No. 20-1664

In the United States Court of Appeals for the Seventh Circuit

GORGI TALEVSKI, by next friend IVANKA TALEVSKI,

Plaintiff-Appellant,

v.

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana
No. 2:19-cv-00013 (Hon. James T. Moody)

BRIEF OF APPELLANT

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**Admitted outside the District of Columbia; practicing law in D.C. under the supervision of Firm principals who are D.C. Bar members.*

Counsel for Gorgi Talevski

July 31, 2020

Clear Form

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1664

Short Caption: Talevski v. Health and Hospital Corporation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Gorgi Talevski

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Arnold & Porter Kaye Scholer LLP; Jay Meisenhelder Employment & Civil Rights Legal Services, PC

Susie Talevski (no law firm affiliation)

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Signature: Andrew Tutt Date: May 6, 2020

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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n/a

Attorney's Signature: R. Stanton Jones Date: 7/29/20

Attorney's Printed Name: R. Stanton Jones

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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n/a

Attorney's Signature: Stephen K. Wirth Date: 7/29/20

Attorney's Printed Name: Stephen K. Wirth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: Nora G. Ellingsen Date: 7/29/20

Attorney's Printed Name: Nora G. Ellingsen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Gorgi Talevski, Ivana Talevski (next friend)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jay Meisenhelder Employment & Civil Rights Legal Services, P.C.

Arnold & Porter Kaye Scholar, LLP

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: s/ Jay Meisenhelder Date: 05/08/2020

Attorney's Printed Name: Jay Meisenhelder

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Gorgi Talevski

Ivanka Talevski

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Susie Talevski Date: May 7, 2020

Attorney's Printed Name: Susie Talevski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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JURISDICTIONAL STATEMENT

Plaintiff-appellant sued Defendants-appellees under 42 U.S.C. § 1983 to enforce federal rights created by 42 U.S.C. § 1396r. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, and also because this is a case "[t]o recover damages … under [an] Act of Congress providing for the protection of civil rights," 28 U.S.C. § 1343(a)(4). Defendant-appellant the Health and Hospital Corporation of Marion County is a municipal corporation, incorporated and with its principal place of business in Indiana. A13. The district court entered final judgment on March 26, 2020. A1-8. Plaintiff-appellant timely filed a notice of appeal on April 22, 2020. A22. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether 42 U.S.C. § 1396r(c) creates federal rights enforceable pursuant to 42 U.S.C. § 1983, as the Third and Ninth Circuits have held, including "[t]he right to be free from … any … chemical restraints imposed for purposes of discipline or convenience" and the right not to be involuntarily "transfer[red] or discharge[d]" from a nursing facility except in limited circumstances not applicable here.

INTRODUCTION

Section 1983 creates a private cause of action against any person who, under color of state law, deprives another "of any rights … secured by the … laws" of the United States. 42 U.S.C. § 1983. The Federal Nursing Home Reform Act's (FNHRA's) "Residents' Bill of Rights" provides nursing home residents with an array of "rights," among them, "[t]he right to be free from … any … chemical restraints imposed for purposes of discipline or convenience" and the "right[]" not to be involuntarily

"transfer[red] or discharge[d]." 42 U.S.C. § 1396r(c). In light of those two statutes' clear textual mandates, the only two federal courts of appeals to address the question have held that these words do exactly what they say they do: provide nursing home patients a cause of action for damages when a nursing home resident is chemically restrained or involuntarily transferred or discharged in violation of the FNHRA. *See Anderson v. Ghaly*, 930 F.3d 1066, 1081 (9th Cir. 2019); *Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 523–25, 532 (3d Cir. 2009).

The Plaintiff-appellant in this case, Gorgi Talevski, has dementia. Unable to care for him at home, his family entrusted his care to a nearby nursing home, Defendant Valparaiso Care and Rehabilitation, owned and operated by Defendants the Health and Hospital Corporation of Marion County and American Senior Communities, LLC.[1] While in their care, he suffered severe abuse. Defendants failed to provide Mr. Talevski with adequate medical care and administered powerful and medically unnecessary drugs to restrain him for purposes of discipline or convenience. Later, without his family's knowledge or his guardian's consent, Defendants involuntarily discharged him from the facility (an action a state administrative judge later determined was unlawful). His family was forced to place him in a nursing home in Bremen, Indiana, 90 minutes away. When Defendants unlawfully discharged Mr. Talevski, they sent him away without his dentures. As a consequence Mr. Talevski's gums receded. The staff at the new nursing home in Bremen were unable to fit new dentures because his gums had receded too far.

[1] According to Defendants-appellees, Valparaiso Care and Rehabilitation is merely an assumed business name under which the Health and Hospital Corporation of Marion County does business. That issue is immaterial here.

Mr. Talevski's next friend and guardian, his wife, Ivanka Talevski, sued Defendants on his behalf under 42 U.S.C. § 1983 to enforce the rights guaranteed him under the FNHRA. But notwithstanding the FNHRA's and § 1983's clear text, and the two decisions by courts of appeals holding that those rights are enforceable in actions under § 1983, the district court in this case dismissed Mr. Talevski's lawsuit. Disregarding the words of the relevant FNHRA provisions and the reasoning of those courts of appeals, the district court held "that the FNHRA does not confer federal rights and, accordingly, cannot support a cause of action under Section 1983." *Talevski ex rel. Talevski v. Health & Hosp. Corp. of Marion Cnty.*, No. 2:19 CV 13, 2020 WL 1472132, at *4 (N.D. Ind. Mar. 26, 2020).

That was error. The text of the statute is unmistakable: the FNHRA confers federal "rights"—explicitly using the word "right" to describe the protection it confers—on nursing home residents. By its plain text, and under the three-part test from *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997), the FNHRA confers enforceable federal rights against state-run nursing homes under § 1983. The Court should reverse the decision below and permit this case to proceed to discovery, a step that will focus the claims and narrow the issues.

STATUTES AND REGULATIONS

Pertinent authorities are reproduced in the appendix at A24–30.

STATEMENT OF THE CASE

I. Legal Background

A. Medicaid, the Federal Nursing Home Reform Amendments (FNHRA), and the Nursing Home "Residents' Bill of Rights"

The federal Medicaid program, 42 U.S.C. § 1396 *et seq.*, is a cooperative federal–state program under which the federal government provides funding to state programs that provide medical assistance to individuals "whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. Among those services is treatment at "nursing facilit[ies]," also known as nursing homes or long-term care facilities. *See id.* § 1396d(a). To participate in the Medicaid Act, a state must comply with the Act and with Centers for Medicare and Medicaid Services (CMS) regulations. *See Bontrager v. Ind. Fam. & Soc. Servs. Admin.*, 697 F.3d 604, 606 (7th Cir. 2012). If a state fails to comply substantially with the requirements of the Medicaid Act, the Secretary of Health and Human Services may (in his or her discretion) withhold federal funding in part or in full. *See* 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35.

In 1985, the Health Care Financing Administration (now CMS) of the U.S. Department of Health and Human Services commissioned the Institute of Medicine (IOM) to conduct a study of nursing home care and to recommend ways to improve nursing home regulation. H.R. Rep. No. 100-391, pt. 1, at 452 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-272. The study found a broad consensus that government regulation, as it then functioned, was not satisfactory because it allowed too many marginal or substandard nursing homes to continue in operation and the quality of care in many homes left much to be desired. *Id.* The IOM report and recommendations formed the

basis for federal legislation—the FNHRA in the Omnibus Budget Reconciliation Act of 1987, codified at 42 U.S.C. §§ 1395i-3, 1396r—which greatly strengthened nursing homes residents' rights. *Id.*

Among other things, the FNHRA included a "Residents' Bill of Rights," H.R. Rep. No. 100–391, pt. 1, at 452 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313–272, establishing new "rights" for nursing home residents because Congress was "deeply troubled that the Federal Government, through the Medicaid program, continue[d] to pay nursing facilities for providing poor quality care to vulnerable elderly and disabled beneficiaries." *Grammer*, 570 F.3d at 523 (quoting H.R. Rep. No. 100-391, pt. 1, at 452 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-272). These rights were to be "strictly observed and vigorously enforced." H.R. Rep. No. 100–391 at 458, *reprinted in* 1987 U.S.C.C.A.N. 2313-278. In fact, the FNHRA created two bills of rights, one for any facility that accepts Medicare reimbursement, 42 U.S.C. § 1395i-3(c), and one for any facility that accepts Medicaid, *id.* § 1396r(c). The relevant provisions are substantively the same in both statutes. *Id.* §§ 1395i-3(c), 1396r(c).

The FNHRA's Residents' Bill of Rights requires nursing homes to recognize, among other rights, patients' rights to choose their personal nursing aides, 42 U.S.C. § 1396r(c)(1)(A)(i); be free from "physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience," *id.* § 1396r(c)(1)(A)(ii); maintain privacy and confidentiality of medical records, *id.* § 1396r(c)(1)(A)(iii)–(iv); have their needs accommodated, *id.* § 1396r(c)(1)(A)(v); and object to certain transfers within the nursing home, *id.*

§ 1396r(c)(1)(A)(x). Nursing home patients also have the right to be notified in writing of these rights under the FNHRA. *Id.* § 1396r(c)(1)(B). The Act further provides a right against discharge or transfer from a patient's current facility to another except under a few specified circumstances. *Id.* § 1396r(c)(2)(A).

1. The FNHRA's Right to Be "Free from Restraint"

Of particular relevance in this case, the FNHRA creates a right to be "free from restraints," including a right to be "free from … chemical restraints." 42 U.S.C. § 1396r(c). Specifically, under the heading "(c) Requirements relating to residents' rights" and the subheading "(1) General rights," the FNHRA states:

> **(A) Specified rights**
>
> A nursing facility must protect and promote the rights of each resident, including each of the following rights:
>
> **[…]**
>
> **(ii) Free from restraints**
>
> The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms. Restraints may only be imposed—
>
> (I) to ensure the physical safety of the resident or other residents, and
>
> (II) only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained).

42 U.S.C. § 1395r(c)(1)(A)(ii).

2. The FNHRA's Right Against Involuntary "Transfer or Discharge"

The FNHRA also creates a right against involuntary "transfer or discharge." Specifically, under the heading "(c) Requirements relating to residents' rights" and the subheading "(2) Transfer and discharge rights," the FNHRA states that "[a] nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless" certain specified circumstances exist that would permit the transfer or discharge. 42 U.S.C. § 1396r(c)(2)(A).

If a nursing home does seek to transfer or discharge a resident, it must first provide notice to the resident. *Id.* § 1396r(c)(2)(B). That notice must, among other required information, inform the resident of her "right to appeal the transfer or discharge under the State process established under subsection (e)(3) of this section." *Id.* § 1396r(c)(2)(B)(iii)(I).

Subsection (e)(3), in turn, sets forth specific requirements for the state-established appeals process:

> The State, for transfers and discharges from nursing facilities effected on or after October 1, 1989, must provide for a fair mechanism, meeting the guidelines established under subsection (f)(3) of this section, for hearing appeals on transfers and discharges of residents of such facilities; but the failure of the Secretary to establish such guidelines under such subsection shall not relieve any State of its responsibility under this paragraph.

Id. § 1396r(e)(3). The phrase "guidelines established under subsection (f)(3)" refers to another FNHRA provision instructing the Secretary of Health and Human Services to "establish guidelines for minimum standards which State appeals processes under subsection (e)(3) ... must meet." *Id.* § 1396r(f)(3). In accordance with that instruction, CMS has promulgated a series of regulations further elaborating the requirements for the

state-established appeals process. *See* 42 C.F.R. §§ 431.200–.246. Those regulations provide that the state "must grant an opportunity for a hearing to ... [a]ny resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged." *Id.* § 431.220(a)(2). The regulations also set forth procedural requirements for the hearing itself. *See id.* §§ 431.240–.243. And, ultimately, if "[t]he hearing decision is favorable to the applicant or beneficiary," the regulations provide that the state "must ..., if appropriate, provide for admission or readmission of an individual to a facility." *Id.* § 431.246.

B. The FNHRA's Inadequate Public Enforcement Mechanisms

Before Congress enacted the FNHRA, only limited sanctions were available against nursing homes failing to comply with federal participation requirements. The Secretary of Health and Human Services (HHS) or the States could decertify the facility and terminate the facility's eligibility for receiving Medicaid reimbursements. H.R. Rep. No. 100–391, pt. 1, at 470 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313–290. Or, under circumstances where non-compliance did not pose an immediate and serious threat to the health and safety of nursing home residents, the Secretary or the State could deny payments for new admissions for up to eleven months. *Id.* But these sanctions were rarely invoked. As a consequence, the Medicare and Medicaid programs allowed nursing home facilities to provide substandard services while remaining in operation and receiving federal funding. *Id.* at 471, *reprinted in* 1987 U.S.C.C.A.N. 2313–291. As knowledge of these problems became more widespread, Congress became "deeply troubled that the Federal government, through the Medicaid program, continue[d] to pay nursing facilities

for providing poor quality care to vulnerable elderly and disabled beneficiaries." *Id.* at 452, *reprinted in* 1987 U.S.C.C.A.N. 2313–272.

The FNHRA provides for enhanced oversight and inspection of nursing homes participating in the Medicare and Medicaid programs. Among the requirements is that participating nursing homes are subject to an unannounced "standard survey" at least once every 15 months. 42 U.S.C. § 1395i-3(g)(2)(A). If this survey reveals that a nursing home facility is failing to meet the required standard of care, the facility must undergo an "extended survey." *Id.* § 1395i-3(g)(2)(B). The certification requirements also subject nursing homes to federal standards in certain areas including "quality of care" and "residents' rights." *Id.* §§ 1395i-3(g), 1396r(g).

The FNHRA also vested the Secretary of HHS and state governments with access to several additional intermediate sanctions designed to encourage nursing homes to comply with the federal participation requirements. Congress allowed for the denial of payments for all Medicare beneficiaries and all newly admitted Medicaid beneficiaries, civil monetary penalties under both Medicare and Medicaid for each day of noncompliance, appointment of temporary management, and, under the Medicaid Act, closure of non-conforming nursing homes and transfer of their residents to other conforming facilities. *Id.* §§ 1395i–3(h)(2)(B), 1396r(h)(2)(A), 1396r(h)(3).

Congress enacted the FNHRA's Bill of Rights and its enhanced enforcement mechanisms because State agencies were failing to ensure that nursing home residents were receiving a minimum standard of care. *See* H.R. Rep. No. 100–391, part 1, at 458 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313–278. But the problem of serious abuses in

nursing home facilities continues. Nearly two decades after the FNHRA's enactment, the federal government found that "state monitoring of nursing home quality and safety [are] limited in their scope and effectiveness." U.S. Gov't Accountability Off., GAO-06-117, Nursing Homes: Despite Increased Oversight, Challenges Remain in Ensuring High-Quality Care and Resident Safety 2 (2005). State inspections routinely understate the extent of serious quality-of-care issues. *Id.* Serious complaints by residents, family members, or staff alleging harm to residents remain uninvestigated for months. *Id.* In those instances where serious deficiencies are identified, State agencies and enforcement policies do not ensure that the deficiencies are addressed and remain corrected. *Id.*

The FNHRA's inadequate enforcement mechanisms have resulted in a well-documented nationwide epidemic of unlawful nursing home discharges. *See, e.g.*, William Pipal, Note, *You Don't Have to Go Home But You Can't Stay Here: The Current State of Federal Nursing Home Involuntary Discharge Laws,* 20 Elder L.J. 235, 236–38, 252–56, 259 (2012). In addition, the use of chemical restraints remains high, particularly in the Midwest. *See Under-Enforced and Over-Prescribed: The Antipsychotic Drug Epidemic Ravaging America's Nursing Homes,* H. R. REP. (2020), *available at* https://bit.ly/312omP0. For example, as of July 2020, approximately 20 percent of all nursing facility residents receive some form of antipsychotic medicine: only two percent have any psychosis diagnosis that the drugs are designed to treat. *See id.*

II. Factual Background

A. Mr. Talevski Develops Dementia, and His Family Turns to the Health and Hospital Corporation of Marion County to Care for Him

In 1970, Mr. Talevski immigrated to the United States from Macedonia. For nearly 30 years, he worked in a steel mill while running a small business building single-family homes. Mr. Talevski and his wife raised two daughters while frequently sending money back to relatives in Macedonia.

In his early 70s, Mr. Talevski began to suffer from memory loss and was eventually diagnosed with dementia. Following his diagnosis, Mr. Talevski's family, including his wife and two adult daughters, devoted themselves to his care. A13. But as the disease progressed, Mr. Talevski's family recognized that he needed full-time care to ensure his safety. A13–14. In January 2016, his family made the difficult decision to entrust his care to Valparaiso Care and Rehabilitation (Valparaiso Care), a long-term care facility owned by the Health and Hospital Corporation of Marion County (HHC). *Id.* HHC contracts with another entity, American Senior Communities, to manage and operate Valparaiso Care. A13.

Before moving into Valparaiso Care, Mr. Talevski was able to walk, talk, feed himself, socialize with others, and recognize his family. A14. But after his arrival at the facility, Mr. Talevski's family began to notice rapid and severe deteriorations in his condition. *Id.* The family also observed that the facility was often understaffed and that the employees who were present appeared to be poorly trained in dealing with dementia patients. *Id.* As a result, and at the request of Valparaiso Care employees, Mr. Talevski's family visited frequently to assist the staff and ensure that their father and husband was

receiving adequate care. *Id.* During these visits, they often found that Mr. Talevski had soiled himself and developed severe rashes in their absence. *Id.*

B. Unbeknownst to Mr. Talevski's Family, HHC Begins to Chemically Restrain Mr. Talevski for Discipline and Convenience

In August 2016, seven months after Mr. Talevski's arrival at the facility, his condition began to deteriorate rapidly and dramatically. A14. He lost the ability to speak English. *Id.* He could not eat on his own. *Id.* At one point, he was unable to get out of bed. *Id.* Alarmed and frightened, his family confronted the Valparaiso Care staff. *Id.* His caretakers were adamant that any changes were due to the natural progression of Mr. Talevski's dementia. *Id.* Suspicious that Valparaiso Care was chemically restraining her father for its own convenience, Mr. Talevski's daughter insisted the staff provide her with a list of her father's medications. *Id.* She discovered that Mr. Talevski was on 10 medications, six of which were powerful psychotropic drugs. *Id.*

Mr. Talevski's daughter immediately sought guidance from outside medical providers. A14. They confirmed that HHC was chemically restraining her father. *Id.* Mr. Talevski's family hired an outside specialist who removed the psychotropic drugs from his treatment program. A14–15. As soon as the drugs were tapered down, Mr. Talevski began to recover. A15. His condition improved to such an extent that he was able to feed himself again. *Id.* Shocked by HHC's treatment of their father and husband, Mr. Talevski's family filed a formal complaint with the Indiana State Department of Health (Health Department) regarding the overprescribing of psychiatric drugs to chemically restrain Mr. Talevski. *Id.*

C. HHC Transfers Mr. Talevski to a Hospital and Refuses to Readmit Him, Resulting in His Involuntary Transfer to a Nursing Home 50 Miles Away

On November 23, 2016, HHC transferred Mr. Talevski to Doctors NeuroPsychiatric Hospital (NeuroPsych), a facility in Bremen, Indiana, 90 minutes away. A15. Now, in order to visit Mr. Talevski, his family had to make a three-hour round trip. *Id.* In justifying its decision, HHC alleged that Mr. Talevski had acted inappropriately toward female staff and residents. *Id.*

Mr. Talevski returned to Valparaiso Care on December 15, 2016. *Id.* Only four days after his return, Valparaiso Care sent Mr. Talevski to NeuroPsych for a second time, this time from December 19 through December 29. *Id.* On December 30, only one day after his return, Valparaiso Care again transferred Mr. Talevski back to NeuroPsych. *Id.* This time, Valparaiso Care did not provide NeuroPsych with his dentures, leaving Mr. Talevski toothless, hours away from his family. *Id.* That failure to provide his dentures continues to harm Mr. Talevski to this day. A16. As a result of not having his dentures, his gums have receded to the point where he can never be fitted with a new pair. *Id.*

When NeuroPsych attempted to return Mr. Talevski on January 9, 2017, Valparaiso Care refused to readmit him. A15. Instead, Valparaiso Care tried to force a transfer of Mr. Talevski to another facility, this time in Indianapolis, 150 miles away from his family. *Id.* Mr. Talevski's family promptly filed a Petition for Review of Involuntary Transfer with the Health Department. *Id.* Pending the outcome of the petition, NeuroPsych found a suitable facility for Mr. Talevski in Bremen. A15–16. Although the

facility was still 90 minutes away, Mr. Talevski's family agreed to the temporary transfer pending the outcome of the petition. A16.

D. An Administrative Judge Determines That HHC Violated Mr. Talevski's FNHRA Rights and Orders HHC to Take Him Back Into Its Care, an Order HHC Ignores

On February 28, 2017, a Health Department administrative law judge rejected Appellees' involuntary transfer of Mr. Talevski from Valparaiso Care. A16. The judge found that it would be an "extreme hardship" for Mr. Talevski to be transferred to a facility in Indianapolis when his family lives in Valparaiso. A40. For any dementia patient, the judge explained, adjusting to a new environment is difficult. A39. But for Mr. Talevski, who no longer speaks English and is only able to communicate with his family in his native Macedonian, the move would be especially detrimental. *Id.*

Based on the judge's order, Mr. Talevski's family attempted to have him returned to Valparaiso Care, closer to family, where they could oversee his care. A16. But Valparaiso Care ignored the order and refused to readmit Mr. Talevski. *Id.* Mr. Talevski's family submitted another complaint to the Health Department regarding Valparaiso Care's refusal to abide by the judge's order. *Id.* Based on that complaint, the Health Department conducted a second investigation of Valparaiso Care and HHC. *Id.* The results of the general investigation into the facility were published in an 81-page report in May 2017. *Id.*

After reviewing the report, American Senior Communities, the nursing home management company, contacted Mr. Talevski's family to discuss Mr. Talevski's return to Valparaiso Care. *Id.* By this point, more than five months after his traumatic involuntary

discharge, Mr. Talevski had adjusted to his new nursing home, and Mr. Talevski's family had become concerned about possible retaliation against Mr. Talevski if he were to return to Valparaiso Care. A16–17. His family ultimately decided not to uproot Mr. Talevski for a fifth time. A17. Mr. Talevski's wife and daughters now make the three-hour round trip to visit their husband and father on a regular basis. *Id.*

III. Proceedings Below

On January 10, 2019, Mr. Talevski, by his next friend and guardian Ms. Talevski, brought this action against HHC, Valparaiso Care, and American Senior Communities, asserting damages claims under 42 U.S.C. § 1983 based on Defendants' violations of his individual rights guaranteed under the FNHRA's Residents' Bill of Rights. A10, 17–19. Mr. Talevski alleged violations of numerous FNHRA provisions, including (i) overprescribing the use of psychotropic drugs as chemical restraints in violation of § 1396r(c)(1)(A)(ii), A18–19; (ii) involuntarily transferring Mr. Talevski, failing to provide proper and timely notice of the transfer, and refusing to readmit Mr. Talevski, all in violation of § 1396r(c)(2), (e)(3), and (f)(3), *id.*; (iii) failing to provide Mr. Talevski with his dentures when transferring him to NeuroPsych, thereby denying Mr. Talevski dental services in violation of § 1396r(b)(4)(A)(vi), *id.*; and (iv) prohibiting Mr. Talevski from voicing grievances without reprisal, in violation of § 1396r(c)(1)(A)(vi), A17–19.

Two months later, Defendants-appellees filed an eight page motion to dismiss the case. A2. HHC, Valparaiso Care, and American Senior Communities contended that Mr.

Talevski's claims fail because none of the rights enumerated in the FNHRA's Residents' Bill of Rights create enforceable, individual rights under § 1983.[2] *Id.*

On March 26, 2020, the district court granted Defendants' motion to dismiss with prejudice. A8. The district court ignored all but one of Mr. Talevski's FNHRA claims. A1. Despite acknowledging that Mr. Talevski, "alleges that defendants failed to abide by the statute *in numerous respects*," *id.* (emphasis added), the district court addressed just one of Mr. Talevski's claims: that Defendants-appellees failed to "attain or maintain the highest practicable physical, mental, and psychosocial well-being" of Mr. Talevski, as required by the FNHRA's quality of life provision, § 1396r(b)(2), *id.* Focusing exclusively on that provision, the district court determined that the quality of life provision does not create a federal right "given the lack of clear statutory language to indicate that nursing home residents are more than simply individuals in the FNHRA's 'general zone of interest,' benefitting from what is otherwise a primarily funding-oriented piece of legislation." A5. The district court did not address or even acknowledge Mr. Talevski's

[2] Defendants argued in the alternative that Mr. Talevski's § 1983 claims are barred by Indiana's two-year statute of limitations for tort actions against the government. But the statute of limitations is inapplicable to Mr. Talevski, who is "under [a] legal disabilit[y]" by reason of his mental state and dementia diagnosis. *See* Ind. Code § 34-11-6-1 (2020); *see also Whitlock v. Steel Dynamics, Inc.*, 35 N.E.3d 265, 270 (Ind. Ct. App. 2015). Mr. Talevski's medical condition is not in dispute, and even if it were, that is a question of fact that cannot be resolved on a motion to dismiss. *See Hayes v. Westminster Vill. N., Inc.*, 953 N.E.2d 114, 117 (Ind. Ct. App. 2011). Whether an individual under legal disability has a legal guardian does not affect whether the statute of limitations applies. *See Barton-Malow Co., Inc. v. Wilburn*, 556 N.E.2d 324, 326 (Ind. 1990). This is a paradigmatic case for the application of the legal disability doctrine: this is a lawsuit to vindicate Mr. Talevski's own rights, but in light of his dementia, it was not until later, when his family and legal guardian learned Defendants were abusing him, that it became possible for them to bring this suit on his behalf. The court below did not discuss or decide this issue.

claims under multiple other provisions of the FNHRA, including the provisions expressly establishing nursing home patients' rights to be free of chemical restraint and not to be involuntarily transferred or discharged.

Mr. Talevski timely appealed. A11.

SUMMARY OF ARGUMENT

The Court should reverse. At minimum, the FNHRA's chemical restraint and involuntary transfer and discharge provisions confer federal rights enforceable in actions under § 1983.[3] The text of those provisions clearly and unambiguously confers definite federal rights. They also meet the three-part test for enforceable federal rights set forth in *Blessing v. Freestone,* 520 U.S. 329, 340–41 (1997) because (1) Congress plainly intended that these rights-conferring provisions should benefit nursing home residents; (2) the asserted rights are not vague and amorphous; and (3) the rights are mandatory, not precatory. *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 972–73 (7th Cir. 2012). Nor is there any evidence that the FNHRA shows a congressional intent to eliminate access to relief under § 1983. This Court should decline to open a circuit split and instead join the Third and Ninth Circuits in recognizing that § 1983 provides a cause of action to enforce FNHRA rights.[4]

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[3] The district court erred in concluding that the complaint did not state a plausible claim under the FNHRA's restraint and involuntary transfer and discharge provisions. That is enough to warrant reversal of the decision below. The Court need not address at this juncture whether the FNHRA may include additional enforceable rights. The district court should consider that question—if necessary—at summary judgment, on the basis of a fully developed factual record.

[4] There is no dispute in this case that Valparaiso Care acted "under color of" state law, nor could there be, because Valparaiso Care "is publicly owned." *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 282 (7th Cir. 1986). And the complaint states a plausible

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal under Rule 12(b)(6). *Ochoa v. State Farm Life Ins. Co.*, 910 F.3d 992, 994 (7th Cir. 2018). "[A] complaint is to be construed liberally so as to do substantial justice." *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (internal quotation marks omitted). "Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Id.* (internal quotation marks omitted); *see also* 5B Charles Alan Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 1357 (3d ed.2015) (noting that courts should "be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability" should be "explored").

ARGUMENT:
The Federal Nursing Home Reform Act Creates Federal Rights Enforceable in § 1983 Actions

A. The Supreme Court Has Recognized That Rights Enumerated in Federal Spending Statutes Are Enforceable § 1983 Actions

Section 1983 creates a private cause of action against any person who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The Supreme Court held in *Maine v. Thiboutot,* 448 U.S. 1 (1980) that § 1983 "means what it says" and thus authorizes suits by private individuals against state actors that violate rights created by federal "laws,"

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claim that American Senior Communities acted "jointly" in Valparaiso's unlawful misconduct. *Id.* (citing *Musso v. Suriano*, 586 F.2d 59, 63 (7th Cir. 1978)); *see Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724-25 (1961) (holding that a private restaurant that leased space in a building financed by public funds and owned by an agency of the State of Delaware acted under color of state law in discriminating against African Americans because the two entities were in such a "position of interdependence … that [they] must be recognized as … joint participant[s] in the challenged activity").

including laws enacted pursuant to Congress's authority under the Spending Clause, U.S. Const. Art. 1, § 8, Cl. 1. *Id.* at 4. The Court has reaffirmed that holding on numerous occasions. *See, e.g., Gonzaga Univ. v. Doe,* 536 U.S. 273, 279-280 (2002); *Blessing v. Freestone,* 520 U.S. 329, 340 (1997); *Suter v. Artist M.,* 503 U.S. 347, 355 (1992); *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 508 (1990); *Wright v. City of Roanoke Redevelopment & Housing Auth.,* 479 U.S. 418, 423 (1987).

Congress has ratified *Thiboutot*'s construction of § 1983 in the Medicaid context by statutorily providing that certain provisions of the Medicaid Act, and other subchapters of the Social Security Act pertaining to the content of a state Medicaid plan, may be enforceable by beneficiaries in a private action under § 1983 in appropriate circumstances. *See* 42 U.S.C. § 1320a-2 ("In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan."); 42 U.S.C. 1320a-10 (same).[5] In enacting the FNHRA, Congress stated that "the specified remedies [in the FNHRA]" should not be construed to limit remedies available, "including

[5] *See also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 512 (1990) (healthcare providers could bring an action under § 1983 to enforce a provision of the Medicaid Act, which required a State plan to adopt "reasonable and adequate" rates for paying providers); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603-606 (5th Cir. 2004); *Rabin v. Wilson-Coker*, 362 F.3d 190, 202 (2d Cir. 2004). Congress enacted 42 U.S.C. § 1320a-2 in the wake of *Suter v. Artist M., supra. See* 42 U.S.C. § 1320a-2 ("This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in [*Suter*], but not applied in prior Supreme Court decisions respecting such enforceability."). In *Suter*, the Court declined to allow an action under 42 U.S.C. § 1983 to enforce a provision of the Adoption Assistance and Child Welfare Act of 1980 that required state plans to make "reasonable efforts" to avoid removing children from their homes and to help children return to their homes. *See* 503 U.S. at 351 (quoting 42 U.S.C. § 671(a)(15)).

private rights of action to enforce compliance with requirements for nursing facilities." *See* H.R. Rep. No. 100–391, at 472.

Section 1983 permits the enforcement only of "*rights*, not the broader or vaguer 'benefits' or 'interests[]'" that might be reflected in federal law. *Gonzaga*, 536 U.S. at 283. Accordingly, to create "rights" enforceable under § 1983, the relevant law "must be 'phrased in terms of the persons benefited[,]'" *id.* at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979)), and its text and structure must unambiguously confer a right on individuals, *Gonzaga*, 536 U.S. at 283. Further, in determining whether and to what extent federal law creates individually enforceable rights, courts must look with care to whom the statutory "provisions speak." *Gonzaga*, 536 U.S. at 287.

In the context of the FNHRA's Residents' Bill of Rights, the relevant statutory text demonstrates that its individual rights provisions run against the nursing home in circumstances like those here, where the State itself operates the facility. *See, e.g.*, *Grammer*, 570 F.3d at 525-32 (holding that residents living in state-operated nursing homes have a § 1983 claim against their nursing homes for violations of the FNHRA); *Rolland v. Cellucci*, 198 F. Supp. 2d 25, 28-30 (D. Mass. 2002) (same); *Tinder v. Lewis Cnty. Nursing Home Dist.*, 207 F. Supp. 2d 951, 954-56 (E.D. Mo. 2001) (same).

B. Congress Clearly Intended to Confer Federal Rights Enforceable in § 1983 Actions in the FNHRA Bill of Rights

Congress intended to endow individuals with enforceable federal rights in the FNHRA. The best evidence of Congressional intent is the words of the statute Congress enacted. *See CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("[T]he plain wording of [a] clause … necessarily contains the best evidence of Congress's … intent.");

see also Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist. 541 U.S. 246, 252 (2004); *see BedRoc Ltd. v. United States,* 541 U.S. 176, 183 (2004). The text of the FNHRA's "Residents' Bill of Rights" makes Congress's intent clear. It states that "[a] nursing facility must protect … the rights of each resident, including …. The right to be free from … any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. § 1396r(c)(1)(A). And under the heading "Transfer and discharge rights" it provides that "A nursing facility … must not transfer or discharge the resident from the facility unless" one of six enumerated criteria are met (none of which are met in this case). *Id.* § 1396r(c)(2).[6]

Nothing more than the statute's text is necessary to resolve this case. But there is more. Congress enacted the FNHRA's Bill of Rights because nursing home residents' rights were being systematically unprotected by State agencies. These deficiencies became apparent when, in 1985, the Institute of Medicine conducted a study of nursing home care. H.R. Rep. No. 100-391(I), pt. 1, at 448, 452 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-268, 2313-272. That report found that government regulation, as it then functioned, was not satisfactory because it allowed too many marginal or substandard nursing homes to continue to operate and the quality of care in many homes left much to be desired. *Id.* Congress passed the FNHRA shortly thereafter, in 1987,

[6] The statute also provides a host of ancillary transfer and discharge rights, including a right to pre-transfer and pre-discharge notice, 42 U.S.C. § 1396r(c)(2)(B); a right to "sufficient preparation and orientation … to ensure safe and orderly transfer or discharge from the facility," *id.* § 1396r(c)(2)(C); and the right to seek readmission to a nursing facility through a state-administrative appeals process.

because Congress was "deeply troubled that the Federal Government, through the Medicaid program, continue[d] to pay nursing facilities for providing poor quality care to vulnerable elderly and disabled beneficiaries." *Grammer*, 570 F.3d at 523 (quoting H.R. Rep. No. 100-391, at 471 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-272). As the House Report explained: "The overriding purpose of these resident rights requirements is to improve the quality of care and the quality of life for all nursing facility residents, whether or not eligible for Medicaid. The Committee expects that they will be strictly observed and vigorously enforced." H.R. Rep. No. 100-391, at 458. As the House Report shows, not only did Congress intend to create rights, Congress expected these rights to be enforced to the greatest extent possible.

The fact that public enforcement mechanisms have failed to protect nursing home residents from widespread abuse is powerful evidence that Congress intended the FNRHA's rights to be privately enforceable. "A fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). And courts will "not lightly conclude that Congress enacted a self-defeating statute." *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019); *King*, 135 S. Ct. at 2492-93. The absence of robust private FNHRA enforcement through § 1983 actions has led to the same underenforcement problems that caused Congress to enact the FNHRA in the first place. Serious abuses in nursing home facilities have continued. State inspections understate the extent of serious issues and fail to ensure that nursing home residents receive a minimum standard of care. *See* U.S. Gov't Accountability Off., GAO-06-117, Nursing

Homes: Despite Increased Oversight, Challenges Remain in Ensuring High-Quality Care and Resident Safety 2 (2005).

Finally, the legal backdrop against which Congress enacted the FNHRA also provides important evidence of Congress's intent. Congress enacted the FNHRA's "Bill of Rights" in 1987, only seven years after *Maine v. Thiboutot* recognized that § 1983 provided a cause of action to enforce federal "rights" in spending statutes, and the same year that the Supreme Court decided *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), which held that a statute that nowhere used the word "right" nonetheless created an enforceable federal right for low-income tenants against being overcharged for utilities. *See id.* at 420 n.2 & 3 (quoting statute and describing regulations); *see also id.* at 429-32 (rejecting argument that the language of the statute was too "vague and amorphous" to create a federal right). The Congress that enacted the FNHRA's Bill of Rights therefore knew that by using the word "right," the FNHRA would clearly create a federally enforceable right under § 1983. *See Wisconsin Central Ltd. v. United States,* 138 S. Ct. 2067, 2074 (2018) ("[E]very statute's meaning is fixed at the time of enactment"); *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) ("[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word.") (internal quotation marks and citation omitted).

C. The Only Two Circuits That Have Addressed the Issue Recognize That FNHRA Rights Are Enforceable in Actions Under § 1983

Two circuit courts have addressed the enforcement of the FNHRA's Bill of Rights through § 1983 and both have concluded that FNHRA rights are enforceable under

§ 1983. Last year, the Ninth Circuit held that nursing home residents may use § 1983 to "challenge a state's violation" of the FNHRA's state-administrative appeals requirement. *Anderson v. Ghaly*, 930 F.3d 1066, 1069 (9th Cir. 2019). There, the plaintiffs were involuntarily transferred to a hospital and then refused readmittance by the nursing home. *See id.* at 1072. The plaintiffs challenged their nursing homes' refusal to readmit them using the appeals process Medicaid required the state to establish. *See id.* All three prevailed in the state's appeals process, but none were readmitted because the state allegedly lacked an effective mechanism for enforcing the judgments. *See id.* Reversing the district court, the Ninth Circuit found that nursing home residents may sue under § 1983 to enforce their appeal rights under the FNHRA, which, the Ninth Circuit held, includes both the right to the appeal itself and the right to have the appeal enforced. *See id.* at 1081.

In reaching its holding, the Ninth Circuit applied the test set forth in *Blessing v. Freestone*, 520 U.S. 329, 340 (1997), which holds that "a particular statutory provision gives rise to a federal right" if (1) Congress intended that the statutory provision in question benefit the plaintiff, (2) the right is not so vague and amorphous that its enforcement would strain judicial competence, and (3) the right is unambiguously conferred. *Blessing*, 520 U.S. at 340–41. The Ninth Circuit had no trouble concluding that all three *Blessing* factors were met, *Anderson*, 930 F.3d at 1073–78, finding among other things that the statute speaks in "express rights-creating terms," *id.* at 1075 (internal quotation marks omitted), that the right at issue (the right to a state administrative hearing) is "an objective individual and judicially reviewable right," *id.* at

1078 (internal quotation marks omitted), and that the right is unambiguously "worded in mandatory, not precatory terms" and "obviously sets out specific requirements for the state," *id.* at 1079 (internal quotation marks omitted). The court also rejected the state's argument that the existence of other FNHRA remedies shows a Congressional intent to foreclose access to § 1983 as a remedy. *Id.* at 1079–80.

The Third Circuit reached the same result regarding several of the rights in 1396r, including the right to be free of chemical restraint. *See Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 532 (3d Cir. 2009); *see also id.* at 523–25 (listing FNHRA rights asserted in the case). Like the Ninth Circuit, the Third Circuit applied the three-factor test from *Blessing*. On *Blessing*'s first factor, whether Congress intended that the statutory provision in question benefit the plaintiff, the Third Circuit held that "[t]here is no question that the statutory provisions … meet the first *Blessing* factor" because the provisions are "obviously intended to benefit Medicaid beneficiaries and nursing home residents." *Id.* at 527 (internal quotation marks omitted). On *Blessing*'s second factor, whether enforcing the right would strain judicial competence, the Third Circuit held that the rights were judicially enforceable because they "clearly delineate[]" "a basic level of service and care for residents and Medicaid patients." *Id.* at 528. On *Blessing*'s third factor, whether the right is unambiguously conferred, the Third Circuit held that the "the language unambiguously binds the states and the nursing homes as indicated by the repeated use of 'must'" and thus "easily satisfies the third factor of the *Blessing* test." *Id.* The Third Circuit further held that the FNHRA's text, history, and structure are all consistent with Congressional intent to provide nursing home residents with individual

rights enforceable through a private cause of action. *See id.* at 528–32. Finally, the Court held that "the Medicaid Act disclosed no evidence of congressional intent to preclude enforcement of the rights created by the various provisions of this statute." *Id.* at 532.

This Circuit has yet to weigh in on this question.

D. Both the FNHRA's Clear Text and the Supreme Court's Test From *Blessing* Establish That the FNHRA Confers, at Minimum, Enforceable Rights Against Chemical Restraint and Involuntary Transfer and Discharge in State-Run Nursing Facilities

1. The FNHRA's Text Unmistakably Confers on Nursing Home Patients a "Right" to be Free From Chemical Restraint and a "Right" Against Involuntary Transfer and Discharge

Typically, in assessing whether a spending statute creates an enforceable federal right, this Court applies the three-factor test from *Blessing v. Freestone,* 520 U.S. 329 (1997). *See Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 972–73 (7th Cir. 2012) (applying *Blessing*). As the next section shows, the relevant provisions of FNHRA clearly meet all *Blessing* factors.

But in this case the *Blessing* test is unnecessary. The Court does not need to go beyond the words of FNHRA and § 1983 to resolve this case. Where, as here, a statute confers a federal right in mandatory terms, using the word "right" to convey the entitlement, the Court does not even need to reach *Blessing*. The *Blessing* test is unnecessary where a statute confers a mandatory federal right using the word "right."[7]

[7] To be sure, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Supreme Court held that a Spending Clause provision—now codified at 42 U.S.C. § 15009 and entitled "Rights of individuals with developmental disabilities"—did not confer an enforceable federal right. 451 U.S. at 8. But the text of the provision is unequivocally precatory. The provision is prefaced with the words "Congress makes the

The Supreme Court has never used the *Blessing* test to consider the reach of a statute that grants a federal right by mandating that a party "must protect" a "right." *See Blessing*, 520 U.S. at 342–43 (discussing cases in which the Court had previously recognized enforceable "rights," none of which involved statutes that specified a "right" that regulated parties were required to protect); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279–83, 287–88 (2002) (similarly discussing earlier cases, and finding that FERPA's nondisclosure provision, which also does not confer any mandatory "rights," does not satisfy *Blessing*).

Because the text of the two provisions at issue in this appeal are absolutely clear, the Court need only read them to decide it. The "[Supreme Court] has explained many times over many years that, when the meaning of the statute's terms is plain, [the Court's] job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."). "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only

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following findings respecting the rights of individuals with developmental disabilities," *id.* at 13, and repeatedly uses the word "should" (rather than "must" or "shall") to describe the responsibilities of those to whom the statute applies, *see id.* at 18–19 (noting that the provision as a whole "is simply a general statement of 'findings'"); *see also Wright*, 479 U.S. at 423 ("[T]he statutory provisions [in *Pennhurst*] were … only statements of 'findings' indicating no more than a congressional preference[.]") (citation omitted).

the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737; *see also Thiboutot*, 448 U.S. at 6–7 & n.4.

The FNHRA's chemical restraint provision states that "[a] nursing facility *must* protect … the *rights* of *each resident*, including … [t]he *right* to be free from … any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. § 1396r(c)(1)(A)(ii) (emphasis added). The FNHRA's "transfer or discharge" provision—which appears under the heading "Transfer and discharge rights"—states that "[a] nursing facility *must* permit *each* resident to remain in the facility and *must not* transfer or discharge the resident from the facility unless" certain specified circumstances exist that would permit the transfer or discharge. *Id.* § 1396r(c)(2)(A) (emphasis added). It is difficult to imagine clearer or more affirmative directives. The provisions apply to "*each* resident" of a nursing facility; grants these residents the "*right*" to be free from chemical restraint and involuntary transfer or discharge; and provides that nursing facilities "*must*" comply. In addition, the statute requires nursing facilities to provide residents with a "notice of rights." *Id.* § 1396r(c)(1)(B). It would make little sense for Congress to require nursing homes to provide residents with notice of their FNHRA rights but provide them no cause of action to enforce them.

Not only does the text of the FNHRA unambiguously confer federal rights, but the text of § 1983 unambiguously provides that an individual can sue state actors that violate those rights. Section 1983 creates a federal remedy against anyone who, under color of state law, deprives "any citizen of the United States ... of any rights … secured by

the … laws." 42 U.S.C. § 1983. Section 1983 "means what it says," *Thiboutot*, 448 U.S. at 4, and "authorizes suits to enforce individual rights under federal statutes as well as the Constitution," *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 119 (2005). Together, the text of the FNHRA and § 1983 provide nursing home residents the right to sue for violations of their rights to be free of chemical restraint and against involuntary transfer and discharge. The Court need go no further.

2. Were There Any Doubt That the FNHRA Creates Federal Rights, Application of the Blessing *Factors Confirms That the FNHRA Creates Enforceable Federal Rights Against Chemical Restraint and Involuntary Transfer and Discharge*

The Court would reach precisely the same result under the *Blessing* test. The FNHRA's rights against restraint and involuntary transfer and discharge meet all three of the *Blessing* factors. The *Blessing* "factors help determine whether a federal statute creates private rights enforceable under § 1983." *Planned Parenthood of Indiana, Inc.*, 699 F.3d at 972–73. They provide that (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) the asserted right must not be "so vague and amorphous that its enforcement would strain judicial competence"; and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Id.* (quoting *Blessing*, 520 U.S. at 340–41). In *Gonzaga University v. Doe*, the Supreme Court clarified that the first *Blessing* factor requires that the federal provision contain an unambiguously conferred federal right using "rights-creating terms." 536 U.S. 273, 283–84 (2002). The relevant statute "must be phrased in terms of the persons benefitted," *id.* at 284, and its text and structure must unambiguously confer a right on individuals, *id.* at 283. If a statutory provision satisfies the *Blessing* test, it is

presumptively enforceable through § 1983. *Bontrager v. Indiana Family & Soc. Servs. Admin.*, 697 F.3d 604, 606 (7th Cir. 2012). There is no question that the statutory provisions under which Mr. Talevski raises his claims meet all three *Blessing* factors.

i. *Blessing* Factor 1: The Chemical Restraint and Involuntary Transfer and Discharge Provisions Are Intended to Benefit Appellant and All Other Nursing Facility Residents.

Blessing's first factor is plainly met in this case. *Blessing*'s first factor requires that "Congress must have intended that the provision in question benefit the plaintiff." *Planned Parenthood of Indiana, Inc.*, 699 F.3d at 972–73. This intention to benefit the plaintiff must go beyond placing the plaintiff within the statute's "general zone of interest." *Gonzaga*, 536 U.S. at 283. To create judicially enforceable private rights, the statute "must be phrased in terms of the persons benefited," with "an *unmistakable focus* on the benefited class," *id.* at 284 (internal quotation marks omitted), and "confer[ ] entitlements sufficiently specific and definite to qualify as enforceable rights." *Id.* at 280. The most obvious way that Congress can show this intention is by employing "rights-creating language" that unambiguously creates an "*individual* entitlement." *Id.* at 287.

FNHRA's chemical restraint and involuntary transfer and discharge provisions meet *Blessing*'s first factor in the most straightforward way: by employing unambiguous rights-creating language. As discussed *supra* Argument Section D.1, FNHRA's chemical restraint provision dictates that a nursing home "*must* protect … the right[] of *each resident*" to be free from "any physical or chemical restraints." 42 U.S.C. § 1396r(c)(1)(A) (emphasis added). Likewise, "[a] nursing facility *must* permit *each resident* to remain in the facility and must not transfer or discharge the resident from the facility[.]" *Id.*

§ 1396r(c)(2) (emphasis added). These substantive, individual rights, enumerated in a section entitled, "Requirements relating to residents' rights," *id.* § 1396r(c), could not make it clearer that Congress, in enacting the FNHRA's Residents' Bill of Rights, intended to benefit nursing home residents.

But Congress's intent is also evident from the statute's context. This Court has held that a statute meets *Blessing*'s first factor where it is clear that no other person or entity would have a "greater interest than the [plaintiff]" in ensuring the Government complied with the statutory mandate. *BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 821 (7th Cir. 2017); *see also Planned Parenthood of Indiana, Inc.*, 699 F.3d at 969, 974 (holding that "Medicaid patients [were] the obvious intended beneficiaries of [a] statute" providing that state Medicaid plans "must ... provide that ... any individual eligible for medical assistance ... may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required"). No one has a greater interest in ensuring that nursing homes acting under color of state law comply with the requirements of the restraint and transfer and discharge provisions of the FNHRA Residents' Bill of Rights than the nursing home residents whose autonomy and bodily integrity those provisions are meant to safeguard.

The two circuits that have addressed whether provisions of the FNHRA satisfy the first *Blessing* factor recognize that these rights are enforceable in actions under § 1983. In *Grammer v. John J. Kane Regional Centers-Glen Hazel*, a mirror image of this case, the Third Circuit held that FNHRA's chemical restraint provision unambiguously confers a federal right. 570 F.3d at 527–28 ("There is no question that the statutory provision[] …

meet[s] the first *Blessing* factor" because "FNHRA's concern is whether each individual placed in a nursing home receives proper care."). Similarly, in *Anderson v. Ghaly*, the Ninth Circuit concluded that the involuntary transfer and discharge provisions create federal rights that sweep within their ambit the right to "challenge a state's violation" of the FNHRA's appeals requirement. 930 F.3d at 1069–72.

The district court erred in concluding that the FNHRA's provisions do not show that "Congress intended … to benefit the plaintiff." *Talevski by Next Friend Talevski v. Health & Hosp. Corp. of Marion Cty.*, No. 2:19 CV 13, 2020 WL 1472132, at *2 (N.D. Ind. Mar. 26, 2020); *contra id.* at *3 ("FNHRA was surely intended to benefit nursing home patients"). The district court reasoned that nursing home residents merely "fall[] within the statute's 'general zone of interest'" because "FNHRA was specifically and consistently drafted in terms of what nursing facilities must do in order to receive government funding." *Id.* at *2. That was wrong. Of course a statute that confers on nursing home residents "rights" to be free from restraint and involuntary transfer and discharge *by nursing homes* speaks "in terms of what nursing facilities must do." *Id.* That does not make it any less of a rights-conferring statute. *See Anderson*, 930 F.3d at 1074 ("Given the conditional nature of these programs, the statutes enacting them will nearly always be phrased with a partial focus on the state."); *see Grammer*, 570 F.3d at 530 ("We are not concerned that the provisions relied upon by the Appellant are phrased in terms of responsibilities imposed on the state or the nursing home. The plain purpose of these provisions is to protect rights afforded to individuals."). The Fourth Amendment speaks in terms of what government officers must do before conducting searches or

engaging in seizures, but that does not mean that no one has enforceable Fourth Amendment rights. Likewise, the First Amendment explicitly regulates Congress, but no one would argue that it does not use rights-creating language.

That district court's reasoning is also wrong because it would apply equally to every right set forth in rights-creating Spending Clause statutes and thus is tantamount to holding that a Spending Statute cannot create federally enforceable rights—something the Supreme Court and this Court have both repeatedly rejected. *Planned Parenthood of Indiana, Inc.*, 699 F.3d at 976–77 (explicitly rejecting this exact argument). "[N]othing in … any .. case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers. There would have been no need, had that been the Court's intent [in *Armstrong* or *Gonzaga*], to send lower courts off on a search for 'unambiguously conferred rights.' A simple 'no' would have sufficed." *BT Bourbonnais Care*, 866 F.3d at 820–21.

The provisions at issue here are no different than in other cases where a statute imposes a duty on a state while creating rights for individuals. In many such cases, including cases under 42 U.S.C. § 1396a, which is entitled "State Plans for Medical Assistance" and deals exclusively with requirements Congress has imposed on participating states, this Court has found such statutory rights enforceable through § 1983. *See Planned Parenthood of Indiana, Inc.*, 699 F.3d at 974 (holding that 42 U.S.C. § 1396a(a)(23) creates an enforceable federal right); *BT Bourbonnais Care, LLC*, 866 F.3d at 821 (holding that 42 U.S.C. § 1396a(a)(13)(A) creates an enforceable federal right);

Bontrager, 697 F.3d at 607 (holding that 42 U.S.C. § 1396a(a)(10)(A) creates an enforceable federal right).

ii. *Blessing* Factor 2: The Rights Are Capable of Enforcement

Blessing's second factor is also met in this case. The second *Blessing* factor is whether the asserted right is not "so vague and amorphous that its enforcement would strain judicial competence." 520 U.S. at 340–41. The term "chemical restraints" is not vague, nor is the obligation amorphous. *See Grammer*, 570 F.3d at 528. The statute's requirement that nursing home residents not be transferred or discharged except under narrow enumerated circumstances similarly meets those requirements. *See Anderson*, 930 F.3d at 1078. These are tort-like legal questions that fall within the very core of judicial competency.

This Court has found that "a right is administrable and falls comfortably within the judiciary's core interpretive competence," *Planned Parenthood of Indiana, Inc.*, 699 F.3d at 974, when there is a measurable standard against which to judge whether the challenged conduct violates the right at issue, *see id.* The requirement that a state "must ... provide that ... any individual eligible for medical assistance ... may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required" is neither vague nor amorphous because "a state infringes the … right when it excludes a provider from its Medicaid program for a reason other than the provider's fitness to render the medical services required," which is "a legal question fully capable of judicial resolution." *Id.* Similarly, a right to have states use a public process with specified procedural steps when they determine Medicaid

payment rates involves "garden-variety procedural rules, which courts are very good at enforcing." *BT Bourbonnais Care, LLC*, 866 F.3d at 822. Enforcement of the FNHRA's restraint and transfer and discharge provisions requires the exact same factual and legal inquiries federal courts use to decide § 1983 suits every day.

The FNHRA's restraint and transfer and discharge provisions are fundamentally unlike the provision of the Medicaid Act that requires state plans for medical assistance to provide care and services in the "best interests" of the recipients, 42 U.S.C. § 1396a(a)(19)—a provision that this Court held was "insufficiently definite to be justiciable" in *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003). Unlike that provision, liability under the restraint and transfer and discharge provisions turns on answers to definite, factually determinable questions: Was the nursing home resident chemically restrained for discipline or convenience? Was the nursing home resident involuntarily discharged or transferred? *Bruggeman* thus has no relevance here.[8] The district court's mistaken reliance on that case stemmed from its failure even to consider Mr. Talevski's claimed violations of his FNHRA rights against restraint and involuntary transfer and discharge, *see Talevski*, 2020 WL 1472132, at *3,

[8] Mr. Talevski may also have a claim under the FNHRA's "quality of life" provision, but the Court need not reach that question because Mr. Talevski clearly states a claim under the chemical restraint and transfer or discharge provisions and he may be able to obtain all of the relief he seeks under those provisions. The question whether the "quality of life" provision is enforceable—which squarely turns on *Blessing*'s second prong, which deals with questions of judicial competency—is better left to resolution at summary judgment on the basis of an actual factual record. There is surely *some* set of facts under which the quality of life provision falls within the sphere of judicial competence. A nursing home that chemically restrains its residents is not caring for them "in such a manner and in such an environment as will promote maintenance or enhancement of" their "quality of life." 42 U.S.C. § 1396r(b)(1)(A).

even though his claims under those provisions are clearly specified in his complaint. A17–19.

iii. *Blessing* Factor 3: The Rights Are Framed in Mandatory Language

The third *Blessing* factor is whether the provision is framed in "mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340–41. Below, the parties did not dispute that the third factor should be resolved in Mr. Talevski's favor. *Talevski*, 2020 WL 1472132, at *2. The district court agreed. *See id.*

The chemical restraint and involuntary discharge provisions do not leave any room for discretion on the part of nursing homes. Both provide that nursing homes "must" fulfill certain obligations. Specifically, the chemical restraint provision states that a nursing home "*must* protect and promote the rights of each resident, including … [t]he right to be free from … chemical restraints[.]" 42 § 1396r(c)(1)(A) (emphasis added). Likewise, the involuntary transfer provision dictates that "[a] nursing facility *must* permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless" one of several narrow circumstances applies. *Id.* § 1396r(c)(2) (emphasis added). This active language is identical to provisions of the Medicaid Act where this Court has found an enforceable right; the only difference is the intended target of the obligation. *See Bontrager*, 697 F.3d at 606.

3. Cases in Which This Court Reviewed Provisions of the Medicaid Act Confirm That the Relevant Provisions of the FNHRA Create Rights Enforceable Under § 1983.

Cases in which this Court has held that portions of the Medicaid Act create and confer federal rights enforceable under § 1983 show that the FNHRA's Residents' Bill of

Rights creates enforceable federal rights. The mandatory, rights-conferring language that Congress used to create enforceable rights in these Medicaid Act provisions is similar to the language that it used to create individual rights in the FNHRA.

In *Bontrager*, this Court held that Section 1396a(a)(10) of the Medicaid Act, which requires that "[a] State plan for medical assistance *must* ... provide ... for making medical assistance available ... to all [eligible] individuals," 42 U.S.C. § 1396a(a)(10)(A) (emphasis added), creates a private right of action enforceable under Section 1983, *Bontrager*, 697 F.3d at 607. Under the statute, "Medical assistance" includes "dental services." 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(10). The *Bontrager* plaintiff, a Medicaid recipient in need of significant dental services, brought suit, alleging that the state violated Medicaid laws by instituting a cap on dental services even when services are covered and medically necessary. *See Bontrager*, 697 F.3d at 606. Unable to pay for the dental services on her own, the plaintiff sought a remedy for the deprivation of her Medicaid Act rights pursuant to § 1983. *See id.* Finding the reasoning of its sister circuits persuasive, this Court found that the provision at issue was "intended to benefit the putative plaintiff, the statute created a binding obligation on the governmental unit, and the plaintiff's interests were not too vague and amorphous for courts to enforce." *Id.* at 607. Accordingly, the *Bontrager* court affirmed the district court's granting of a preliminary injunction based on her § 1983 claims. *See id.* at 612.

Similarly, in *Planned Parenthood*, the Seventh Circuit considered the Medicaid Act's "free choice of provider" provision. 699 F.3d at 968. Under that provision, state Medicaid plans "must" allow beneficiaries to obtain medical care from "any institution,

agency, ... or person, qualified to perform the service." 42 § 1396a(a)(23). The Court held that "[t]his language does not simply set an aggregate plan requirement, but instead establishes a personal right to which all Medicaid patients are entitled." *Planned Parenthood*, 699 F.3d at 974. The provision uses "individually focused terminology," that is "unmistakably phrased in terms of the persons benefitted." *Id.* In addition, the Court determined that the provision is "plainly couched in mandatory terms," and "falls comfortably within the judiciary's core interpretive competence." *Id.*

This Court has continued to reiterate the significance of both decisions. In *BT Bourbonnais Care, LLC*, this Court highlighted both cases, noting that, "nothing in … *Gonzaga*, or any other case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress's Spending Clause powers." 866 F.3d at 820–21. District courts in the Seventh Circuit have also relied heavily on both cases when determining whether a provision of the Medicaid Act creates and confers federal rights enforceable under § 1983. For example, in *Fiers v. La Crosse County*—the district court's primary source of authority for its holding in this case—the district court compared the FNHRA's general quality of life provision to the provisions analyzed in *Bontrager* and *Planned Parenthood* in considering whether the FNHRA's quality of life provision uses the rights-creating language sufficiently specific and definite to confer an enforceable federal right. 132 F. Supp. 3d 1111, 1116–17 (W.D. Wis. 2015).

4. The Third Circuit's Reasoning in Grammer *and the Ninth Circuit's Reasoning in* Anderson *Confirm That FNHRA Creates Enforceable Rights Against Chemical Restraint and Involuntary Transfer and Discharge*

The holdings of the Third and Ninth Circuits in *Grammer* and *Anderson* confirm that the FNHRA's Bill of Rights' provisions are clearly enforceable through § 1983. Those circuits correctly concluded that the question is not close. The Third Circuit found that "[t]here is no question that [the FNHRA's] statutory provisions … meet the first *Blessing* factor," because they are "obviously intended to benefit Medicaid beneficiaries and nursing home residents." *Grammer*, 570 F.3d at 527. The FNHRA's "provisions make clear that nursing homes must provide a basic level of service and care for residents and Medicaid patients." *Id.* at 528. And "the language unambiguously binds the states and the nursing homes as indicated by the repeated use of 'must.'" *Id.* In comparing the FNHRA to statutes held not to create enforceable rights, the Third Circuit noted that unlike those statutes "the FNHRA [is] replete with rights-creating language" and "[is] clearly 'phrased in terms of the persons benefitted'" and "[t]he plain purpose of these provisions is to protect rights afforded to individuals." *Id.* 528–30. In sum, "the specific rights conferred by the FNHRA could not be clearer." *Id.* at 531.

The Ninth Circuit was equally emphatic that the FNHRA creates enforceable federal rights under § 1983 to enforce state determinations of unlawful discharge or transfer.[9] California conceded that the FNHRA provides an enforceable right to a

[9] *Anderson* dealt with a suit against the State of California for failing to ensure enforcement of administrative appeals under the FNHRA. This suit is even more clear-cut than *Anderson* because Mr. Talevski is seeking money damages directly against a

hearing following an involuntary discharge or transfer, *see Anderson*, 930 F.3d at 1075. And the Ninth Circuit forcefully rejected California's argument that the right extended only "to the hearing decision itself" and did not include a right to "any state implementation of the decision reached," *id.*, holding "Congress could not have intended FNHRA to create meaningless show trials that allow nursing homes to persist in improper transfers and discharges," *id.* at 1076.

The court found that "the text[,]" "bolstered by the structure of FNHRA" and "the overall purpose of FNHRA[,]" dictated a holding that "with regard to *Blessing*'s first, rights-creating prong … FNHRA's recognition of an individual right to 'a fair mechanism ... for hearing appeals on transfers and discharges,' includes within it the opportunity for redress." *Id.* at 1076–78. The right was clearly "an objective individual and judicially reviewable right." *Id.* at 1078. The Court noted in particular that the "six specific criteria for which a transfer or a discharge is permissible" made "the substance of an appeals decision quite amenable to judicial consideration." *Id.* And the Ninth Circuit held that "the statute could not be clearer" that it "unambiguously impose[s] a binding obligation on the States" because it used the word "must" and is thus "worded in mandatory, not precatory terms." *Id.* at 1079.

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publicly owned nursing home that has already been found by a state administrative judge to have unlawfully discharged him for a wrongful discharge and transfer. Because the only available remedy under the state appeals process for wrongful discharges and transfers is readmission to the nursing home, rather than damages, *see* 42 C.F.R. § 431.246, the state appeals mechanism offers a complementary remedy to a § 1983 suit, not a substitute remedy.

Those cases prove what is already clear from FNHRA's text, structure, legislative history, and purpose—namely, that its restraint and transfer and discharge provisions are textbook examples of a rights-creating provisions enforceable through § 1983.[10]

5. The FNHRA Does Not Explicitly or Impliedly Foreclose Access to § 1983 Relief

The FNHRA neither explicitly nor implicitly forecloses enforcement through § 1983. "If the existence of a federal right is established … there is a presumption that the right is enforceable under § 1983." *Indianapolis Minority Contractors Ass'n, Inc. v. Wiley*, 187 F.3d 743, 750 (7th Cir. 1999). "[B]ut that presumption may be rebutted if Congress intended to foreclose a remedy under § 1983." *Id.* "Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. The Third and Ninth Circuits did not hesitate to conclude that FNHRA neither expressly nor impliedly precludes enforcement through

[10] In contrast to these persuasive decisions from the Third and Ninth Circuits, the court below relied on three inapposite district court cases: *Fiers v. La Crosse County*, 132 F. Supp. 3d 1111 (W.D. Wis. 2015); *Schwerdtfeger v. Alden Long Grove Rehab. & Health Care Center, Inc.*, No. 13 C 8316, 2014 WL 1884471 (N.D. Ill. May 12, 2014); and *Terry v. Health & Hospital Corporation*, No. 10-cv-607 (S.D. Ind. Mar. 29, 2012), 2012 U.S. Dist. LEXIS 43702. Two of those cases did not analyze FNHRA's restraint and discharge and transfer provisions (*Fiers* and *Terry*) and one of them involved a private nursing home not subject to suit under § 1983 (*Schwerdtfeger*). To the extent their reasoning is relevant, it is unpersuasive. *See, e.g.*, *Schwerdtfeger*, 2014 WL 1884471, at *5 (claiming the phrase "[n]o person in the United States shall ... be subjected to discrimination under any program or activity receiving Federal financial assistance" is relevantly different from the phrasing of the FNHRA's rights-creating provisions such that the former creates enforceable federal rights but the latter do not); *Fiers*, 132 F. Supp. 3d at 1116 (similar). Those cases illustrate why "[a] decision of a federal district court judge is not binding precedent … even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (internal quotation marks omitted).

§ 1983. *See Grammer*, 570 F.3d at 531–32; *Anderson*, 930 F.3d at 1079–80. This Court should reach the same conclusion.

No provision of the Medicaid Act expressly forbids enforcement through § 1983. Therefore, the only question is whether Congress established a comprehensive remedial scheme sufficient to impliedly preclude such enforcement. Courts "do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wilder*, 496 U.S. at 520. For such a conclusion to be warranted, "the remedial mechanisms provided" must be "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action for the enforcement of [the plaintiffs'] rights secured by federal law." *Wright*, 479 U.S. at 424.

The Medicaid Act shows no evidence of any such congressional intent. The FNHRA's other enforcement mechanisms all involve enforcement by the federal government or state governments, mechanisms that have proven ineffective at ensuring that the FNHRA's restraint and transfer and discharge rights are not routinely violated. *See* Statement of the Case I.B (describing enforcement mechanism). The main mechanism by which the FNHRA is enforced—the threat to withhold federal funds—has been repeatedly held to be insufficient to foreclose access to § 1983. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255–56 (2009); *Blessing*, 520 U.S. at 347–48 (citing and discussing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989), *Wright*, 479 U.S. at 426–27 and *Wilder* 496 U.S. at 523 for the proposition that the mere "availability of administrative mechanisms to protect the plaintiff's interests" is insufficient to foreclose access to § 1983).

The Supreme Court has held that the key consideration is whether Congress has created a "comprehensive enforcement scheme that is *incompatible* with individual enforcement under § 1983." *Fitzgerald*, 555 U.S. at 252 (emphasis added). Thus, in the three cases where the Supreme Court has held that a statute impliedly foreclosed access to § 1983 "the statutes at issue required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit." *Id.* at 254. "Offering plaintiffs a direct route to court via § 1983 would have circumvented these procedures and given plaintiffs access to tangible benefits—such as damages, attorney's fees, and costs—that were unavailable under the statutes." *Id.* The FNHRA includes no similar private enforcement scheme that a § 1983 would "circumvent[]." Because all of the FNHRA's existing remedies are compatible with § 1983, the FNHRA nowhere evidences any Congressional intent to foreclose access to § 1983. *Id.* at 253.

In fact, far from forbidding recourse to § 1983, the FNHRA expressly preserves it. The FNHRA includes a savings clause that provides that "[t]he remedies provided under this subsection are in addition to those otherwise available under State *or Federal law* and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. § 1396r(h)(8) (emphasis added). The language of that section could not be clearer that the remedies specified in the FNHRA are intended to *supplement* any other remedy available under either State or Federal law (which includes actions under § 1983). If Congress had meant to make the FNHRA's enforcement scheme exhaustive or exclusive, it would have written a provision in the statute foreclosing access to other remedies. Instead, it did the opposite, and wrote a

provision specifically *preserving* access to other State and Federal remedies. Congress clearly did not intend the remedies in the FNHRA to be exhaustive or exclusive.

Finally, § 1983 suits to enforce FNHRA rights advance the statute's core purpose. This lawsuit, and the threat of money damages that is carried with it, serves to ensure that the Appellees follow the law and protects individual rights. A civil judgment does not differ dramatically in impact from the civil penalty that is authorized by the FNHRA. Both serve not only to compensate or penalize for a past wrong, but also help to ensure past wrongs are not repeated. Because this lawsuit furthers the overriding and fundamental purposes of the FNHRA, resort to § 1983 should not be precluded.

CONCLUSION

The judgment below should be reversed.

Dated: July 31, 2020

Respectfully submitted,

s/ Andrew Tutt

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Circuit Rule 32(c). The brief contains 12,538 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 365 (2016) in Century Expanded BT 12-point font.

s/ Andrew Tutt
Andrew T. Tutt

CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on July 31, 2020, I electronically filed the foregoing Brief of Appellant via ECF, and service was accomplished on counsel of record by that means.

s/ *Andrew Tutt*
Andrew Tutt

APPENDIX

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

I hereby certify that the Appendix herein includes all of the materials required by Circuit Rule 30(a) and (b).

s/ *Andrew Tutt*
Andrew Tutt

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

GORGI TALEVSKI, by Next Friend Ivanka Talevski,	)	
Plaintiff,	)	
v.	)	**No. 2:19 CV 13**
HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, AMERICAN SENIOR COMMUNITIES, LLC, and VALPARAISO CARE AND REHABILITATION,	)	
Defendants.	)	

OPINION and ORDER

I. BACKGROUND

In January 2016, plaintiff was a patient at a nursing home facility named as a defendant in this case, Health and Hospital Corporation ("HHC") of Marion County (d/b/a Valparaiso Care and Rehabilitation). HHC was managed by another named defendant, American Senior Communities, LLC.

Plaintiff sued defendants, pursuant to 42 U.S.C § 1983, for violation of his alleged rights under the Federal Nursing Home Reform Act, 42 U.S.C. § 1396r *et seq.* ("FNHRA"). Plaintiff alleges that defendants failed to abide by the statute in numerous respects, including by failing to "attain or maintain [plaintiff's] highest practicable physical, mental, and psychological well-being." (DE # 1 at 6-7.)

Defendants now move to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). (DE # 14). One of the issues raised therein is dispositive: whether the FNHRA provides for a federal private right of action that may be redressed under 42 U.S.C. § 1983. Because the court finds that it does not, defendants' motion to dismiss shall be granted.

II. LEGAL STANDARD

A judge reviewing a complaint pursuant to Rule 12(b)(6) must construe the allegations in the complaint in the light most favorable to the non-moving party, accept all well-pleaded facts as true, and draw all reasonable inferences in favor of the non-movant. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Reger Dev., LLC v. Nat'l City Bank*, 595 F.3d 759, 763 (7th Cir. 2010). Under the liberal notice-pleading requirements of the Federal Rules of Civil Procedure, the complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

III. DISCUSSION

The question before the court is whether Section 1983 may serve as a vehicle for a private right of action for a violation of the FNHRA. Section 1983 provides a cause of action to enforce individual rights conferred by federal statute (as well as the Constitution). *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119 (2005). "[T]o seek redress through § 1983, however, a plaintiff must assert the violation of a federal right,

not merely a violation of federal law." *Blessing v. Freestone,* 520 U.S. 329, 340 (1997). Under *Blessing*, courts consider three factors when determining whether a federal statute creates and confers a federal right: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) the asserted right must not be "so vague and amorphous that its enforcement would strain judicial competence"; and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health,* 699 F.3d 962, 972–73 (7th Cir. 2012) (quoting *Blessing,* 520 U.S. at 340–41).

In *Gonzaga University v. Doe,* the Supreme Court clarified the *Blessing* factors, holding that federal statutes must unambiguously create and confer federal rights to support a cause of action under Section 1983. 536 U.S. 273 (2002). Post-*Gonzaga*, the *Blessing* factors "are meant to set the bar high" as "nothing 'short of an unambiguously conferred right [will] support a cause of action brought under § 1983.'" *Planned Parenthood,* 699 F.3d at 973 (quoting *Gonzaga,* 536 U.S. at 283). *Gonzaga* specifically addressed Spending Clause legislation, clarifying that "unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Gonzaga,* 536 U.S. at 280 (quoting *Pennhurst State Sch. and Hosp. v. Halderman,* 451 U.S. 1, 17, 28, n. 21 (1981)). *Gonzaga* also clarified that even federal statutes intended to benefit a particular class do not necessarily confer federal rights; falling within a federal statute's "general zone of interest" is insufficient. *Gonzaga,* 536 U.S. at 283. This is because Section 1983 provides a cause of action for deprivations of rights, not broader benefits or interests. *Id.*

The issue in this case is whether the FNHRA confers federal rights under the *Blessing–Gonzaga* standard articulated above. The parties do not appear to dispute that the third *Blessing* factor should be resolved in plaintiff's favor, so the court's discussion focuses on the remaining two.

First, the court must determine whether Congress intended the FNHRA to benefit the plaintiff. *Blessing*, 520 U.S. at 340. At first glance, it appears that Congress did, in fact, intend for the FNHRA to benefit nursing home residents such as plaintiff, when it passed statutory requirements that nursing homes must, for example, "attain or maintain [a resident's] highest practicable physical, mental, and psychological well-being" in order to receive certain federal funding. 42 U.S.C. § 1396r(b)(2). One can easily infer that when a nursing home facility complies with the statute, nursing home residents ultimately reap benefits.

However, the court is mindful that *Gonzaga* holds that falling within the statute's "general zone of interest" does not confer upon an individual a private right of action under the statute. 536 U.S. at 283. It is important to note that the FNHRA was specifically and consistently drafted in terms of what nursing facilities must do in order to receive government funding. *See* 42 U.S.C. § 1396r *et seq.* Generally speaking, "statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 377 (7th Cir. 2010) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)).

Therefore, while the first factor weighs somewhat in favor of plaintiff, it does so insignificantly given the lack of clear statutory language to indicate that nursing home residents are more than simply individuals in the FNHRA's "general zone of interest," benefitting from what is otherwise a primarily funding-oriented piece of legislation. Several fellow district courts under the purview of the Seventh Circuit Court of Appeals came to a similar conclusion. *Fiers v. La Crosse Cnty.*, 132 F. Supp. 3d 1111, 1119 (W.D. Wis. 2015) (no private right of action because FNHRA focuses on facility regulation rather than articulating a right granted to the protected class); *Schwerdtfeger v. Alden Long Grove Rehab. & Health Care Ctr., Inc.*, No. 13–cv–8316, 2014 WL 1884471 (N.D. Ill. May 12, 2014) (no private right of action under FNHRA, because while statute derivatively benefits residents, statute's "focus [is] twice removed from the individuals who will ultimately benefit from the [statute]"); *Terry v. Health & Hosp. Corp. of Marion Cnty.*, No. 1:10-cv-00607-DML-JMS, slip op. at 16 (S.D. Ind. Mar. 29, 2012) (no private right of action because "FNHRA is couched in terms of what the state must require of a skilled nursing facility for its certification for participation in the federal Medicaid and Medicare programs").

The second *Blessing-Gonzaga* factor requires this court to consider whether the asserted right is "so vague and amorphous that its enforcement would strain judicial competence." *Planned Parenthood*, 699 F.3d at 972–73. None of the parties in this case pay particular attention to this factor in their briefing, least of whom plaintiff, who devotes a mere sentence to an analysis of the issue: "[N]one of [plaintiff's] allegations is sufficiently different from the kinds of issues courts deal with on a daily basis in many

other areas of law." (DE # 19 at 10.) The court disagrees, as the allegations contain indefinite terms such as "enhancement of quality of life" and "highest practicable physical, mental, and psychosocial well-being" (DE # 1), which other district courts in this circuit have found too vague and amorphous to support an argument for the existence of a private right of action under the FNHRA. *See, e.g., Terry*, No. 1:10-cv-00607-DML-JMS, slip op. at 19 ("quality of care standards Ms. Terry points to are not specific, but in fact express a generalized standard—attainment of "highest practicable well-being"); *Fiers*, 132 F. Supp. 3d at 1117 (allegations related to "maintenance or enhancement of his quality of life," "maintain[ance of] the highest practicable physical, mental, and psychosocial well-being," and "inadequate policies and plans of care to properly supervise and provide care for its residents" were so vague and amorphous that enforcement would strain judicial competence).

Further, the Seventh Circuit has held that a statutory provision similar to the FNHRA's general "quality of life" protections was insufficiently clear to confer a federal right in *Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003). In that case, the Seventh Circuit held that the portion of the Medicaid Act requiring state plans for medical assistance to provide care and services in the "best interests" of the recipients was "insufficiently definite to be justiciable, and in addition cannot be interpreted to create a private right of action, given the Supreme Court's hostility . . . to implying such rights in spending statutes." *Id.* at 911. Like the allegations related to the Medicaid Act provision at issue in *Bruggeman*, plaintiff's allegations related to the FNHRA require reading rights into the statute that would be so vague and amorphous

that enforcement would strain judicial competence. Thus, this factor weighs heavily in defendants' favor.

When balancing the *Blessing* factors, the court is mindful of the Supreme Court's admonishment that the court listen for Congress's "clear voice" in discerning a private right of action from statutory text, while keeping in sight the ultimate question of whether Congress unambiguously intended to confer a private right of action. *Gonzaga,* 536 U.S. at 283. As previously explained, the FNHRA was surely intended to benefit nursing home patients, but the indirect nature of this benefit renders the first *Blessing* factor's weight, in plaintiff's favor, rather insignificant. The second factor weighs heavily in defendant's favor, as the nature of the rights asserted are vague. Though the third factor – the mandatory nature of the statutory requirements – weighs in plaintiff's favor, it carries little weight, as the mandatory nature of statutory provisions seems inconsequential compared to the competing factors suggesting that a private right of action should not be inferred from vague Congressional statements regarding indirect beneficiaries in the first place. The *Blessing* factors, when weighted and compared with *Gonzaga* as a guiding principle, indicate that this court should not infer that Congress intended to create private right of action when it drafted the FNHRA. The same result was reached by other district courts in this circuit. *Fiers,* 132 F. Supp. 3d at 1119; *Schwerdtfeger,* 2014 WL 1884471, at *6; *Terry,* No. 1:10-cv-00607-DML-JMS, slip op. at 16.

Plaintiff urges this court to dismiss the holdings of its sister district courts, and instead to embrace the holdings of other circuits where a private right of action has been read into the FNHRA. *See, e.g., Grammer v. John J. Kane Reg'l. Ctrs.,* 570 F.3d 520 (3d

Cir. 2009); *see also Anderson v. Ghaly*, 930 F.3d 1066, 1075 (9th Cir. 2019). However, the court finds the reasoning employed by the district courts in *Fiels, Terry,* and *Schwerdtfeger* (especially when viewed in the context of *Bruggeman*) to be sound predictors of how the Seventh Circuit might rule on the issue. Accordingly, the court rejects plaintiff's argument that this court should adopt the non-binding precedent of other circuits.

IV. CONCLUSION

For the foregoing reasons, the court concludes that the FNHRA does not confer federal rights and, accordingly, cannot support a cause of action under Section 1983. Therefore, defendants' motion to dismiss (DE # 14) is **GRANTED** and this case is **DISMISSED**.

SO ORDERED.

Date: March 26, 2020

s/James T. Moody
JUDGE JAMES T. MOODY
UNITED STATES DISTRICT COURT

U.S. District Court Northern District of Indiana [LIVE]
USDC Northern Indiana (Hammond)
CIVIL DOCKET FOR CASE #: 2:19-cv-00013-JTM-APR

Talevski v. Health and Hospital Corporation of Marion County The et al
Assigned to: Senior Judge James T Moody
Referred to: Magistrate Judge Andrew P Rodovich
Demand: $100,000

Case in other court: USCA, 20-01664

Cause: 42:1396 - Tort Negligence

Date Filed: 01/10/2019
Date Terminated: 03/26/2020
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Gorgi Talevski
by
next friend
Ivanka Talevski

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#	Docket Text	Date Filed
1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0755-3779794.), filed by Gorgi Talevski. (Attachments: # 1 Civil Cover Sheet, # 2 Proposed Summons : HHC, # 3 Proposed Summons ASC, # 4 Proposed Summons VCR, # 5 Proposed Summons Combined)(Meisenhelder, Jay) (Entered: 01/10/2019)	01/10/2019
2	NOTICE of Appearance by Jay Meisenhelder on behalf of Gorgi Talevski (Meisenhelder, Jay) (Entered: 01/10/2019)	01/10/2019
	Senior Judge James T Moody and Magistrate Judge Andrew P Rodovich added. (NEW CASE) (rmc) (Entered: 01/11/2019)	01/11/2019
3	Summons Issued as to American Senior Communities LLC, Health and Hospital Corporation of Marion County The, Valparaiso Care and Rehabilitation. NOTE:The attached document is accessible by court personnel only. Summons forms that were electronically submitted to the court for issuance will be returned to counsel via e-mail. (rmc) (Entered: 01/11/2019)	01/11/2019
4	*Refiled at 5 using NDIN appearance form*NOTICE of Appearance by Susie Talevski on behalf of Gorgi Talevski (Talevski, Susie) Modified on 1/29/2019 to update docket text. (nal) (Entered: 01/25/2019)	01/25/2019
5	NOTICE of Appearance by Susie Talevski on behalf of Gorgi Talevski (Talevski, Susie) (Entered: 01/28/2019)	01/28/2019
6	NOTICE of Appearance by Laura K Binford on behalf of All Defendants (Binford, Laura) (Entered: 02/19/2019)	02/19/2019
7	Corporate Disclosure Statement by Health and Hospital Corporation of Marion County The, Valparaiso Care and Rehabilitation. (Binford, Laura) (Entered: 02/19/2019)	02/19/2019
8	Corporate Disclosure Statement by American Senior Communities LLC. (Binford, Laura) (Entered: 02/19/2019)	02/19/2019
9	NOTICE by American Senior Communities LLC, Health and Hospital Corporation of Marion County The, Valparaiso Care and Rehabilitation of Initial Extension of Time to Respond to Plaintiff's Complaint (Binford, Laura) (Entered: 02/19/2019)	02/19/2019
10	MINUTE ORDER: Each party and each attorney in this case shall take reasonable steps to preserve electronically stored information (ESI) that is relevant to any claim or defense in this case, whether or not the information is admissible at trial. This requirement relates back to the point in time when the party or attorney reasonably anticipated litigation about these matters. Text entry order. By Magistrate Judge Andrew P Rodovich on 2/20/2019. (tc) (Entered: 02/20/2019)	02/20/2019
11	NOTICE of Appearance by Jaclyn M Flint on behalf of All Defendants (Flint, Jaclyn) (Entered: 02/21/2019)	02/21/2019
12	ORDER AND NOTICE OF HEARING: In Person Rule 16 Preliminary Pretrial Conference set for 4/12/2019 09:00 AM in US District Court - Hammond before Magistrate Judge Andrew P Rodovich. A proposed Discovery Plan under Federal Rule of Civil Procedure 26(f) to be filed no later than five (5) business days prior to the pretrial conference. Signed by Magistrate Judge Andrew P Rodovich on 3/20/2019. (tc) (Entered: 03/20/2019)	03/20/2019
13	MAGISTRATE JUDGE CONSENT FORMS sent to all parties. Magistrate Consent forms due by 4/12/2019. (tc) (Entered: 03/20/2019)	03/20/2019
14	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Defendants American Senior Communities LLC, Health and Hospital Corporation of Marion County The, Valparaiso Care and Rehabilitation. (Binford, Laura) (Entered: 03/26/2019)	03/26/2019
15	MEMORANDUM in Support of 14 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by American Senior Communities LLC, Health and Hospital Corporation of Marion County The, Valparaiso Care and Rehabilitation. (Binford, Laura) (Entered: 03/26/2019)	03/26/2019
16	MINUTE ORDER: The Rule 16 Preliminary Pretrial Conference set for 4/12/2019 09:00 AM in US District Court - Hammond before Magistrate Judge Andrew P Rodovich is VACATED re 14 Motion to Dismiss, to be reset at a later date if necessary. By Magistrate Judge Andrew P Rodovich on 3/28/2019. Text entry only. (tc) (Entered: 03/28/2019)	03/28/2019
17	Consent MOTION for Extension of Time to File Response/Reply as to 14 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Plaintiff Gorgi Talevski. (Meisenhelder, Jay) (Entered: 04/05/2019)	04/05/2019
18	ORDER: Court GRANTS 17 Consent Motion for 21-Day Extension of Time to Respond to Defendants' Motion to Dismiss. Plaintiff to respond by 4/30/2019. By Magistrate Judge Andrew P Rodovich on 4/8/2019. Text entry only. (tc) (Entered: 04/08/2019)	04/08/2019

#	Docket Text	Date Filed
19	RESPONSE to Motion re 14 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by Gorgi Talevski. (Meisenhelder, Jay) (Entered: 04/29/2019)	04/29/2019
20	REPLY to Response to Motion re 14 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by American Senior Communities LLC, Health and Hospital Corporation of Marion County The, Valparaiso Care and Rehabilitation. (Binford, Laura) (Entered: 05/06/2019)	05/06/2019
21	NOTICE of Change of Address/Contact Information (Binford, Laura) (Entered: 08/20/2019)	08/20/2019
22	OPINION AND ORDER: Defendants' Motion to Dismiss 14 is GRANTED and this case is DISMISSED. Signed by Senior Judge James T Moody on 3/26/2020. (shk) (Entered: 03/26/2020)	03/26/2020
23	CLERK'S ENTRY OF JUDGMENT. (shk) (Entered: 03/26/2020)	03/26/2020
24	NOTICE OF APPEAL as to 22 Opinion and Order, Terminate Civil Case, filed by Plaintiff Gorgi Talevski. Filing fee $ 505, receipt number 0755-4206357. (Meisenhelder, Jay) (Entered: 04/22/2020)	04/22/2020
25	Docketing Statement re: 24 Notice of Appeal filed by Gorgi Talevski. (Meisenhelder, Jay) (Entered: 04/22/2020)	04/22/2020
26	Short Record Sent to US Court of Appeals re 24 Notice of Appeal. Appeal filing fees paid in the amount of $505 - Receipt # 0755-4206357. (bas) (Entered: 04/23/2020)	04/23/2020
27	USCA Case Number 20-1664 for 24 Notice of Appeal filed by Gorgi Talevski. (rmf) (Entered: 04/24/2020)	04/23/2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

GORGI TALEVSKI, by Next Friend Ivanka Talevski,	)	
Plaintiff,	)	
v.	)	
THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY,	)	**CASE NO. 2:19-cv-0013-**
AMERICAN SENIOR COMMUNITIES, LLC, and	)	
VALPARAISO CARE AND REHABILITATION,	)	
Defendants.	)	

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff Gorgi Talevski, by Next Friend Ivanka Talevski, and by counsel, files his Complaint and Demand for Jury Trial against Defendants The Health and Hospital Corporation of Marion County ("HHC"), American Senior Communities, LLC ("ASC"), and Valparaiso Care and Rehabilitation ("VCR") depriving and/or conspiring to deprive Plaintiff of rights secured under the Omnibus Budget Reconciliation Act of 1987 ("OBRA"), the Federal Nursing Home Reform Act ("FNHRA"), 42 U.S.C. § 1396, *et seq*., the Federal Nursing Home Regulations found in 42 C.F.R. Sec. 483, and the Constitution of the United States of America, under color of state law, pursuant to 42 U.S.C. § 1983.

I. Parties, Jurisdiction and Venue

1. Plaintiff Gorgi Talevski ("Mr. Talevski") is an adult individual residing at Signature of Bremen located at 316 Woodies Lane in Bremen, Marshall County, Indiana, within the

geographical boundaries of the Northern District of Indiana. At all times relevant to this action, Mr. Talevski has resided within the geographic boundaries of the Northern District.

2. Ivanka Talevski ("Mrs. Talevski") is the Plaintiff's wife and attorney in fact, and at all times relevant to this action, has resided at 429 Hampshire Court, Valparaiso, Porter County, Indiana, within the geographical boundaries of the Northern District of Indiana.

3. Valparaiso Care and Rehabilitation ("VCR") is a long-term care, skilled nursing facility, located in Valparaiso, Porter County, Indiana, within the geographical boundaries of the Northern District of Indiana.

4. The Health and Hospital Corporation of Marion County ("HHC') is a municipal corporation, owned by Marion County, Indiana, and headquartered in Indianapolis, Indiana. At all times relevant to this action, HHC has owned VCR, as well as approximately 77 other nursing homes throughout Indiana.

5. American Senior Communities ("ASC") is a privately held nursing home management company headquartered in Indianapolis, Indiana. At all times relevant to this case, ASC has been under contract with HHC to manage and operate VCR, as well as all of HHC's other nursing homes throughout the state.

6. This case presents an issue of federal law, and therefore, subject matter jurisdiction is proper in this Court, pursuant to 28 U.S.C. § 1331, .

7. All acts and events relating to this action having occurred within the geographical boundaries on the Northern District of Indiana, venue is proper in this Court.

II. Factual Allegations

8. Mr. Talevski suffers from dementia. His family cared for him until it became clear that he needed full-time care to ensure his safety.

9. In January 2016, when Mr. Talevski's family could no longer care for him, he became a patient at VCR, a nursing facility located in his hometown Valparaiso, Indiana. At the time that he entered VCR, Mr. Talevski was able to able to walk, talk, feed himself, socialize, and recognize his family.

10. While Mr. Talevski was a resident at VCR, his wife and two daughters were frequently called to the facility to help staff with Mr. Talevski. Mrs. Talevski and her daughters observed that VCR's dementia unit was often understaffed. Additionally, the staff that was present appeared to be poorly trained in dealing with dementia patients. On a number of occasions, Mr. Talevski's family found that he had soiled himself, and had a severe rash on his buttocks.

11. As Mr. Talevski's time at VCR passed, he began losing his ability to communicate in English. Instead, he could communicate only in his native Macedonian. VCR never provided or used any language translation services or other means to communicate with Mr. Talevski. Consequently VCR staff had great difficulty caring for Mr. Talevski.

12. In late August 2016, Mr. Talevski suddenly and dramatically decompensated. He stopped eating on his own, requiring his wife and daugthers to go to VCR to feed him. One one occasion, Mr. Talevski could not even get up out of bed at all.

13. When Mr. Talevski's confronted VCR staff about why Mr. Talevski's condition was deteriorating so drastically, they were told that it was the progression of his disease.

14. On or about September 2016, Mr. Talevski's daughter asked VCR staff for a list of all the medications that Mr. Talevski was being given. The list revealed that Mr. Talevski was on ten different medications, six of which were psychotropic medications.

15. Mr. Talevski's daughter strongly suspected that her father was being chemically restrained, a suspicion she confirmed with outside medical providers, and Mr. Talevski's family

sought outside medical care from a specialist to remove these medications from her father's regime.

16. During the week of September 27, 2016, the Indiana State Department of Health ("ISDH") conducted its annual survey of VCR. During that time, survey nurses were available for residents or family members to speak with. Mr. Talevski's family filed a formal compliant with ISDH regarding the over-prescribing of psychiatric drugs to chemically restrain Mr. Talevski.

17. As Mr. Talevski's medication was tapered down, per the orders of his own neurologist, Mr. Talevski began to recover, and started to feed himself once agian.

18. In late November, VCR started to send Mr. Talevski out to Doctors NeuroPsychiatric Hospital ("NeuroPsych") in Bremen, Indiana, which is an hour and half away from Valparaiso. VCR's reason for this action was alleged inappropriate behavior towards female residents and staff.

19. Initially, Mr. Talevski was sent to NeuroPsych from November 23 through December 15, 2016. Only four days after his return from NeuroPsych, Mr. Talevski was sent to the facility for a second time, from December 19 through December 29. The ***day after his return*** Talevski was sent to NeuroPsych for a third time.

20. NeuroPsych intended to return Mr. Talevski to VCR on January 9, 2017. However, VCR refused to accept Mr. Talevski back. Instead, VCR tried to force his transfer to an all-male dementia facility in Indianapolis.

21. The last time Mr. Talevski was sent to NeuroPsych, he was sent without his dentures. VCR never provided NeuroPsych with Mr. Talevski's dentures, leaving him, essentially, toothless in Bremen.

22. When VCR refused to allow Mr. Talevski to return, his family filed a Petition for Review of Involuntary Transfer through the ISDH.

23. Although the staff at NeuroPsych attempted to find another facility for Mr. Talevski,

they were unable to find another appropriate facility in Northwest Indiana. NeuroPsych was able to find a suitable facility in Bremen, although that facility was a ninety-minute drive from Mr. Talevski's family in Valparaiso.

24. The family agreed to Mr. Talevski's temporary transfer there pending the outcome of the ISDH hearing.

25. Because Mr. Talevski had not had his dentures at NeuroPsych, when he was transferred to Bremen, the staff there was unable to fit new dentures because his gums had receded to far. As of the date of filing, Mr. Talevski is still without his dentures.

26. On January 19, 2017, an ISDH Administrative Law Judge ("ALJ") held a nearly six-hour-long hearing following which the ALJ effectively denied VCR's attempt to "patient dump" Mr. Talevski, ruling "the decision to transfer [Mr. Talevski] from Valparaiso Care and Rehabilitation should **NOT** be affirmed." The order was issued February 28, 2017.

27. Based on the ALJ's order, the family attempted to have Mr. Talevski returned to VCR. However, VCR simply ignored the order and refused to readmit Mr. Talevski.

28. As a result, Mr. Talevski unnecessarily spent more than a month and a half at NeuroPsych, at a cost of nearly $30,000, all of which was paid for by Medicare.

29. Mr. Talevski's family complained to the ISDH regarding VCR's refusal to abide by the ALJ's order. The ISDH sent in another nurse investigator to address all the complaints against the nursing home.

30. In May 2017, the ISDH issued their finding in an 81 page document.

31. After "dumping" Mr. Talevski at NeuroPsych in January, following the May ISDH report, ASC contacted Mrs. Talevski to discuss evaluating Mr. Talevski for return to VCR.

32. After meeting with VCR staff in June 2017, and after reading the 81 page report, Mr.

Talevski's family was very concerned about possible retribution against Mr. Talevski if he was to be returned. Additionally, Mr. Talevski was by now acclimated to his new surrounding at the Bremen nursing home.

33. As a result, Mr. Talevski's family opted to leave Mr. Talevski in the Breman facility.

34. As a result, Mr. Talevsji's family is required to make a three-hour round-trip to visit Mr. Talevski, which they do on a regular basis.

III. Legal Allegations

Count One: Deprivation of Rights Under Color of State Law (42 U.S.C. § 1983)

35. Plaintiff restates each and every allegation in paragraphs one (1) through thirty-four (34) as though fully set forth herein.

36. Defendant HHC is a corporation owned by Marion County, Indiana, and is therefore "person . . . under color of any statute, ordinance, regulation, custom, or usage, of [the State of Indiana," as that term is used in 42 U.S.C. § 1983.

37. Defendant VCR is wholly-owned by HHC and is therefore a "person . . . under color of any statute, ordinance, regulation, custom, or usage, of [the State of Indiana," as that term is used in 42 U.S.C. § 1983.

38. Defendant ASC manages VCR as an agent of HHC, and is therefore "person . . . under color of any statute, ordinance, regulation, custom, or usage, of [the State of Indiana," as that term is used in 42 U.S.C. § 1983.

39. The 1987 Omnibus Budget Reconciliation Act ("OBRA"), the Federal Nursing Home Reform Act ("FNHRA"), which was contained within the 1987 OBRA, and the implementing regulations therefore, found at 42 C.F.R. § 483, *et seq*., clearly and unambiguously create rights enforceable pursuant to 42 U.S.C. § 1983.

40. The Defendants' actions, individually and/or collectively, and in derogation of the above statute and regulations, have deprived Mr. Talevski of those rights by:

a. maintaining a policy, practice or custom of allowing the use illegal chemical restraints on Mr. Talevski and other VCF patients;

b. maintaining a policy, practice or custom that denied Mr. Talevski, via his legal representatives, to file grievance free of reprisal as required by law;

c. maintaining a policy, practice or custom that deprived Mr. Talevski and other VCR residents, to remain at the nursing facility and not to be transferred or discharged without due process;

d. denying Mr. Talevski due process by failing to provide proper and timely notification of any transfer or discharge from the nursing facility;

e. by maintaining a policy, practice, or custom, that failed to care for Mr. Talveski in such a manner and in such an environment as to promote maintenance or enhancement of the quality of life of each resident;

f. by maintaining a policy, practice, or custom that failed to provide Mr. Tavelsi with nursing and related services and specialized rehabilitative services to attain or maintain his highest practicable physical, mental, and psychosocial well-being; that is, by repeatedly and regularly failing to have sufficient staff to care for Mr. Tavelski;

g. failing to provide Mr. Talevski with medically-related social services, including but not limited to translation services, to attain or maintain his highest practicable physical, mental, and psychosocial well-being; that is, by failing to provide an effective means to communicate with Mr. Tavelski in his native language;

h. failing to provide Mr. Talevski with pharmaceutical services (including procedures that assure the accurate acquiring, receiving, dispensing, and administering of all drugs and biologicals) to meet his needs; that is, by

over-prescribing the use of psychotropic drugs as chemical restraints;

i. failing to provide Mr. Talevski with an on-going program, directed by a qualified professional, of activities designed to meet his interests and the physical, mental, and psychosocial well-being;

j. by failing to provide Mr. Talevski with routine dental services (to the extent covered under the State plan) and emergency dental services to meet his needs; that is, by failing to provide him with his dentures when transferring him to NeuroPsych;

k. depriving Mr. Talevski of his right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat his medical symptoms; that is, by over-prescribing the use of psychotropic drugs to chemically restrain Mr. Talevski;

41. The Defendants' actions were intentional, willful, and in reckless disregard for Mr. Talevski's rights.

42. As a result of the Defendants' unlawful actions, Mr. Talevski suffered, and continues to suffer, damages, including but not limited to, legal expenses, physical and mental pain and suffering, emotional distress, humiliation, and embarrassment.

IV. Relief Requested

WHEREFORE, Plaintiff Gorgi Talevski, by Next Friend Ivanka Talevski, respectfully requests that the Court enter judgment in her favor, and against the Defendants, and provide the following relief:

43. Order the Defendants, jointly and severally, to pay him actual damages in an amount sufficient to compensate him for any actual out-of-pocket costs, including but not limited to any subrogation by any insurance company or government entity;

44. Order the Defendants, jointly and severally, to pay him compensatory damages for the physical and mental pain and suffering, emotional distress, humiliation, and embarrassment caused by Defendants' actions;

45. Order Defendant ASC to pay him punitive damages, for its willful, reckless and malicious actions;

46. Order the Defendants, jointly and severally, to pay pre- and post-judgment interest on all sums awarded

47. Order the Defendants, jointly and severally, to pay her reasonable attorney fees and costs of litigating this action; and

48. Order the Defendants, jointly and severally, to provide any and all other relief to which the Plaintiff may be entitled.

V. Demand for Jury Trial

Plaintiff Gorgi Talevski by Next Friend Ivanka Talevski, and by counsel, demands a trial by jury on all issues so triable.

Respectfully submitted,

s/ Jay Meisenhelder
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

GORGI TALEVSKI, by his Next Friend Ivanka Talevski,	)	
Plaintiff,	)	
v.	)	**CASE NO. 2:19-cv-00013-JTM-APR**
HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, AMERICAN SENIOR COMMUNITIES, LLC, and VALPARAISO CARE AND REHABILITATION,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Ivanka Talevski, as Next Friend of Georgi Talevski, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Seventh Circuit the Order of the District Court Dismissing this case, entered in this action on March 26, 2020. [Dkt. # 22].

Respectfully submitted,

s/ Jay Meisenhelder

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CERTIFICATE OF SERVICE

I certify that on April 20, 2020, the foregoing was filed electronically. Copies will be sent to all counsel of record by operation of the Court's CM/ECF system.

s/ Jay Meisenhelder

effectuate the purposes of this order. Each such department and agency shall consult with the Committee in order to achieve such consistency and uniformity as may be feasible.

PART III—ENFORCEMENT

SEC. 301. The Committee, any subcommittee thereof, and any officer or employee designated by any executive department or agency subject to this order may hold such hearings, public or private, as the Committee, department, or agency may deem advisable for compliance, enforcement, or educational purposes.

SEC. 302. If any executive department or agency subject to this order concludes that any person or firm (including but not limited to any individual, partnership, association, trust, or corporation) or any State or local public agency has violated any rule, regulation, or procedure issued or adopted pursuant to this order, or any nondiscrimination provision included in any agreement or contract pursuant to any such rule, regulation, or procedure, it shall endeavor to end and remedy such violation by informal means, including conference, conciliation, and persuasion unless similar efforts made by another Federal department or agency have been unsuccessful. In conformity with rules, regulations, procedures, or policies issued or adopted by it pursuant to Section 203 hereof, a department or agency may take such action as may be appropriate under its governing laws, including, but not limited to, the following:

It may—

(a) cancel or terminate in whole or in part any agreement or contract with such person, firm, or State or local public agency providing for a loan, grant, contribution, or other Federal aid, or for the payment of a commission or fee;

(b) refrain from extending any further aid under any program administered by it and affected by this order until it is satisfied that the affected person, firm, or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order, and any nondiscrimination provisions included in any agreement or contract;

(c) refuse to approve a lending institution or any other lender as a beneficiary under any program administered by it which is affected by this order or revoke such approval if previously given.

SEC. 303. In appropriate cases executive departments and agencies shall refer to the Attorney General violations of any rules, regulations, or procedures issued or adopted pursuant to this order, or violations of any nondiscrimination provisions included in any agreement or contract, for such civil or criminal action as he may deem appropriate. The Attorney General is authorized to furnish legal advice concerning this order to the Committee and to any department or agency requesting such advice.

SEC. 304. Any executive department or agency affected by this order may also invoke the sanctions provided in Section 302 where any person or firm, including a lender, has violated the rules, regulations, or procedures issued or adopted pursuant to this order, or the nondiscrimination provisions included in any agreement or contract, with respect to any program affected by this order administered by any other executive department or agency.

PART IV—ESTABLISHMENT OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

[Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, § 6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART V—POWERS AND DUTIES OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

SEC. 501. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, § 6–604, Jan. 17, 1994, 59 F.R. 2939.]

SEC. 502. (a) The Committee shall take such steps as it deems necessary and appropriate to promote the coordination of the activities of departments and agencies under this order. In so doing, the Committee shall consider the overall objectives of Federal legislation relating to housing and the right of every individual to participate without discrimination because of race, color, religion (creed), sex, disability, familial status or national origin in the ultimate benefits of the Federal programs subject to this order.

(b) The Committee may confer with representatives of any department or agency, State or local public agency, civic, industry, or labor group, or any other group directly or indirectly affected by this order; examine the relevant rules, regulations, procedures, policies, and practices of any department or agency subject to this order and make such recommendations as may be necessary or desirable to achieve the purposes of this order.

(c) The Committee shall encourage educational programs by civic, educational, religious, industry, labor, and other nongovernmental groups to eliminate the basic causes of discrimination in housing and related facilities provided with Federal assistance.

SEC. 503. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, § 6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART VI—MISCELLANEOUS

SEC. 601. As used in this order, the term ''departments and agencies'' includes any wholly-owned or mixed-ownership Government corporation, and the term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories of the United States.

SEC. 602. This order shall become effective immediately.

[Functions of President's Committee on Equal Opportunity in Housing under Ex. Ord. No. 11063 delegated to Secretary of Housing and Urban Development by Ex. Ord. No. 12892, § 6–604(a), Jan. 17, 1994, 59 F.R. 2939, set out as a note under section 3608 of this title.]

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

CODIFICATION

R.S. § 1979 derived from act Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

AMENDMENTS

1996—Pub. L. 104–317 inserted before period at end of first sentence '', except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable''.

1979—Pub. L. 96–170 inserted ''or the District of Columbia'' after ''Territory'', and provisions relating to Acts of Congress applicable solely to the District of Columbia.

(C) Competency

The nursing facility must not permit an individual, other than in a training and competency evaluation program approved by the State, to serve as a nurse aide or provide services of a type for which the individual has not demonstrated competency and must not use such an individual as a nurse aide unless the facility has inquired of any State registry established under subsection (e)(2)(A) of this section that the facility believes will include information concerning the individual.

(D) Re-training required

For purposes of subparagraph (A), if, since an individual's most recent completion of a training and competency evaluation program, there has been a continuous period of 24 consecutive months during none of which the individual performed nursing or nursing-related services for monetary compensation, such individual shall complete a new training and competency evaluation program, or a new competency evaluation program.

(E) Regular in-service education

The nursing facility must provide such regular performance review and regular in-service education as assures that individuals used as nurse aides are competent to perform services as nurse aides, including training for individuals providing nursing and nursing-related services to residents with cognitive impairments.

(F) "Nurse aide" defined

In this paragraph, the term ''nurse aide'' means any individual providing nursing or nursing-related services to residents in a nursing facility, but does not include an individual—

(i) who is a licensed health professional (as defined in subparagraph (G)) or a registered dietician, or

(ii) who volunteers to provide such services without monetary compensation.

Such term includes an individual who provides such services through an agency or under a contract with the facility.

(G) Licensed health professional defined

In this paragraph, the term ''licensed health professional'' means a physician, physician assistant, nurse practitioner, physical, speech, or occupational therapist, physical or occupational therapy assistant, registered professional nurse, licensed practical nurse, or licensed or certified social worker.

(6) Physician supervision and clinical records

A nursing facility must—

(A) require that the health care of every resident be provided under the supervision of a physician (or, at the option of a State, under the supervision of a nurse practitioner, clinical nurse specialist, or physician assistant who is not an employee of the facility but who is working in collaboration with a physician);

(B) provide for having a physician available to furnish necessary medical care in case of emergency; and

(C) maintain clinical records on all residents, which records include the plans of care (described in paragraph (2)) and the residents' assessments (described in paragraph (3)), as well as the results of any pre-admission screening conducted under subsection (e)(7) of this section.

(7) Required social services

In the case of a nursing facility with more than 120 beds, the facility must have at least one social worker (with at least a bachelor's degree in social work or similar professional qualifications) employed full-time to provide or assure the provision of social services.

(8) Information on nurse staffing

(A) In general

A nursing facility shall post daily for each shift the current number of licensed and unlicensed nursing staff directly responsible for resident care in the facility. The information shall be displayed in a uniform manner (as specified by the Secretary) and in a clearly visible place.

(B) Publication of data

A nursing facility shall, upon request, make available to the public the nursing staff data described in subparagraph (A).

(c) Requirements relating to residents' rights

(1) General rights

(A) Specified rights

A nursing facility must protect and promote the rights of each resident, including each of the following rights:

(i) Free choice

The right to choose a personal attending physician, to be fully informed in advance about care and treatment, to be fully informed in advance of any changes in care or treatment that may affect the resident's well-being, and (except with respect to a resident adjudged incompetent) to participate in planning care and treatment or changes in care and treatment.

(ii) Free from restraints

The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms. Restraints may only be imposed—

(I) to ensure the physical safety of the resident or other residents, and

(II) only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used (except in emergency circumstances specified by the Secretary until such an order could reasonably be obtained).

(iii) Privacy

The right to privacy with regard to accommodations, medical treatment, written and telephonic communications, visits,

and meetings of family and of resident groups.

(iv) Confidentiality

The right to confidentiality of personal and clinical records and to access to current clinical records of the resident upon request by the resident or the resident's legal representative, within 24 hours (excluding hours occurring during a weekend or holiday) after making such a request.

(v) Accommodation of needs

The right—

(I) to reside and receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered, and

(II) to receive notice before the room or roommate of the resident in the facility is changed.

(vi) Grievances

The right to voice grievances with respect to treatment or care that is (or fails to be) furnished, without discrimination or reprisal for voicing the grievances and the right to prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.

(vii) Participation in resident and family groups

The right of the resident to organize and participate in resident groups in the facility and the right of the resident's family to meet in the facility with the families of other residents in the facility.

(viii) Participation in other activities

The right of the resident to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility.

(ix) Examination of survey results

The right to examine, upon reasonable request, the results of the most recent survey of the facility conducted by the Secretary or a State with respect to the facility and any plan of correction in effect with respect to the facility.

(x) Refusal of certain transfers

The right to refuse a transfer to another room within the facility, if a purpose of the transfer is to relocate the resident from a portion of the facility that is not a skilled nursing facility (for purposes of subchapter XVIII of this chapter) to a portion of the facility that is such a skilled nursing facility.

(xi) Other rights

Any other right established by the Secretary.

Clause (iii) shall not be construed as requiring the provision of a private room. A resident's exercise of a right to refuse transfer under clause (x) shall not affect the resident's eligibility or entitlement to medical assistance under this subchapter or a State's entitlement to Federal medical assistance under this subchapter with respect to services furnished to such a resident.

(B) Notice of rights

A nursing facility must—

(i) inform each resident, orally and in writing at the time of admission to the facility, of the resident's legal rights during the stay at the facility and of the requirements and procedures for establishing eligibility for medical assistance under this subchapter, including the right to request an assessment under section 1396r–5(c)(1)(B) of this title;

(ii) make available to each resident, upon reasonable request, a written statement of such rights (which statement is updated upon changes in such rights) including the notice (if any) of the State developed under subsection (e)(6) of this section;

(iii) inform each resident who is entitled to medical assistance under this subchapter—

(I) at the time of admission to the facility or, if later, at the time the resident becomes eligible for such assistance, of the items and services (including those specified under section 1396a(a)(28)(B) of this title) that are included in nursing facility services under the State plan and for which the resident may not be charged (except as permitted in section 1396*o* of this title), and of those other items and services that the facility offers and for which the resident may be charged and the amount of the charges for such items and services, and

(II) of changes in the items and services described in subclause (I) and of changes in the charges imposed for items and services described in that subclause; and

(iv) inform each other resident, in writing before or at the time of admission and periodically during the resident's stay, of services available in the facility and of related charges for such services, including any charges for services not covered under subchapter XVIII of this chapter or by the facility's basic per diem charge.

The written description of legal rights under this subparagraph shall include a description of the protection of personal funds under paragraph (6) and a statement that a resident may file a complaint with a State survey and certification agency respecting resident abuse and neglect and misappropriation of resident property in the facility.

(C) Rights of incompetent residents

In the case of a resident adjudged incompetent under the laws of a State, the rights of the resident under this subchapter shall devolve upon, and, to the extent judged necessary by a court of competent jurisdiction, be exercised by, the person appointed under State law to act on the resident's behalf.

(D) Use of psychopharmacologic drugs

Psychopharmacologic drugs may be administered only on the orders of a physician and only as part of a plan (included in the written plan of care described in paragraph (2)) designed to eliminate or modify the symptoms for which the drugs are prescribed and only if, at least annually an independent, external consultant reviews the appropriateness of the drug plan of each resident receiving such drugs.

(2) Transfer and discharge rights

(A) In general

A nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless—

(i) the transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility;

(ii) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(iii) the safety of individuals in the facility is endangered;

(iv) the health of individuals in the facility would otherwise be endangered;

(v) the resident has failed, after reasonable and appropriate notice, to pay (or to have paid under this subchapter or subchapter XVIII of this chapter on the resident's behalf) for a stay at the facility; or

(vi) the facility ceases to operate.

In each of the cases described in clauses (i) through (iv), the basis for the transfer or discharge must be documented in the resident's clinical record. In the cases described in clauses (i) and (ii), the documentation must be made by the resident's physician, and in the case described in clause (iv) the documentation must be made by a physician. For purposes of clause (v), in the case of a resident who becomes eligible for assistance under this subchapter after admission to the facility, only charges which may be imposed under this subchapter shall be considered to be allowable.

(B) Pre-transfer and pre-discharge notice

(i) In general

Before effecting a transfer or discharge of a resident, a nursing facility must—

(I) notify the resident (and, if known, an immediate family member of the resident or legal representative) of the transfer or discharge and the reasons therefor,

(II) record the reasons in the resident's clinical record (including any documentation required under subparagraph (A)), and

(III) include in the notice the items described in clause (iii).

(ii) Timing of notice

The notice under clause (i)(I) must be made at least 30 days in advance of the resident's transfer or discharge except—

(I) in a case described in clause (iii) or (iv) of subparagraph (A);

(II) in a case described in clause (ii) of subparagraph (A), where the resident's health improves sufficiently to allow a more immediate transfer or discharge;

(III) in a case described in clause (i) of subparagraph (A), where a more immediate transfer or discharge is necessitated by the resident's urgent medical needs; or

(IV) in a case where a resident has not resided in the facility for 30 days.

In the case of such exceptions, notice must be given as many days before the date of the transfer or discharge as is practicable.

(iii) Items included in notice

Each notice under clause (i) must include—

(I) for transfers or discharges effected on or after October 1, 1989, notice of the resident's right to appeal the transfer or discharge under the State process established under subsection (e)(3) of this section;

(II) the name, mailing address, and telephone number of the State long-term care ombudsman (established under title III or VII of the Older Americans Act of 1965 [42 U.S.C. 3021 et seq., 3058 et seq.] in accordance with section 712 of the Act [42 U.S.C. 3058g]);

(III) in the case of residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy system for developmentally disabled individuals established under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 U.S.C. 15041 et seq.]; and

(IV) in the case of mentally ill residents (as defined in subsection (e)(7)(G)(i) of this section), the mailing address and telephone number of the agency responsible for the protection and advocacy system for mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act[2] [42 U.S.C. 10801 et seq.].

(C) Orientation

A nursing facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

(D) Notice on bed-hold policy and readmission

(i) Notice before transfer

Before a resident of a nursing facility is transferred for hospitalization or therapeutic leave, a nursing facility must provide written information to the resident and an immediate family member or legal representative concerning—

(I) the provisions of the State plan under this subchapter regarding the pe-

[2] See References in Text note below.

riod (if any) during which the resident will be permitted under the State plan to return and resume residence in the facility, and

(II) the policies of the facility regarding such a period, which policies must be consistent with clause (iii).

(ii) Notice upon transfer

At the time of transfer of a resident to a hospital or for therapeutic leave, a nursing facility must provide written notice to the resident and an immediate family member or legal representative of the duration of any period described in clause (i).

(iii) Permitting resident to return

A nursing facility must establish and follow a written policy under which a resident—

(I) who is eligible for medical assistance for nursing facility services under a State plan,

(II) who is transferred from the facility for hospitalization or therapeutic leave, and

(III) whose hospitalization or therapeutic leave exceeds a period paid for under the State plan for the holding of a bed in the facility for the resident,

will be permitted to be readmitted to the facility immediately upon the first availability of a bed in a semiprivate room in the facility if, at the time of readmission, the resident requires the services provided by the facility.

(E) Information respecting advance directives

A nursing facility must comply with the requirement of section 1396a(w) of this title (relating to maintaining written policies and procedures respecting advance directives).

(F) Continuing rights in case of voluntary withdrawal from participation

(i) In general

In the case of a nursing facility that voluntarily withdraws from participation in a State plan under this subchapter but continues to provide services of the type provided by nursing facilities—

(I) the facility's voluntary withdrawal from participation is not an acceptable basis for the transfer or discharge of residents of the facility who were residing in the facility on the day before the effective date of the withdrawal (including those residents who were not entitled to medical assistance as of such day);

(II) the provisions of this section continue to apply to such residents until the date of their discharge from the facility; and

(III) in the case of each individual who begins residence in the facility after the effective date of such withdrawal, the facility shall provide notice orally and in a prominent manner in writing on a separate page at the time the individual begins residence of the information described in clause (ii) and shall obtain from each such individual at such time an acknowledgment of receipt of such information that is in writing, signed by the individual, and separate from other documents signed by such individual.

Nothing in this subparagraph shall be construed as affecting any requirement of a participation agreement that a nursing facility provide advance notice to the State or the Secretary, or both, of its intention to terminate the agreement.

(ii) Information for new residents

The information described in this clause for a resident is the following:

(I) The facility is not participating in the program under this subchapter with respect to that resident.

(II) The facility may transfer or discharge the resident from the facility at such time as the resident is unable to pay the charges of the facility, even though the resident may have become eligible for medical assistance for nursing facility services under this subchapter.

(iii) Continuation of payments and oversight authority

Notwithstanding any other provision of this subchapter, with respect to the residents described in clause (i)(I), a participation agreement of a facility described in clause (i) is deemed to continue in effect under such plan after the effective date of the facility's voluntary withdrawal from participation under the State plan for purposes of—

(I) receiving payments under the State plan for nursing facility services provided to such residents;

(II) maintaining compliance with all applicable requirements of this subchapter; and

(III) continuing to apply the survey, certification, and enforcement authority provided under subsections (g) and (h) of this section (including involuntary termination of a participation agreement deemed continued under this clause).

(iv) No application to new residents

This paragraph (other than subclause (III) of clause (i)) shall not apply to an individual who begins residence in a facility on or after the effective date of the withdrawal from participation under this subparagraph.

(3) Access and visitation rights

A nursing facility must—

(A) permit immediate access to any resident by any representative of the Secretary, by any representative of the State, by an ombudsman or agency described in subclause (II), (III), or (IV) of paragraph (2)(B)(iii), or by the resident's individual physician;

(B) permit immediate access to a resident, subject to the resident's right to deny or withdraw consent at any time, by immediate family or other relatives of the resident;

(C) permit immediate access to a resident, subject to reasonable restrictions and the

resident's right to deny or withdraw consent at any time, by others who are visiting with the consent of the resident;

(D) permit reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident's right to deny or withdraw consent at any time; and

(E) permit representatives of the State ombudsman (described in paragraph (2)(B)(iii)(II)), with the permission of the resident (or the resident's legal representative) and consistent with State law, to examine a resident's clinical records.

(4) Equal access to quality care

(A) In general

A nursing facility must establish and maintain identical policies and practices regarding transfer, discharge, and the provision of services required under the State plan for all individuals regardless of source of payment.

(B) Construction

(i) Nothing prohibiting any charges for non-medicaid patients

Subparagraph (A) shall not be construed as prohibiting a nursing facility from charging any amount for services furnished, consistent with the notice in paragraph (1)(B) describing such charges.

(ii) No additional services required

Subparagraph (A) shall not be construed as requiring a State to offer additional services on behalf of a resident than are otherwise provided under the State plan.

(5) Admissions policy

(A) Admissions

With respect to admissions practices, a nursing facility must—

(i)(I) not require individuals applying to reside or residing in the facility to waive their rights to benefits under this subchapter or subchapter XVIII of this chapter, (II) subject to subparagraph (B)(v), not require oral or written assurance that such individuals are not eligible for, or will not apply for, benefits under this subchapter or subchapter XVIII of this chapter, and (III) prominently display in the facility written information, and provide to such individuals oral and written information, about how to apply for and use such benefits and how to receive refunds for previous payments covered by such benefits;

(ii) not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility; and

(iii) in the case of an individual who is entitled to medical assistance for nursing facility services, not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State plan under this subchapter, any gift, money, donation, or other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility.

(B) Construction

(i) No preemption of stricter standards

Subparagraph (A) shall not be construed as preventing States or political subdivisions therein from prohibiting, under State or local law, the discrimination against individuals who are entitled to medical assistance under the State plan with respect to admissions practices of nursing facilities.

(ii) Contracts with legal representatives

Subparagraph (A)(ii) shall not be construed as preventing a facility from requiring an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care.

(iii) Charges for additional services requested

Subparagraph (A)(iii) shall not be construed as preventing a facility from charging a resident, eligible for medical assistance under the State plan, for items or services the resident has requested and received and that are not specified in the State plan as included in the term "nursing facility services".

(iv) Bona fide contributions

Subparagraph (A)(iii) shall not be construed as prohibiting a nursing facility from soliciting, accepting, or receiving a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to the resident (or potential resident), but only to the extent that such contribution is not a condition of admission, expediting admission, or continued stay in the facility.

(v) Treatment of continuing care retirement communities admission contracts

Notwithstanding subclause (II) of subparagraph (A)(i), subject to subsections (c) and (d) of section 1396r–5 of this title, contracts for admission to a State licensed, registered, certified, or equivalent continuing care retirement community or life care community, including services in a nursing facility that is part of such community, may require residents to spend on their care resources declared for the purposes of admission before applying for medical assistance.

(6) Protection of resident funds

(A) In general

The nursing facility—

(i) may not require residents to deposit their personal funds with the facility, and

(ii) upon the written authorization of the resident, must hold, safeguard, and account for such personal funds under a system established and maintained by the facility in accordance with this paragraph.

(B) Management of personal funds

Upon written authorization of a resident under subparagraph (A)(ii), the facility must manage and account for the personal funds of the resident deposited with the facility as follows:

(i) Deposit

The facility must deposit any amount of personal funds in excess of $50 with respect to a resident in an interest bearing account (or accounts) that is separate from any of the facility's operating accounts and credits all interest earned on such separate account to such account. With respect to any other personal funds, the facility must maintain such funds in a non-interest bearing account or petty cash fund.

(ii) Accounting and records

The facility must assure a full and complete separate accounting of each such resident's personal funds, maintain a written record of all financial transactions involving the personal funds of a resident deposited with the facility, and afford the resident (or a legal representative of the resident) reasonable access to such record.

(iii) Notice of certain balances

The facility must notify each resident receiving medical assistance under the State plan under this subchapter when the amount in the resident's account reaches $200 less than the dollar amount determined under section 1382(a)(3)(B) of this title and the fact that if the amount in the account (in addition to the value of the resident's other nonexempt resources) reaches the amount determined under such section the resident may lose eligibility for such medical assistance or for benefits under subchapter XVI of this chapter.

(iv) Conveyance upon death

Upon the death of a resident with such an account, the facility must convey promptly the resident's personal funds (and a final accounting of such funds) to the individual administering the resident's estate.

(C) Assurance of financial security

The facility must purchase a surety bond, or otherwise provide assurance satisfactory to the Secretary, to assure the security of all personal funds of residents deposited with the facility.

(D) Limitation on charges to personal funds

The facility may not impose a charge against the personal funds of a resident for any item or service for which payment is made under this subchapter or subchapter XVIII of this chapter.

(7) Limitation on charges in case of medicaid-eligible individuals

(A) In general

A nursing facility may not impose charges, for certain medicaid-eligible individuals for nursing facility services covered by the State under its plan under this subchapter, that exceed the payment amounts established by the State for such services under this subchapter.

(B) "Certain medicaid-eligible individual" defined

In subparagraph (A), the term "certain medicaid-eligible individual" means an individual who is entitled to medical assistance for nursing facility services in the facility under this subchapter but with respect to whom such benefits are not being paid because, in determining the amount of the individual's income to be applied monthly to payment for the costs of such services, the amount of such income exceeds the payment amounts established by the State for such services under this subchapter.

(8) Posting of survey results

A nursing facility must post in a place readily accessible to residents, and family members and legal representatives of residents, the results of the most recent survey of the facility conducted under subsection (g) of this section.

(d) Requirements relating to administration and other matters

(1) Administration

(A) In general

A nursing facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident (consistent with requirements established under subsection (f)(5) of this section).

(B) Required notices

If a change occurs in—

(i) the persons with an ownership or control interest (as defined in section 1320a–3(a)(3) of this title) in the facility,

(ii) the persons who are officers, directors, agents, or managing employees (as defined in section 1320a–5(b) of this title) of the facility,

(iii) the corporation, association, or other company responsible for the management of the facility, or

(iv) the individual who is the administrator or director of nursing of the facility,

the nursing facility must provide notice to the State agency responsible for the licensing of the facility, at the time of the change, of the change and of the identity of each new person, company, or individual described in the respective clause.

(C) Nursing facility administrator

The administrator of a nursing facility must meet standards established by the Secretary under subsection (f)(4) of this section.

(2) Licensing and Life Safety Code

(A) Licensing

A nursing facility must be licensed under applicable State and local law.

(B) Life Safety Code

A nursing facility must meet such provisions of such edition (as specified by the Sec-

CONFIDENTIAL

STATE OF INDIANA	)	BEFORE AN ADMINISTRATIVE
	) SS:	LAW JUDGE FOR THE INDIANA STATE
COUNTY OF MARION	)	DEPARTMENT OF HEALTH
		CAUSE NO. IVT-000350-17

PETITION FOR HEARING OF)
INVOLUNTARY TRANSFER/DISCHARGE)
OF G.T., RESIDENT FROM)
VALPARAISO CARE & REHAB)
VALPARAISO, INDIANA 47383)

NOTICE OF FILING FINAL ORDER

You are hereby notified that on the 28th day of February, 2017, Eric Miller, Chief of Staff signed the *Notice of Filing Recommended Order* concerning the above-referenced matter.

A copy of the *Notice of Filing Recommended Order* signed by the parties, is attached hereto and made a part of this *Notice of Filing Final Order*.

Dated at Indianapolis, Indiana this 1st day of March, 2017.

Indiana State Department of Health

Angela L Becker

ANGELA L. BECKER
LITIGATION LIAISON

Enclosures

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CONFIDENTIAL

STATE OF INDIANA	)	BEFORE AN ADMINISTRATIVE
	) SS:	LAW JUDGE FOR THE INDIANA STATE
COUNTY OF MARION	)	DEPARTMENT OF HEALTH
		CAUSE NO. IVT-000350-17

PETITION FOR HEARING OF	)
INVOLUNTARY TRANSFER/DISCHARGE	)
OF G.T., RESIDENT FROM	)
VALPARAISO CARE & REHAB	)
VALPARAISO, INDIANA 47383	)

NOTICE OF FILING RECOMMENDED ORDER

You are hereby notified that on the 3rd day of February, 2017, Scott Wallace, the duly appointed Administrative Law Judge, entered and issued his "*Recommended Order*" concerning the above-referenced matter, a copy of which is attached hereto and made a part of this *Notice of Filing Recommended Order*.

If the parties to this action wish to have the ultimate authority review the "*Recommended Order*" the party requesting review must not be in default and must petition for such review in a writing that:

(1) identifies the basis of the objection with reasonable particularity; and,

(2) is filed with the Indiana State Department of Health at the Office of Legal Affairs, 2 North Meridian Street, Indianapolis, Indiana 46204, on or before February 24, 2017.

If no objection is received by February 24, 2017, the "*Recommended Order*" will be submitted to the State Health Commissioner or his designee, who is the ultimate authority in this matter, for approval and issuance of a final order.

Dated at Indianapolis this 6th day of February, 2017.

Angela L Becker

ANGELA L. BECKER
LITIGATION LIAISON

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STATE OF INDIANA	)	BEFORE AN ADMINISTRATIVE LAW JUDGE
	)SS:	FOR THE INDIANA STATE DEPARTMENT OF HEALTH
COUNTY OF MARION	)	CAUSE NO.: IVT-000350-17

PETITION FOR REVIEW OF)
INVOLUNTARY TRANSFER OF)
G. T., RESIDENT,)
FROM VALPARAISO CARE & REHAB)
VALPARAISO, IN 46383)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

PRELIMINARY COMMENTS

This matter was assigned to Scott Wallace, duly appointed Administrative Law Judge (ALJ) for the Indiana State Department of Health ("Department") on or about January 10, 2017. At issue is an appeal by Petitioner G. T. (alternately "G. T." and "Petitioner") of a Notice of Transfer made by the Facility on or about January 6, 2017, from Valparaiso Care and Rehabilitation, at 606 Wall Street, Valparaiso, IN 46383. Petitioner made a timely appeal by written submission in the form of a fax on or about January 9, 2017.

On or about January 13, 2017, the undersigned Administrative Law Judge scheduled a hearing for January 19, 2017.

Pursuant to Ind. Code § 4-21.5 et. Seq., the ALJ has considered the evidence herein from the entire record of this Cause, and developed the following Findings of Fact and Conclusions of Law. These Findings of Fact and Conclusions of Law are also based on the evidence and exhibits presented at the Informal Hearing and the transcript of that Hearing and the arguments of the parties.

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FINDINGS OF FACT

1. The Administrative Law Judge is designated to hear appeals on the involuntary interfacility transfer of a resident in a comprehensive care facility pursuant to 410 IAC 16.2-3.1-12 and 42 CFR 483.12.

2. This matter is properly before the ALJ pursuant to Ind. Code § 4-21.5, et seq., and that he has the authority to hear and rule upon all matters presented herein.

3. All Findings of Fact that can more properly be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law that can more properly be deemed Findings of Fact are hereby deemed Findings of Fact.

4. Petitioner has resided at the facility since January of 2016. At the time of hearing, Petitioner temporarily was inpatient at Bremen Hospital. Petitioner had four other hospital stays during this time. He stayed at St. Catherine's Hospital March 3, 2016 through March 17, 2016 and July 21, 2016 through July 26, 2016. He stayed at Bremen Hospital November 23, 2016 through December 15, 2016 and December 19, 2016 through December 29, 2016.

5. According to Exhibit 6, Resident Face Sheet, Petitioner suffers from, among other things, unspecified dementia with behavioral disturbance, cognitive communication deficit, dementia in other diseases classified elsewhere with behavioral disturbance, and other sexual dysfunction not due to a substance or known physiological condition.

6. Petitioner no longer understands English. He communicates with his family in his native Macedonian language.

7. Petitioner has had a variety of incidents with other residents and staff. These incidents include physical harm to staff and sexual inappropriateness with female residents. These incidents are documented in Exhibit A, Resident Progress Notes.

8. Exhibit A, Resident Progress Notes, contains the entire list of incidents for Petitioner. These incidents include the following:

   a. On January 26, 2016, Petitioner was overly friendly with females touching their arms and legs. Petitioner was redirected away from other female residents several times.
   b. On January 28, 2016, Petitioner was kissing and touching residents that morning.
   c. On February 10, 2016, Petitioner was inappropriately touching another female resident and trying to lure resident into his room.
   d. On February 22, 2016, a CNA reported to the nurse that Petitioner was leading a female resident into his room numerous times and closing the door. It took three staff members to separate and redirect the two residents.
   e. On February 29, 2016, Petitioner still continues to touch and rub on the arms and legs of female residents. Petitioner tries to take them to his room. He gets angry when staff tries to redirect him.

f. On July 2, 2016, as noted in the July 5, 2016 note, Petitioner pushed a CNA, pulled a knife on a nurse while making stabbing motions, and raised fists to staff.
g. On July 3, 2016, Petitioner was redirected out of another resident's room. Petitioner raised his fist to the staff. Petitioner was rubbing the arms and face of female residents.
h. On July 21, 2016, Petitioner tried to stab a worker with a fork.
i. On July 27, 2016, Petitioner touched a female resident on the breast on top of the clothing. He slid his hand under the sleeve of same resident's shirt. Throughout the evening he had four more events of touching female residents on the hands or back, not of a sexual nature.
j. On July 27, 2016, Petitioner continued to inappropriately touch residents. This included kissing or grabbing other residents.
k. On November 23, 2016, Petitioner grabbed, twisted, and shoved a staff member onto a couch when the staff member tried to redirect his behavior.
l. On December 19, 2016, Petitioner was rubbing himself between his legs and put his arm around another female resident. Petitioner follows female residents around the dining room. Later, Petitioner was waving a broom stick around in the dining room. Petitioner was roaming and not easily redirected.
m. On December 30, 2016, Petitioner was touching female residents on the shoulder as he walked by them. He also attempted to pull another female resident onto his lap. When redirected, he grabbed her hand twisting and pulling; he reared back to hit her.

9. According to exhibit A, on March 4, 2016, the facility discussed with Petitioner's family the possibility of transferring Petitioner to an all male facility.

10. On January 6, 2017, Melissa Hershman received a general order from Dr. Mirochna that stated Petitioner was not to return to the facility. He requires an all male facility. On January 6, 2017, Dr. Mirochna wrote in the Resident Progress Notes that Petitioner poses a danger to other residents at the facility due to his increased physical and sexual behaviors toward women. Dr. Mirochna stated, "I am in support of and recommend placement in another facility, preferably all male."

11. If transferred, Petitioner would go to Harcourt Terrace Nursing and Rehabilitation in Indianapolis, IN. The facility stated that it could only find two facilities, both in Indianapolis, that could accommodate Petitioner – that being an all male unit with dementia care.

12. As of the date of the hearing, the facility had not completed a relocation planning conference.

CONCLUSIONS OF LAW

1. This matter is properly before the ALJ herein, pursuant to Ind. Code § 4-21.5, and that

the ALJ has the authority and jurisdiction to hear and rule upon all matters presented herein.

2. No known procedural defect occurred in the hearing process.

3. The AOPA, Ind. Code § 4-21.5, requires that this decision be rendered solely on the record before the ALJ. However, the ALJ may also utilize his experience, technical competence, and specialized knowledge in evaluating evidence.

4. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact that can be deemed Conclusion of Law are hereby deemed Conclusions of Law.

5. The issue herein is whether Petitioner could be transferred to another facility because the safety of the individuals in the facility is endangered or the health of the individuals in the facility would otherwise be endangered. More specifically, the first issue is whether the facility followed the proper procedures as stated in the Indiana Administrative Code. And secondly, the issue is whether Petitioner's behavior rises to the level of endangering the safety or health of the individuals while weighing his behavior with his psychological and social health.

6. 410 IAC 16.2-3.1-12(4), states, "Health facilities must permit each resident to remain in the facility and not transfer or discharge the resident from the facility unless:
(C) The safety of individuals is endangered;
(D) The health of the individuals in the facility would otherwise be endangered[.]"

7. According to 410 IAC 16.2-3.1-12(4)(a), when a facility discharges a resident because the transfer is necessary for the resident's welfare and his needs cannot be met by the facility, the resident's clinical record must be documented. The documentation must be made by the resident's physician. It does not require the physician "order" the transfer, but rather that the physician supports the transfer in the resident's clinical documented record.

8. According to 410 IAC 16.2-3.1-12(a)(18), Prior to any interfacility or involuntary intrafacility relocation, the facility shall prepare a relocation plan to prepare the resident for relocation and to provide continuity of care. In nonemergency relocations, the planning process shall include a relocation planning conference to which the resident, his or her legal representative, family members, and physician shall be invited. The planning conference may be waived by the resident or his or her legal representative.
(19) At the planning conference, the resident's medical, psychosocial, and social needs with respect to the relocation shall be considered and a plan devised to meet these needs.

9. Because the Facility has not completed a relocation plan, it cannot transfer the Petitioner involuntarily. Even if the Representatives do not cooperate with the relocation process, the facility is required to first complete a relocation plan as described in 410 IAC 16.2-3.1-12(a)(18). The law requires the facility to notify and invite the representative or the

resident - not require them to be present. If the resident or representative refuses to cooperate or attend the meeting, the facility can still go along with the relocation plan meeting. But the facility has to complete that plan before an involuntary transfer is authorized. Even though the facility could complete a relocation plan meeting before it transferred the resident, the ALJ cannot authorize a transfer when all the requirements for transfer have not been met.

10. 410 IAC 16.2-3.1-12(a)(18), specifically uses the words "In nonemergency relocations, the planning process shall include a relocation planning conference[.]" Thus, if the facility does not complete a relocation planning conference, it can only transfer the resident in an emergency. 410 IAC 16.2-1.1-24 defines emergency as, "a situation or physical condition that presents imminent danger of death or serious physical or mental harm to one (1) or more residents of a facility." Based on the facts presented, Petitioner's behavior does not rise to the level of imminent danger of death or serious physical or mental harm. Because the situation with Petitioner does not present imminent danger or death or serious physical or mental harm to a resident, it is not an emergency. Because it is not an emergency, the facility is required to complete a relocation planning conference.

11. The second issue is addressing the case on the specifics and whether it would otherwise be granted if a relocation planning conference was completed. The biggest problem with the transfer is that it transfers Petitioner to Indianapolis when his family lives in or around Valparaiso. It would likely be a hardship on any dementia patient to be relocated. New environments can be difficult for dementia patients, and it often takes time to adjust to new surroundings. This would be exacerbated for Petitioner because he no longer speaks English and because his strong family network would be so far away. His family would likely ease a transition by both being a comforting force in his life and by being able to communicate with him. With his family being so far away, Petitioner would likely suffer more.

12. Even though it would likely be harmful to Petitioner to be transferred to a facility in Indianapolis, he is not absolved of all bad conduct. The facility still has a duty to its other residents to keep them safe and healthy. One problem is that Petitioner has had very little time to acclimate himself back to the facility after he returned from Bremen. From November 23, 2016 through the date of the hearing, Petitioner only spent five days at the facility. When he came back December 15, 2016, he did not have much time to readjust before he was sent back on December 19, 2016. The same is true when he came back on December 29, 2016. He was sent out the next day. This does not mean that the facility erred in sending him to the hospital. It just means that it is difficult to assess how he would adjust after several days, several weeks of a new environment.

13. Two of Petitioner's most concerning sexual events are on July 27, 2016 when he touched the breast of a female resident and on December 19, 2016 when he was rubbing himself inappropriately and following female residents into their rooms. Both of those events took place after just having returned to the facility from the hospital stay. Because it can sometimes take quite a bit of time for a dementia patient to readjust to new surroundings, incidents like these are somewhat expected.

14. Also, the record is not clear that Petitioner needs to go to an all male facility. Dr. Mirochna noted that he recommends placement in another facility, preferably all male. He did not state that he needs to go to an all male facility. The facility should not have limited the search for a new facility to an all male facility.

15. Based on factors that a transfer to Indianapolis would be an extreme hardship for Petitioner, his most recent incidents occurred after just returning to the facility, and it's not clear that Petitioner must go to an all male facility, the transfer would not be granted if the relocation planning conference had been completed. However, these incidents would be reevaluated with any future incidents if they so arose.

RECOMMENDED ORDER

The decision to transfer G. T. from Valparaiso Care and Rehabilitation should **NOT** be affirmed.

So RECOMMENDED this 3rd day of February, 2017.

Scott Wallace
Administrative Law Judge

FINAL ORDER

APPROVED AND ORDERED this 28th day of February, 2017.

ERIC MILLER
CHIEF OF STAFF