 23 assisted livings self-reported to DOH as offering adult day services.[6]

History of Previous Studies and Outcomes

Over the years, the State and Legislature have commissioned different studies, task forces, and committees to evaluate long term care in South Dakota.

- HB1156 during the 2006 Legislative Session required a study of the long-term care system. The study was completed in November 2007 by Abt Associates, Inc.[7] and provided the following key findings:
    1. Growth in the elderly population will fuel a rising demand for services.
    2. South Dakota needs to rebalance and replace nursing facility capacity.
    3. South Dakota needs to target assisted living capacity towards growing regions.
    4. South Dakota needs to expand home health care services.
    5. South Dakota needs to expand home and community-based services (HCBS).
    6. The labor force is not keeping pace with the growth of elders: shortages are imminent.

    In 2015, Abt. Associates provided an update to the 2007 report.[8]

- A task force was established in 2008 to develop recommendations to implement the findings from the study. The task force consisted of over 100 members including representatives from nursing facilities, assisted living services, home care providers, provider associations, legislators, tribes, advocates, and state agencies. The task force met over the 2008 interim and submitted the following recommendations[9] in November 2008:

    1. South Dakota needs to develop a single point of entry system to make access to information, assessment, and referral to appropriate service providers easier.
        - Outcome: The South Dakota Aging and Disability Resource Center was established in 2011 and rebranded/marketed as Dakota at Home in 2017. Dakota at Home provides free information and referral service by providing objective information and options planning to help individuals, regardless of age, disability, or income. Certified staff help individuals and families identify and access public and private services and supports in their local community.

          In FY2022, there were 13,472 contacts made to Dakota at Home. The Department of Human Services (DHS) is currently in the process of exploring options to expand and improve the marketing of Dakota at Home to continue to broaden awareness.

    2. State of South Dakota should expand existing home and community-based services to better meet the needs of seniors throughout the state by supporting them to stay in their own homes and communities as long as possible.
        - Outcome: DHS has expanded home and community-based services in the following ways:
            i. Enlisted additional providers of in-home services, including those that are culturally in tune with ethnic populations;

[6] Adult Day Services: https://dhs.sd.gov/docs/FY24%20ADS%20Provider%20Provisions-FINAL.pdf
[7] The 2007 report can be found at: https://mylrc.sdlegislature.gov/api/Documents/251647.pdf
[8] The 2015 updated report can be found at: https://mylrc.sdlegislature.gov/api/Documents/125132.pdf
[9] The Continuum of Care Needs of the Elderly Task Force Report: https://mylrc.sdlegislature.gov/api/Documents/251639.pdf

ii. Created rate tiers for assisted living to reimburse for higher care needs at assisted living centers;
iii. Expanded services through the Medicaid waiver to include additional alternative living arrangements structured family caregiving and community living homes;
iv. Expanded transitions to the community from a nursing facility through referrals to Money Follows the Person;
v. Created an exceptions process within the HOPE waiver whereby people may exceed the individual cost neutrality threshold if it allows the person to be adequately supported in the community and does not cost the State to exceed the overall cost neutrality requirement;
vi. Addition of chore services (lawn mowing, snow and ice removal, or other services required by city or county ordinance);
vii. Addition of Adult Companion to the HOPE waiver;
viii. Expansion of specialized medical equipment to include assistive technology;
ix. Increase in earned income allowance for Assisted Living Waiver consumers;
x. Increase in standard needs allowance for In-Home Waiver consumers;
xi. Removal of the requirement for a physician's order for level of care determination.

3. State of South Dakota should enhance existing home and community-based services to ensure services are comprehensive and meet the needs of the elder in South Dakota.
    - Outcome: Same as the above.

4. South Dakota should implement an access critical nursing facility model to ensure people have access to care within a reasonable distance to their communities.
    - Outcome: During the 2011 Session, SB 140 was enacted and is codified in SDCL 34-12-35.5. There are currently 13 critical access nursing facilities.

5. South Dakota should right size the nursing facility industry by realigning moratorium bed levels to reflect projected demand for nursing facility services.
    - Outcome: This recommendation was not pursued.

6. South Dakota should expand nursing facility beds through an RFP like process developed by state agencies for areas in the state that will need additional nursing facility services.
    - Outcome: During the 2012 Session, SB 196 was enacted and is codified in SDCL 34-12-35.6 to 34-12-35.9 and 34-12.39.5. The utilization of the RFP process has been marginal.

7. South Dakota needs to maintain a sustainable financial infrastructure for the current and future system of care.
    - Outcome: The State is pursing this recommendation through achieving reimbursement rates of 100% methodology starting in FY2024 and the review and update of different rate methodologies through SDCL Chapter 28-22.

8. The Departments of Social Services (DSS) and Health (DOH) should continue to collect data and analyze the need for additional assisted living facilities in certain areas of the state.
    - Outcome: During the 2017 Session, SB 6 added additional factors for consideration of new for nursing facility beds or new facilities and requiring DOH and DHS to submit a written report and testify before the Senate and House Health and Human Services

committees regarding additional nursing facility beds or additional new nursing facilities and long-term healthcare needs.[10]

- The legislative interim study on the regulation of nursing and assisted living beds was completed in the 2016 interim.[11] The committee approved five pieces of draft legislation for the 2017 Session.

    1. HB 1002 – The proposed legislation required both DOH and DSS to provide a written report and testimony to the House and Senate Health and Human Services standing committees concerning the state's current and projected long-term care facility needs.
        - Outcome: The bill was tabled during committee.

    2. HB 1003 – The proposed legislation allowed for a nursing facility to transfer or sell nursing bed capacity to another facility. The legislation also provided that any transferred or purchased beds must be licensed within 24 months of the transfer or sale by the receiving facility, have a minimum Medicaid occupancy rate and be involved in home and community-based care.
        - Outcome: The bill passed out of committee but failed in the House.

    3. SB 6 – The legislation added additional factors for consideration of new for nursing facility beds or new facilities and requiring DOH and DHS to submit a written report and testify before the Senate and House Health and Human Services committees regarding the need for additional nursing facility beds or additional new nursing facilities and long-term healthcare needs.
        - Outcome: SB 6 was enacted and is codified in 34-12-35.7 and 34-12-35.11.

    4. SB 5 – The proposed legislation allowed any nursing facility to use any unused bed capacity by July 1, 2018 or the unused bed capacity reverts back to DOH. A nursing facility would've had until July 1, 2023 to submit a proposal to use all or a portion of the unused bed capacity previously held by the nursing facility.
        - Outcome: The bill was deferred to the 41st legislative day in committee.

    5. HB 1004 – The proposed legislation provided for a program to assist nursing and assisted living facilities in recruiting registered nurses, licensed nurses, nurse aides, and medication aides. No more than 60 registered nurses, licensed nurses, nurse aides, and medication aides could participate in the program each year. The program would provide an incentive payment of $10,000 to licensed and registered nurses, $5,000 to nurse aides and $2,500 dollars to medication aides.
        - Outcome: The bill failed in House Health and Human Services but was referred to House Appropriations. The House Appropriations committee deferred the bill to the 41st legislative day.

- The legislative interim study on redefining nursing home criteria was completed in the 2019 interim.[12] Five legislators and seven public members met to redefine Human Service Center (HSC) nursing home admission criteria and build mental health nursing home capacity for persons with organic brain damage. The study committee submitted the following recommendations in October 2019:

[10] 2017 Session, SB 6: 34-12-35.7 and 34-12-35.11

[11] Documents relating to the interim study on the regulation of nursing and assisted living beds: https://sdlegislature.gov/Interim/Committee/168/HearingDocuments

[12] Documents relating to the interim study on redefining nursing home criteria: https://sdlegislature.gov/Interim/Committee/221/HearingDocuments.

1. DSS should establish a process allowing preauthorization of Medicaid eligibility prior to admission in long-term facilities.
    - Outcome: DSS reviewed this recommendation and federal regulation related to Medicaid eligibility in long-term care facilities. DSS did not identify an allowable pathway for preauthorization of Medicaid eligibility prior to admission in long-term care facilities due to regulations in the Social Security Act.
        - Medicaid eligibility includes factors outside of financial criteria. Most people require a 30-day period of institutionalization to meet eligibility criteria in a long-term care facility. Even if individuals are estimated to be in a facility for 30 days, it is not guaranteed, and many individuals are discharged prior to 30 days and do not meet the criteria.
        - Additionally, financial criteria for married persons are tied to the first date the applicant began continuous confinement in a medical institution and cannot be completed unless they have a 30-day stay. A resource assessment must be completed for resources the applicant and their spouse had as of that date. South Dakota cannot waive these requirements.
        - The ability to backdate Medicaid up to 3 months is a method which can assist with these barriers to preauthorization. All persons who are already eligible for an existing Medicaid category in South Dakota only need to meet the level of care criteria to be approved for Long-Term Care Medicaid coverage when they are in a skilled nursing facility level of care.

2. Increased availability and 24/7 access to telehealth is needed.
    - Outcome: Recommendation is being reviewed.

3. The Yankton Area Mental Wellness Conference is encouraged to include a forum for mental health issues in South Dakota for 2020.
    - Outcome: This conference is not under the authority of DSS, however, DSS has participated, including the following agenda items:

      2022 Presentation: Overview of the Publicly Funded System.

      2023 Presentation: Overview of the Publicly Funded Treatment System in South Dakota.

4. DSS should submit a request for information in providing a specialized unit to treat geriatric mental health patients discharged from the Human Services Center (HSC) geriatric unit and later submit the report to the members of the committee, the Joint Committee on Appropriations, and the Executive Board by June 30, 2021.
    - Outcome: No information was found or provided regarding this recommendation.

5. HSC should sponsor one continuing medical education class related to mental health case studies in calendar year 2020.
    - Outcome: This effort was delayed due to the COVID-19 pandemic. HSC Staff Development is creating a case study driven training for the medical students focused on the impacts of medical issues on behaviors with dementia/major neurocognitive disorders. HSC will deliver this to the medical students during their day on campus each year. HSC will create a virtual training mirroring the training for the medical students which would be available to the SD Medical Association and connected to continuing education. It is expected both trainings will be available in the next six months

6. DHS should create a workgroup to review the definition and criteria for add-on payment for community-based nursing home providers.
    - Outcome: The criteria for extraordinary care payments program was updated to include Traumatic Brain and Spinal Cord Injuries.

Laws and Regulations on Long-term Care

In general

- SDCL 34-12-1.1(4) broadly defines a health care facility to include, among other things, any institution, hospital, nursing facility, assisted living center, adult foster care home, inpatient hospice, residential hospice, or community living home.

- Per SDCL 34-12-2.1, no state or federal funds passing through the state treasury may be paid to a health care facility which does not have a license issued by DOH.

- Per SDCL 34-12-40, a continuing care agreement is an agreement to provide a person board and lodging, in addition to care in a nursing facility or assisted living center, for the duration of the person's life, in exchange for an entrance fee paid to the provider.

    - A continuing care retirement community is a facility that offers any person, under a continuing care agreement, board and lodging, in addition to care in a nursing facility or assisted living center, regardless of whether the lodging and care is provided at the same location. SDCL 34-12-42.

- SDCL chapter 28-18 provides authority for the incorporation of non-profit self-sustaining corporations formed for the care and accommodation of aged persons. Such non-profit corporations may operate over an area of one or more counties, and DSS may lease property, under its jurisdiction, suitable for the establishment of such homes for the aged. The cooperation and assistance of private individuals and charitable organizations may be utilized and the contributions of private or public agencies may be accepted.

Nursing (homes) facilities

- SDCL 34-12-1.1(6) defines a nursing facility as any facility maintained and operated for the purpose of providing care to one or more persons, for consideration or not, who are not acutely ill but require nursing care and related medical services of such complexity as to require professional nursing care under the direction of a physician on 24-hour per day basis.
    - They are also for those who do not require the degree of care and treatment a hospital is designed to provide, but who, because of their mental or physical condition, require medical care and health services available to them only through institutional facilities.

- Per SDCL 34-8-1 and SDCL 34-9-2, county hospitals and municipal hospitals, respectively, may be construed to include a nursing facility or home for the aged.

- Per SDCL 34-12-35.5, access critical nursing facilities, which are designed to ensure geographic access to nursing facility services in rural areas by providing enhanced reimbursement to eligible nursing facilities to help the facility stay financially viable,[13] are designated by DOH based on the following six criteria:

[13] Definition according to the South Dakota Association of Healthcare Organizations, https://sdaho.org/wp-content/uploads/2021/10/NF-Rate-Methodology21.pdf

- No other nursing facility is located within 20 miles;
- The nursing facility is located in the largest municipality within 35 miles, unless the next closest nursing facility is located more than 50 miles from any other nursing facility;
- The nursing facility provides nursing facility services;
- The nursing facility is integrated with other health care services, through affiliation or formal agreement;
- The current 5-year average number of occupied beds in the facility is less than 60; and
- The nursing facility agrees to relinquish any excess moratorium beds that are authorized.

- Per 34-12-35.6, DOH may authorize the increase in the number of beds in an existing nursing facility, or may authorize the construction of a new nursing facility, so long as the total number of nursing facility beds statewide does not exceed the total number of beds in existence statewide on July 1, 2005.
  - If an existing nursing facility ceases operation, the authorized beds from that facility shall be held available by the department for 18 months from the date of closing, and shall be available for use by any entity licenses to operate a nursing facility. SDCL 34-12-39.6.
  - Per SDCL 34-12-35.7, DOH with assistance from DHS, shall annually consider the need for additional nursing facility beds, nursing facilities, or both, with the following factors taken into consideration:
    1. The current number of available nursing facility beds and nursing facilities in the state;
    2. The current and projected future need for additional nursing facility beds and nursing facilities in the state, and the current long-term care needs of the population to be served;
    3. The number of nursing facility beds available for redistribution and the number of nursing facility beds redistributed pursuant to this chapter;
    4. The potential impact on existing nursing facilities;
    5. Any additional costs to the state or general public that may result; and
    6. Other current and projected long-term healthcare needs across the state.

- Per SDCL 34-12-35.12, to obtain the designation of a regional nursing facility, the nursing facility must meet the following five criteria:
  - The nursing facility is enrolled and in good standing with Medicaid;
  - The facility provides home and community-based services in the region through an affiliation or contractual arrangement;
  - There is an intent to construct a new facility or substantially remodel an existing facility upon merging with one or more health care facilities in a 30-mile radius;
  - The new or substantially remodeled facility will support a homelike environment, contain single occupancy rooms and toilet areas, abide by best practices regarding infection control and prevention, allow for private visitation, and support other best practices related to aging; and
  - Any other criteria set forth by the department are met.

- Per SDCL 34-12-39.2, no new nursing facility may be constructed, operated, or maintained unless the nursing facility is serving as a replacement for an existing facility and has met at least one of six requirements (eliminate/prevent imminent safety hazards, comply with state licensure standards, comply with Social Security standards, respond to natural disaster emergency, improve physical conditions, or consolidate or join another health care or long-term service provider).

- A replacement nursing facility must be located within 15 miles of the existing facility, if the existing facility is located in a first-class municipality; if the existing facility is located outside of a first-class municipality, the replacement facility must be located within 60 miles of the existing facility. SDCL 34-12-39.2.
- A new nursing facility may be may be constructed, operated, or maintained as part of an existing nursing facility if the new nursing facility is located within 15 miles of the existing nursing facility, the combined bed capacity of both the existing and new nursing facilities does not exceed the total number of beds afforded to the existing nursing facility, and both the existing and new nursing facilities serve Medicaid residents and independently maintain an annual minimum Medicaid occupancy rate no less than ten percent below the state-wide average. SDCL 34-12-39.4.
- A new nursing facility may be constructed, operated, or maintained on any American Indian reservation that is wholly or partially located west of the one hundred and second meridian if the facility is needed to serve a local population previously unserved through lack of nursing facilities within a 45-mile radius. SDCL 34-12-56.
    - No more than one such nursing facility may be located within the same American Indian reservation, and the number of beds in the nursing facility may not exceed 50. No state funds may be used for construction. SDCL 34-12-56.

- SDCL 34-12-7 and 34-12-13 grant the DOH authority to make rules regarding nursing facilities, including licensure and patients' health and safety. Rules that address patients' health and safety include:
    - Sanitary and safe conditions of the premises (SDAR Chapter 44:73:02);
    - Cleanliness of operation;
    - Fire safety and construction (Chapter 44:73:03);
    - Physical equipment found necessary and in the public interest;
    - Management and administration (Chapter 44:73:04);
        - A nursing home facility's governing body, or an individual or partnership carrying out the same duties, is legally responsible for overall conduct of the facility. The governing body shall establish and maintain administration policies, procedures, or bylaws governing the operation of the facility. SDAR 44:73:04:02.
        - The governing body shall designate an appropriately licensed and qualified administrator to represent the governing body and to be responsible for the daily overall management of the facility. SDAR 44:73:04:03.
        - The governing body shall establish and maintain policies regarding admission, transfer, and discharge of residents (SDAR 44:73:04:07), as well as admission of residents with communicable diseases (SDAR 44:73:04:08).
        - Policies also are put in place for the facility regarding:
            - Prevention and control of influenza (SDAR 44:73:04:09);
            - Prevention and control of pneumonia (SDAR 44:73:04:10);
            - Disease prevention (SDAR 44:73:04:11); and
            - Tuberculin screening requirements (SDAR 44:73:04:12).
    - Physician's services (Chapter 44:73:05);
        - Each resident may be admitted only on the order of a physician, physician assistant, or nurse practitioner. The medical provider will provide the staff of the facility with documented information regarding current medical findings and with written orders for immediate care of the individual. SDAR 44:73:05:02.
    - Nursing and related care (Chapter 44:73:06);
        - A nursing home facility shall establish and maintain policies that provide the nursing staff with methods of meeting its administrative and technical responsibilities in providing care. SDAR 44:73:06:04.

        - The facility shall provide nursing services leading to safe and effective care through the ongoing development and implementation of written care plans for each resident. A care plan must address the medical, physical, mental, and emotional needs of the resident. SDAR 44:73:06:05.
    - Dietetic services (Chapter 44:73:07);
    - Medication control (Chapter 44:73:08);
        - All medications or drugs administered to residents must be ordered electronically or in writing and signed by the prescriber. SDAR 44:73:08:02. A pharmacist reviews the drug regimen at least monthly. SDAR 44:73:08:03.
        - All medications or drugs need to be stored in a well-illuminated, locked storage area that is not accessible to residents or visitors. SDAR 44:73:08:04.
        - The release of medication must be documented in the resident's record, indicating quantity, drug name, and strength. Medications or drugs prescribed for one resident may not be administered to another resident. SDAR 44:73:08:05.
        - Each medication administered must be recorded in the resident's medical record and signed by the person responsible. SDAR 44:73:08:07.
    - Records (Chapter 44:73:09);
    - Diagnostic services;
    - Hospital complementary services;
    - Long-term care diversionary services;
    - Patient safety and health; and
    - Residents' rights in nursing homes and assisted living centers (Chapter 44:73:11).

Assisted living centers

- SDCL 34-12-1.1(2) defines an assisted living center as any institution, rest home, boarding home, place, building, or agency that is maintained and operated to provide personal care and services that meet some need beyond basic provision of food, shelter, and laundry.

- Per SDCL 34-12-37, a nursing facility which (1) limits its admissions to only those persons who have resided in an adjacent self-care living unit operated by the nursing facility for at least one year, (2) maintains an endowment to provide nursing bed care for such persons who are unable to pay the cost of nursing care, and (3) does not participate in Medicaid may not ever change more than 10 assisted living center beds to nursing beds.

- SDCL 34-12-7 and 34-12-13 grant DOH authority to make rules regarding assisted living centers. This means the rules address the same areas of regulation as nursing facilities. SDAR Article 44:70 addresses assisted living centers.

Community living home

- SDCL 34-12-1.1(13) defines a community living home as any family-style residence whose owner or operator is engaged in the business of providing individualized and independent residential community living supports for compensation to at least one unrelated adult, but no more than four adults, and provides one or more regularly scheduled health-related services, either administered directly or in collaboration with an outside health care provider.

- SDCL 34-12-7 and 34-12-13 grant DOH authority to make rules regarding community living homes. SDAR Article 44:82 addresses community living homes.
    - The owner or operator must provide all basic and necessary household furnishings and supplies for the residents, including furniture, bedding, towels, kitchen furnishings (pots,

pans, dishes, and utensils), daily supplies, and other items commonly found in a private residence. SDAR 44:82:02:03.
    - Accessible and usable accommodations must be available to meet the needs of residents with disabilities. SDAR 44:82:02:10.
    - The owner or operator is responsible for the daily overall operation of the home and must be available in the home as needed to meet the needs of the residents according to the residents' respective care plans. SDAR 44:82:04:01.

Residential living center

- Residential living centers are addressed in SDAR Article 44:23 and SDCL 34-12-32, the latter of which grants DOH the authority to promulgate rules. Enacted rules address the registration procedure and form for residential living centers. SDAR Chapter 44:23:03. They also address the types of services allowable for residents. SDAR 44:23:01:05.

Congregate housing

- Per SDAR Article 46:11 – Developmental Disabilities — congregate housing is addressed under the definition of "group home" in SDAR 46:11:01:01. SDCL 27B-2-26 grants the DHS the authority to promulgate rules necessary for "community service providers, South Dakota Developmental Center—Redfield, and other nonpublic facilities, services, and supports for persons with developmental disabilities and for services and supports to be provided or purchased by the Department of Human Services under this title."

Adult foster care homes

- SDCL 34-12-1.1(8) defines an adult foster care home as a family-style residence providing supervision of personal care, health services, and household services for no more than four aged, blind, physically disabled, developmentally disabled, or socially-emotionally disabled adults.

- SDCL 34-12-7 and 34-12-13 grant DOH authority to make rules regarding adult foster care homes. SDAR Article 44:77 lays out the rules of adult foster care.
    - Licensed adult foster care home owners must meet the following requirements:
        - Neither the adult foster care home owners nor the family members residing at the residence may be a habitual user of alcohol or drugs;
        - Neither the adult foster care home owner nor family members residing at the residence may have a conviction for abusing or neglecting another person; and
    - Any person providing supervisory care and support in the adult foster care home must be at least 18 years of age. SDAR 44:77:01:05.There are restrictions as to what types of residents can be accepted and retained in adult foster care homes. Residents must be able to:
        - Turn self in bed and raise from bed or chair independently or with limited assistance of one staff for safety;
        - Transfer – ability to walk and get in and out of bed or a chair – independently or with limited assistance one staff and do not require a mechanical lift;
        - Complete activities of daily living of mobility or ambulation (walking), dressing, toileting, personal hygiene, and bathing with limited assistance of one staff but less than total assist (where the resident is incapable of participating in the activity and the staff must perform all services);
        - Complete own ostomy or catheter cares;
        - Feed self with set up, cueing, and supervision;

- Display normal expected behaviors for condition that do not place self or other at risk;
- Complete own injections if required or may be provided by a licensed nurse;
- Manage care for the resident's own feeding tube, tracheostomy, or peritoneal (kidney) dialysis;
- Remains free from the need for restraints;
- Demonstrate no need for skilled services unless provided by contract with a Medicare-certified home health agency for a limited time with a planned end date;
- Does not pose a danger to self or others;
- Be free from communicable diseases that place other residents or staff at risk; and
- Maintain conditions that are stable and controlled that do not require frequent medical intervention. SDAR 44:77:01:06.

Home health

- Per SDCL chapter 34-3A, counties and municipalities authorized to establish a home health agency services special revenue fund, with expenditures used to assist in paying the salaries and expenses of county/municipality health personnel.
    - DHS Division of Long Term Services and Supports, does not provide nursing services but contracts with local provider agencies to provide services.[14]

- SDCL 28-6-1 grants rule-making authority to DSS for home health services. SDAR Chapter 67:16:05 addresses home health services, which are defined as skilled nursing services, medical social services, or home health aide services provided by a home health agency. SDAR 67:16:05:01.
    - Home health services are available to an individual in the individual's place of residence. SDAR 67:16:05:03.
    - Home health services are limited to:
        - Skilled nursing services;
        - Medical social services provided by a licensed social worker who is not an employee of the DSS;
        - Medical supplies used incidental to the visit, when necessary to administer the prescribed plan of care;
        - Multiple visits of the same discipline on the same day, if the medical necessity for the multiple visits is documented;
        - Daily visits if the medical necessity for the visits is documented. The daily visits are limited to four weeks but may be extended if the need for additional visits is documented;
        - Therapy services; and
        - Postpartum services. SDAR 67:16:05:05.

Adult Day Services

- SDCL 1-36A-25 grants DHS the authority to establish a program of services for adults and the elderly, including the administration of programs funded under the Older Americans Act. In effect, that includes adult day services per 42 U.S. § 3030d(a)(5)(C).

[14] https://dhs.sd.gov/ltss/nursing.aspx

- SDCL 1-36A-26 grants DHS the authority to promulgate rules for programs such as adult day services. Chapter 67:40:19 is where those rules ended up. The rules effectively consist of the eligibility determination and the requirement for an individual care plan. At the federal level, 7 CFR § 226.19a regulates adult day care centers.

Hospice

- SDCL 34-12-1.1(9) defines inpatient hospice as any facility that is not part of a hospital or nursing home that is maintained and operated for purpose of providing all levels of hospice care to terminally ill individuals on a 24-hour per day basis.

- SDCL 34-12-1.1(10) defines residential hospice as any facility that is not part of a hospital or nursing home that is maintained and operated for the purpose of providing custodial care to terminally ill individuals on a 24-hour per day basis.

- SDCL 34-12-7 and 34-12-13 grant DOH authority to make rules regarding hospice care.
  - SDAR Article 44:79 contains the rules for inpatient hospice facilities.
    - A hospice must accept patients in accordance with the following restrictions:
      - The hospice facility must be certified by the Centers for Medicare and Medicaid Services as a Medicare-certified hospice providing inpatient hospice services;
      - A patient accepted for care by a hospice must be housed within the facility covered by the license;
      - A hospice may not accept or retain a patient who requires care in excess of the classification for which it is licensed;
      - Personnel essential to maintaining adequate staff may not leave a hospice during the person's tour of duty in the hospice to provide services to a person who is not patient of the hospice; and
      - A hospice facility may only admit and retain a patient certified by a physician as terminally ill. SDAR 44:79:01:05.
  - SDAR Article 44:80 addresses residential hospice facilities.
    - Acceptance of patients for residential hospice facilities is similar to inpatient hospice facilities. SDAR 44:80:01:05.

For additional information on the statutes and rules addressed above, see Appendix A: Sustainable Models for Long-Term Care Statutes and Regulations.

Rate Reimbursement and Payment

Long-term care facilities receive different reimbursement rates based on different methodologies or fee schedules established by the State. DSS and DHS jointly establish a rate-setting methodology for services delivered by community-based health and human services providers. Each category of service completes a comprehensive rate modeling analysis at least every five years. The departments may conduct the analysis earlier or on a more frequent basis if warranted by cost report information or other market conditions. Any new service model completes comprehensive rate modeling analysis prior to implementation. A comprehensive rate modeling analysis applies to certain community-based providers and providers deemed appropriate for inclusion by the agency.[15]

- **Nursing (homes) facilities** recently updated their methodology and are starting new model of care. Resource Utilization Groups (RUGS) has been the existing model of care, which focuses on categorizing the patients into groups based on care and resource needs. However, CMS has mandated states change the model from RUGS to Patient Driven Payment Model (PDPM). PDPM focus on the unique, individualized needs, characteristics, and goals of each patient and will begin on July 1, 2023.

  Nursing homes tend to have a higher Medicaid patient count and thereby are more reliant on the state reimbursement rate for operations compared to a facility with more private pay patients The reimbursement rate for nursing facilities will vary depending on their costs. Facilities report their costs to DHS through cost reports which contain expenses for staff salaries and benefits, professional fees and contract services, travel, supplies, and other expenses. Revenues are also part of the report.[16]

  Nursing homes have routine nursing facility items and services which are included in the facility's reimbursement rate like daily meals, some therapy services, expendable items for care and treatment of residents, personal hygiene items, general nursing services, telemedicine originating site facility fee as well as other items and services. There are also nonroutine nursing facility services which are not included in the reimbursement rate. These services are billed separately to DSS Medicaid by the physician, laboratory, pharmacy, agency, or other entity providing the service. Nonroutine nursing facility services include prescription drugs, physician services, vaccines and immunizations, laboratory or radiology services, mental health services, and other services.[17]

- **Assisted living centers** have a tiered daily reimbursement rate. Rates tiers are determined by a standardized needs assessment tool completed by a Long-Term Services and Support (LTSS) specialist at least annually with all consumers of the HOPE waiver. The information collected during the assessment generates a RUG score based on an algorithm developed by InterRAI. The services authorized and delivered by the provider to eligible consumers is reimbursed at the established rates. The state fiscal year 2023 base rate is $59.52 per day, while Tier 1 is $70.23 per day, and Tier 2 $81.54 per day. [18] The state fiscal year 2024 base rate is $67.56 per day, while Tier 1 is $79.71 per day, and Tier 2 $92.55 per day. [19] In addition, the consumer is responsible for their portion of room and board

[15] Chapter 28-22 Rate-Setting: https://sdlegislature.gov/Statutes/Codified_Laws/2051962

[16] Nursing facilities Rates: https://dhs.sd.gov/docs/Nursing%20Facility%20SFY%2024%20%20Rate%20List.pdf

[17] Nursing facility services: https://dss.sd.gov/docs/medicaid/providers/billingmanuals/Institutional/Skilled_Nursing_Facilities_and_Nursing_Facilities.pdf

[18] FY2023 Assisted Living Centers, Community Living Homes, Adult Foster Care, and Structured Family Caregiving: https://dhs.sd.gov/docs/LTSS%20Fee%20Schedule%20FY2023%20Rates_11.17.22.pdf

[19] FY2024 Assisted Living Centers, Community Living Homes, Adult Foster Care, Structured Family Caregiving, and Adult Day Services: https://dhs.sd.gov/docs/LTSS%20Fee%20Schedule%20FY2024RATE.pdf

(as Waiver services are not able to pay for this) paid directly to the provider, which for SFY24 equates to $874/month.

The RUG score determines which rate tier an individual falls into:

- Base: low Activities of Daily Living (ADL) score (<6), not medically complex and no behaviors;
- Tier 1: moderate-high ADL score (>6) and/or medically complex but no behaviors;
- Tier 2: Behaviors present, regardless of ADL status r medical complexity.

- **Community living homes and adult foster care homes** have a tiered daily reimbursement rate similar to assisted living centers. The state fiscal year 2023 base rate is $44.86 per day, while Tier 1 is $56.07 per day, and Tier 2 $62.81 per day. The state fiscal year 2024 base rate is $47.10 per day, while Tier 1 is $58.87 per day, and Tier 2 $65.95 per day. In addition, the consumer is responsible for their portion of room and board (as Waiver services are not able to pay for this) paid directly to the provider, which for SFY24 equates to $874/month.

- **Home health agencies** have a contracted service fee schedule with the State. The rates paid cannot exceed the provider's private pay rates. The state fiscal year 2023 rates are paid in 15-minute units: $8.49 for homemaker or personal care, $19.56 for nursing, $7.33 for adult companion, and $7.33 for respite care.[20] The state fiscal year 2024 rate is paid in 15-minute units at the following rates: $10.22 for homemaker or personal care, $21.42 for RN or $17.82 for LPN for nursing, $9.89 for adult companion, and $9.89 for respite care.

- **Structured family caregiving** is reimbursed at tiered levels based on the HOPE waiver consumer's assessment results. The rates for services purchased by the State from a provider are specified in the HOPE Waiver Services Fee Schedule. All services authorized and delivered by a provider to eligible HOPE waiver consumers are reimbursed at stated rates. The stipend paid to the structured family caregiver must be 50% or more of the HOPE waiver consumer's identified rate. If the State's rate(s) of reimbursement exceeds a provider's private pay rate(s), the State's reimbursement will be adjusted to match the private pay rate(s). The state fiscal year 2023 base rate is $73.14 per day, with Tier 1 at $91.43 per day and Tier 2 $102.40 per day. The state fiscal year 2024 base rate is $76.80 per day with Tier 1 at $96.00 per day and Tier 2 $107.52 per day.

- **Adult day services** is reimbursed at two different rates for attendance and personal care services through both the HOPE waiver and OAA (Older Americans Act) Title III funding. For OAA Title III, the provider must meet the 25% cash match of the program costs. The state fiscal year 2024 rates are in 15 minute increments at $3.53 for attendance and $10.22 for personal care.

- **Hospice services** are not considered a long-term care option, but nursing facilities and other long-term care options do provide hospice services.[21] There are currently 20 registered facilities who provide hospice services in the state. The different hospice service rates are calculated using a wage component multiplied by a wage index plus another component.[22]

[20] Home Health: https://dhs.sd.gov/docs/FY23%20In-Home%20Provider%20Rates%20and%20County%20Coverage%2001.31.23%20.pdf
[21] Hospice Services: https://dss.sd.gov/docs/medicaid/providers/billingmanuals/Institutional/Hospice_Services.pdf
[22] Hospice Rates: https://dss.sd.gov/docs/medicaid/providers/feeschedules/Other_Services/Hospice_latest.pdf

Existing Incentive Models for Long-term Care

- **Access Critical Nursing Home Program** ensures geographic access to nursing facility services in rural areas by providing enhanced reimbursement to eligible nursing facilities to help the facility stay financially viable. The incentive includes no direct care celling or occupancy limit, no 105% ceiling limit, no overall limitation, and a 2% margin. DHS makes a designation based on the following six criteria:[23]
    - No other nursing facility is located within 20 miles;
    - The nursing facility is located in the largest municipality within 35 miles, unless the next closest nursing facility is located more than 50 miles from any other nursing facility;
    - The nursing facility provides nursing facility services;
    - The nursing facility is integrated with other health care services, through affiliation or formal agreement;
    - The current 5-year average number of occupied beds in the facility is less than 60; and
    - The nursing facility agrees to relinquish any excess moratorium beds that are authorized.

  The designated access critical nursing homes include:

  Avera St. Lukes, Eureka
  Bennett County Hospital & Nursing Home, Martin
  Sanford Mid Dakota Care, Chamberlain
  Prairie Good Samaritan Center, Miller
  Platte Health Center, Inc., Platte
  Empress Wheatcrest Hills, Britton
  Winner Regional, Winner
  Bethel Lutheran Home, Madison
  Seven Sister's Living Center, Hot Springs
  Tekakwitha Nursing Home, Sisseton
  Philip health Services, Philip
  Five Counties Nursing Home, Lemmon
  Avera Oahe Manor, Gettysburg

- **Regionalization** is an incentive model in long-term care passed by the legislation during the 2021 session as SB 167 to provide a nursing facility to receive a designation as a regional nursing facility. To obtain the regional designation and receive the regional nursing facility rate, a facility must:[24]
    - Be enrolled and in good standing with South Dakota Medicaid;
    - Provide services in the region through affiliation or contract;
    - Demonstrate intent to construct a new nursing facility or to substantially remodel an existing facility, upon merging with one or more health care facilities within a thirty-mile radius;
    - Demonstrate that the newly constructed nursing facility or the substantially remodeled facility will:
        - Support a homelike environment with a cluster, neighborhood, or household model layout;
        - Contain single occupancy rooms and toilet areas;
        - Abide by best practices regarding infection control and prevention;
        - Allow for private visitation; and
        - Support other best practices related to aging;
        - Meet any other criteria set forth in rules promulgated by the department for the implementation of this section.

  There are currently no regional nursing facilities designated by DHS. The rate incentives received for a regional nursing facility includes no direct care celling or occupancy limit, no 105% ceiling limit, no overall limitation, and a 2% margin.

[23] SDCL 34-12-35.5
[24] SDCL 34-12-35.12

- **Behavior Program** for nursing facilities serves individuals with extraordinary behavioral needs who are supported by Medicaid. Through an agreement with DHS, an eligible provider is reimbursed 100% of allowable costs. Providers may choose to designate a specific area of their nursing facility to ensure costs are more easily captured, ease the administrative burden of completing time studies, and ensure specialized training for the team working with individuals in the behavior program. On a monthly average there are about 30 patients at 2 different facilities participating in the program.[25]

  Individuals who may meet the criteria for the behavior program include those who:
  - Receive South Dakota Medicaid
  - Need nursing facility level of care
  - Have a history of regular/recurrent persistent disruptive behavior which is not easily altered
  - Have behaviors which require increased resource use from nursing facility staff not addressed in the reimbursement methodology
  - Have behaviors that are disruptive or interfere with care
  - Have an organic or psychiatric disorder of thought, mood, perception, orientation, or memory which significantly affects behavior and is interfering with care and placement

- **Extraordinary care add-on payments** provide additional reimbursement for Medicaid recipients requiring extraordinary care such as equipment and services not otherwise covered under normal Medicaid case mix reimbursement methodology. The individual requiring extraordinary care must be a South Dakota Medicaid recipient and must meet nursing facility level of care as defined in ARSD Chapter 67:45:01. When medical criteria are met, add-pay can be used to help cover skilled therapy, equipment purchase/rentals, private rooms, extra staff, and staff time, as well as other services deemed medically necessary. On a monthly average there are about 140 total patients with about 30-40 facilities participating in the program for chronic complex needs, traumatic brain injury, and extreme behavior.[26]

  Extraordinary care categories include:
  - Chronically Ventilator Dependent
  - Traumatic Brain and Spinal Cord Injuries
  - Multiple Chronic Complex Medical Conditions
  - Total Parenteral Nutrition
  - Specialized Skin or Wound Care
  - Specialty Bed/Mattress
  - Behaviorally Challenging

State Operated Long-term Care Facilities

- **Veteran's Home** is a state-owned facility for the treatment and care of veterans for duty related disabilities. The Veteran's Home is codified in law per SDCL 33A-4.

  The Veteran's Home takes care of an average of 60 veterans per month. The care for 30 of these veterans is paid through Medicaid at the standard FMAP rate for Medicaid. The care for the other 30 veterans is paid through the "prevailing rate". If a veteran has at least a 90% service-related disability rate, the treatment is paid by the federal government at 100% of the cost. The treatment is paid out of the Veteran's Home Operating Fund and reimbursed by the federal government.

  The number of veterans served by the Veteran's Home is limited by the number of nursing staff. Between March 2022 and March 2023, the department hired 37 staff to work at the Veteran's Home,

[25] Behavior Program: https://mylrc.sdlegislature.gov/api/Documents/251685.pdf
[26] Extraordinary Care Add-Pay Program: https://mylrc.sdlegislature.gov/api/Documents/251686.pdf

but 51 staff left in the same period. The number of staff working in the Veteran's Home has gone down from 124 in March 2022 to 113 in March 2023.

- **Human Services Center (Geriatrics unit)** is operated by DSS in Yankton. The unit focuses on treating nursing home patients who have issues that cannot be treated normally in nursing homes. Patients go through the Adult Acute Psychiatric Program first before being admitted. The per diem charge per day is $838.20, which does not include pharmacy, lab, ancillary or professional fees. The average number of people admitted is 15-20 people a year with an average length of stay of a few months to two years.

Penalties and Fines in Long-term Care

The U.S. Centers for Medicare & Medicaid Services (CMS) and the State DOH are the regulating authorities responsible for identifying deficiencies and handling complaints in long-term care. DOH identifies the deficiencies and citations, while CMS sets the penalty. The biannual nursing facility regulation report published by DOH provides a report on deficiencies identified and any civil money penalties (CMP).

A CMP is a monetary penalty CMS may impose against skilled nursing facilities (SNFs), nursing facilities (NFs), and dually certified SNF/NFs for either the number of days or each instance a facility is not in substantial compliance with one or more Medicare and Medicaid participation requirements for Long Term Care Facilities. A portion of CMPs collected from facilities are returned to the state in which the CMPs are imposed. State CMP funds may be reinvested to support activities benefiting nursing facility residents and protect or improve their quality of care or quality of life. The table below provides the scope and severity of the deficiencies by federal fiscal year.

S & S	FFY 2018		FFY 2019		FFY 2020*		FFY 2021**		FFY 2022***		FFY 2023****	
	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%
A	0	0%	0	0%	11	3%	9	3%	19	3%	9	3%
B	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
C	0	0%	1	0%	7	2%	16	5%	22	4%	18	6%
D	178	50%	295	53%	188	58%	167	47%	181	33%	116	39%
E	136	39%	187	33%	75	23%	85	24%	181	33%	66	22%
F	10	3%	20	4%	25	8%	51	14%	108	19%	71	24%
G	18	5%	30	5%	16	5%	11	3%	27	5%	16	5%
H	4	1%	26	5%	0	0%	3	1%	8	1%	1	0%
I	0	0%	0	0%	0	0%	0	0%	0	0%	0	0%
J	7	2%	0	0%	3	1%	3	1%	4	1%	2	1%
K	0	0%	0	0%	0	0%	1	0%	0	0%	0	0%
L	0	0%	0	0%	0	0%	8	2%	4	1%	0	0%
TOTAL	353		559		325		354		554		299	

**FFY2020 – 36 deficiencies related to F880 Infection Prevention & Control and 3 deficiencies related F884 NHSN Reporting*
***FFY2021 – 61 deficiencies related to F880 Infection Prevention & Control and 25 deficiencies related to F884 NHSN Reporting*
****FFY2022 – 40 deficiencies related to F880 Infection Prevention & Control and 35 deficiencies related to F884 NHSN Reporting*
*****FFY2023 (PROVISIONAL) – 18 deficiencies related to F880 Infection Prevention & Control and 26 deficiencies related to F884 NHSN Reporting*

Note:
A, B, & C Tags = No harm. Minimal negative impact.
D, E, & F Tags = No harm. Potential for more than minimal harm.
G, H, & I Tags = Actual harm. Not immediate jeopardy.
J, K, & L Tags = Immediate jeopardy to resident health or safety.

According to the DOH report, in 2022 there were 64 total civil money penalties imposed for a total of $845,844.61, of which $610,216.53 was for Medicaid patients. One money penalty was removed. The dollar difference between total and Medicaid is penalties related to Medicare. Private pay is not penalized.[27] For 2023, there were 23 total civil money penalties imposed for a total of $274,520.

Civil Money Penalties Summary

Civil Money Penalties to a facility					
by Federal Fiscal Year as of March 31, 2022					
Year	**Number Imposed**	**Number Removed**	**Total Imposed**	**Total**	**Total Medicaid**
2022	64	1	63	$845,844.61	$610,216.53
2021	87	2	85	$1,012,876.02	$771,439.44
2020	21	1	20	$221,817.92	$199,547.23
2019	17	0	17	$461,982.95	$371,047.57
2018	7	0	7	$319,626.55	$267,532.28
2017	28	2	26	$1,118,266.50	$904,691.02
2016	9	1	8	$113,850.65	$88,559.49
2015	3	0	3	$107,282.50	$89,543.68
Total	**236**	**7**	**229**	**$4,201,547.70**	**$3,302,577.24**

** 2020 7 CMP's imposed due to F880 (Infection Prevention & Control or F884 (NHSN Reporting)*

*** 2021 74 CMP's imposed due to F880 (Infection Prevention & Control or F884 (NHSN Reporting)*

**** 2022 43 CMP's imposed due to F880 (Infection Prevention & Control or F884 (NHSN Reporting)*

[27] The Biannual Nursing Facility Regulation Report can be found on the DOH website at https://doh.sd.gov/providers/licensure/default.aspx