

The Nursing Home Enforcement System in New York State Does it Work?

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EXECUTIVE SUMMARY

Introduction

The New York State Department of Health has the responsibility of regulating the care at the state's nursing homes. Its responsibility is three-fold: to establish minimum standards of care that all nursing homes must follow; to inspect, or survey, the homes to determine if these standards are being followed; and to use its enforcement powers to act against those facilities that do not abide by these standards.

This last function, the use of its enforcement powers, is perhaps the most crucial part of the State's regulatory job. Even with the best regulatory standards and the most effective survey process possible, conditions in nursing homes will not be of high quality unless compliance with the standards are effectively enforced.

This report evaluates the ability of the New York State Health Department to carry out this function and the effectiveness of the New York State nursing home enforcement system for the years 1990 to 1994.

Sources of Data

The research is based on a number of data sets including records of deficiencies and enforcement actions from January 1, 1990 to July 1, 1994. These data sets were obtained from the New York State Department of Health.

The analysis focuses on deficiencies, surveys, and enforcement actions based on surveys after the October 1, 1990 implementation of the OBRA-87 nursing home reforms.

Additional sources of information include data from the Nursing Home Administrator Board of Examiners, copies of enforcement letters and posters sent to facilities, and interviews with Department of Health staff.

Findings

1. *The state's enforcement system is working. Unfortunately, the state is using it less and less.*

It's working.

- Facilities that were fined tended to have many fewer and less serious violations on future surveys than they had prior to the fining.

- Facilities that were not fined tended to have the same number or slightly more violations.

Unfortunately, although there is no evidence that care is improving, or improving to the extent indicated by the decline, the enforcement system is being used less and less.

- The numbers of deficiencies written by surveyors declined from a high of 2475 in 1990 to a low of 748 (for 6 months) in 1994. *This is a decrease of 40 percent* based upon 1,496 deficiencies for 1994.
- The numbers of the most serious level of deficiencies (A level or Condition Level) also dropped significantly in 1992. These deficiencies dropped from a high of 126 in 1990 to a low of 19 (for six months) in 1994, *a decline of over 70 percent.*
- The numbers of enforcement actions decreased from a high of 78 in 1992 to a low of 10 with 8 pending in 1994 (six months). *This is a decline of over 74 percent.*

Regional Differences

- Buffalo's decline was the most significant. Historically high, the average facility in Buffalo went from a high of 7.12 deficiencies in 1991 to a low of 2.69 in 1993.
- The only region where deficiencies went up was New Rochelle. The average facility went from 4.50 to 5.50.
- Buffalo dropped from a high of 33 enforcement actions in 1992 to a low of 4 with 2 pending in 1994 (six months).
- New York City settled no actions in the first 6 months of 1994 and had only 2 pending.
- Rochester and Syracuse settled no actions and had none pending in the first 6 months of 1994.
- Rochester only had 1 action in 1993.
- Northeast has had only 2 actions in the 2 years of 1993 and 1994 with only 1 action pending.

2. *The process of penalizing facilities for violations of care standards seems to work against holding providers accountable.*

- Even after a surveyor finds problems in care, many hurdles must be jumped before a deficiency is written and before any penalty is even considered.

The first step involves a decision whether or not to even write a deficiency for a discovered care problem. If a deficiency is to be written, a decision must be made as to what level deficiency should be written. When a facility is cited, a decision must be made whether to pursue the initiation of an enforcement action. When a fining action is initiated, a decision is made as to how much of the potential maximum fine to attempt to levy. There is then a long period of time while the facility negotiates with the Department.

- Often, the state goes through a process where at every step it asks itself, "Why are we pursuing this action; can we win?" It rarely asks, "Why are we not pursuing actions in more cases?"
- Even when the state does initiate an enforcement action, the length of time from the decision to the settlement takes over a year and the maximum allowable fine is rarely levied. Over 50 percent of all the fines levied fell under 50 percent of the allowable fine.

3. *Almost a third of all certification surveys are deficiency-free.*

- Surveyors cited no deficiencies on almost 31 percent of all state certification surveys. This is among the highest deficiency-free rate in the country.

4. *Historically, there has been much regional variability in the writing of deficiencies and the initiation of enforcement actions.*

Without any evidence that care is or has been different over the years, in different parts of the state, there are many differences in the number and severity of deficiency writing in different regions.

On the face of it, nursing home residents seem to be more protected in some regions than in others. Is care so much poorer in Buffalo and New Rochelle than in other areas or is management or training better?

- Some regions, New York City, New Rochelle and Syracuse were seriously hampered during these years with a low number of surveyors available to inspect facilities. Although this did not seem to affect New Rochelle, it is

possible that this may account in some part for the low numbers of deficiencies written in New York City and Syracuse.

- The New Rochelle and the Buffalo regional offices wrote the most deficiencies in the state, with Buffalo writing the most A/Condition level violations.
- In fact, Buffalo, with only 14 percent of the nursing homes in the state to monitor, compared to New York City's 27 percent, wrote 22 percent of all the deficiencies and 43 percent of all the A/Condition level deficiencies while New York City, wrote only 18 percent of all the deficiencies and only 8.5 percent of the A/Condition levels in the state.
- Buffalo wrote the highest number of deficiencies for each survey conducted, while New York City wrote the fewest.
- Buffalo wrote a mean of 4.35 deficiencies per survey.
- New York City wrote only 2.07 per survey.
- Federal "look-behind" surveys conducted in New York City to monitor New York City's ability to monitor compliance with standards, found many more deficiencies per survey than New York City did, suggesting that New York City surveyors are not finding the deficiencies they should.
- Syracuse had the highest percentage of deficiency-free surveys (over 46 percent). Over 63 percent of Syracuse's certification surveys found either one or no deficiencies. Are facilities so much better in Syracuse or are residents less protected in Syracuse because surveyors are not finding the problems they should?
- New Rochelle has the lowest percent (17 percent) of deficiency-free surveys.
- New York City had the second highest deficiency-free surveys: almost 39 percent.
- Buffalo had the highest percent of certification surveys with over 7 deficiencies.
- New York City had the lowest percent of certification surveys with over 7 deficiencies.

OTHER FINDINGS

1. *Some specific types of deficiencies were cited more than others.*

Statewide

- The three most frequently cited areas were quality of care, quality of life, and resident assessment.
- The areas infrequently cited were resident rights, resident behavior and practices, physician services, transfer and discharge, nursing services, specialized rehabilitation, dental services, pharmacy services, and infection control.
- Violations in resident rights, resident behavior, pharmacy and infection control has risen over the time period of the study while violations in resident assessment, dietary, physical environment and administration has declined.

Regional Differences

- New York City and New Rochelle wrote over 76 percent of all the resident rights violations and over 61 percent of all the resident behavior violations in the state. Are there so few of these problems in other regions or are surveyors in other regions not focusing on these problems enough?
- Syracuse, writing under 10 percent of all the deficiencies in the state, wrote 28 percent of all the violations in physician services, 35 percent of the special rehabilitation violations and 27 percent of all the pharmacy violations. Do facilities in Syracuse have special problems in these areas or do surveyors in Syracuse have more competency in these areas?
- Rochester, writing only 8 percent of all the deficiencies, wrote 13 percent of the dietary and 16 percent of the dental services violations.
- Buffalo wrote 40 percent of the state's deficiencies in administration and almost 30 percent of the quality of care violations.
- Northeast wrote 40 percent of the nursing services violations, almost 25 percent of the infection control deficiencies and almost 20 percent of the pharmacy violations.

- New York City wrote the fewest number of physician services deficiencies in the state.
- Syracuse wrote the fewest resident rights and physical environment violations.
- Rochester wrote the fewest resident assessment and specialized rehabilitation violations in the state.

2. ***Although administrators are responsible for the care in their facilities, almost no actions have been taken against nursing home administrators during the years 1990 to 1994 even though 196 actions have been initiated for poor care against the nursing home.***

- Only 7 administrators have been sanctioned since 1989; only 2 for issues related to the time period of this study.

Conclusions

- The fining mechanism of the state seems to be working; facilities that have been fined have fewer deficiencies after being fined; facilities that have not been fined have slightly more.
- Unfortunately, even though it seems to be an effective tool, the state has not used it consistently in the past and the trend for the future is to use it less and less in all regions.
- Wide variations in the frequency, severity and type of violations by region, without evidence that care is different and has been significantly different over the years, suggest that some regions do better than others in monitoring care in our state's nursing homes.
- The significant drop in the frequency and severity of deficiencies across the state with an accompanying decline in enforcement actions, without any clear evidence that care has improved significantly and to the same degree as the decline, raises serious questions about the ability of the state to enforce its rules.

Recommendations

The state has a valuable tool against poor care in its fining system. It must encourage more writing of deficiencies where appropriate and more fines when appropriate.

- ***The state must emphasize the protection of vulnerable nursing home residents, rather than the due process rights of nursing home providers, especially after a provider has been found to have problems.***

If a surveyor finds violations of care standards and decides not to write a deficiency s/he must be required to give reasons why a deficiency will not be written. Surveyor supervisors must examine these reasons not to write a deficiency as carefully as they examine reasons to write a deficiency.¹

Surveyors must also be required to examine carefully the severity levels of any deficiencies they write and must be encouraged to write the most serious deficiency appropriate.

Since the writing of deficiencies causes more work for surveyors in terms of additional followup surveys, defense of their rationale to both their supervisors and now to providers, and potential testifying in a hearing, surveyors must be sent the message clearly by the Department of Health that in order to protect nursing home residents, their role is to cite facilities for deficiencies in care and that they will be rewarded for this.

- ***The state must investigate why the numbers of deficiencies are dropping.***

The state must develop a stringent internal quality assurance system. It should conduct its own "look-behind surveys." It should consider using teams from different regions to conduct these "look behind surveys." The fining process seems to be effective in limiting future deficiencies; if the current trend continues, this effective system will be completely gone.

- ***The state must carefully evaluate every one of the times that a decision was made not to pursue a fine.***
- ***The state must add more personnel to both the surveyor and legal staff in order to shorten the time period for an enforcement action to be completed.***

¹New federal requirements that went into effect in July, 1995 will handle this issue somewhat. Surveyors are now required to write deficiencies for every violation. However, since the type of penalty imposed will depend on the frequency and severity of the deficiency, the severity of the deficiency will become more important.

- *The state must examine the regional differences in terms of deficiency writing and enforcement actions very carefully. It must discover why there are such differences.*

It must evaluate the enormous amount of patient/resident quality outcome and quality of life data it already has to compare facilities in different regions over time. It should also compare to other states. On the face of it, nursing home residents in various parts of the state seem less protected than others.

- *The state must examine its nursing home administrator licensure sanction system.*

It does not seem to work at all. Why are so few actions being taken? Why are administrators not being held accountable for the care in their facilities?

- *The Health Care Financing Administration (HCFA) has the responsibility to conduct "look-behind" surveys in all of the regions in New York State. It also needs to find out why there are such wide regional differences among offices.*

- *The state must review why it does not use any other enforcement action other than fining.*

It is crucial for the state to examine each of the alternatives available to it. Now that the federal government has initiated additional alternatives (as of July, 1995), the state needs to analyze why it feels it is unable to use other alternatives and to try to figure out ways to make them more usable.

CHAPTER ONE

Introduction

The New York State Department of Health has the responsibility of regulating the care at the state's nursing homes. Its responsibility is three-fold: to establish minimum standards of care that all nursing homes must follow; to inspect, or survey, the homes to determine if these standards are being followed; and to use its enforcement powers to act against those facilities that do not abide by these standards.

This last function, the use of enforcement powers, is perhaps the most crucial part of the State's regulatory job. Even with the best regulatory standards and the most effective survey process possible, conditions in nursing homes will not be of high quality unless compliance with the standards are effectively enforced.

This report evaluates the ability of the New York State Health Department to carry out this function and the effectiveness of the New York State nursing home enforcement system for the years 1990 to 1994.

Project Goals:

1. Analyze and evaluate the state's criteria for citing facilities for non-compliance during the years 1989 to July, 1994.
2. Analyze the federal and state sanctions available to and used by the state during these years.
3. Analyze, by year, type of survey, type of deficiency, severity and regional office, patterns of citations or deficiencies.
4. Describe the process the state goes through as it decides to initiate an enforcement action.
5. Analyze the types of enforcement actions taken.
6. Analyze the time it takes from the decision to take an enforcement action to the settlement.
7. Conduct detailed analyses on the enforcement action taken most often, fining.
8. Analyze the relationships between stated criteria for initiating an enforcement action and fines.
9. Analyze the relationship between multiple numbers of deficiency and fines.
10. Analyze the effectiveness of the fining system.

Methodology

The research is based on three data sets. The first data set included a single record for each deficiency for the period from January 1, 1989 to September 30, 1990. The second data set included a single record for each deficiency for the period from October 1, 1990 to June 30, 1994. The third data base included a single record for each enforcement action for the period from January 1, 1990 to June 30, 1994. The three data sets were obtained from the New York State Department of Health.

The bulk of the analysis is based on the latter two of these data sets and focuses on deficiencies, surveys, and enforcement actions based on surveys after the October 1, 1990 implementation of the OBRA-87 nursing home reforms. In the analyses of surveys and of facility behavior, the deficiency data were aggregated to the facility and survey levels. In the analysis of enforcement actions, the data on enforcement was merged with the facility level data.

The emphasis is on descriptive statistics, such as means and proportions, and the review of a limited number of bivariate relationships such as the number of deficiencies per survey in each office. Because the data on which this report is based are population, rather than sample, data, tests of statistical significance are not used.

Additional sources of information include data from the Nursing Home Administrator Board of Examiners, copies of enforcement letters and posters sent to facilities, and interviews with Department of Health staff.

CHAPTER TWO

BACKGROUND

The enforcement system is the culmination of the state's regulatory function. Enforcement actions taken by the state Department of Health are based upon the findings of surveys monitoring care conducted by surveyors around the state. All reports of deficiencies, violations of nursing home standards, are reviewed by the state for possible penalties against the violating nursing homes.

The Survey System

There are 6 New York State Health Department regional survey offices that house surveyors who inspect the care given in nursing homes in their geographic area:

The Northeast regional office serves the counties of Albany, Clinton, Columbia, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Warren, and Washington. During the years of the study, the Northeast office was responsible for inspecting approximately 79 facilities.

The Buffalo office serves the counties of Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, and Wyoming and was responsible for 92 facilities.

The Rochester office serves the counties of Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, and Yates. The Rochester office was responsible for 68 facilities.

The Syracuse office serves the counties of Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tioga, and Tompkins. Syracuse was responsible for 93 facilities.

The New Rochelle office serves the counties of Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester, Nassau, and Suffolk and was responsible for 149 facilities.

The New York City office serves the boroughs of Bronx, Brooklyn, Manhattan, Queens, and Staten Island. New York City was responsible for 176 facilities.

TYPES OF SURVEYS

There are five different types of surveys conducted by surveyors:

The **certification survey** is the standard survey conducted to monitor compliance with rules and regulations in order to allow providers to participate in the Medicaid and Medicare programs.²

The **post certification visit (PCV)** is conducted only if B level (least serious) deficiencies are found on the standard certification survey.

A **complaint survey** is conducted in response to a general complaint about care or an abuse, neglect, or mistreatment complaint.

An **interim survey** is conducted only if an A level (most serious) deficiency is found on the certification survey.

Other types of surveys (called "**Other**") are conducted for other reasons, such as to survey the opening of a new facility or when a facility gets a new administrator or director of nursing.

Federal Oversight

The federal government, under the auspices of the Health Care Financing Administration (HCFA), is responsible for monitoring compliance with federal regulations. Federal rules state that facilities that do not comply with federal regulations are not to participate in the Medicare/Medicaid program; they are not to receive Medicare/Medicaid funds.

HCFA contracts out this oversight function to the state Department of Health. However, HCFA retains its responsibility to make sure that the state is adequately carrying out this function. In that capacity, HCFA conducts a number of "look-behind" surveys. These surveys are conducted by federal inspectors who survey facilities soon after the state. Part of HCFA's evaluation of the state's competence

²There are 12 nursing homes in New York State that do not participate in the Medicare/Medicaid programs. They still must follow the New York State Nursing Home Code of standards and are surveyed in much the same way.

relates to the comparison of the findings of these look-behind surveys to state findings.

Criteria for Writing Deficiencies

Pre-1992

During 1989, 1990, and 1991, New York State received a waiver from the Federal Government to use its own uniform system for inspecting and citing facilities for not following standards of care. This system was called, "New York Quality Assurance System (NYQAS)"³

Selecting A Sample of Residents For Review

NYQAS required that a sample of residents for surveyor review be selected prior to the survey. This selection was based upon the presence of negative outcomes such as pressure sores, restraints, psychotropic drug use, catheters, and urinary tract infections. It was also based upon deterioration or absence of improvement in negative outcomes over time. This selection also included a few residents who had no problems and 5 who were recently discharged. Ten percent of the residents with at least a minimum of 12 were selected.

Thus, surveyors entered the facility with a list of residents whose care they would review. On-site, surveyors added 5 to 10 newly admitted residents, up to 5 other residents they believed should be looked at, and 5 more to conduct an in-depth review of their quality of life.

Judging the Harm To Resident: The Deficit Level Index

One of the most unique contributions of NYQAS was the development of a way to judge the harm that a violation might cause a nursing home resident in order to help surveyors decide whether or not to write a deficiency based upon the violation:

When the surveyor in her/his review of a resident's care found that a federal or state requirement was violated, a "negative finding" was written. This is not a deficiency. It is a finding that a requirement has not been met. The surveyor then rated the severity of this negative finding in terms of its harm to the resident. S/he

³See NHCC's report, "Evaluation of NYQAS: New York Quality Assurance System - A Consumer Perspective," December, 1990.

used a specially devised index called the, "Deficit Level Index (DLI)" (see DLI Scale in the Appendix).

This index had two scales. One scale rated the physical harm to the resident based on any change for the worse or any failure to achieve and maintain the highest practicable level of the resident's well-being. This scale went from 1 to 5, with 1 meaning that no harm had occurred or was likely to occur to 5 meaning that physical and life threatening harm had occurred. The second scale focused on psychological issues rating the discomfort or degradation in quality of life experienced by the resident. This scale went from 1 to 5 by rating the probable response to the negative finding. One (1) meant that the negative finding was an event that would probably have led to someone merely mentioning the event to a staff person; 5 meant that a person would probably have requested an outside investigation of possible criminal conduct.

Major and Minor Deficiencies

During this time there were two ways of labeling deficiencies in terms of their seriousness. A "condition" level deficiency was the most serious. "Standard" level deficiencies were less serious. In 1990, the Federal government changed the condition level of violations to "A" violations and the standard level of violations to "B" violations. Thus, "condition" and "A" violations were considered the most serious and might lead to the most serious enforcement actions and, "standard" and "B" violations were considered less serious and might lead to no or less serious sanctions.

Decision to Cite the Facility: Deficiencies

Team Decisions

All decisions to cite (write a deficiency) a facility were made by the entire team of surveyors inspecting the facility. Each team of surveyors had a team leader who was responsible for covering all the necessary steps in the survey process. Team conferences were held each day the surveyors were in the facility. During these conferences, discussions of all problems found were discussed. The team would review all conclusions, request additional information or clarification as needed, analyze all findings, and apply the DLI to each problem found.

Specific Criteria for Writing Standard or "B" Deficiencies

Although the survey team was given much discretion on deciding whether to write

a deficiency or not, the DLI gave the surveyor much direction.⁴ Surveyors were allowed to write a deficiency only under certain rules. Depending on the frequency and severity (as determined by the DLI) of the negative findings or violations, surveyors were permitted to write Standard or "B" deficiencies. In addition, in one case they were actually required to write a deficiency. Below are the criteria used by the surveyors in deciding to write a deficiency:

One negative finding with a DLI of 4 (which means that harm has occurred that needed physician intervention on scale 1, or that a person would take steps to report the event to the State Health Department on scale 2) or 5 on either scale may be cited as a deficiency at the discretion of the survey team.

Three negative findings with DLIs of 3 or higher may be cited as a deficiency.

Five negative findings with DLIs of 2 or higher may be cited as a deficiency.

Seven negative findings of which 3 are in the same unit of care, each of which has a DLI of 2 or higher, may be cited as a deficiency.

Fifteen negative findings with DLI scores of 3 or more, for which one service is responsible, may be cited as a deficiency.

Only one case required that a deficiency be written. If a department head has not been designated for the required number of hours or, if designated, did not have a license, education, and experience in conformance with regulations, or if a required service or program, or the governing body, is not available or provided for as required by regulations, a deficiency must be cited.

Criteria For Writing Condition or "A Deficiencies

Condition or A level deficiencies usually mean that the problems found are system-wide. The criteria used to decide whether to cite these were not as detailed as for Standards or "Bs." Much discretion was given the surveyors and their supervisors.

The surveyors were required to analyze all of the negative findings for their severity, frequency, and impact on overall quality of care and quality of life.

In addition, if there were 15 or more negative findings with DLIs of 3 or greater for

⁴As we will see later in the findings related to deficiency writing, the numbers of deficiencies written in the state dropped significantly when the DLI was eliminated.

the services of dietary, physician, PT, OT, speech, dental, pharmacy, or administration, then a condition or "A" deficiency was required to be written.

Two other rules determined condition or level A deficiencies. If any condition or "A" deficiency was written there was an automatic condition or "A" deficiency written for Administration. If there was a standard or "B" deficiency written for governing body, then there must be a condition or "A" deficiency for administration.

Problems with NYQAS

According to NHCC's report on NYQAS, surveyors complained that often the sample of residents for review given to them before the survey was either not accurate or the residents were no longer in the facility. They felt they wasted valuable time looking for residents who are not there or who never had the problem for which they were selected.

Many surveyors had problems understanding scale 2 of the DLI scales. Scale 1, which rates physical harm, was easier to understand than scale 2, which relates to psychological or quality of life issues.

Advantages of NYQAS

Many surveyors believed that NYQAS helped to heighten their awareness of resident rights and quality of life issues.

Post 1992

After October, 1992 New York State lost its waiver and was required to use the federal method for writing deficiencies. This method gave even more discretion to the surveyors and much less direction in decisions to write deficiencies based upon violations found.⁵

The surveyors were asked to review all information and violations of the state and federal code of standards that they found. Similar to NYQAS, daily meetings were held with the whole team to discuss the writing of deficiencies.

In general, the team is asked to determine the facility's performance in meeting the requirements and protecting and promoting residents' rights. Although this is done

⁵Again, as we will see later in findings on frequency of deficiency writing and subsequent enforcement actions, the numbers dropped significantly after this time.

without the Deficit Level Index, it does require a general judgement of severity and frequency before a level B is cited.

Surveyors considered how the information they have collected related to specific level B requirements. The federal process leaves the judgement of severity and frequency to the surveyor and states that, as different from the DLI, the threshold at which the frequency or severity of occurrences amount to a deficiency varies from situation to situation.

In the federal system, as in the older State system, a negative resident outcome is strong evidence of a deficiency.

If the data indicated that the facility was not in compliance with any specific level B requirement, and a decision was made to write a deficiency, the survey team was asked to determine if non-compliance with the level B requirements was of sufficient severity and frequency to conclude that the broader level A requirement was not met.

Types of Deficiencies⁶

There are 15 major categories of deficiencies which cover a number of additional violations. Below is the name of each major category and a sample of the issues each covers:

1. Resident Rights

- exercise of rights
- notice of rights
- protection of funds
- free choice
- privacy and confidentiality
- grievances
- mail
- visitation rights

2. Admission, Transfer and Discharge Rights

- transfer and discharge issues
- notice of bedhold policy
- admissions policy
- equal access to quality care

⁶These categories refer to all deficiencies written after October, 1990 when OBRA went into effect.

3. Resident Behavior and Facility Practice

- restraints
- abuse
- staff treatment of residents

4. Quality of Life

- dignity
- self-determination
- participation in resident and family groups
- activities
- social services

5. Resident Assessment

- comprehensive assessments
- care plans
- discharge

6. Quality of Care

- activities of daily living
- vision and hearing
- pressure sores
- urinary incontinence
- range of motion
- psychological functioning
- feeding tubes
- accidents
- nutrition
- drug therapy

7. Nursing Services

- sufficient staff
- registered nurse

8. Dietary Services

- staffing
- menus
- food
- diets

- assistive devices
- sanitary conditions

9. Physician Services

- physician supervision
- physician visits
- emergency care
- delegation of tasks

10. Specialized Rehabilitative Services

- provision of service
- qualifications

11. Dental Services

12. Pharmacy Services

- procedures
- drug review
- labeling
- storage of drugs

13. Infection Control

- preventing spread of infection and linens

14. Physical Environment

- life safety from fire
- space and equipment
- resident rooms
- toilet facilities
- call systems
- dining
- activities

15. Administration

- licensure
- compliance with laws
- governing body

- training of nurse aides
- proficiency of nurse aides
- staff qualifications
- medical director
- laboratory services
- quality assurance

CHAPTER THREE

SANCTIONS AVAILABLE TO THE NEW YORK STATE HEALTH DEPARTMENT

Federal Sanctions

During the time period of this study, federal rules allowed for only two types of sanctions: termination and ban on admissions. Both sanctions are for serious level "A" violations or a serious pattern of non-compliance.

Termination

If it is determined that the residents' health and safety was jeopardized, the state had to initiate an enforcement action to terminate the nursing home's participation in the Medicaid/Medicare program⁷ unless the facility corrected within 23 days.

If it is determined that the residents' health and safety is not in immediate jeopardy, the facility had 90 days in which to correct before termination.

Termination from participation means that the home will no longer receive Medicare or Medicaid reimbursement. For most homes, this will lead to closure.

Intermediate Bans on Admissions

As an alternative to termination in the case where the residents are not in jeopardy, the state may initiate an enforcement action to place a ban on admissions. This means that no Medicaid or Medicare funds will be given for any new Medicare or Medicaid patients admitted to the facility. This effectively stops the admission of any new Medicare or Medicaid residents.

If imposed, the ban would stay in effect for a period of 11 months. If the facility was not back in compliance by then, the state had to terminate the facility's participation in the Medicaid/Medicare program.

⁷Participation in the Medicare/Medicaid program allows facilities to receive Medicare and Medicaid reimbursement and requires compliance with Federal regulations. Only

12 of the homes in New York State have elected not to participate. The Department of Health uses state sanctions to enforce state rules in these facilities.

In August, 1991, the federal rules regarding the use of the ban changed. As of that date, the ban on admissions could be used only in lieu of termination if the state agreed to pay back the federal government any Medicaid or Medicare funds expended if the facility was not back in compliance within 6 months. Since New York State refused to agree to this, the state has not used the ban for the last 2 or 3 years.

Thus, whenever an "A" violation is written, the state had to start termination proceedings as its only option. Of course, if the facility was found to be back in compliance, the proceedings were stopped. Clearly, the start and stop of termination proceedings did not have the same effect as the stopping of Medicaid/Medicare revenue.

State Sanctions Available (Article 28 of Public Health Law)⁸

The state passed a number of laws allowing additional sanctions that could be used for less serious cases than that of jeopardy or imminent danger. In addition, a number were passed that allowed sanctions that could be used for serious cases to remove the owner, replacing her/him with a receiver who would correct the deficiencies, thus avoiding closing the facility.

FINES⁹

There are two types of fines used by the New York State Health Department. One is a fine for one-time occurrences.¹⁰ This fine can be assessed upon the identification of a deficiency on any inspection or survey. The maximum fine allowed for such violation or deficiency is \$2,000.

The second type of fine available to the New York State Department of Health,

⁸Although State law gave the State alternatives to Federal sanctions, they could only be used if they were not in violation of Federal rules. Thus, in some instances, termination had to be used.

⁹As we will see later, of all the available state sanctions, the state chose to initiate fining actions over 90 percent of the time.

¹⁰Section 12 of the Public Health Law

which would allow fairly large fines, is for continuous violations.¹¹ The Department can fine a facility up to \$1,000 a day for each violation found to be continuing. This fine mechanism is used when the violation continues to exist after the facility has had 30 days to correct the violation. As discussed below, this type of fine was rarely used because it required giving the facility 30 days to correct and because the State believed that it was too difficult to prove continuing violation.

REVOCATION OF AN OPERATING CERTIFICATE¹²

The Department of Health may decide to try to revoke or withdraw an operating certificate if it believes there has been a substantial violation of standards; if it finds any condition that it believes is dangerous to the life, health, and safety of the residents; or if the facility has a habitual practice of violations. An operating certificate can be revoked only after a hearing.

SUSPENSION OR LIMITATION OF AN OPERATING CERTIFICATE¹³

If conditions are present in a facility that the Department of Health believes present imminent danger to the health or safety of the residents, it has the right to move to suspend or limit an operating certificate for up to 60 days before a hearing.

"Imminent" means that if a violation is not immediately corrected, it may jeopardize the health and safety of the residents. During this time, the Department may limit or prohibit the admitting of new residents; it may remove some or all of the residents; it may limit or suspend reimbursement. The facility is given a written notice, and a hearing must be held within 61 days.

This sanction can also be used instead of revoking an operating certificate after a hearing is held. If the hearing upholds the charges, the Department may close a portion of the facility and/or force a reduction in the number of residents a facility may have instead of removing the operator.

The Department of Health may also decide, after a hearing, not to renew an operating certificate.¹⁴ It may do this if it believes that the premises, equipment, personnel, rules and by-laws, and standards of care are unfit and inadequate.

¹¹Section 2803 (b) and (7) of the Public Health Law

¹²Section 2806 (1) of the Public Health Law

¹³Section 2806 (1) of the Public Health Law

¹⁴Section 2805 (b) of the Public Health Law

APPOINTMENT OF A RECEIVER¹⁵

Rather than close a facility, the Department of Health has, in the past, tried to appoint a receiver in those cases involving revocation of an operating certificate. The Department of Health can use two different types of receivership in order to remove the operator and replace her/him with a receiver (someone to take over the running of the facility).

One is called an "involuntary" (the operator has no choice in the selection) receivership. If the Department decides to use this, it must initiate legal proceedings and convince a judge that the facility has had a history of noncompliance with other related enforcement action.

The second type is called a "voluntary" receivership. For this, the operator acknowledges the existence of a problem and either willingly agrees to accept a receiver or asks the Department to appoint a receiver. In these cases, *the operator often chooses the receiver*.

The state has not used the receivership sanction since the new federal rule went into effect on the use of the alternative to termination, the intermediate ban on admissions. According to state staff, in the past the state used the receivership sanction in combination with the ban. Instead of using termination, it appointed a receiver and then imposed a ban which would allow the receiver 11 months to correct violations. The state staff now believe that since they cannot use the ban on admissions, they no longer can appoint a receiver unless the problems found do not warrant termination under federal rules.

APPOINTMENT OF A CARETAKER¹⁶

This sanction is a temporarily court appointed caretaker to manage a facility to protect the interests of the residents and the operator while legal action is pending to revoke the operating certificate. This sanction may be chosen if the Department has found conditions that are substantial violations of the code; dangerous to life, health, and safety of the residents; or a pattern or practice of habitual violation.

ENFORCEMENT ACTIONS AGAINST LICENSED ADMINISTRATORS

Whenever an enforcement action is undertaken against the operator of a facility a

¹⁵Section 2810 Public Health Law

¹⁶Section 2806 (b) of the Public Health Law

determination is made whether the administrator should be referred to the New York State Board of Examiners of Nursing Home Administrators for sanctions. This board, which is housed within the Office of Health Systems Management of the State Department of Health, consists of 13 members appointed by the State Health Commissioner. The Board is composed of 1 physician, 1 hospital administrator, 1 registered nurse, 3 nursing home administrators from not-for-profit homes and 3 nursing home administrators from for-profit homes, 3 members of the public and 1 academic from a college offering training for administrators. The members are appointed for 3 year terms and may serve for 2 consecutive terms.

The Department of Health makes a determination whether it will suggest that the administrator be given possible disciplinary action. It sends this determination to the staff of the Board of Examiners for Nursing Home Administrators. Before the staff of the Licensure Board recommends that an administrator be sanctioned, it examines the history of the facility and the seriousness of the resident outcomes. The staff may decide to issue warning letters in those cases where it believes that the cases do not warrant consideration by the Board. In these situations, the Board does not review the cases.

If Board staff suggests that the Board review a case, the Board has the right to suspend, revoke an administrator's license or censure an administrator, or assess a fine of up to \$1,000 for every violation attributable to a nursing home administrator after a hearing. The board may also decide to send a warning letter where it is determined by the Board that formal discipline is not warranted.

The Board may sanction an administrator if, after a hearing, s/he is found guilty of fraud, convicted of moral turpitude, is or has been an alcohol abuser or is addicted to drugs, or has become mentally ill, has been guilty of unethical conduct, is guilty of a felony, or has intentionally participated in any practice that endangered the health or safety of her/his residents.

Unethical conduct may mean many things: violation of any provision of the code or the law; conviction of a crime; practice of fraud; immoral conduct; wilful falsification of records; habitual drunkenness; addiction to drugs; failure to exercise true regard for the safety, health, and life of patients; unauthorized disclosure of information about a patient; or unlawful discrimination.

CHAPTER FOUR

FINDINGS

Deficiency Data

Any enforcement action initiated by the state against a nursing home is based upon written deficiencies. Thus, findings related to the number, severity, and type of deficiencies written in the state are crucial to the study of the enforcement system. This section discusses these findings. In order to show a clear pattern over time, the initial frequencies cited below include deficiencies written in the years 1989 through June 30, 1994. However, since the survey process changed dramatically in October, 1990 with the implementation of the federal Nursing Home Reform Law (Omnibus Budget Reconciliation Act of 1987 - OBRA) and the update of the New York State Nursing Home Code of standards, all later detailed analyses were based upon deficiency data collected after October 1, 1990.

Frequency and Severity of Deficiencies

Numbers of Deficiencies Written By Year

Table 1 indicates that the numbers of deficiencies written by New York State surveyors rose in 1990 when OBRA went into effect and the New York State Nursing Home Code was upgraded. However, the rates began to drop soon after the state was required to stop using its Deficit Level Index (see Chapter Two for a discussion of the DLL) which gave surveyors specific criteria and direction for writing deficiencies.

TABLE 1

YEAR	FREQUENCY	CHANGE FROM PREVIOUS YEAR
1989	2211	---
1990	2475	+12
1991	2307	- 7
1992	1953	- 15
1993	1849	- 5
1994 (6 MONTHS)	748	---

Frequency and Severity of Deficiencies by Year

As discussed earlier, condition or A Level deficiencies are cited for the most serious problems and standard or B level deficiencies are cited for the less serious problems. Table 2 shows the frequencies of these deficiencies over time.

TABLE 2

DEF LEVEL	1989	1990	1991	1992	1993	1994	TOTAL
COND/A AS PERCENT OF TOTAL	3 %	5 %	5 %	2 %	1 %	*	4 %
COND/A	75	126	123	53	25	19	421
STAN/B	2136	2349	2184	1900	1824	729	11122
TOTAL	2211	2475	2307	1953	1849	748	11543

* partial year

Similar to Table 1, this data indicates that the number of condition/A deficiencies

rose in 1990, when OBRA was passed and the New York State Nursing Home Code was updated, but began decreasing when the DLI was discontinued.

Frequency and Severity of Deficiencies by Regional Office

Table 3 shows the total numbers and the severity level of the deficiencies written by each regional office over the 5 1/2 years.

TABLE 3

DEF LEVEL	NE	BUFF	ROCH	SYRAC	NEW R	NYC	TOTAL
COND/A	38	183	39	23	102	36	421
STAN/B	1220	2332	966	1016	3514	2074	11122
TOTAL	1258	2515	1005	1039	3616	2110	11543

Although New York City has the most residents' care to monitor (about 38 percent of all the residents in the state) and the most nursing homes to inspect (176), it wrote only 18 percent of all the deficiencies in the state and only 8.5 percent of the condition/A deficiencies (the lowest percentage in the state).

Buffalo, which has about half of New York City's number of nursing homes to monitor, wrote more deficiencies than New York City, writing 22 percent of all the deficiencies and over 43 percent of all the condition/A deficiencies.

New Rochelle, second only to New York City in its number of homes to monitor, wrote over 31 percent of the deficiencies in the state and 24 percent of the condition/A deficiencies.

Average Number of Deficiencies Per Survey by Regional Office¹⁷

Table 4 shows this same information in a different way by listing the mean number of deficiencies per survey written by each regional office. This information includes data on all of the surveys conducted by each regional office.

¹⁷This analysis includes deficiency data from October 1, 1990 through June 30, 1994. When OBRA was implemented the survey process changed drastically. All detailed analysis that follow include only post-OBRA data.

Table 4
Deficiencies Per Survey

REGIONAL OFFICE	MEAN PER SURVEY
NE	2.79
BUFFALO	4.35
ROCHESTER	2.74
SYRACUSE	2.43
NEW ROCHELLE	3.65
NEW YORK CITY	2.07
STATEWIDE	3.04

Over the 3 3/4 years that the data is based upon, the Buffalo regional office stands out in its significantly higher rate of deficiency writing. Its mean is twice that of New York City, which had the lowest mean of all the offices.

Frequency and Severity of Deficiencies by Type of Survey

TABLE 5

DEF LEVEL	CERT	PCV	COMPLT	INTERM	OTHER	TOTAL
COND/A	188	8	18	47	2	263
STAND/B	5845	541	387	376	86	7235
TOTAL	6033	549	405	423	88	7498

As expected, most of the deficiencies are found on the standard certification surveys. The large number of deficiencies found through the PCV and interim surveys indicate that when deficiencies are found on the certification surveys, many deficiencies remain in effect 3 months or more later or many new deficiencies are found. The low number of deficiencies written on complaint

surveys is something consumers have long been concerned about.¹⁸

¹⁸See NHCC's report, "The Nursing Home Complaint System in New York State: Does It Work?" by Cynthia Rudder, Ph.D., September, 1992.

TABLE 6

Percent of Deficiencies by Type of Survey and Regional Office
October, 1990 to July, 1994

REGIONAL OFFICE	CERT	PCV	COMPT	INTERM	OTHER	TOTAL
NE of office total of state total	82.86 10.74	5.75 8.20	5.75 11.11	4.86 8.98	0.77 6.82	782 10.43
BUFF of office total of state total	78.63 20.80	6.02 17.49	2.07 8.15	13.22 49.88	0.06 1.14	1596 21.29
ROCH of office total of state total	89.49 9.03	3.61 4.01	5.58 8.40	1.31 1.89	0.00 0.00	609 8.12
SYRACUSE of office total of state total	85.56 10.61	1.60 2.19	9.36 17.28	3.34 5.91	0.13 1.14	748 9.98
NEW ROCH of office total of state total	76.31 32.09	10.21 47.18	6.66 41.73	4.81 28.84	2.01 57.95	2537 33.84
NYC of office total of state total	82.30 16.72	9.38 20.95	4.40 13.33	1.55 4.49	2.37 32.95	1226 16.35
TOTAL	6033 80.46	549 7.32	405 5.40	423 5.64	88 1.17	7498 100.00

Table 6 allows us to see two types of information: the percent of deficiencies written on each type of survey as a percent of the statewide total and as a percent of the total deficiencies written by each regional office. For example, the cell next to Rochester indicates that 89.49 percent of Rochester's deficiencies were written on certification surveys and that Rochester wrote 9.03 percent of all of the deficiencies written on certification surveys in the state.

Table 6 indicates that New Rochelle and Buffalo write the most deficiencies on the certification surveys (they wrote 32 and almost 21 percent of all the state deficiencies written on these surveys). More information related to certification surveys is noted in Table 8 below.

Buffalo writes a high percentage of its deficiencies on the interim surveys (surveys that check on correction of A level deficiencies found on certification surveys) - 13.22 percent. No other regional office comes close to this percent. This suggests that facilities in Buffalo with A level violations either do not correct their deficiencies by the time the Buffalo surveyors come back, or new violations are being found.

PCV deficiencies form a high percentage of both New Rochelle and New York City's deficiencies (10.21 and 9.38 percent). This also indicates that facilities in these regions are either not correcting all of their B level violations in a timely fashion, or new violations are being found.

Almost 42 percent of all the complaint survey deficiencies are written by the New Rochelle regional office and over 17 percent are written by the Syracuse Office. Thus, over 60 percent of all of the deficiencies written on complaint surveys were written in only 2 offices. Buffalo, the office that writes so many deficiencies on other types of surveys, writes the fewest deficiencies on complaint surveys.

Multiple Numbers of Deficiencies

Table 7 analyzes the total number of deficiencies written on all types of surveys during the time period of October, 1990 to July, 1994.

Table 7

NUMBERS OF DEFICIENCIES	NUMBER OF SURVEYS	PERCENT OF SURVEYS
0	922	22.8
1	896	22.2
2 OR 3	1071	26.5
4,5,6,OR 7	773	19.1
OVER 7	380	9.4

When we look at the data relating to all surveys we find that 22.8 percent of all of the surveys were deficiency-free. As we will see below in Table 8, when looking at only certification surveys, the number of deficiency-free surveys rise to almost 31 percent. The fact that this percentage is lower than that for certification surveys is somewhat surprising given the fact that certification surveys tend to be more comprehensive and allow surveyors to remain in the facility for longer periods of time. We might expect more deficiencies to be found on certification surveys. Table 7 also indicates that 45 percent of all the surveys found only one or no deficiencies.

Analysis of Certification Surveys

The certification survey is the most comprehensive survey conducted. Thus, details of this survey demonstrates some interesting issues. Table 8 analyzes the number of deficiencies written on certification surveys from October 1, 1990 through June, 30, 1994 by regional office. This table indicates the number and percents of certification surveys where 0, 1, 2 or 3, 4,5,6, or 7, or over 7 deficiencies were written.

TABLE 8
Deficiencies Written on Certification Surveys
(October, 1990 to July, 1994)

REGIONAL OFFICE	0	1	2 OR 3	4, 5, 6, 7	OVER 7	TOTALS
NE -num of surv -of office total -of state total	78 29.10 11.47	54 20.15 14.06	73 27.24 13.57	47 17.54 11.55	16 5.97 8.51	268 12.20
BUFFALO -num of surv -of office total -of state total	67 20.43 9.85	51 15.55 13.28	94 28.66 17.47	68 20.73 16.71	48 14.63 25.53	328 14.93
ROCH -num of surv -of office total -of state total	94 37.45 13.82	44 17.53 11.46	57 22.71 10.59	42 16.73 10.32	14 5.58 7.45	251 11.42
SYRACUSE -num of surv -of office total -of state total	140 46.67 20.59	50 16.67 13.02	51 17.00 9.48	31 10.33 7.62	28 9.33 14.89	300 13.65
NR -num of surv -of office total -of state total	84 17.07 12.35	81 16.46 21.09	119 24.19 22.12	140 28.46 34.40	68 13.82 36.17	492 22.39
NYC -num of surv -of office total -of state total	217 38.89 31.91	104 18.64 27.08	144 25.81 26.77	79 14.16 19.41	14 2.51 7.45	558 25.40
TOTAL	680 30.95	384 17.48	538 24.49	407 18.53	188 8.56	2197 100.00

Table 7 allows us to see 3 types of information: the number of certification surveys conducted by each regional office; the percent of deficiencies written as a percent of the statewide total; and the percent of deficiencies written as a percent of the total deficiencies written by each regional office. For example, the cell next to New York City tells us that New York City had 217 deficiency-free certification surveys and that this represented 38.89 percent of all of the certification surveys conducted by New York City. In addition, the information in the cell tells us that New York City's deficiency-free certification surveys represent 31.91 percent of the deficiency-free surveys in the state.

Table 8 demonstrates that almost 31 percent of all state certification surveys were deficiency-free. Close to half of all the certification surveys in the state found only one or no deficiencies. However, regional office performances shows great variability. Syracuse had the highest percent of deficiency-free certification surveys during this time: 46.67 percent; in addition, over 63 percent of its surveys found only one or no deficiencies. New Rochelle had the lowest percent of deficiency-free surveys: just over 17 percent. New York City had the second highest number of deficiency-free certification surveys: almost 39 percent; over 57 percent of its surveys found only one or no deficiencies.

The data also indicates significant differences in regional offices in relation to certification surveys with over 7 deficiencies. Buffalo has the highest percent of its certification surveys with over 7 deficiencies: 14.63 percent; New York City has the lowest percent: 2.51 percent.

Frequency of Deficiencies by Facility

In addition to looking at the number of deficiencies per survey, the analysis of the frequency of deficiencies for each facility gives other information.

Deficiencies and Facilities

The facility-specific data below discusses deficiencies for the full three years of post-OBRA data (1991, 1992 and 1993).¹⁹

Table 9 shows the number of facilities with zero, 1, 2 or 3, 4,5,6 or 7, or over 7 deficiencies for each year for all types of surveys.

¹⁹Using data from these three years without including the partial years of 1990 and 1994 allowed us to see a complete picture of each facility's deficiency record for the three year period.