

Elder Law NEWS

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Supreme Court Preserves Right to Sue Public Nursing Homes

In a major win for nursing home residents and their families, the U.S. Supreme Court has upheld the right to sue government-run Nursing homes under the Federal Nursing Home Reform Act (FNHRA). In a 7-2 decision, the court decided that these plaintiffs could seek relief in federal court.



Background of the Case

In 2019, the family of Gorgi Talevski, a patient with dementia who had been living at a state-owned nursing home in Indiana, sued the owner of the nursing home for violating Talevski's rights.

They claimed that the facility's alleged actions of overmedicating Talevski with psychotropic drugs and transferring him to a different facility without their permission



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were against the law. Talevski, a Medicaid recipient, died in 2021; his family asserted that his health had worsened as a result of the facility's mistreatment.

The FNHRA prohibits using chemical restraint for discipline or convenience, and transfers are only permitted under limited circumstances. The federal court dismissed the case, stating that Talevski had no right to sue under FNHRA. However, the 7th Circuit reversed the decision, and the U.S. Supreme Court has now agreed that Talevski's family can in fact sue the nursing home.

Upholding the Rights of Medicaid Recipients

The civil rights case, [Health & Hospital Corp. of Marion County v. Talevski](#), became a closely watched legal battle across the nation. Under the Supreme Court's ruling, individuals residing in publicly owned nursing facilities – and those who rely on government assistance programs such as Medicaid – can file federal lawsuits if they believe their rights have been violated.

In issuing its decision, the country's highest court upheld its precedent in the Wilder v. Virginia Hospital Association case from 1990. That decision stated the Constitution's



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Spending Clause authorizes federal lawsuits under Section 1983, which enforces the rights that are established by Congressional law.

What This Decision Means

While most government-run nursing homes are [concentrated in Indiana](#), this decision will affect facilities that are owned by the state, county, or Veterans Administration.

Justice Elena Kagan said during oral arguments that while FNHRA is a big statute that says many things, “one of those things it does say to every nursing home facility [is that it] has to ensure that individual rights are respected and lays out in considerable detail what those rights are and says it’s [their] job to see that those rights are fulfilled.”

Advocates for older adults as well as people with disabilities, many of whom depend on public assistance programs, are lauding the ruling. [In a news release](#) issued by the American Civil Liberties Union, Susan Mizner, director of the organization’s Disability Rights Program, stated: “This decision is a crucial victory for the civil rights of nursing home residents, people with disabilities, and everyone protected under Titles VI and IX of the Civil Rights Act.”



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Agencies That Inspect Nursing Homes Face Staffing Crisis

The Senate Special Committee on Aging has released a [report](#) exposing an understaffing problem among the survey agencies across the nation that are responsible for overseeing nursing home inspections. The staffing crises at these agencies, according to the report, has led to an increase in the number of regulation violations and ultimately is making long-term care facilities unreasonably dangerous for their residents.



Senior man talking with female health care inspector who is taking notes in binder. Today, more than [1.1 million](#) individuals live in about 15,000 nursing homes nationwide. Yet as many as one in nine of these facilities have not had an annual inspection in the past two years – in large part due to staffing shortages. In its report, committee members make several recommendations to Congress for addressing this shortage – including decreasing burnout among agency staff, increasing staff salary, and lowering the overall turnover rate among inspection staff.



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What Do State Survey Agencies Do?

State survey agencies contract with a state Medicaid agency to inspect long-term care facilities and ensure they are meeting federal standards for medical care, are fully prepared for emergencies, are keeping residents safe, and more. These agencies create inspection reports that detail a facility's performance and document violations of state statutes and regulations. Such reports are intended to be conducted on an annual basis.

State survey agencies must have adequate staff to carry out these tasks, however. Enforcing federal and state regulations helps protect nursing home residents from unreasonable risk of harm. If these agencies do not have the workforce they need to operate efficiently, the older adults that call these care facilities home may continue to endure a substandard quality of care as a result.

Key Findings

According to the report:

- Most state survey agencies have severe vacancy rates. Thirty-one of 52 state survey agencies have staff vacancy rates of 20 percent or higher; nine agencies have a vacancy rate of 50 percent.



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- Nearly one-third of the 15,000 nursing homes across the United States are behind on annual surveys.
- Eleven percent of nursing homes nationwide have not had an annual survey completed in two years.
- Many states currently rely on third-party companies to survey their long-term care facilities, which comes at a significant expense.

Recommendations for Addressing the Nationwide State Agency Staffing Shortage

There are several causes for the high staff turnover in the industry, among them low salaries and burnout.

The committee recommended the following to address such issues while increasing the efficiency of state survey agencies:

- Increase funding to the Office of the Inspector General (OIG) for the Department of Health and Human Services. (The OIG seeks to provide oversight and improve the efficiency of HHS programs such as Medicare and Medicaid.)
- Expand funding for state long-term care ombudsman programs, which serve as crucial advocates for nursing home residents.



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- Boost funding for nursing educational programs.
- Invest further in state and federal funding for inspection activities.
- Strengthen the process for reviewing inspection results by requiring survey agencies to verify any deficiencies cited in their inspection reports.
- Provide more robust mental health resources for the health care workforce.
- Relax hiring requirements for inspection staff and hire professionals from disciplines besides nursing.
- Review current duties of inspection staff and eliminate tasks not related to inspection.
- Have the Centers for Medicare and Medicaid Services (CMS) track and publicly report the capacity of survey agencies to effectively perform oversight of nursing homes.
- Track survey agencies' use of contractors to ensure the quality of oversight by these third-party inspectors.

Investing in Survey Agencies Ensures Better Oversight for Care of Older Americans

Fixing dangerous and unregulated long-term care facilities is not an issue that can be ignored, particularly given that the population of older adults will exponentially increase



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over the next several decades. By 2040, older Americans are projected to number [80.8 million](#) – and [94.7 million by 2060](#).

“The people working at survey agencies are dedicated professionals who endure long hours conducting emotionally taxing work, often for relatively low pay, each of whom wants to see patient care and safety improved,” the report states. “Ensuring that every nursing home patient receives high-quality care demands that the nation provide these public servants with the resources necessary to properly oversee facilities.”





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CMS: Medicare Will Soon Cover Certain Alzheimer's Treatments

Medicare recipients living with a diagnosis of Alzheimer's recently received promising news: The Centers for Medicare & Medicaid Services (CMS) has announced that it would begin covering [new Alzheimer's treatments](#) that receive approval from the FDA.



"If the FDA grants traditional approval, CMS is prepared to ensure anyone with Medicare Part B who meets the criteria is covered," CMS administrator Chiquita Brooks-LaSure said in a statement.

Barriers to Coverage

According to the [Alzheimer's Association](#), nearly 7 million American seniors are living with [Alzheimer's disease](#), the most common form of dementia. It remains the fifth-leading cause of death among adults aged 65 and older.





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Among patient advocates, the news about Medicare coverage for newer therapies is welcome. It could mean that more people will now be able to afford newer Alzheimer's drugs as they secure full FDA approval.

One medication, Leqembi, could be fully approved by the FDA as soon as July 2023. Currently, it costs more than \$26,000 annually, a price tag that keeps it far from reach for the vast majority of patients. The other FDA-approved therapy available is Aduhelm, which comes at a similarly high cost. Both have received [accelerated approval](#) by the FDA.

To be eligible to receive coverage for these Alzheimer's treatments, patients will need the following:

- [Medicare Part B](#),
- a diagnosis of early dementia or mild cognitive impairment caused by Alzheimer's, and
- a health care provider and clinical team that take part in what is known as a registry, which is a health agency database where information regarding patient outcomes is tracked.



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The Controversies Surrounding Alzheimer's Treatment

Advocates, as well as some lawmakers and health care experts, are expressing concern on several fronts, however.

For example, the Alzheimer's Association issued a [statement](#) arguing against the inclusion of registries in the coverage requirements.

"We remain concerned that the requirement of clinicians to register and enter data will create unnecessary hurdles," the association stated.

Meanwhile, [at least two lawmakers](#) say that the CMS' plan does not make clear how seniors who need this type of treatment will actually gain access to it. They are raising questions that CMS has not yet addressed regarding how the registry would work, including when it would go live and how patients would find out whether their doctor takes part in registries.

In their [joint statement](#), they ask Brooks-LaSure to "either reconsider the coverage with evidence requirements for the Alzheimer's treatments or to immediately begin





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preparing for a registry that is clearly defined and minimizes provider and patient burden.”

Still others point out that coverage of a drug such as Leqembi would mean [increased spending](#) for Medicare Part B, which in turn could mean higher Medicare Part B premiums for patients.

