

To: Administrative Law Judge Ann C. O'Reilly
From: Long-Term Care Imperative
Date: February 9, 2021
Re: Proposed Rules of the Minnesota Department of Health Governing Licensed Assisted Living Facilities, Minnesota Chapter 4659, Minnesota Revisor ID R-4605
OAH Docket # 65-9000-37175

The following document, ***Analysis of the Costs of Assisted Living Licensure, February 9, 2021***, is a supplement to the document, "*Memorandum_re_Rule-Making_Hearing_for_the_Assisted_Living_Licensure_Rules_01.15.21.pdf*," submitted by Sam Orbovich, with Fredrikson & Byron, PA, representing the Long-Term Care Imperative.

The Long-Term Care Imperative, a collaboration of LeadingAge Minnesota and Care Providers of Minnesota, two of the state's largest long-term care associations, surveyed both Associations' senior housing members on the costs of assisted living licensure. We have used that information to conduct an analysis of the provisions of the proposed rule and statute to estimate the costs of assisted living licensure on providers.

Sincerely,



Patti Cullen, CAE
President and Chief Executive Officer
Care Providers of Minnesota



Gayle Kvenvold
President and Chief Executive Officer
LeadingAge Minnesota

ANALYSIS OF THE COSTS OF ASSISTED LIVING LICENSURE

The Long-Term Care Imperative

February 9, 2021

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Background

The Long-Term Care Imperative, a collaboration of LeadingAge Minnesota and Care Providers of Minnesota, two of the state’s largest long-term care associations, surveyed both Associations’ senior housing members on the costs of assisted living licensure. To assist with the survey development, administration, and Microsoft Excel Data Model, the LTC Imperative partnered with CLA (CliftonLarsonAllen), a national firm providing industry-focused wealth advisory, outsourcing, audit, tax, and consulting services.

Survey Development and Administration

- The survey was developed during the summer and fall of 2020.
- Survey link was emailed Monday, November 2, 2020 to 894 settings
- Survey closed on November 30, 2020.
- Follow-up to clarify responses during December 2020.
- 218 Respondents
- 43 Responses removed from analysis due to incompleteness, outlier etc.
- 175 of 218 responses included in analysis.

Statistical Methods

As was the case with the Minnesota Department of Health’s, “Cost Baseline and Impact Analysis, Assisted Living Licensure Statute 1/18/2021, (or MDH Report)” the LTC Imperative survey did not draw a sample from our memberships and then obtain responses from the sample.

Instead, the LTC Imperative survey was sent to all members. Like the MDH survey, the survey response was voluntary. A voluntary survey is subject to selection bias. This is an important point. Since responses were not random and the values of the total population of settings are unknown, we are careful to point out that the confidence level and intervals are not adjusted for any selection bias.

Accordingly, the LTC Imperative’s survey had:

Population:	894
Respondents:	218
Responses included:	175 (95% confidence level with a 6.62% confidence interval)

General Statement and Summary of Findings

While it is mentioned in several parts of the report, we would like to highlight the differences between providers in terms of payor mix. The MDH Report does not analyze or mention the state’s Medicaid Elderly Waiver program’s payment for customized living services or use of the Housing Support program room and board rate for payment and/or recipient contribution toward room and board. Providers with higher proportions of Elderly Waiver clients will not be able to “raise” the rates of the Medicaid clients to address any new costs. The marginal cost of the proposed assisted living rule and Elderly Waiver’s lower reimbursement for services may create access issues for these Medicaid beneficiaries (see page 10).

The MDH Report also does not take economies of scale into account. Smaller communities will have a particular financial burden because they will be forced to try and spread the increased costs over a limited number of tenants. Some aspects of the new license, such as the fee structure, are clearly not designed to mitigate costs for smaller settings.

The following table summarizes the LTC Imperative’s findings on the costs of Assisted Living Licensure. The table is ordered to call attention to costs relating to 1) requirements related to the proposed rule, 2) requirements related to the proposed rule and associated statutory provisions, and 3) requirements included only in statute.

Area of Findings	Costs Relating to Requirements from	Findings and Estimated Cost to Setting for Average / Typical Setting
Disaster Preparedness	Proposed Rule	Implementation Cost of \$4,736 Annual Cost (each year after implementation) of \$3,063
Training	Proposed Rule	Annual Cost of \$1,600
Assessment	Proposed Rule	Annual Cost of \$775
Missing Resident Requirements	Proposed Rule	Annual Cost of \$66,556
24-hour awake staff	Minnesota statute	
Call Light Response	Minnesota statute	
Termination of Resident Contracts and Relocation of Residents	Proposed rule and Minnesota statute	Annual cost of \$21,750
Resident Lease and Services Agreements	Proposed rule and Minnesota statute	Implementation Cost of \$900 to \$2,700
Marketing Materials	Proposed rule and Minnesota statute	Cost not estimated. 53.3% of respondents stated they intend to change any of their marketing materials or indoor/outdoor signs.
License Fee	Minnesota statute	Annual cost increase of \$1,858 (assuming fee is applied based on full resident count and not those receiving services)
Meals	Minnesota statute	Considerable compliance costs for those moving from 2 to 3 meals, needing registered dietician services, and not currently providing snacks.
Facility Fire Protection	Minnesota statute	A 40-unit assisted living setting certified for dementia services with 1,000 square feet per unit would spend \$54,000 to comply.

Disaster Preparedness (Appendix Z Emergency preparedness)

When the federal government implemented Appendix Z, a detailed analysis of the implementation costs was required. The Federal Register (Vol. 81, No. 180 / Friday, September 16, 2016) provides estimates of the Medicare and Medicaid Programs Emergency Preparedness Requirements for Medicare and Medicaid Participating Providers and Suppliers (Appendix Z).

Since assisted living does not have a federal definition, we have selected the estimates provided for “LTC facilities” as these are comparable to those settings seeking an assisted living license.

According to the study, "LTC Facilities" the implementation of Appendix Z cost (in 2016 dollars):

Appendix Z	Cost (2016 Dollars)	Cost (Dec-2020 Dollars)
Implementation Cost (p. 63965)	\$4,383	\$4,736
Annual Cost (each year after implementation). Calculated by LTC Imperative using data from pages 63962 to 63965.	\$2,835	\$3,063

We do not understand the MDH report’s statement that, “This results in a recommended reduction in the SONAR estimate of \$510. The total complete preparedness cost recommendation based on this analysis would be \$1,275 for a total anticipated cost for the average facility of \$3,108 in staff time depending on alignment of current plans with new standards (page 28).”

Training

The MDH cost analysis document identifies increased costs due to additional staff dementia training for medium-sized settings (capacity 16-50) as \$743 annually plus an unspecified amount related to turnover. We believe there are flaws with this estimate and the actual training costs will be somewhat higher. The MDH estimate of direct care positions in those settings is 12.39 employees. It is not clear how MDH factors in part-time employees, and it is known these settings use a lot of part-time workforce. Likewise, the average AL setting size is around a capacity of 40. This is on the higher part of the MDH range. As a result, we think a base number of employees should be at least 15.

The MDH study also uses a \$15 per hour cost, which covers wages but not the associated benefits and payroll taxes. We believe the true cost of paying employees for training is \$20 per hour. To account for turnover, which surveys have found annually to be in the 30-40% range, we would recommend assuming 20 employees trained annually. With those estimates, an average setting that needs to provide the four hours of additional dementia training to direct care staff annually would have an increased training cost of \$1,600 annually.

Assessment Costs

The proposed rule directs the registered nurse to conduct and complete the nursing assessments. Specifically,

- A registered nurse shall complete nursing assessments and reassessments.

According to our survey, the average nursing assessment takes 2-hours and 7 minutes to conduct.

Presently, a setting may involve other staff positions in completing a resident assessment. The requirement that only an R.N. complete the nursing assessment means there will be some cost to settings utilizing licensed practical nurses, social workers, activity directors etc. as those positions are typically paid less per hour.

According to the 2020 Senior Housing Compensation Report (an annual survey of Assisted Living settings by Care Providers of Minnesota, LeadingAge Minnesota, and Healthcare Human Resources Association of Minnesota), the average weighted wage for these positions is:

Position	Weighted Average Hourly Wage	Comparable Higher Cost when Substituting R.N.
Activities Director:	\$21.86	\$10.18
Social Worker:	\$23.35	\$8.69
Licensed Practical Nurse (LPN):	\$24.72	\$7.32
Registered Nurse:	\$32.04	

For example, current accepted practice permits LPNs to conduct every-other-one of the 90-day assessments. The proposed rule does not seem to allow this practice.

- Therefore, at minimum, a setting utilizing this practice would experience the increased cost of going from LPN to RN for two assessments per year. The annual cost per resident is estimated to be \$15.50. A setting with 50 residents needing assessments would have estimated annual cost increases of \$775.
- The MDH report does not consider this issue and marginal increase in costs.

New required elements in a uniform assessment tool will result in needing updated software for those providers using assessment software. It is assumed that software vendors will pass along any costs of updating software to their customers.

24-hour awake staff, Call Light Response and Missing Resident Requirements

The Assisted Living Licensure Statute and Proposed Rule both include requirements for staffing greater than current staffing levels in most communities. While we focused on the “missing resident” requirement, this proposed rule interacts with Minnesota statute where both statutory and the proposed rules requirements together create significant costs.

Specifically, when combined, the statutory requirements for 24-hour awake staffing and call lights to be answered within 10 minutes, and the proposed rule that a staff member immediately leave work to search for a missing resident create a requirement that a setting must have at least 2-overnight staff.

The LTC Imperative survey found a fewer percent of settings without 24-hour staffing than the MDH survey (1.3% vs. 6%). For those settings needing to add an overnight awake staff MDH estimates a minimum cost of \$54,750 (\$15 per hour, 365 days salary-only estimate) (page 16 of MDH report). Note we were unable to recreate MDH’s annual minimum cost of \$54,750 due to not knowing the underling formula used.

The LTC Imperative Survey did collect average hourly wage information and % of payroll taxes and benefits. Using this information, our estimate for a setting without 24-hour awake staff to comply the 24-hour awake requirement for all respondents is \$66,556 per year, which is \$11,986 greater than the MDH estimate:

Number of Units	10 or less	11 to 40	41 or greater	All
Average Hourly Wage	\$20.62	\$17.94	\$20.03	\$19.17
Average Percent Benefits and Payroll Taxes	14.8%	16.5%	21.5%	18.9%
Average Hourly Wage and Benefit Cost	\$23.67	\$20.91	\$24.34	\$22.79
Cost of 8-Hour Shift for 365 Days	\$69,118	\$61,048	\$71,062	\$66,556

Two additional staffing requirements create scenarios where a setting would not be compliant unless it had at least two awake overnight staff.

Specifically, the proposed rules state:

- A requirement that staff conduct an immediate and thorough search of the facility, the facility’s premises, and the immediate neighborhood in each direction when a resident is suspected to be missing.
- During the hours of 10:00 p.m. to 6:00 a.m., direct-care staff shall respond to a resident’s request for assistance with health or safety needs as soon as possible, but no later than 10 minutes after the request is made.

While the elopement of residents is rare, the event does occur, and the proposed rule would seem to require 2-overnight staff to comply. More importantly, a small or mid-size setting that has one overnight staff could have 2 of 4, 2 of 6, or 2 of 20 residents needing attention. If the requirement is to respond no later than 10-minutes after the request, then 2-staff is required. The frequency of this occurrence is unknown. Nor has MDH included this possibility in their cost estimates.

Many settings staff the overnight with one employee. For these settings, we believe the 10-minute response and elopement rules require a minimum of 2-staff, and using the estimates above will cost, on average, \$66,556.

License Fees

Providers electing to obtain an Assisted Living License, with or without being in the certified dementia care category, will experience and increase in their annual fees paid.

	Median Fee Costs	% with Over 10% Increase
Current Fees	\$4,838	
New Fees (2020 Resident Count)	\$5,475	65.8%
New Fees (2019 Resident Count)	\$5,800	65.8%
New Fees (Only Residents on Home Care)	\$4,775	55.0%
	Average	Average Increase
Current Fees	\$5,252	
New Fees (2020 Resident Count)	\$7,001	\$1,749
New Fees (2019 Resident Count)	\$7,111	\$1,858
New Fees (Only Residents on Home Care)	\$5,818	\$566

The LTC imperative disagrees with the MDH conclusion that, “Due to the high variability of baseline costs under the more complex system that currently exists, it is not possible to generalize where cost increases may exist, and for the average facility, the expenses to maintain licensure under the new statute will likely be reduced (page 8 of MDH report).” While it does not capture all possible situations, we were able to produce estimates of the fee cost changes and the MDH report has some of that analysis as well. Our data does not agree with the MDH study conclusion that most providers see a decrease.

Moreover, MDH has not clearly identified how the new assisted living license fee will be determined based on the wording of the statute.

- Will all residents of a setting with a license be used? Or will residents receiving home care services be used? As noted in the table above, there is a significant difference.
- The legislature did appropriate funds to MDH via the assisted living license fees. It is not clear if the analysis provided by the MDH report agrees with this additional funding, or not.

Finally, the LTC Imperative utilized the median cost of current fees (HWS, Food License and Home Care License) for a sample and compared that to median fees using the statutory formula. The results in increases for most providers. These increases will be particularly challenging for small providers and for those serving a high percentage of Elderly Waiver clients, whose ability to raise revenue is limited.

Termination of Resident Contracts and Relocation of Residents

The assisted living license statute and proposed rule include new requirements around terminating services to residents that will significantly lengthen the process and result in extended periods of non-payment. Provider-initiated terminations are rare in assisted living settings.

Our survey found that the provider currently experiences one termination of services/lease per year, with a few larger settings experiencing higher levels than that. A major reason for provider-initiated terminations is non-payment of rent and/or services.

The proposed requirements in the rule will create significant financial burden by potentially preventing providers from completing provider-initiated terminations. Proposed Rule 4659.0120 subpart 1 (A) requires a pretermination meeting to occur before a termination can commence and that the resident and the resident representative must have at least 5-day notice of the pretermination meeting. Subpart 1 (B) further requires that “The facility must arrange the pretermination meeting to occur on a day that the resident and the resident's representatives are able to attend.” This proposed rule does not consider the potential scenario of an uncooperative resident or resident representative, and that a resident may avoid or delay a provider-initiated termination by simply refusing to attend a pre-termination meeting.

Our survey found that the provider currently experiences one termination of services/lease per year, with a few larger settings experiencing higher levels than that.

Our cost survey found a median monthly revenue for rent and services of approximately, \$3,625.

- Meaning that a six-month non-payment period while pursuing a termination would cost the provider about \$21,750.
- If a provider is unfortunate to have three of those situations in a year, the loss would be over \$60 thousand.
- The proposed requirements will create significant financial burden.

The relocation assistance required by the statute adds an additional cost burden to providers in the situation where a resident contract is terminated. We do not have data to dispute the MDH study finding that more than half of providers already meet the current requirements, but those that do not will have an additional cost burden. In addition, while rare, full closures of settings will come up with significant expense due to the relocation planning requirements.

Resident Lease and Services Agreements

We estimate that settings will have legal costs between \$900 to \$1,800.

Resident Lease and Services Agreements		Item	
Percent of respondents stated they would have outside legal counsel develop a new Resident Lease and Service Agreements contract to comply with the law and rules.		65.6%	
Estimated the average number of hours billed by outside legal counsel by respondents		9 Hours	
Average Attorney Fees from			
https://thervo.com/costs/attorney-fees	\$100 per Hour	\$200 per Hour	\$300 per Hour
9-hours times Hourly Attorney Fee	\$900	\$1,800	\$2,700

Marketing Materials, Indoor/Outdoor Signs

- 53.3% of respondents stated they intend to change some of their marketing materials and/or indoor/outdoor signs.
- We did not estimate the cost of this requirement.

Facility Fire Protection

The assisted living license statute and proposed rule include fire protection requirements that will impose some additional costs for at least some providers.

In our survey of 175 providers, only 2 reported not currently having smoke detectors that meet these requirements. While this may not be a representative sample, it does appear to confirm that this requirement will not burden most providers.

The requirement for sprinklers in dementia units is more of a concern. Our survey has 78 dementia providers (2019 registration), and six of them are not fully sprinklered. That confirms the less than 10% supposition in the MDH study, but for the impacted providers the costs will be substantial, albeit with several years to prepare for it.

According to a [2013 cost assessment](#) by the National Fire Protection Association (NFPA), the average fire sprinkler installation cost for a residential setting is about \$1.35 per square foot of coverage.

- A 40-unit assisted living setting certified for dementia services with 1,000 square feet per unit would spend \$54,000 to comply (not adjusted for inflation).

Meal Requirements

The assisted living license statute and proposed rule includes several requirements. Some of these requirements may require changes by the provider to comply. While we generally agree with MDH’s cost analysis, we believe the analysis overlooks several important areas.

First, MDH does not estimate the costs of contracting with or employing a dietician. According to our survey, 25.7% of respondents do employ a dietician. There are several options that a setting may choose from to comply with these requirements.

Possible Compliance Remedy and Estimated Cost	Annual Costs per Setting
On-line / Software that creates menus, pull sheets and prep lists, tracks inventory and calculates nutrition values and costs (these often meet the required registered dietician reviews). Typically, \$100 to \$150 per month per login.	\$1,200 to \$1,800
Hire a Registered Dietician (estimated annual salary plus benefits). Source: 2020 Nursing Facility Compensation Survey	\$76,702
Utilize a consulting registered dietician (10 to 50 hours per year depending on menu cycle at \$80 to \$150 per hour)	\$800 to \$7,500 plus

Second, the requirement that settings provide three meals per day and a snack does increase costs. While we found a lower percentage of settings do not provide three meals than the MDH survey, our results do indicate that 15.4% do not provide snacks.

Number of Residents	10	25	50
Annual Cost of Snack Requirement (\$0.50 Per Day)	\$1,825	\$4,563	\$9,125

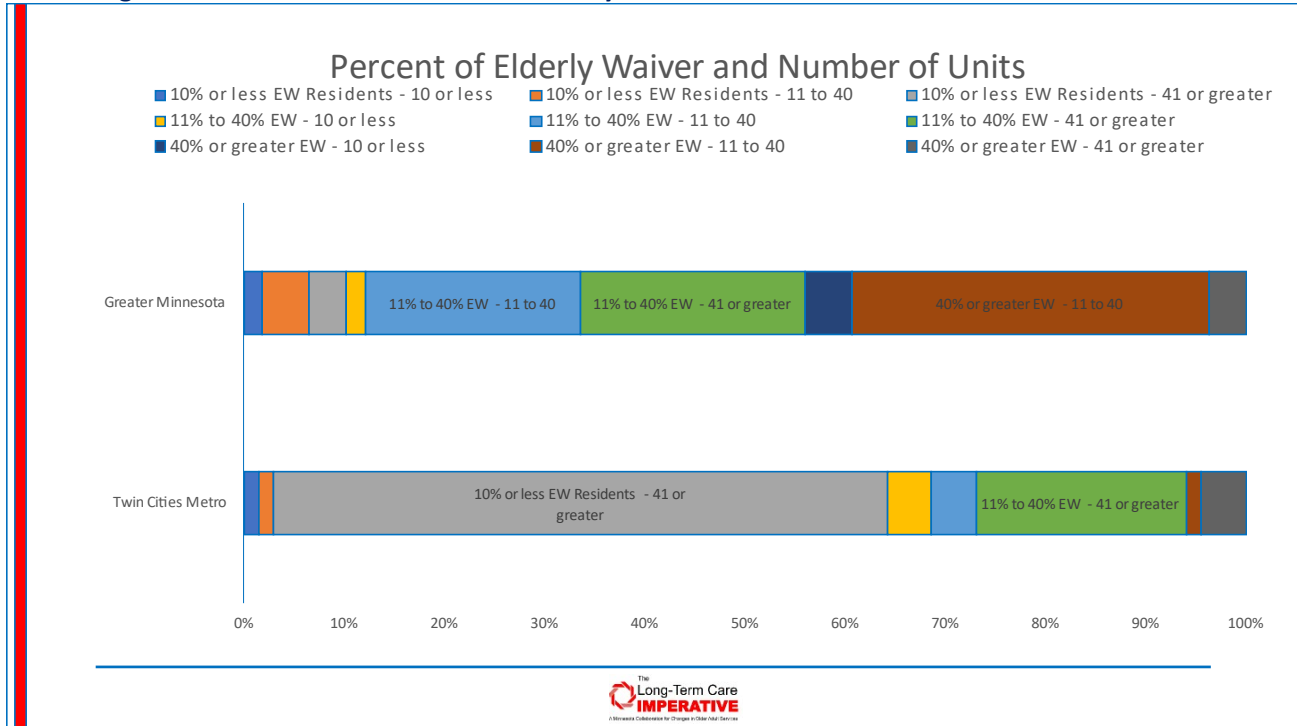
Third, and most important, the MDH report does not consider the costs to settings serving a higher proportion of residents who services are covered by Minnesota Medicaid’s Elderly Waiver Program. The rates paid by the Elderly Waiver program are set by the state legislature and have not increased since January 1, 2019 (nor are there presently future increases budgeted in statute). Raw food costs are covered by rent. Rent for persons on Elderly Waiver is generally capped at the Housing Supports rate (even if the person does not qualify for Housing Supports). The Housing Supports rate is adjusted by formula annually on July 1.

While Elderly Waiver may pay for the preparation of 3 meals and a snack, the amount does not vary by size of setting. Elderly Waiver has no mechanism to cover the increased meal cost as the rates are fixed. Hence, smaller settings do not enjoy any economies of scale. While we concur with MDH’s estimate that adding a third meal would have a salary cost of \$27,375 annually, we disagree with the MDH conclusion that this “would be offset by meals purchased” (page 13 of MDH report). Instead, we assume that settings will need to raise the rates of private paying individuals, who may or may not elect to have a 3rd meal.

Elderly Waiver	Daily Rate for Meal Prep
Breakfast	\$3.67
Lunch	\$4.57
Supper	\$4.57
Snack	\$0.45

Descriptive Charts The following is some general overview data for assisted living providers based on our provider survey (described on page one).

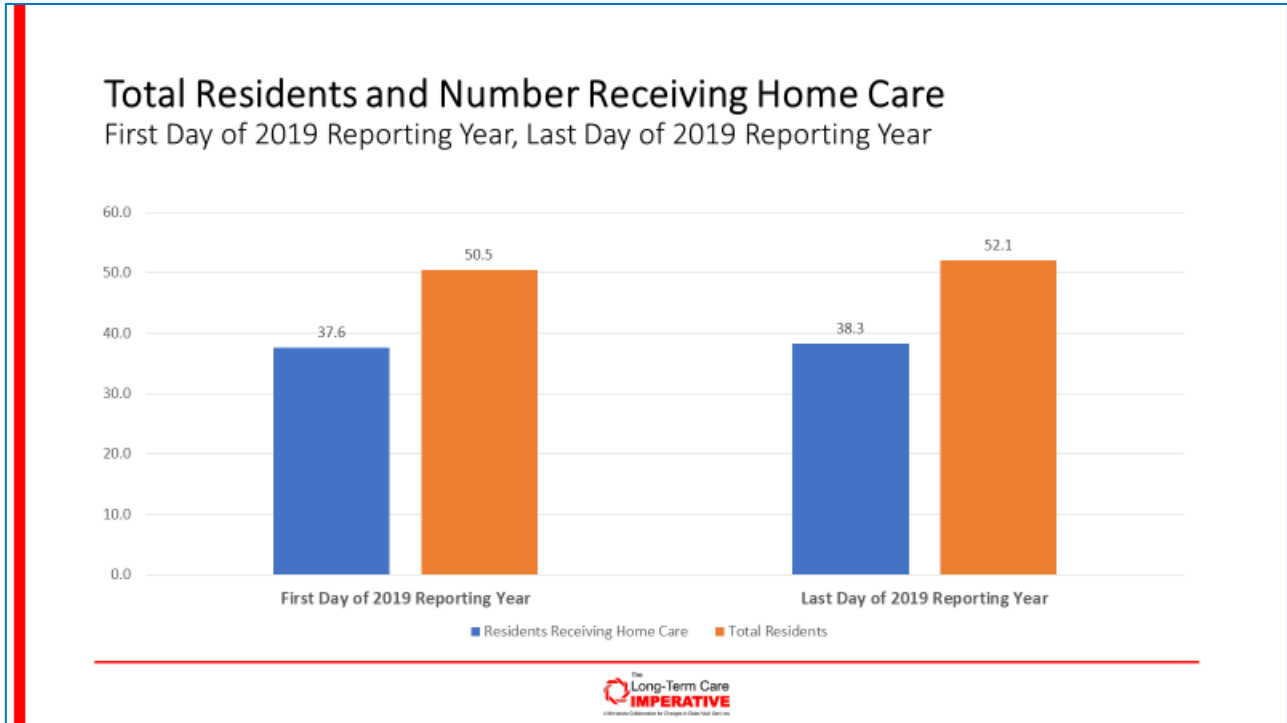
There is a significant difference between the 7-County Twin Cities Metro and Greater Minnesota when examining Number of Units and Percent of Elderly Waiver Residents.



Breaking percent of residents on Elderly Waiver by Region further illustrates difference.



According to the survey, at both the beginning and the end of the reporting year, on average there were 12.9 and 13.8 residents, respectively, that were not receiving home care services.



The respondents had the following 2019 housing with services registration and/or assisted living designations.

