Table 9

Prevalence of Different Deficiency Levels Per Facility

NUMBERS OF DEF PER FACILITY	1991	1992	1993
0			
-number of fac	62	74	47
-percnt of fac	9.4	11.3	7.2
1			
-number of fac	245	238	256
-percnt of fac	37.3	36.2	39.0
2 or 3			
-number of fac	155	152	169
-percnt of fac	23.6	23.1	25.7
4,5,6 or 7			
-number of fac	110	130	128
-percnt of fac	16.7	19.8	19.5
over 7			
-number of fac	85	63	57
-percnt of fac	12.9	9.6	8.7

1992 had the highest percentage of facilities with zero deficiencies on all types of surveys. 1991 had the highest percentage of facilities with 7 or more deficiencies.

Table 10 shows the number of deficiencies the average facility in the state and in each regional office had over the three years.

Table 10

Deficiencies Per Facility

REGIONAL OFFICE	MEAN	MINIMUM	MAXIMUM
NORTHEAST	8.81	2	46
BUFFALO	14.21	0	62
ROCHESTER	8.22	1	51
SYRACUSE	8.13	0	69
NEW ROCHELLE	14.75	1	109
NEW YORK CITY	7.72	0	39
STATEWIDE	10.47	0	109

The average facility in both New Rochelle and Buffalo had over 14 deficiencies over the three years (with a range of total number per facility from 0 to 109), while the average facility in New York City had only 7.72 deficiencies over the three years (with a range of total number per facility from only 0 to 39).

Table 11 shows the same information by each of the three years.

Table 11

Deficiencies Per Facility Per Year

REGIONAL OFFICE	1991	1992	1993
NORTHEAST mean num	3.85	2.06	2.93
BUFFALO mean num	7.12	4.43	2.69
ROCHESTER mean num	3.08	2.58	2.58
SYRACUSE mean num	2.70	3.04	2.40
NEW ROCHELLE mean num	4.50	4.78	5.50
NEW YORK CITY mean num	2.77	2.71	2.27
STATEWIDE mean num	3.92	3.38	3.20

The average facility's number of deficiencies has been dropping over the three year period from a high of almost 4 across the state in 1991 to a low of a little over 3 in 1993. While most individual regional offices show the same trend, New Rochelle, the office whose average facility had the highest number of deficiencies over the three year period, went up from a 4.5 in 1991 to 5.5 in 1993. Buffalo, whose average facility had the second highest number of deficiencies over the three year period, went down significantly from a high of over 7 in 1991 to a low of 2.69 in 1993.

Table 12 below summarizes a number of the regional differences in relation to the frequency and severity of deficiencies and the change over time in the number of

deficiencies per facility.

Table 12

SUMMARY OF REGIONAL DIFFERENCES

REG. OFFICE	TOTAL DEFICIENC	TOTAL LEVEL A'S	MEAN DEF PER SURVY	MEAN DEF PER FAC*	CHG. IN NUM OF DEF PER FACILITY*
NE	1258	38	2.79	8.81	- .93
Buff	2515	183	4.35	14.21	- 4.43
Roch	1005	39	2.74	8.22	- .50
Syrac	1039	23	2.43	8.13	- .30
NR	3616	102	3.65	14.75	+1.00
NYC	2110	36	2.07	7.72	- .50

*over three years: 1991, 1992, and 1993

Numbers of Deficiencies by Type of Deficiency

As discussed in the Background section, there are 15 major types of deficiencies that can be written.

Table 13 indicates the different types of deficiencies cited statewide during the 3 3/4 years[20]. All of the deficiencies listed on this table refer to B level violations only. All of the 263 A level violations written in the state during this time period were not categorized on state data sources and thus could not be analyzed.

[20]When OBRA was implemented in October, 1990, the different kinds of deficiencies were renamed. Thus, the data for the tables dealing with the types of deficiencies are from October, 1990 through June 30, 1994.

TABLE 13

FREQUENCY OF DIFFERENT DEFICIENCIES

TYPE OF DEFICIENCY	FREQUENCY	PERCENT
RESIDENT RIGHTS	400	5.3
TRANSFER AND DISCHARGE	26	0.3
RESIDENT BEHAVIOR AND FACILITY PRACTICES	307	4.1
QUALITY OF LIFE	1054	14.1
RESIDENT ASSESSMENT	1292	17.2
QUALITY OF CARE	1541	20.6
NURSING SERVICES	10	0.1
DIETARY SERVICES	561	7.5
PHYSICIAN SERVICES	229	3.1
SPECIALIZED REHABILITA.	57	0.8
DENTAL SERVICES	6	0.1
PHARMACY SERVICES	91	1.2
INFECTION CONTROL	214	2.9
PHYSICAL ENVIRONMENT	688	9.2
ADMINISTRATION	642	8.6

Note: 380 deficiencies were unable to be categorized, of which 263 were Level A violations.

The three most frequent areas cited in the state were: quality of care, quality of life and resident assessment.

Quality of care regulations cover rules governing the major care issues in nursing homes: activities of daily living, vision and hearing, pressure sores, urinary incontinence, range of motion, psychosocial functioning, naso-gastric tubes, accidents, nutrition, hydration, drug therapy, and medication errors.

Quality of life regulations outline the rules governing residents' quality of life which includes: dignity, self-determination and participation, participation in resident and family groups, participation in other activities, social services, activities, and environment.

The resident assessment regulations outline the steps necessary when assessing a resident and developing plans of care. They include: admission orders, comprehensive assessment, accuracy of assessment, comprehensive care plans, and discharge plans.

The areas cited less than 6 percent of the time were resident rights, resident behavior and practices (which covers restraints, abuse and staff treatment of residents), physician services, transfer and discharge, nursing services, specialized rehabilitation, dental services, pharmacy services, and infection control.

Differences in Type by Year

Table 14 shows the types of deficiencies written statewide by year.

TABLE 14

PERCENT OF YEARLY DEFICIENCIES
IN EACH DEFICIENCY CATEGORY

TYPE OF DEFICIENCY	1990	1991	1992	1993	1994*	PERCT OF TOT
RESIDENT RIGHTS	4.37	4.98	4.25	6.60	6.95	5.33
TRANSFER	0.0	0.22	0.36	0.43	0.80	0.35
RESIDENT BEHAVIOR	2.50	2.12	4.86	5.62	5.75	4.09
QUALITY OF LIFE	15.60	15.26	12.54	13.25	14.97	14.06
RESIDENT ASSESSMENT	14.35	21.76	19.00	13.14	11.23	17.23
QUALITY OF CARE	19.19	17.99	21.97	22.23	21.79	20.55
NURSING SERVICES	0.31	0.04	0.15	0.16	0.13	0.13
DIETARY SERVICES	9.67	6.81	7.37	8.55	5.35	7.48
PHYSICIAN SERVICES	2.65	3.21	2.87	2.65	4.41	3.05
SPECIAL REHABILIT	0.94	0.78	0.67	0.87	0.53	0.76
DENTAL SERVICES	0.0	0.13	0.10	0.05	0.00	0.08
PHARMACY SERVICES	0.78	0.82	1.43	1.41	1.74	1.3
INFECTION CONTROL	2.03	2.25	2.10	3.41	6.02	3.0
PHYSICAL ENVIRONMENT	10.45	8.71	9.06	10.22	7.22	9.7
ADMINISTRA.	10.45	9.58	8.60	6.98	7.62	9.0

*partial year

This table indicates that deficiencies in resident rights, transfer and discharge (although total is quite small - 26 over the entire time period), resident behavior, pharmacy, and infection control have risen over the last 3 3/4 years, while deficiencies in resident assessment, dietary services, specialized rehabilitation (also low total - 57), physical environment and administration have gone down.

Percent of Deficiencies by Type and Regional Office

Table 15 examines each regional office's deficiencies by type of deficiency written in relation to the statewide totals.

TABLE 15

REGIONAL OFFICES' DEFICIENCIES AS PERCENTAGES OF STATEWIDE TOTAL

TYPE OF DEFICIEN	NE	BUFF	ROCH	SYRAC	NR	NYC	TOTAL
RESIDENT RIGHTS	6.25	8.50	5.00	3.75	43.50	33.00	400
TRANSFE	11.54	11.54	3.85	3.85	42.31	26.92	26
RESIDENT BEHAVIO	7.17	17.59	6.51	7.17	28.01	33.55	307
QUALITY OF LIFE	9.68	14.33	8.63	11.57	42.50	13.28	1054
RESIDENT ASSESSM	10.76	20.90	7.97	10.22	30.88	19.27	1292
QUALITY OF CARE	10.58	29.98	8.37	13.30	22.71	15.06	1541
NURSING SERVICES	40.00	0.00	0.00	0.00	40.00	20.00	10
DIETARY SERVICES	5.17	16.04	13.19	8.20	45.63	11.76	561
PHYSICIA SERVICES	9.61	22.27	8.30	28.38	24.89	6.55	229
SPECIAL REHAB	12.28	10.53	0.00	35.09	38.60	3.51	57
DENTAL	16.67	16.67	16.67	16.67	16.67	16.67	6
PHARMA	19.78	3.30	7.69	27.47	36.26	5.49	91
INFECTI CONTROL	24.77	9.81	3.27	2.34	39.72	20.09	214
PHYSICA ENVIRON	15.26	9.88	7.85	2.03	43.31	21.66	688
ADMINIS	7.01	39.88	7.48	6.85	32.24	6.54	642

Table 15 demonstrates that there is significant regional differences in terms of the types of deficiencies written. Although New York City wrote only 16 percent of all

the deficiencies in the state, it wrote 33 percent of all the resident rights and resident behavior violations. New Rochelle wrote almost 34 percent of the deficiencies in the state, yet wrote over 42 percent of the resident rights, transfer, dietary services, physical environment and quality of life violations. Between them, New York City and New Rochelle wrote over 76 percent of all the resident rights violations in the state and over 61 percent of all the resident behavior violations. Although Syracuse wrote only 9.98 percent of the deficiencies in the state, it wrote 28 percent of the physician services, 35 percent of the special rehabilitation and 27 percent of the pharmacy violations. Rochester wrote only 8 percent of all the deficiencies, yet wrote 13 percent of the dietary services and 16 percent of the dental services violations. Buffalo wrote 21 percent of all the deficiencies, yet wrote almost 40 percent of the deficiencies in administration and almost 30 percent of the quality of care violations. Northeast wrote only 10 percent of the state's violations, yet wrote 40 percent of the nursing services violations; almost 25 percent of the infection control; and almost 20 percent of the pharmacy violations.

Table 15 also indicates that New York City wrote the fewest physician services deficiencies in the state while Syracuse wrote the fewest resident rights and physical environment violations. Rochester wrote the fewest resident assessment and specialized rehabilitation in the state.

Table 16 compares the percent of different types of deficiencies written within each regional office. This allows us to see what areas different regional offices are focusing on or what problems facilities in different regions have.

TABLE 16

DEFICIENCY TYPE AS A PERCENT OF EACH REGIONAL OFFICE'S TOTAL

TYPE OF DEF	NE	BUFF	ROCH	SYR	NR	NYC	% OF TOTAL
RESIDENT RIGHTS	3.20	2.13	3.28	2.01	6.86	10.77	5.33
TRANSFER	0.38	0.19	0.16	0.13	0.43	0.57	0.35
RESIDENT BEHAVIOR	2.81	3.38	3.28	2.94	3.39	8.40	4.09
QUALITY OF LIFE	13.04	9.46	14.94	16.31	17.66	11.42	14.06
RESIDENT ASSESSMEN	17.77	16.92	16.91	17.65	15.73	20.31	17.23
QUALITY OF CARE	20.84	28.95	21.18	27.41	13.80	18.92	20.55
NURSING SERVICES	0.51	0.0	0.0	0.0	0.16	0.16	0.13
DIETARY SERVICES	3.71	5.64	12.15	6.15	10.09	5.38	7.48
PHYSICIAN SERVICES	2.81	3.20	3.12	8.69	2.25	1.22	3.05
SPECIALIZE REHABILIT	0.90	0.38	0.00	2.67	0.87	0.16	0.76
DENTAL SERVICES	0.13	0.06	0.16	0.13	0.04	0.08	0.08
PHARMACY	2.30	0.19	1.15	3.34	1.30	0.41	1.21
INFECTION CONTROL	6.78	1.32	1.15	0.67	3.35	3.51	2.85
PHYSICAL ENVIRONMT	13.43	4.26	8.87	1.87	11.75	12.15	9.18
ADMINISTR	5.75	16.04	7.88	5.88	8.16	3.43	8.56

The highest percentage of Northeast's deficiencies, in addition to those most frequently cited by all the regional offices (quality of care, resident assessment, and quality of life), was physical environment.

The highest percentage of Buffalo's deficiencies in addition to those most frequently cited was in the area of administration.

The highest percentages of New Rochelle's deficiencies in addition to those most frequently cited were in the areas of physical environment and dietary services.

The highest percentages of New York City's deficiencies in addition to those most frequently cited were in the areas of physical environment and resident rights.

Differences in Type by Type of Survey

Table 17 indicates that from the standard certification survey to the post certification visit (PCV), to monitor correction of any B level violations found, the percent of deficiencies found in resident behavior, quality of life, quality of care, and pharmacy stayed about the same. Either facilities did not correct these deficiencies or other violations were found in these same areas on the PCV. Percentages of violations found in the areas of resident assessment, physical environment, and administration actually went up from the standard survey to the PCV. A number of areas went down: resident rights, dietary services, physician services, specialized rehabilitation, and infection control.

Another interesting finding is that one-half of all of the deficiencies in transfer and discharge (11) were cited on complaint surveys.

Table 17

TYPE OF DEFICIENCY AND TYPE OF SURVEY

TYPE OF DEF	CERT	PCV	COMPLT	INTERIM	OTHER	TOTAL
RESIDENT RIGHTS	5.69	2.37	6.17	3.78	3.41	400 5.07
TRANSFER	0.22	0.18	2.72	0.0	1.14	26 0.35
RESIDENT BEHAVIOR	4.19	3.83	5.68	2.13	1.14	307 4.09
QUALITY OF LIFE	14.57	14.57	9.14	12.06	7.95	1054 14.06
RESIDENT ASSESSMT	16.54	23.50	15.31	19.62	22.73	1292 17.23
QUALITY OF CARE	20.37	21.13	24.44	21.04	9.09	1541 20.55
NURSING SERVICES	0.12	0.36	0.25	0.0	0.0	10 0.13
DIETARY SERVICES	8.30	5.65	2.96	3.31	3.41	561 7.48
PHYSICIAN SERVICES	3.07	2.00	3.70	3.78	2.27	229 3.05
SPECIAL REHABILIT	0.83	0.18	0.49	0.95	0.0	57 0.76
DENTAL SERVICES	0.07	0.00	0.25	0.24	0.0	6 0.08
PHARMACY SERVICES	1.09	1.09	2.72	1.65	1.14	91 1.21
INFECTION CONTROL	2.98	2.37	1.48	1.89	7.95	214 2.85
PHYSICAL ENVIRONMT	9.61	10.75	4.44	3.78	17.05	688 9.18
ADMINIST.	7.87	8.74	9.88	4.42	20.45	642 8.56

Federal "Look-Behind" Surveys

The Health Care Finance Administration (HCFA) has a contract with the New York State Health Department for the state to inspect New York State nursing homes for compliance with federal mandates. HCFA inspectors conduct "look-behind" surveys as part of a system of monitoring the State's ability to oversee compliance. HCFA surveyors conduct their own surveys soon after state surveyors finish their survey.

HCFA conducted most of its look-behind surveys in the New York City office. Table 18 shows the number of these surveys by regional office.[21] HCFA wrote 342 deficiencies on its 83 look-behind surveys.

Table 18

Federal Look-Behind Surveys

REGIONAL OFFICE	FREQUENCY	PERCENT
Northeast	2	2.4
Buffalo	2	2.4
Rochester	1	1.2
Syracuse	0	0.0
New Rochelle	17	20.5
New York City	61	73.5
TOTAL	83	100.00

Table 19 examines in detail, the pattern of deficiencies of HCFA's look-behind surveys in New York City and New Rochelle.

[21]This analysis is based upon deficiency data from the State Health Department as stated in the Introduction section.

Table 19

Number of Deficiencies Per Survey

REGIONAL OFFICE	0 DEF	1 DEF	2 OR 3	4 TO 7	OVER 7
NYC number percent	10 16.39	7 11.48	11 18.03	20 32.79	13 21.31
NR number percent	7 41.18	2 11.76	1 5.88	4 23.53	3 17.65

This data suggests that HCFA's surveyors find more deficiencies than New York City surveyors. Information from Table 8, shown earlier, which lists the percent of zero and multiple levels of deficiencies on certification surveys, indicates different patterns between HCFA and New York City and New Rochelle surveys.

Below is an excerpt from 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
NR	17.07 %	16.46 %	24.19 %	28.46 %	13.82 %
NYC	38.89 %	18.64 %	25.81 %	14.16 %	2.51 %

Data from Table 8 indicates that 38.89 percent of all of New York City's certification surveys had zero deficiencies, that only 14.16 percent had 4 to 7 deficiencies, and only 2.51 percent had over 7 deficiencies. HCFA's look-behind survey results from its look-behind surveys conducted in New York City show a different pattern (see Table 19). Only 16.39 percent of HCFA's surveys in New York City had zero deficiencies, 32.79 had 4 to 7, and 21.31 had over 7.

The results for New Rochelle are different.[22] Table 8 indicates that New Rochelle's patterns of deficiencies on certification surveys are similar to HCFA's look-behinds in terms of multiple numbers of deficiencies on surveys. Table 8 shows that 28.46 percent of New Rochelle's certification surveys had 4 to 7 deficiencies (compared to HCFA's 23.53 percent) and almost 14 percent had over 7 deficiencies (compared to HCFA's 17.65 percent). This pattern differs in terms of zero deficiencies. Table 8 indicates that only 12.35 percent of New Rochelle's surveys had zero deficiencies; HCFA results indicate over 41 percent of its look-behind surveys in New Rochelle were deficiency free.

Table 20 shows the types of deficiencies cited on HCFA look-behind surveys.

[22]New Rochelle's data is based upon a small sample of look-behind surveys: 17.

Table 20

TYPE OF DEFICIENCY	FREQUENCY	PERCENT
Resident Rights	49	14.3
Transfer	7	2.0
Resident Behavior	9	2.6
Quality of Life	33	9.6
Resident Assessmt	52	15.2
Quality of Care	64	18.7
Nursing Services	1	0.3
Dietary Services	32	9.4
Physician Services	6	1.8
Pharmacy Services	8	2.3
Infection Control	29	8.5
Physical Environ	37	10.8
Administrative	7	2.0

*There were no deficiencies written in specialized rehab., dental services; 8 (or 2.3 percent) were not labeled and thus are not included.

Comparing the types of deficiencies found on HCFA's look-behind surveys to those found on New Rochelle and New York City's surveys (see Tables 15 and 16 above) indicate a number of differences.

A larger percentage of HCFA violations was found in resident rights, transfer and discharge (based on 7 deficiencies), pharmacy services (based on 8), and infection control than were found in New Rochelle or New York City. The percent found in infection control was 2.5 times that of New Rochelle or New York City.

A lower percentage of violations was found in resident behavior, resident assessment, administration and in quality of life than was found in New Rochelle or New York City. The percent found in quality of life was much lower than that found in these regions.

HCFA found a much higher percent of violations in dietary services than in New York City and a higher percent of violations in quality of care than in New Rochelle.

Table 21 shows the multiple pattern of deficiency writing by HCFA on its look-behind surveys.

Table 21

Deficiency Levels

DEFICIENCIES	FREQUENCY	PERCENT
zero	20	24.1
one	10	12.0
two or three	13	15.7
four to seven	24	28.9
greater than 7	16	19.3

The pattern shown in Table 21 differs from the pattern shown above for New York City and New Rochelle (see Table 8). Almost 32 percent of New York City's certification surveys were deficiency free, while only 12.35 percent of New Rochelle's were deficiency free. Only 7.45 percent of New York City's certification surveys found more than 7 deficiencies, while over 36 percent of New Rochelle's did. HCFA's percentages were 24.1 percent and 19.3 respectively.

CHAPTER FIVE

Findings:

Decisions to Initiate An Enforcement Action

Once deficiencies are written, a decision must be made about whether to initiate an enforcement action against a facility. Staff in the Bureau of Long Term Care, Department of Health, the staff responsible for the oversight of nursing home care in New York State, state that they review all deficiencies on a regular basis to see if an enforcement action leading to a sanction should be initiated.

During the time period of this study, an enforcement action was considered only under the following criteria: a condition level or an "A" level deficiency was written; a repeat standard or "B" level deficiency in a area considered "serious" was written; or a deficiency was written on any complaint survey. See the Appendix for a list of level "Bs" that the Department believes are serious enough that when repeated should be considered for an enforcement action. As we shall see, if a decision is made to initiate an enforcement action, it is most likely to be a fine.

Federal requirements mandate the initiation of an enforcement action whenever a condition or "A" level violation is determined.

Process of Bringing An Enforcement Action

Enforcement Process From the Last Survey to Referral to Legal Affairs

When the Bureau of Long Term Care has decided to seriously consider the initiation of an enforcement action against a facility, its staff reviews the written deficiencies and, if necessary, speaks to the regional office staff and surveyors to discuss the documentation originally written by the surveyor. Only after it believes that it has a good case does the Bureau refer the action to Legal Affairs.

Since most of the enforcement actions initiated in the state during this time period were fines (91 percent), the detailed analysis of enforcement actions relates only to fining actions.

Table 1 indicates the time it took from the last survey at which the state staff decided to pursue an enforcement action (fine) to its referral to Legal Affairs.

Table 1

Time From Survey to Referral
Fining Actions

REGIONAL OFFICE	MEAN TIME IN MONTHS	MINIMUM TIME	MAXIMUM TIME	NUMBER OF ACTIONS
Northeast	8.00	3.0	13	14
Buffalo	5.79	0.0	12	43
Rochester	6.00	3.0	10	12
Syracuse	6.80	5.0	9	10
New Roch	7.00	2.0	12	26
NYC	4.80	3.0	7	10
Statewide	6.34	0.0	16	114

It took an average of 6.6 months from the time of the last survey at which a decision to seriously consider the initiation of an fining action was made to the first step in the process: referral to Legal Affairs to prepare the case. Regional offices differ from a high of 8 months for the Northeast area office to a low of 4.80 months for New York City.

Table 2 indicates the time it took for the entire process to be finalized.

TABLE 2

Time From Survey to Settlement
Fining Actions

	MEAN TIME	NUMBER OF ACTIONS
Statewide	12.20 months	114 actions
Northeast	14.69	13 actions
Buffalo	11.42	43 actions
Rochester	11.25	12 actions
Syracuse	11.60	10 actions
New Roch.	13.31	26 actions
NYC	11.20	10 actions

It took an average of over a year to conclude the enforcement action from the survey at which a decision was made to think about initiating an enforcement action[23] to the settlement of the case.

The amount of time it takes for enforcement actions to be completed indicates there is a need to do something to shorten this time. [24]

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[23]This is not always the survey at which deficiencies were first found. It is the survey at which enough has happened so that the state decides to pursue an action. Often, there are early surveys with deficiencies.

[24]Prior to 1987, the State's enforcement system took even longer. A work group of consumers and state staff, chaired by NHCC's Director, worked together to shorten the time from what it had been: one to five years. During 1988 the Department was able to shorten the time for the whole process to about 8 months. Soon after, the time frames climbed again. Given the low number of staff to function in this important area, we might expect the amount of time to continue to grow.

Warning Letters

If the Bureau does not believe that it has a good enough case to refer to Legal Affairs, it might send the facility a warning letter.

NUMBERS OF WARNING LETTERS BY YEAR AND REGIONAL OFFICE

	NE	BUFF	ROCH	SYRC	NR	NYC	TOTAL
1990	4	6	5	0	8	8	31
1991	4	2	0	0	9	4	19
1992	2	2	0	2	1	3	10
1993	10	41	10	16	53	26	156
1994*	6	11	1	0	15	0	33
TOTAL	26	62	16	18	86	41	249

*to July 1, 1994

Description of the Enforcement Process From Referral to Legal Affairs to Conclusion of Enforcement Action

When the Bureau of Long Term Care staff believes that an enforcement action should be initiated, it sends a letter to the facility notifying it of the initiation of the action and how the facility may settle without a hearing (see sample letter in the Appendix). The facility is required at this time to post an enforcement poster in its lobby (see sample enforcement poster in the Appendix). At the same time, the Bureau of Long Term Care refers the case to the Legal Affairs Division. As we have seen, this takes an average of 6.6 months.

Most actions are settled without a hearing. According to the letter sent to the facility, the facility has 15 days to call the Department's attorney and state that it wants to settle without going to a hearing. If not approached by the facility, the legal staff will develop a statement of charges and prepare for a hearing. In 1987, upon pressure from consumers, the Department set a goal of 90 days during which a facility might negotiate an agreement. If a settlement was not reached during that time frame, the Department was supposed to go directly to a hearing. However, this goal proved impossible to reach. If it appears that a facility is willing to settle, staff will allow some

deviation from this time frame. According to legal staff, a hearing is an extremely time intensive process involving going over each charge with the surveyor, writing up a statement of charges, and actually spending time at the hearing. Thus, they are willing to spend more time, if necessary to avoid going to a hearing. They believe that they do not end up with any higher fines by going through a hearing versus working out a settlement.

CHAPTER SIX

FINDINGS: ENFORCEMENT ACTIONS

The data related to initiated and settled enforcement actions taken by the state during the time period of the study indicate that 1991 and 1992 were the years in which most of the actions were initiated. Table 1 below shows the number of enforcement actions[25] by year and regional office. The time period covers from January 1, 1990 through June 30, 1994.

Table 1

YEAR	NE	BUFF	ROCH	SYRC	NR	NYC	TOTAL
1990	2	9	7	2	3	5	28
1991	8	20	3	3	11	8	53
1992	8	33	9	4	14	10	78
1993	1	2	1	4	7	4	19
1994	1	4	0	0	5	0	10
Pending	1	2	0	0	3	2	8
TOTAL	21	70	20	13	43	29	196

Table 1 indicates that the number of enforcement actions have declined significantly since 1992, the year most actions were taken.[26] Table 1 also demonstrates that Buffalo and New Rochelle, not surprisingly, initiated the highest number of

[25]Actions include mostly fines. In addition, there are a few withdrawn actions, 1 action where no fine was assessed, 4 receiverships, and 1 intermediate ban. This analysis does not include sanctions taken against administrators. See below.

[26]The reason that so many actions were taken during 1992 may be twofold. One, as mentioned earlier, the State was working closely with consumers to better its enforcement record, and two, OBRA (the Omnibus Budget Reconciliation Act of 1987) went into effect in October, 1990, which led to many more deficiencies being written in 1991.

enforcement actions in the state. However, Table 1 indicates that the number of enforcement actions are dropping throughout the state, even in these two regional offices.

INTERMEDIATE BANS AND RECEIVERSHIPS

The state has used the intermediate ban sanction only 6 times since 1989 and has not used it at all since September, 1991.

As mentioned above, 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.

Five of the six times the state used the ban in the past, it has been used to give a receiver, who had been appointed on the same day as the ban or within days or weeks of the ban, the chance to correct deficiencies.

Although the state could have used the intermediate ban allowed under state law, according to state staff, the state has not used this ban because it involves intense work and requires the state to go before a law judge before imposing. This is also the reason given for the non-usage of any other of the state sanctions available.

Receivership

Only 4 receiverships were imposed during the time period of the study. Of these, two were in homes in the Buffalo regional office, one was in the Northeast office, and one was in New Rochelle.

Most of these receiverships occurred in 1991 (3), and one occurred in 1990. None have been imposed since 1991.

SANCTIONS TAKEN AGAINST ADMINISTRATORS

Staff of the Board of Examiners of Nursing Home Administrators review all cases involving enforcement actions to decide if the Board should consider sanctioning an administrator. The Board's criteria when reviewing cases include: term of service as administrator; number of deficiencies cited during surveys; number of repeat deficiencies; level of deficiencies; actual resident outcomes; potential resident outcomes; and survey history of the administrator and the facility.

During the time period of this study, only 7 administrators have been sanctioned, 6

for unethical conduct and 1 for a felony conviction. Most of these sanctions were for violations made prior to 1990.

One, censured (officially reprimanded) on March 3, 1990 and fined $400, was sanctioned for violations found during a tenure as an administrator in 1981.

A second, also censured in March, 1990, fined $1,000 and not allowed to practice for a year, was sanctioned for violations found prior to 1983.

A third, given one year suspension in March, 1990, was sanctioned for deficiencies found in 1986.

A fourth, censured and fined $1,000 in July, 1990, was sanctioned for violations found in 1985.

A fifth, censured in November, 1992, was sanctioned for problems found in 1989.

A sixth was given a two year suspension and fined $2,000 in November, 1992, when she pled guilty to a scheme to defraud in open court in June, 1991.

The last had his license forfeited because he was a convicted felon.

From the period of January 1, 1990 to August, 1994, the Board has issued 12 warning letters and the staff has issued 49 warning letters.

Fines

Fining is the most often used sanction. Even though the state has a number of different choices available to it for standard or "B" level violations and for "A" violations in addition to Federal sanctions, it most often chose fining during the years 1990 to the present.

Ninety-one (91) percent of all state sanctions chosen during the last 3 1/2 years were fines.

During the years 1990 to the present, the state has used the fining authority under Section 12 of the Public Health Law, which allows it to fine a facility for up to $2000 for every violation of the code of standards. It has rarely used the continuing violation authority (Section 2803), which allows it to fine a facility from $600 to $1000 for each violation for each day the violation is continuing.

Even though continuous violation procedure might accrue higher fines, Bureau of Long Term Care and Legal Affairs staff believe that it is too difficult to use. It first requires giving the facility 30 days to correct before it can levy a fine. The state believes it

must then go on-site a number of times after the 30 day period to prove that the violation is continuing. The state feels it does not have the surveyors and time necessary to prove continuing violations.[27]

Since most of the actions have been fines, detailed data related to fines is found below.

Calculation of Fines

When the Bureau of Long Term Care decides to initiate an action to fine a facility, it first decides which of all the deficiencies written it will calculate a fine for. It makes this decision based upon the ability of the surveyor's finding to be upheld in a hearing. Using the original statement of deficiencies written by regional office surveyors, Bureau of Long Term Care staff choose the number of deficiencies it believes can be supported and then calculate the potential maximum fine possible under Section 12 of the New York Public Health Law, which allows a maximum penalty of $2,000 per violation.

Then, Bureau staff and Legal Affairs staff, after examining the specific violations for their severity and the history of violations at the facility, calculate a fine that they believe they can win if they are forced to go to an administrative law judge hearing. Most of the time, this number is less than the potential fine allowable under law.

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[27]It is interesting that the state of Ohio believes that it can prove continuing violations without going on-site a number of times. In speaking to a state official, he said that if the violation is still in existence at the follow-up survey, it is assumed to have been continuing.

Levying of Fines

In addition, if fines levied are substantial, a portion of the fine might be suspended to encourage settlement without a hearing and continued compliance. The suspended portion would be collected only in the event that the facility does not maintain compliance within the next 12 months. The table below indicates how often the state levies the maximum fine.

TABLE 2

Potential Maximum Fines versus Actual Fines Levied[28]

	1991	1992	1993
Maximum fine*	14** (16%)+	3 (12%)	1 (7%)
90 - 99%	1 (1%)	2 (8%)	0
80 - 89%	3 (4%)	2 (8%)	1 (7%)
70 - 79%	3 (4%)	4 (15%)	1 (7%)
60 - 69%	4 (5%)	1 (4%)	2 (14%)
50 - 59%	9 (11%)	2 (8%)	0
40 - 49%	8 (10%)	4 (15%)	2 (14%)
30 - 39%	10 (12%)	2 (8%)	3 (21 %)
20 - 29%	23 (27)	5 (19%)	4 (29 %)
10 - 19%	6 (7%)	0	0
1 - 9%	1 (1%)	0	0

* The maximum fine has been estimated very conservatively. Letters to facilities, stating that they are liable for fines list the conditions or "A" violations in which standard or "B" level violations have been cited and for which they may be fined. It does not indicate how many violations have been cited within each condition or "A" level. The maximum violations for this purpose has been estimated to be at least one (even though it could be more but not less) in each listed condition or "A" level. This conservative estimate is multiplied by $2,000, the maximum allowable amount for each deficiency.

**The number of fining actions falling in each category.

+ The percentage of total actions falling in each category.

[28]There were no fines collected during the first 6 months of 1994.

Table 1 indicates that for all three years the largest percentage of fining actions were levied at between 20 and 29 percent of the potential maximum fine. In 50 percent of the cases, fines were levied at 50 percent of the maximum possible. In 1993, only one maximum fine was collected.

TABLE 3

AVERAGE AMOUNT OF FINES LEVIED
FROM OCTOBER 1, 1990 TO JULY 1, 1994

STATEWIDE	$7,509.21*
NORTHEAST	5,176.92
BUFFALO	9,646.51
ROCHESTER	6,850.00
SYRACUSE	5,960.00
NEW ROCHELLE	7,030.77
NEW YORK CITY	4,935.00

*These are the amounts of collected fines. Assessed fines are somewhat higher. The Department relieves the facility of some portion of the fine if the facility stays in compliance.

Enforcement actions based upon Buffalo's written deficiencies collect the highest fines; enforcement actions based upon New York City's written deficiencies collect the lowest fines.

Table 4 below indicates that, like the total number of deficiencies and enforcement actions, the number of fines are dropping.

Table 4

Fines From October 1, 1990 to July 1, 1994

YEAR	FREQUENCY
1991	28
1992	65
1993	16
1994 (6 months)	9*

* 8 cases have missing data or are pending

CHAPTER SEVEN

Effectiveness of the Enforcement System

Relationship Between Serious B Level Deficiencies and Fines

Table 1 demonstrates the relationship between deficiencies found in areas considered serious by the Department and fines.

Table 1

Relationship Between Serious Deficiencies and Fines

TYPE OF SURVEY	PERCENT OF FAC. FINED*	AVERAGE FINE PAID**	AVERAGE NO. MONTHS FROM SURVEY TO SETTLEMENT	NUMBER OF FINES**
Facilities With a Serious Deficiency 10/90-12/91	30	$6,548	12.9	155
Facilities With No Serious Deficiency 10/90-12/91	5	3,760	16.9	10

* These percentages are adjusted so that they represent the percent of facilities with any fine.

**These are based upon fines after 10/90. Twenty facilities with a serious deficiency on a survey were fined more than once.

Table 1 indicates that facilities with deficiencies in areas considered serious by the Department are more likely to be fined and at a higher rate than facilities with deficiencies in less serious areas.

Relationship Between Complaint Surveys and Fines

Table 2 demonstrates the relationship between deficiencies on complaint surveys and the collection of fines.

Table 2

Relationship Between Complaint Surveys and Fines

TYPE OF SURVEY	PERCENT OF FAC. FINED*	AVERAGE FINE PAID**	AVERAGE NO.OF MONTHS FROM SURVEY TO SETTLEMT**	NUMBER OF FINES**
Facilities With a Deficiency On a Complaint Survey 10/90-12/91	33	$6,183	13	30
Facilities With a Deficiency on a Noncomplt Survey 10/90-12/91	26	6,614	12.9	126

* These percentages are adjusted so that they represent the percent of facilities with any fine.

**These are based on fines after 10/90. Seven facilities with a deficiency on a complaint survey and 22 facilities with a deficiency on a noncomplaint survey were fined more than once.

Thus, deficiencies found on complaint surveys are more likely to lead to a fine than deficiencies found on other surveys. However, this may be a function of the seriousness of the deficiencies cited. The correlation between any deficiency found

on a complaint survey and a deficiency in a serious area was .97. Thus, if a deficiency is written on a complaint survey, it is likely to be in a serious area. As Table 1 above indicates, facilities with deficiencies in serious areas are fined more often, and at higher rates, than facilities with deficiencies in nonserious areas.

Relationship Between An A Level Deficiency and Fines

Table 3 indicates the relationship between A level deficiencies and fines.

Table 3
Relationship Between A Level Violations and Fines

TYPE OF SURVEY	PERCENT OF FAC. FINED*	AVERAGE FINE PAID**	AVERAGE NO.OF MONTHS FROM SURVEY TO SETTLEMT**	NUMBER OF FINES**
Facilities With an A Level Deficiency 10/90-12/91	88	$10,156	11.7	60
Facilities With no A Level Deficiency 10/90-12/91	18	4,332	13.9	115

* These percentages are adjusted so that they represent the percent of facilities with any fine.
**These are based on fines after 10/90. Seventeen facilities with A level deficiencies were fined more than once.

Facilities with A level violations are much more likely to be fined and at a much higher level than facilities without an A level violation.

Multiple Numbers of Deficiencies

Table 4 shows the relationship between multiple numbers of deficiencies and fines.

Table 4

Relationship Between Facilities with Seven or More Deficiencies and Fines

TYPE OF SURVEY	PERCENT OF FAC. FINED*	AVERAGE FINE PAID**	AVERAGE NO. OF MONTHS FROM SURVEY TO SETTLEMT**	NUMBER OF FINES**
Facilities With More Than 7 Def. in Last Quarter of 1990 or all of 1991 +	64%	$9,392	11.9	83
Facilities With 7 or Fewer Def. in the Last Quarter of 1990 or All of 1991	15%	$3,621	14.9	92

* These percentages are adjusted so that they represent the percent of facilities with any fine.

**Seventeen facilities with a serious deficiency on a survey were fined more than once, and six facilities with fewer 7 or more fewer deficiencies were fined more than once.

+ Since it takes on average over a year to conclude the fining action, this timeframe was used to make sure that the enforcement actions for the deficiencies analyzed were complete.

Clearly, the more deficiencies a facility received, the more likely it was to be fined and to be fined at a higher level.

Relationship Between Fining and Future Deficiencies

Table 5 shows the relationship between fining and future deficiencies.

Table 5
Fine and Facility Deficiencies Records*

TIMING OF FINES	AVERAGE NO. OF DEFICIENCIES	AVERAGE NO. OF DEF. IN SERIOUS AREAS	AVERAGE NO. OF A LEVEL DEF.
Facilities Fined in 1990 or 1991			
1991	5.3	4.3	.44
1992	3.4	2.8	.08
1993	3.0	2.4	.08
Facilities Fined in 1992			
1991	10.5	8.1	.93
1992	5.7	4.1	.42
1993	2.6	2.0	.11
Facilities Fined in 1990 or 1991 and in 1992			
1991	10.5	7.9	1.1
1992	9.9	7.9	1.1
1993	2.2	2.0	0.0
Facilities With No Fines in 1990, 1991 or 1992			
1991	2.2	1.7	.04
1992	2.4	1.9	.02
1993	2.8	2.1	.02

*This table divides facilities based on fines and a very small number of these facilities were fined more than once in a year.

This table indicates that fining seems to work. Facilities that were fined tended to have many fewer violations on surveys conducted after being fined than they had prior to the fining. Facilities that were not fined tended to have about the same number of violations (actually slightly more).

CHAPTER EIGHT

DISCUSSION

The Enforcement System: A Process to Avoid Holding Most Providers Accountable?

The process of penalizing facilities for violations of care standards seems to be a long weaning out process. 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 when the facility negotiates with the Department.

As we have seen, fewer deficiencies are being written; fewer A level deficiencies are being written; and fewer enforcement actions are being initiated. 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?"

The Good News: The Fining Process is Effective

Our data indicates that facilities that are fined tend to have much fewer deficiencies on surveys conducted after the fining action. Facility deficiencies of facilities that were fined went down from a high of over 10 to a low of a little over 2 on succeeding surveys. In comparison, facilities that were not fined tended to receive the same or a slightly higher number of deficiencies on future surveys. Fining facilities seems to lead to fewer future deficiencies.

The Bad News: The State Is Using the Fining Process Less and Less

Unfortunately, even though our analysis shows that the fining system seems to be working, the state is using it less and less.

Fewer Providers are Being Held Accountable: Numbers of Deficiencies and Enforcement Actions are Declining

The data are clear. Without any evidence that care is improving, the numbers and severity of deficiency writing and the subsequent enforcement actions are declining.

Numbers and Severity are Declining

The number of A level violations has dropped from a high of 126 in 1991 to a low of 19 in the first six months of 1994. The numbers of facilities with over 7 deficiencies has declined from a high of 85 in 1991 to a low of 57 in 1993. The average facility's number of deficiencies has dropped from a high of 3.92 in 1991 to a low of 3.20 in 1993. This drop is evidenced in virtually all of the regional offices except for New Rochelle. Buffalo's average facility dropped from a high of 7.12 deficiencies in 1991 to a low of 2.69 in 1993. Almost 31 percent of all of the certification surveys in the state are deficiency-free.

The New York State Department of Health record is quite different than that of regulatory agencies in other parts of the country. The American Health Care Association recently released a study titled, "Nursing Facilities' Deficiency Report #7." The report is based data from standard surveys conducted between October 1, 1992 and September 30, 1993. Data for the report came from the OSCAR system maintained by the Health Care Financing Administration. The study found that New York and Region II, of which New York is a part, wrote the lowest number of deficiencies per facility in the country. The national average was 2 1/2 times as much. In addition, the report found that New York and Region II had the highest number of deficiency-free facilities. The number of level A violations were also low: more than half that of the national average.

Enforcement Actions and Fines are Declining

Not only is it difficult for a facility to be cited in New York State even if surveyors find evidence of poor care, but the chances of being fined are small. The numbers of initiated enforcement actions has declined from a high of 78 in 1992 to a low of 19 (of which 8 are still pending) in the first six months of 1994. Only 64 percent of facilities with more than 7 deficiencies are fined.

It is possible that the elimination of the Deficit Level Index (DLI) had something to do with the reduction in the number of deficiencies being written, and the accompanying decline in enforcement actions. This index is described in detail in the Background section. The DLI helped surveyors by giving them specific criteria for when a deficiency should probably be written. By removing this tool, it is possible that surveyors were more uncertain about writing deficiencies. In addition, NYQAS (see Background section), which was eliminated in 1992, included threshold levels of violations where the surveyor was required to explain why a deficiency was not being written. Although there are now many places where surveyors must explain why they believe a deficiency is warranted, there is no requirement to ever explain why a deficiency is not being written even though violations of standards have been found. Both of these factors might had added to the decline in the numbers of deficiencies.

In addition, during these years the number of surveyors also declined. The state fiscal crisis led to a reduction in the numbers of people available to inspect care in nursing homes. This is particularly true in New York City, New Rochelle and Syracuse, two of which reported the lowest number of deficiencies. Reduction in numbers of inspectors has meant that the remaining surveyors had a greater load. Given the fact that finding deficiencies on certification surveys guarantees additional followup surveys that there might not be enough people to conduct, is it any surprise that the numbers of deficiencies have dropped?[29]

Most Facilities Are Not Being Held Accountable Within a Reasonable Time Frame

Even when facilities are cited for care problems and are penalized with a fine, the amount of time taken to settle an enforcement action is too long. It takes the state over half a year, once deficiencies are written, to decide whether or not to initiate an action and refer the case to the Legal Affairs division of the department. And it takes over a year from the last survey at which the state decides to initiate an enforcement action to the settlement of the action.

Regional Offices Differ In Terms of Their Ability to Hold Providers Accountable

Regional offices differ in terms of the frequency, severity, and type of deficiencies they write and in their subsequent initiation of enforcement actions. If care in the different regions is not substantially different, then nursing home residents are not getting equal protection from the Department of Health. The amount of their protection seems to depend on what area of the state they live in.

The Buffalo and New Rochelle offices write the greatest number and most serious deficiencies in the state. New York City and Syracuse write the least serious and fewest number of deficiencies per survey in the state.

These differences in performance are very important. According to Legal Affairs staff,

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[29]The new federal enforcement regulations that went into effect in July, 1995, require states to institute an informal appeal process for providers to argue against any deficiencies they receive. Consumers are very concerned that this process will further erode the numbers of deficiencies cited as surveyors will have an additional incentive not to write a deficiency. Why write a deficiency if no one is asking why you are not writing one? Why write one if you have to defend yourself for writing one?

the number and severity of the deficiencies and the caliber of the documentation of the deficiencies are the most important variables in winning an enforcement action.

Are differences in types of deficiencies indicative of differences in care or differences in the training, expertise, focus or numbers of surveyors in different regions? Facilities in New York City tend to be cited more for resident rights and resident behavior and practice and less on physician services than facilities in other areas. Facilities in Northeast tend to be cited less on dietary services than facilities elsewhere, but much more on infection control. Facilities in Buffalo tend to be cited less on quality of life than facilities elsewhere, but much more on quality of care and administration. Facilities in Rochester tend to be cited more in the area of dietary services than others. Facilities in Syracuse tend to be cited less for violations in resident rights, infection control, and physical environment than others, and more in the areas of quality of care, physician services, specialized rehabilitation and pharmacy services. Facilities in New Rochelle tend to be cited more in dietary services. Is the care that dramatically different in the different regions of the state?

Because of these differences in number, severity, and type, the number of enforcement actions and amounts of fines also differ from regional office to regional office. Buffalo initiated 70 enforcement actions over the time period of the study; Northeast initiated 21; Rochester, 20; Syracuse, 13; New Rochelle, 43; New York City, only 29. Buffalo's average fine was $9,646.51 while New York City's was only $4,935.

Why are there such differences? Is care different in different facilities in different areas? Is care better in certain regions than in others? Data from HCFA's "look-behind" surveys seem to suggest that the low number of deficiencies written by New York City may not mean that facilities are better in that region. HCFA found many more deficiencies on its surveys than did the New York City office. In addition, consumer experience does not indicate better care in those regions with fewer deficiencies.

Are different regional offices better managed than others? Are supervisors and surveyors better in one region than another? Are different messages being given to surveyors in different areas in terms of whether to write deficiencies? Do some regional offices focus on specific areas and ignore others?

The Enforcement System Against Nursing Home Administrators is a Failure

Although administrators are often responsible for any care problems encountered in nursing homes, they are rarely, if ever, held accountable by the state for their role in poor care.

During the period of the study, encompassing 196 initiated enforcement actions, only 7 administrators were sanctioned. Of these, only 2 actions were related to care activities during the period of the study. Although the Board has the authority to suspend, revoke a license, censure, and assess a fine of $1,000 for every violation made after a hearing, the 2 actions involved only a censure (official rebuke) for problems found during 1989 and a two year suspension and $2,000 fine for a scheme to defraud in open court in 1991. On paper, the ability to sanction administrators through their license is a potentially effective weapon against poor care. However, the state has not used this weapon effectively. It is unclear why. Perhaps the makeup of the Board of Examiners is part of the reason. Almost one-half of the membership is made up of nursing home administrators; additionally, 1 other member is a hospital administrator. Only 3 people are members of the public. Although state staff indicated that the Health Commissioner tended to appoint people who were active in the health care field, these public members need not have any expertise in nursing home care issues. Such a makeup may lead to the inability of the Board to sanction their own.

HCFA Look-Behinds Should Be Carried Out in Other Regional Offices

Most of these surveys have been conducted in New York City. Given the results of this study demonstrating the significant differences among regional offices without any clear reason why there should be such differences, HCFA should be conducting more look-behind surveys in other regional offices as well as New York City.

Neglected Alternatives: The State Does Not Use Other Available Alternatives

New York State was way ahead of the country when it attempted to find a variety of ways to sanction those nursing homes that did not comply with state or federal regulations. A common complaint around the country was that there were few alternatives to federal termination for facilities with serious problems. Termination usually meant closure, with the resulting trauma for nursing home residents who would have to be transferred to other facilities.

In addition there was little action that could be taken against facilities that went in and out of compliance. In fact, the new federal enforcement rules that went into effect in July, 1995 were written to give states many alternatives to termination, some of them similar to those already on the books in New York State. Thus, New York State, with laws allowing many choices of sanctions, had a number of potential ways to better protect nursing home residents. However, the New York State Department of Health has primarily used only one of these alternatives: fines.

The state believes, as discussed above, that it can no longer use the intermediate ban, and thus cannot use the receivership statute. It also believes that most of the other alternatives to fining require intense staff time to pursue because almost all require the

state to go to a hearing prior to implementation. However, as we have seen, the fining action also takes an enormous amount of staff time even though the state does all it can to avoid going to hearing.

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.

Specifically:

- ***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. [30]

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.***

- ***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.

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[30]New 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 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.

APPENDIX

New York State Department of Health

NOTICE OF ENFORCEMENT

_____

The Department of Health has initiated the following enforcement action for violations found in _____

_____

on _____ .

____ An action to fine the facility a maximum of $2000 per violation of the Public Health Law.

____ An action to place the facility under a new operator.

____ A referral to the U.S. Department of Health and Human Services/New York State Department of Social Services to stop Medicare/Medicaid payments for new admission until corrections are made.

____ A referral to the U.S. Department of Health and Human Services to stop Medicare/Medicaid payments to the facility.

A copy of the violations found is available in the facility administrator's office for review by interested parties.

The facility has a right to contest the enforcement action being taken.

Further information regarding this enforcement action may be obtained from the New York State Department of Health by calling:

(518) 445-9989 collect
(Monday - Friday 8:30 am - 4:45 pm).

DEFICIT LEVEL INDEX

A

RESIDENT OUTCOME SCALE

Rate the harm to the resident based on the change for the worse or the failure to achieve and maintain the highest practicable level of the resident's physical, mental, and psychological well-being.

DEFICIT LEVEL

1. No harm has occurred nor was it likely to have occurred.

2. No harm has occurred but if multiple similar events were to occur over time, harm would gradually occur.

3. No harm has occurred, but there is the potential for harm from a single occurrence. The harm that could occur need not require physician intervention;

   OR

   Harm has occurred which did not warrant physician intervention.

4. Harm has occurred which warranted physician intervention.

5. Harm has occurred which is physical and life threatening.

B

REACTION SCALE

Rate the discomfort or degradation in quality of life experienced by the resident as determined by the reaction of a reasonable person to the situation. A reasonable person reacts more strenuously with repetition of the same or similar situations.

DEFICIT LEVEL

1. A reasonable person may mention the occurrence to a staff person.

2. A reasonable person would make verbal objection to the staff person immediately responsible or would remove self from the situation.

3. A reasonable person would report the occurrence to the supervisor of the staff person immediately responsible or the facility administrator.

4. A reasonable person would take steps beyond reporting to the facility administrator to ensure no recurrence such as relocation out of the facility or notification of regulatory authorities.

5. A reasonable person would request outside investigation of possible criminal conduct.

Bureau of Long Term Care
Quality Assurance and Enforcement
Level B Review Triggers
Areas of Serious Concern

Resident Rights

- exercise of rights
- protection of resident funds
- privacy and confidentially

Resident Behavior and Facility Practice

- restraints
- abuse
- staff treatment of residents

Quality of Life

- dignity
- activities
- social services
- environment

Resident Assessment

- comprehensive assessment
- comprehensive care plans

Quality of Care

- activities of daily living
- vision and hearing
- pressure sores
- urinary incontinence
- range of motion
- psychological functioning
- naso-gastric tubes
- accidents
- nutrition
- hydration
- special needs
- drug therapy
- medication errors

Nursing Services

- registered nurse

Dietary Services

- menus and nutrition adequency
- food
- assistive devices
- sanitary conditions

Physician Services

- physician visits

Specialized Rehabilitativ Services

- provision of service

Dental Services

- skilled nursing facilit
- nursing facility

Pharmacy Services

- service consultation

Infection Control

- preventing spread of infection
- linens

Physical Environment

- space and equipment
- resident rooms
- resident call system
- other environmental conditions

Administration

- compliance of Federal, State and Local laws
- required training of nurse aides
- proficiency of nurse aides
- laboratory services
- disaster, emergency preparedness

STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Mark R. Chassin, M.D., M.P.P., M.P.H.
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Paula Wilson
Executive Deputy Commissioner

OFFICE OF HEALTH SYSTEMS MANAGEMENT
Raymond Sweeney
Director
Brian Hendricks
Executive Deputy Director

June 21, 1994

LETTER TO NURSING HOME RE: ENFORCEMENT ACTION

RE: October 14, 1993, recertification survey

Dear Mr.

You are hereby notified that on the above-referenced date Sylcox Nursing Home was found to be in violation of provisions of the New York State Medical Facilities Code.

Pursuant to Section 12 of the Public Health Law, the facility is liable for penalties of up to $2,000 per violation of Article 28 of the Public Health Law and the New York State Medical Facilities Code. The violations for which penalties are being sought fall under Quality of Life, and Quality of Care. A copy of the surveillance document, upon which a determination has been made that enforcement action was warranted, is being provided to you.

In addition, a Notice of Violations poster is being forwarded to the facility and must be posted in a prominent location within the facility so that residents, their relatives and friends, staff, visitors, volunteers and other interested parties may be informed of violations for which the Department of Health has initiated an enforcement referral. Upon request from these individuals, you must make available for review any statements of deficiencies or other written materials furnished to you by the Department in connection with this notice. The Notice of Violations poster must remain prominently posted in the facility until the enforcement action is completed (i.e., a Stipulation and Order is signed or an Order after hearing has been issued). Failure to follow this requirement constitutes a violation of 10 NYCRR, Section 413 related to the Consumer Information System.

Until this matter is resolved, the Department cannot make an affirmative statement as to the residential health care facility operator's character and competence as required by Section 2801-a(3) of the Public Health Law or current substantial compliance with all applicable codes, rules and regulations as required by Section 2802(3)(e) of the Public Health Law, as such pertains to any Certificate of Need application filed by the residential health care facility.

NURSING HOME COMMUNITY COALITION
OF NEW YORK STATE (NHCC)

Cynthia Rudder, Ph.D.
Director

Barbara Lynch, Administrative Assistant