2 Inspection Results

SUMMARY

Over the last inspection year, there has been a significant increase in the average number of deficiencies issued to nursing homes in Minnesota. In the most recent round of inspections, Minnesota Department of Health (MDH) inspectors issued an average of 9.7 deficiencies per nursing home, 57 percent more than in their prior inspections. Minnesota's rate of deficiencies exceeded the national average of 8.4 for the first time in recent years. Despite the increase, however, the number of deficiencies that resulted in resident harm or placed residents in immediate jeopardy decreased in Minnesota. Furthermore, few nursing homes appealed inspection results, and the majority of the deficiencies that were appealed were upheld. Federal regulations set forth for a range of sanctions for nursing homes that do not correct their deficiencies, and MDH generally gives them 40 days to do so before imposing sanctions. In federal fiscal years 2002 and 2003 combined, MDH denied Medicare and Medicaid payments for new admissions to 4 percent of Minnesota nursing homes with deficiencies and issued civil monetary penalties to 2 percent of them.

As discussed in Chapter 1, nursing home inspectors issue deficiencies for violations of federal regulations. Each deficiency's seriousness is defined by its scope (how many residents or staff are affected by or involved in the deficient practice) and severity (the amount of actual or potential discomfort or harm involved for residents). This chapter addresses the following questions:

- **How have the number, type, and distribution of deficiencies cited by nursing home inspectors changed over time, and how do these changes compare with national averages?**

- **How often have nursing homes in Minnesota been sanctioned for the deficiencies that they receive, and how does this compare with national averages?**

- **To what extent have nursing home providers appealed deficiencies that they have been issued, and what has been the result?**

To answer these questions, we examined state and federal laws, rules, regulations, and guidelines related to nursing home inspections. We obtained data from the Minnesota Department of Health (MDH) on deficiencies for each nursing home participating in the Medicare and Medicaid programs nationwide over the last several years.[1] We examined the national literature and reviewed data on Minnesota nursing home characteristics to determine what factors might explain why some nursing homes receive more deficiencies than others and why states differ in the number of deficiencies they issue. We also analyzed national enforcement data on sanctions against nursing homes in Minnesota and other states, and data from MDH on the extent to which Minnesota nursing homes appeal deficiencies and the outcomes of those appeals.

TRENDS IN NURSING HOME DEFICIENCIES

This section looks at the overall number of deficiencies that Minnesota inspectors issued to nursing homes over the last four inspections and compares those figures to national trends. We also examine the types of deficiencies issued and their scope and severity.

Deficiencies per Nursing Home

Inspection teams from MDH issue deficiencies when a nursing home does not meet a federal requirement.[2] Our review of the results of nursing homes' four most recent inspections revealed that:

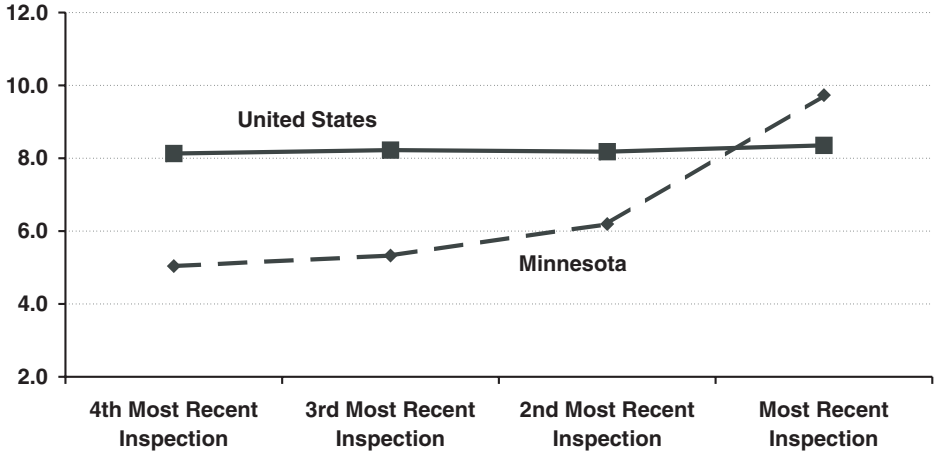
- **MDH inspectors issued significantly more deficiencies per nursing home in their most recent inspections than they issued in the three previous ones, putting Minnesota above the national average for the first time in recent years.**

As shown in Figure 2.1, Minnesota inspectors issued 9.7 deficiencies per nursing home in their most recent inspections—57 percent more than the 6.2 deficiencies they issued in nursing homes' previous inspections and nearly double the average of 5.1 deficiencies per nursing home that MDH inspectors issued in the fourth

1 The department downloaded data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System, which maintains records for the four most recent inspections. When the results from a new inspection are entered, the most recent inspection becomes the prior or second most recent inspection, and the results of the fourth most recent inspection are dropped from the database. As a result, the system is constantly in flux, making analysis specific to the point in time that data were downloaded. The data that we used were downloaded on May 24, 2004, and include inspections from October 1999 through March 2004. Deficiencies issued as a result of Office of Health Facility Complaints investigations are also included in the database.

2 A facility receives a deficiency for each regulation that it violates, regardless of how many times it violates that regulation. For example, a facility where one or two nurse assistants fail to wash their hands after contact with a resident and a facility where ten nurse assistants fail to do so will both receive one deficiency. However, a deficiency's scope will generally increase as the number of times a regulation is violated increases.

Figure 2.1: Average Number of Nursing Home Deficiencies, Four Most Recent Inspections, Minnesota and the United States



SOURCE: Office of the Legislative Auditor's analysis of data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System; accessed May 24, 2004.

In the most recent round of inspections, Minnesota issued 17 percent more deficiencies per facility than were issued nationwide.

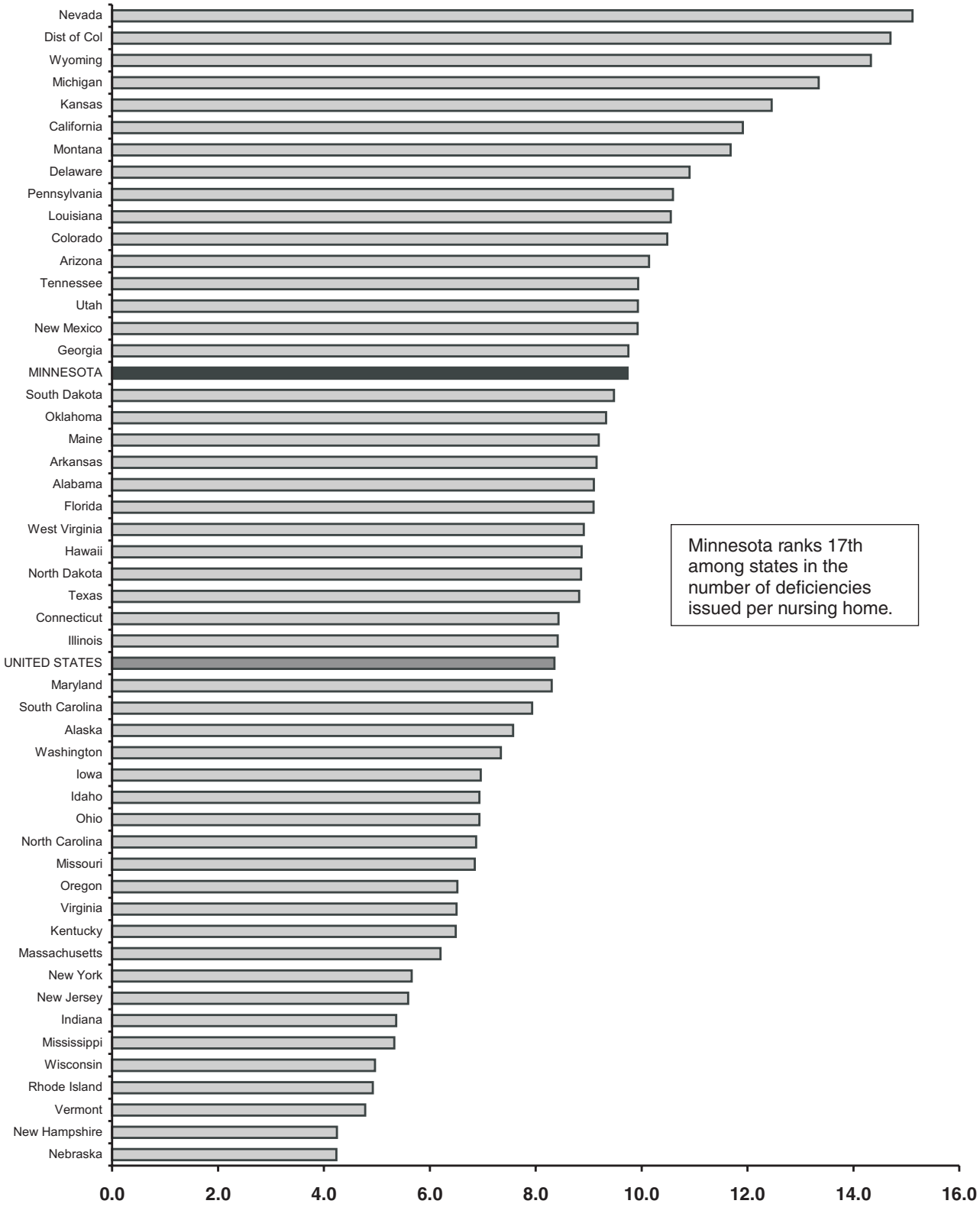
most recent inspections.[3] Furthermore, only 3 percent of Minnesota nursing homes had no deficiencies in their most recent inspections, compared with 11 percent in their prior round of inspections. Inspectors issued more than ten deficiencies to 40 percent of the nursing homes in the most recent inspections, compared with 19 percent in the prior inspections.

In contrast, the average number of deficiencies per facility nationwide increased only 3 percent over the four inspection periods, from 8.1 to 8.4 deficiencies per facility. As a result, Minnesota inspectors issued, on average, 17 percent more deficiencies per facility in the most recent round of inspections than were issued nationwide. In the three previous inspections, Minnesota inspectors issued from 24 to 38 percent fewer deficiencies than the national average.

As shown in Figure 2.2, states vary considerably in the number of deficiencies they issue, ranging from 4.2 deficiencies per nursing home in Nebraska and New Hampshire to 15.1 in Nevada. Minnesota ranked 17th among states in deficiencies issued per facility. Only two states, Maryland and Maine, had greater percentage increases in deficiencies per nursing home than Minnesota over their four most recent inspections.

3 In a recent report that recorded nursing home deficiencies as of December 9, 2004, MDH found that Minnesota nursing homes averaged 8.6 deficiencies per facility. This figure, though, excludes life safety deficiencies. The department contracts with the State Fire Marshall's Office to conduct this portion of the inspection. We found that, as of May 24, 2004, Minnesota averaged 8.8 deficiencies per nursing home, excluding life safety deficiencies. MDH also found that facilities inspected after April 1, 2004 had fewer deficiencies, on average, than those inspected earlier. Minnesota Department of Health, *Annual Quality Improvement Report on the Nursing Home Survey Process and Progress Reports on Other Legislatively Directed Activities* (St. Paul, December 15, 2004), 2-5.

Figure 2.2: Deficiencies per Nursing Home by State, Most Recent Inspection



SOURCE: Office of the Legislative Auditor's analysis of data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System; accessed May 24, 2004.

Minnesota ranked second among the six states in the Chicago region in deficiencies issued per facility.[4] Michigan inspectors issued the most deficiencies per facility (13.3) and Wisconsin the fewest (5.0). On average, the number of deficiencies per facility issued by inspectors in the Chicago region was the same in the most recent round of inspections as it was four inspections ago. Appendix A shows the number of deficiencies issued per facility for all 50 states and the District of Columbia over the four most recent inspections.

Nursing homes must comply with more than 270 standards at all times.

As noted in Chapter 1, facilities can receive deficiencies for failing to meet any of CMS's 274 nursing home standards. In the most recent round of inspections, Minnesota inspectors issued deficiencies to nursing homes for violating 176 of the 274 standards. Table 2.1 lists the ten most frequently issued deficiencies in Minnesota. Together, violations of these ten standards accounted for 38 percent of the deficiencies issued. Appendix B provides a more inclusive list of deficiencies issued to 20 or more nursing homes in their most recent inspections. It organizes deficiencies into categories, which we discuss next.

Table 2.1: Ten Most Frequently Issued Deficiencies to Minnesota Nursing Homes, Most Recent Inspections

Deficiency Description	Number of Deficiencies Issued	Percentage of Facilities With This Deficiency
Services must be provided by competent persons in accordance with the resident's care plan.	231	55%
Facilities must store, prepare, distribute, and serve food under sanitary conditions.	167	40
Facilities must provide a safe, functional, sanitary, and comfortable environment for residents, staff, and the public.	162	39
Each resident must receive care and services necessary to achieve the highest practicable physical, mental, and psychological well-being.	161	38
Care must be provided in a manner and environment that maintains or enhances each resident's dignity.	130	31
Facility must remain as free of accident hazards as is possible.	125	30
Incontinent residents must receive appropriate treatment and services.	121	29
Each resident's drug regimen must be free from unnecessary drugs.	121	29
Each resident must receive adequate supervision and assistance devices to prevent accidents.	120	29
Each resident must have a comprehensive care plan.	118	28

SOURCE: Office of the Legislative Auditor's analysis of data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System; accessed May 24, 2004.

4 The federal government divides the United States into ten regions. The Chicago region covers Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Categories of Deficiencies

As noted in Chapter 1, CMS organizes deficiencies into 16 categories. We combined some of the lesser used categories for our analysis, resulting in the 10 categories shown in Table 2.2. We found that:

- **MDH inspectors issue more quality of care deficiencies than any other category of deficiencies.**

Table 2.2: Categories of Deficiencies Issued to Minnesota Nursing Homes, Most Recent Inspections

Type of Deficiency	Total Deficiencies Issued	Percentage of All Deficiencies	Average Number of Deficiencies per Facility	Percentage of Facilities With This Type of Deficiency
Quality of Care	1,163	29%	2.8	82%
Resident Assessment	708	17	1.7	74
Safety	393	10	0.9	37
Resident Rights and Facility Practices	390	10	0.9	55
Quality of Life	372	9	0.9	52
Dietary Services	274	7	0.7	49
Physical Environment	265	6	0.6	47
Medical and Related Services	234	6	0.6	38
Infection Control	178	4	0.4	35
Administration	102	3	0.2	21
Total	4,079	100%	9.7	

SOURCE: Office of the Legislative Auditor's analysis of data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System; accessed May 24, 2004.

In recent reports, five out of six nursing homes were cited for not providing appropriate treatment and services to residents.

Twenty-nine percent of the 4,079 deficiencies that MDH inspectors issued to nursing homes in their most recent inspections were for quality of care violations. These violations involve failing to provide appropriate treatment and services to meet residents' needs, such as providing assistance with eating, walking, toileting, exercising, grooming, hygiene, and receiving medication; or failing to keep the nursing home environment free from hazards that could lead to accidents. For example, a resident who sits in a chair or lies in bed all day without being repositioned could develop a pressure sore that, in addition to being painful, could lead to infection. Likewise, failing to provide walking or range of motion exercises could result in a decline in a resident's physical mobility. Preventable accidents and medication errors could also result in resident discomfort or harm. On average, inspectors issued 2.8 quality of care deficiencies per Minnesota nursing home, an increase of 59 percent from their previous inspections. Nearly five out of every six nursing homes received at least one quality of care deficiency in their most recent inspections.

Seventeen percent of deficiencies issued to nursing homes in their most recent inspections were related to requirements to assess residents' needs when they enter the nursing home and periodically thereafter. Included in this category are

violations for failing to develop a care plan for each resident and to provide services in accordance with that care plan. Nearly three-fourths of Minnesota nursing homes received at least one resident assessment deficiency in their most recent inspections.

Life safety code violations and violations of resident rights and facility practices each made up 10 percent of the deficiencies that inspectors issued to nursing homes. As noted in Chapter 1, MDH contracts with the State Fire Marshall's Office to examine facility compliance with life safety regulations. Life safety violations typically involve fire hazards such as fire doors that do not close tightly, exit aisles that are blocked, and smoke barriers not up to code. Resident rights and facility practices include, among other things, the right to personal privacy, the right to obtain information, and the right to be free from abuse.

Quality of life deficiencies, which made up 9 percent of the deficiencies issued to nursing homes in their most recent inspections, are related to the physical comfort and psychological well being of residents. They include violations such as the failure to treat residents with dignity, accommodate reasonable resident preferences, have an ongoing activities program, and provide a safe and comfortable environment.

Nursing homes must provide services to residents in a dignified manner.

Physical environment violations accounted for 6 percent of deficiencies.

Physical environment deficiencies involve conditions such as scrapes and gouges in furniture, doors, and walls; excessive dirt, dust, and debris; and unlocked closets or storerooms that could pose a danger to residents who enter. Many providers have criticized inspectors for issuing deficiencies for scratches on furniture or dust on radiators, conditions they argue are common to many private residences. Regardless of the merits of those criticisms, physical environment deficiencies only accounted for 6 percent of the deficiencies issued in nursing homes' most recent inspections.

Infection control deficiencies, while only 4 percent of deficiencies issued in the most recent inspections, increased 154 percent from the previous inspections and 205 percent over the four-inspection period, the greatest percentage increase of any type of deficiency. The failure of staff to wash their hands after direct contact with residents is the most common deficiency in this category.

Other deficiency categories are dietary services, medical and related services (including physician, nursing, pharmacy, dental, and rehabilitation services), and administration. Appendix C shows the number of deficiencies per Minnesota nursing home for each deficiency category for the four most recent inspection periods.

Seriousness of Deficiencies

Although there has been a dramatic increase in the number of deficiencies issued per nursing home:

- **Most of the deficiencies that MDH inspectors issued were for isolated occurrences that did not involve actual harm or immediate jeopardy to nursing home residents.**

As discussed in Chapter 1, inspection teams assign each deficiency a letter code (A through L) depending on its scope and severity. As shown in Table 2.3, 56 percent of deficiencies issued by MDH inspectors were level "D" deficiencies—isolated occurrences that resulted in no more than minimal discomfort to residents or had the potential for resident harm. Another 27 percent

Table 2.3: Number of Deficiencies in Minnesota Nursing Homes by Scope and Severity, Four Most Recent Inspections

	Fourth Most Recent Inspection		Third Most Recent Inspection		Second Most Recent Inspection		Most Recent Inspection		Percentage
Scope and Severity	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage	Change[a]
B	94	4.5%	111	5.0%	110	4.2%	184	4.5%	96%
C	160	7.6	161	7.3	140	5.4	193	4.7	21
D	1,020	48.3	1,166	52.6	1,384	53.4	2,296	56.3	125
E	469	22.2	495	22.3	593	22.9	1,119	27.4	139
F	133	6.3	92	4.1	126	4.9	180	4.4	35
G	206	9.8	167	7.5	192	7.4	93	2.3	-55
H	11	0.5	8	0.4	14	0.5	2	0.0	-82
I	0	0.0	0	0.0	0	0.0	0	0.0	0
J	14	0.7	15	0.7	31	1.2	8	0.2	-43
K	2	0.1	2	0.1	2	0.1	3	0.1	50
L	2	0.1	1	0.0	1	0.0	1	0.0	-50
Total	2,111	100.0%	2,218	100.0%	2,593	100.0%	4,079	100.0%	93%
G or Higher	235	11.1	193	8.7	240	9.3	107	2.6	-54
Substandard Care[b]	19	0.9	19	0.9	26	1.0	11	0.3	-42
Immediate Jeopardy[c]	18	0.9	18	0.8	34	1.3	12	0.3	-33

NOTE: Level "A" deficiencies are not entered into the federal government's database. We estimated that they make up a very small percentage of total deficiencies in Minnesota. In our review of a random sample of 100 inspection reports, we found 16 level "A" deficiencies, about 1.6 percent of the deficiencies issued to those facilities.

[a]Percentage change from the fourth most recent inspection to the most recent inspection.

[b]A quality of life, quality of care, or resident behavior and facility practices deficiency issued at level "F" or "H" or higher is considered to be substandard care.

[c]An Immediate jeopardy deficiency has a scope and severity level of "J" or higher.

SOURCE: Office of the Legislative Auditor's analysis of data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System; accessed May 24, 2004.

were level "E" deficiencies—a pattern (rather than an isolated occurrence) of such violations. Only 2.6 percent of deficiencies involved actual harm or immediate jeopardy to residents (level "G" or higher).

The data in Table 2.3 also show that the total number of deficiencies increased 93 percent over the last four inspection periods. However:

- **The total number of deficiencies increased because of increases in "less serious" deficiencies.**

Over the past four inspections, the number of level "D" deficiencies increased 125 percent and the number of level "E" deficiencies increased 139 percent. In contrast, the number of deficiencies at level "G" or higher (actual harm or immediate jeopardy) declined 54 percent. In the most recent inspection, 15 percent of facilities had at least one deficiency at level "G" or higher compared with 21 percent of facilities in the prior inspections and 23 percent three inspections ago.

Although total deficiencies have increased, inspectors are issuing fewer "serious" deficiencies.

According to CMS, a facility is providing substandard care if it has one or more quality of care, quality of life, or facility practices and resident behavior deficiencies at level "F" or "H" or higher. As shown in Table 2.3, substandard care deficiencies declined 58 percent, from a total of 26 substandard deficiencies in the prior inspections to 11 in the most recent inspections. The total number of immediate jeopardy deficiencies (level "J" or higher) declined 65 percent, from 34 to 12.

Nationwide, inspectors issued level "G" or higher deficiencies to 16 percent of the nursing homes inspected, compared with 15 percent for Minnesota nursing homes. Inspectors issued immediate jeopardy deficiencies to 2.2 percent of the facilities nationwide compared with 2.1 percent of Minnesota facilities; 3.2 percent of facilities nationwide had at least one substandard care deficiency compared with 2.1 percent of Minnesota facilities. For the Chicago region, 16 percent of nursing homes had at least one deficiency at level "G" or higher, 1.9 percent had an immediate jeopardy deficiency, and 2.5 percent had a substandard deficiency. Appendix D presents several indicators of the number and seriousness of nursing home deficiencies for each state and federal region.

Factors Relating to Nursing Home Deficiencies

In theory, the number of deficiencies that inspectors issue to nursing homes might be influenced by: (1) nursing homes characteristics, such as the number of residents living there, the staff to resident ratio, and the amount of care required by residents; (2) management practices, such as employee training and supervision and spending on facility upkeep and maintenance; and (3) inspection practices, such as inspector decisions about issuing deficiencies, state policies, and the number of hours spent observing resident care. In this section, we briefly consider the relationship between nursing home characteristics and the number of deficiencies they receive.

In general, national studies and our own analysis suggest that:

- **Nursing home characteristics, for the most part, do not explain why inspectors issue more deficiencies to some nursing homes than to others.**

Researchers have found statistically significant but weak relationships between nursing home characteristics, such as the number of residents and the proportion of residents receiving Medicaid, and the number of deficiencies that facilities receive. However, these relationships explain only a small portion of the variance in deficiencies.[5]

We examined facility characteristics in three ways: size (average number of residents per day), staffing (number of nursing and total staff per resident), and case mix (residents' need for services). Table 2.4 shows the average number of deficiencies issued to Minnesota nursing homes that are high, medium, and low

Table 2.4: Minnesota Nursing Home Characteristics and Number of Deficiencies, Most Recent Inspections

Nursing Home Characteristic	N	Average Number of Deficiencies	Correlation
Size			
Small	140	7.9	
Medium	141	9.4	r = .22; significant at p = .01.
Large	139	11.9	
RNs and LPNs per Resident			
Low	140	9.5	
Medium	140	9.8	r = -.07; not significant.
High	140	9.9	
Nursing Staff per Resident[a]			
Low	140	9.7	
Medium	140	9.9	r = -.04; not significant.
High	140	9.6	
Total Staff per Resident			
Low	140	10.1	
Medium	140	10.3	r = -.10, significant at p = .05.
High	140	8.8	
Resident Case Mix[b]			
Low	130	9.9	
Medium	130	9.1	r = ,09; not significant.
High	131	10.5	

[a]Includes nurse administrators, registered nurses, licensed practical nurses, certified nurse aides, nurse aides in training, and medication aides.

[b]The higher the case mix score, the more services the residents required. We were only able to obtain case mix data for 391 facilities (93 percent).

SOURCE: Office of the Legislative Auditor's analysis of data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System; accessed May 24, 2004; and Minnesota Department of Human Services case mix data for federal fiscal year 2003.

5 Harrington, Charlene, Zimmerman, David, Karon, Sarita L, Robinson, James, and Beutel, Patricia, "Nursing Home Staffing and its Relationship to Deficiencies," *Journal of Gerontology* (2000), 55 (5), S278-S287; and Minnesota Department of Health, *Survey Findings Review Subcommittee Final Report* (St. Paul, July 2004), 7.

on each characteristic as well as the correlation between the characteristic and the number of deficiencies issued.

As shown in Table 2.4, we found a positive relationship between the average number of residents in a nursing home and the number of deficiencies that a facility receives. Nursing homes with many residents averaged four more deficiencies in their most recent inspections than nursing homes with few residents. One possible explanation is that larger facilities are more difficult to manage and more things can go wrong. They care for more residents, they need to train and manage more staff, and they maintain more square footage. In addition, MDH allocates more staff hours to larger facilities. It seems plausible that with more observations, more interviews of residents, and more records reviewed, the likelihood of observing errors giving care or doing paperwork might increase.

We did not find a strong relationship between nursing home characteristics and the number of deficiencies they receive.

We did not find a significant relationship between the number of nursing staff per resident and deficiencies.[6] We did find a small relationship between total staff per resident and deficiencies.[7] Facilities in the high staff per resident group had 1.5 fewer deficiencies than nursing homes in the low or medium groups. But when we controlled for facility size, the correlation between total staff per resident and deficiencies was not statistically significant.

Nursing home residents differ in their physical and mental capabilities and some residents need more assistance and care than others. It is possible that homes with a high proportion of "needy" residents find it more difficult to meet all of their residents' needs in a timely manner, thereby incurring more deficiencies. We looked at the relationship between deficiencies and residents' needs using case mix data compiled by the Minnesota Department of Human Services.[8] As shown in Table 2.4, facilities whose residents have the highest need for services received slightly more deficiencies, on average, than other facilities, but facilities whose residents have the least need for services averaged slightly more deficiencies than facilities whose residents had a medium level of need. Overall, we did not find a statistically significant relationship between resident case mix and deficiencies.

The absence of strong relationship between facility characteristics and deficiencies suggests that Minnesota nursing homes' above average rate of deficiencies compared with other states is not due to differences in nursing home

6 Nursing staff includes nurse administrators, registered nurses, licensed practical nurses, certified nurse aides, nurse aides in training, and medication aides.

7 Total staff includes nursing staff and administrators, physicians, dentists, podiatrists, pharmacists, dieticians, food service workers, occupational therapists, physical therapists, recreational therapists, activities staff, speech pathologists, social workers, mental health professionals, housekeeping staff, and others.

8 The term "case mix" refers to the average need for services of a facility's residents. All nursing home residents are periodically assessed on a scale that measures their need for assistance with various activities, including eating, ambulating, and toileting, and whether they suffer from a variety of conditions, such as incontinence, pressure sores, dementia, or depression. Each item is weighted based on the average number of minutes required to provide the needed services. A facility's case mix is calculated by averaging the scores of its residents. The Department of Human Services uses the case mix scores as one component in determining nursing home reimbursement rates for Medicare and Medicaid. We used case mix data for the federal fiscal year ending September 30, 2003. Fifty-nine percent of nursing homes' most recent inspections as of May 24, 2004 occurred during this period. We also looked at the relationship between case mix and deficiencies for the second most recent inspections and found similar results to those reported in Table 2.4.

size, staffing, or resident characteristics. Moreover, even if there were stronger relationships, the characteristics of Minnesota nursing homes would not explain why Minnesota facilities received more deficiencies, on average, than the nation as a whole. Nursing homes in Minnesota were smaller than nursing homes nationwide, averaging 83.4 residents per facility in calendar year 2003 compared with 88.9 for the nation as a whole.[9] Minnesota nursing homes, on average, had the same number of nursing staff (registered nurses, licensed practical nurses, and nurse assistants) per resident as nursing homes nationwide.[10] In addition, Minnesota nursing home residents appear to have slightly less need for services than nursing home residents nationwide. On a measure similar to DHS' case mix score, Minnesota nursing home residents had an average score of 95.7 in calendar year 2003 compared with an average score of 103.7 nationwide, indicating less need for services in Minnesota facilities[11] Finally, nursing home size, staffing, and case mix in Minnesota has not changed appreciably in the last few years. Thus, the sharp increase in deficiencies issued in the most recent round of inspections is most likely due to factors other than nursing home characteristics.

SANCTIONS

As discussed in Chapter 1, federal regulations provide for a range of sanctions that MDH must impose when nursing homes have deficiencies at level "D" or above.[12] Depending on the seriousness of a nursing home's deficiencies, sanctions may be relatively mild, such as state monitoring of facilities, or more severe, such as denial of Medicare and Medicaid payments for new admissions. In addition, MDH may impose civil monetary penalties of up to $10,000 per day or $10,000 per deficiency.[13] Most sanctions, however, do not become effective immediately upon imposition and, depending on the circumstances, facilities are usually able correct deficiencies before sanctions go into effect.

Nursing homes can generally avoid sanctions if they correct deficiencies within 40 days.

For most deficiencies, nursing homes can generally avoid imposition of a sanction if they correct their deficiencies and return to substantial compliance within a time frame specified by MDH, usually 40 days from the completion of the inspection.[14] The department must impose sanctions immediately if inspectors issue an immediate jeopardy deficiency or if a facility receives one or more deficiencies at level "G" or higher in two consecutive inspections.[15] However,

9 Harrington, Charlene, Carrillo, Helen, and Crawford, Cassandra, *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1997 Through 2003* (San Francisco: University of California San Francisco Department of Behavioral Sciences, August 2004), 8, 14.

10 *Ibid*., 66.

11 *Ibid*., 36.

12 For some types of deficiencies, such as room size or staffing levels, nursing homes can request a waiver from MDH that allows them to be out of compliance without incurring a sanction. Centers for Medicare and Medicaid Services, *State Operations Manual* (Washington, DC, May 21, 2004), ch. 7, sec. 7014.

13 Penalties must be reduced 35 percent if a facility waives its right to appeal a deficiency. *42 CFR* sec. 488.436 (b).

14 Nursing homes may request a waiver extending the amount of time they have to comply with certain types of deficiencies.

15 CMS, *State Operations Manual*, ch. 7, sec. 7301A and 7304B1.

except for civil monetary penalties, MDH must generally give a nursing home at least 15 days notice before the "imposed" sanction goes into effect; MDH must give 2 days' notice for immediate jeopardy deficiencies.[16] Nursing homes can sometimes correct deficiencies immediately. For example, a home would normally repair a malfunctioning call button system the same day it is brought to the facility's attention or well before the sanction becomes consequential. If a nursing home does not achieve compliance within three months of an inspection, MDH must deny Medicare and Medicaid payments for new admissions to the facility. If a facility fails to comply within six months, it must be terminated from the Medicare and Medicaid programs.[17]

Taken together, the federal regulations result in a system in which:

- **Most deficiencies do not result in sanctions because nursing homes have the opportunity to correct deficiencies before sanctions take effect.**

As shown in Table 2.5, MDH imposed sanctions that became effective on 14 percent of the nursing homes with deficiencies in calendar years 2002 and 2003. In comparison, 15 percent of nursing homes in nearby states (those bordering Minnesota or in the Chicago region) and about 10 percent nationwide experienced sanctions. Most of Minnesota's sanctions involved state monitoring, where a state employee or contractor oversees the nursing home's correction of deficiencies. MDH routinely informs all facilities receiving deficiencies that state

Table 2.5: Sanctions Received by Nursing Homes in Minnesota and Nearby States, CY 2002 and 2003 Combined

State	Inspections Resulting in Deficiencies	Sanctions Put Into Effect		State Monitoring		Denial of Payment for New Admissions		Civil Monetary Penalty	
		Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Minnesota	**795**	**114**	**14%**	**113**	**14%**	**30**	**4%**	**14**	**2%**
Illinois	2,118	444	21	0	0	265	13	364	17
Indiana	1,667	240	14	0	0	141	8	208	12
Iowa	835	40	5	0	0	23	3	32	4
Michigan	1,396	347	25	35	3	129	9	254	18
North Dakota	268	5	2	0	0	0	0	0	0
Ohio	2,422	326	13	0	0	22	1	315	13
South Dakota	216	38	18	14	6	4	2	0	0
Wisconsin	938	75	8	0	0	13	1	73	8
Nearby States	9,860	1,515	15	31	0	583	6	1,243	13
U.S.	34,817	3,498	10	200	1	1,113	3	2,573	7

NOTE: This table excludes sanctions that were imposed but did not go into effect because facilities corrected the deficiencies before the effective date of the sanction.

SOURCE: Office of the Legislative Auditor's analysis of data from the Centers for Medicare and Medicaid Services' Online Survey and Certification Reporting System; accessed April 28, 2004.

16 CMS, *State Operations Manual*, ch. 7, sec. 7305B3.

17 New deficiencies cited in follow-up inspections must also be corrected within the original three and six month deadlines.

monitoring will be imposed if a deficiency is not corrected by a specified date. Other nearby states do not make extensive use of state monitoring as an enforcement tool.[18]

Few nursing homes paid fines or had their Medicare and Medicaid payments withheld due to noncompliance.

Two sanctions have direct monetary consequences for nursing homes: civil monetary penalties and denial of reimbursement for new Medicare and Medicaid residents.[19] For 2002 and 2003 combined, 4 percent of Minnesota nursing homes with deficiencies were denied reimbursement for new Medicare and Medicaid residents and 2 percent paid civil monetary penalties. Amounts collected ranged from $650 to $41,020, with a median penalty of $8,395. Eleven Minnesota facilities paid civil monetary penalties in 2002, but only 3 facilities paid them in 2003.

As shown in Table 2.5, Minnesota was less likely to deny Medicare and Medicaid reimbursements for new admissions and it issued fewer civil monetary penalties than did nearby states. On average, nearby states denied Medicare and Medicaid payments for new residents to 6 percent of their nursing homes with deficiencies and they imposed civil monetary penalty on 13 percent of their facilities.

APPEALS

Federal regulations require that states have an "informal" method for facilities to dispute deficiencies.[20] Except for immediate jeopardy or substandard quality of care deficiencies, facilities may not appeal the scope and severity of a deficiency.[21] In Minnesota, facilities can choose one of two informal methods. Under "informal dispute resolution," an MDH supervisor or manager from a district other than the one that conducted the inspection hears the appeal and makes a recommendation to the Commissioner of Health.[22] Under "independent informal dispute resolution," an administrative law judge from the Office of Administrative Hearings conducts the hearing. Both sides have the right to present evidence and be represented by counsel. The law judge must issue findings on each contested deficiency within ten days of the close of the hearing. MDH reimburses the Office of Administrative Hearings for the cost of hearings, but nursing homes must reimburse the department for the proportion of costs corresponding to the proportion of contested deficiencies that are upheld. The Commissioner of Health may reject or modify the law judge's recommendation.[23] While CMS holds states accountable for decisions made through both informal

Minnesota nursing homes can appeal inspection results through one of two informal mechanisms.

18 Some states impose sanctions that Minnesota does not use. For example, 15 percent of South Dakota facilities with deficiencies and 12 percent of Illinois' facilities were directed to attend in-service training. Michigan imposed directed plans of correction on 4 percent of its facilities with deficiencies.

19 Other sanctions that have significant financial impacts, such as termination from the Medicare and Medicaid programs or facility closure, are rarely imposed by any state.

20 CMS allows facilities to appeal findings of noncompliance that result in sanctions other than state monitoring directly to the U.S. Department of Health and Human Services. CMS, *State Operations Manual*, ch. 7, sec. 7303.

21 CMS, *State Operations Manual*, ch. 7, sec. 7212A, 7212C (2).

22 *Minn. Stat.* (2004), §144A.10, subd. 15.

23 *Minn. Stat.* (2004), §144A.10, subd. 16.

dispute resolution mechanisms, the agency retains the right to reject state decisions and make its own binding determinations.[24]

Despite the significant increase in the number of deficiencies issued:

- **Minnesota nursing homes appealed very few deficiencies in the last two years, and the majority of their appeals were not successful.**

In federal fiscal years 2003 and 2004 combined, 68 nursing homes appealed 141 deficiencies through informal dispute resolution with MDH.[25] This represents about 2 percent of all deficiencies issued. As shown in Table 2.6, MDH rescinded 22 of the 141 deficiencies (16 percent) that were appealed and reduced the scope and severity of 9 others (6 percent).[26] The remaining 110 deficiencies (78 percent) were upheld, although a few of them were slightly modified, such as eliminating or restating one of several findings that supported the deficiency.

Although the 2003 Legislature required that the administrative law judge option become effective on July 1, 2003, MDH did not implement the process until July 2004.[27] As of December 2004, 34 nursing homes had requested administrative hearings regarding 141 deficiencies. Fourteen facilities subsequently withdrew their appeals and MDH rescinded two other facilities' deficiencies before the hearing occurred. Of the remaining appeals, 7 are pending and 12 have been decided. Those 12 originally covered 73 deficiencies but facilities later withdrew 35 deficiencies from their appeals. Table 2.6 shows that,

Table 2.6: Nursing Home Appeals of Deficiencies

	Number	Percentage
Appeals Heard by the Minnesota Department of Health		
Deficiencies rescinded	22	16%
Deficiencies upheld with no change in scope or severity	110	78
Deficiencies upheld but scope and severity reduced	9	6
Total	141	100%
Appeals Heard by an Administrative Law Judge		
Deficiencies rescinded	6	16%
Deficiencies upheld with no change in scope or severity	16	42
Deficiencies upheld but scope and severity reduced	16	42
Total	38	100%

NOTE: This table reflects appeals heard by the Minnesota Department of Health in federal fiscal years 2003 and 2004 and appeals heard by administrative law judges between July 2004 and December 2004.

SOURCE: Minnesota Department of Health, Informal Dispute Resolution Tracking Log, federal fiscal years 2003 and 2004.

24 CMS, *State Operations Manual,* ch. 7, sec. 7212C (3). To date, CMS has not reversed any appeal decisions made by MDH.

25 This excludes three requests that were subsequently withdrawn.

26 Six of the nine were reduced from level "G" to level "D".

27 *Laws of Minnesota* (1Sp2003), ch. 14, art. 2, sec. 10; and MDH, *Annual Quality Improvement Report*, 10.

of the 38 remaining deficiencies, administrative law judges upheld 16 deficiencies (42 percent), reduced the severity and scope of 16 (42 percent), and rescinded 6 (16 percent).

According to some providers, both informal dispute resolution mechanisms are biased against them because the Commissioner of Health, whose agency issued the deficiencies in the first place, makes the final decision. Moreover, some nursing home administrators were concerned that the Commissioner of Health recently overruled a law judge in one appeal in support of the inspectors' decision. In that case, however, the Commissioner modified but did not entirely reject the law judge's decision. So far, the Commissioner has not overturned other administrative law judge decisions.