



**ISSUES RELATED TO THE ESTABLISHMENT OF NURSING HOMES
ON INDIAN RESERVATIONS**

Introduction

The question of providing long-term care, particularly nursing home care, for Native Americans residing on Indian reservations in South Dakota continues to be a thorny issue for state, tribal, and federal policymakers and a source of controversy and misunderstanding for the affected populations. Although frequently cited as the reason for the lack of nursing homes on reservations, the state of South Dakota's moratorium on the number of nursing home beds permitted in the state does not directly prohibit the construction or operation of nursing homes on reservations, although the moratorium may affect how they would be funded. The moratorium, which was adopted in 1988, has been extended four times and is currently in effect through 2005. Each time the Legislature has extended the moratorium, debate has arisen over its effect on elderly care for Native Americans. However, the answer to the need for nursing homes on Indian reservations is not as simple as providing the tribes with an exemption from the moratorium.

Federal or State Responsibility?

The basic impediment to the establishment of nursing homes on Indian reservations is the question of whether such care is solely a federal responsibility, a state responsibility, or a

responsibility that should be shared to some degree among the federal government, the tribes, and the states. A strong case can be made that elderly care for Native Americans on reservations is a federal obligation. The federal government has long provided education and health care facilities on reservations, the latter through the Indian Health Service, and these have been regarded as federal duties dating back to the beginning of the reservation system.

Federal responsibility for the well-being of Native Americans on reservations is a long-standing moral and legal obligation. As the system has evolved, however, nursing home care for the elderly was somehow not addressed. Traditionally, care of elders was a family responsibility, and Native American elders occupied, and still occupy, positions of esteem in native culture. However, life expectancy for Native Americans has been increasing, and there is more need now for long-term care facilities on reservations than in earlier decades. The disproportionate incidence of diabetes and other illnesses among the Native American population makes the need for elderly care facilities more acute. Whether justified or not, the federal government has chosen not to provide elderly care on Indian reservations.

Another factor that complicates the situation is the tribe's legal status as a sovereign entity subservient only to the federal government. This makes state law and state regulation unenforceable and inapplicable to Indian reservations. While it is true that the state has a presence on reservations in programs such as welfare and the food stamps, the state's ability to regulate activities on the reservation is extremely limited. The federal government is generally the appropriate entity in most cases to administer programs and activities on Indian reservations that are not handled by tribal governments.

Federal Funding Limitations

While it may have been logical to have originally included elderly care within the Native American health care system, the fact is that more recent federal budgetary and political concerns have prevented the federal government from providing elderly care on Indian reservations. Currently, the Indian Health Service's (IHS) existing programs are seriously underfunded; one study shows the Indian Health Service to be funded at less than fifty percent of what it needs to provide core medical services. This, of course, does not include long-term care for the elderly, and the Indian Health Service's budgetary problems for its existing responsibilities leave the prospects for elderly care not very promising.

For the Indian Health Service to provide long-term elderly care, two types of federal legislation are necessary. First, Congress must authorize the Indian Health Service to provide such care; second, Congress must appropriate the necessary funds. In 2000, Congress considered the reauthorization of the Indian Health Care Improvement Act (S. 2526). This bill contains authority for the

Indian Health Service to offer long-term care for Native American elderly, among other services. However, the bill is not expected to pass this year and is likely to be scaled back before being reintroduced next year. Appropriations would also be required.

Federal policymakers remain reluctant to expand health services to Native Americans to include nursing home care. For example, if the Indian Health Service were to begin funding nursing home care for 60% of South Dakota's Medicaid-eligible Native American nursing home population, it would cost more than \$2.0 million per year at the current cost of care. Providing nursing home care on reservations throughout the country would be an expensive undertaking for IHS, which is concerned that its resources are not sufficient to meet current commitments. Budgetary concerns continue to prevent the federal government from providing long-term care on Indian reservations, even though this would be the simplest, most logical, and probably the most equitable solution to the problem.

State Concerns and Medicaid

Because federal policymakers have chosen not to fund long-term care for Native American elderly people through the Indian Health Service, their position seems to be that Native American elderly should be treated just like everyone else, even though tribal members on the reservation are handled very differently in other aspects of life, such as health care, education, housing, and law enforcement. For nursing home care, the conventional, mainstream financing method is through the Medicaid program. Essentially, the Medicaid program in this context provides federal money for nursing home care for qualifying individuals.

This federal money is passed through the state. In addition, the state is required to pay a match of approximately one-third.

Because of the high cost of nursing home care, nearly all residents eventually become eligible for Medicaid. In South Dakota in 1998, more than sixty percent of total days of nursing home care were paid by Medicaid. Native Americans in South Dakota are admitted to nursing homes off the reservation and those who qualify for Medicaid are funded in the same way as the general population, with the state paying the one-third match amount. Since there are no nursing homes on any of the reservations, tribal members who reside on the reservation must find nursing homes off the reservation, which is often a substantial distance away from their home communities and their families.

It is the policy of the state of South Dakota that it will pay the Medicaid match for Native Americans who use nursing homes off the reservation, as it does for the general population. However, state policymakers also believe that elderly care on the reservation, like education and other basic health care, is a federal responsibility and should be paid by the federal government without a cost share required from the state. It is worth noting that the state already pays a portion of the costs of long-term care for elderly reservation residents who use nursing homes off the reservation, a situation that affects the state budget. Many, if not most, of these people would prefer to use facilities on the reservation if they were available, and it is fair to say that the state is currently shouldering costs that would be more appropriately borne by the federal government.

South Dakota's Nursing Home Moratorium

In 1988, the state of South Dakota imposed a moratorium on new nursing home beds in the state to discourage further construction of nursing homes when empty beds were available in many parts of the state and to hold down state Medicaid costs associated with state matching funds. The availability of Medicaid for long-term care had spurred the construction of excess high-cost facilities during the 1980s and contributed to growing state matching costs. In addition to controlling the expansion of nursing home facilities, the moratorium has also had the effect of encouraging alternative, lower-cost approaches to elderly care, such as assisted living centers, and varying levels of in-home care. These approaches have enabled people to postpone entering nursing homes. Currently, nursing homes in South Dakota have an occupancy rate of 89%, and it is fair to say that the moratorium has served its intended purposes. The Legislature has agreed and has extended the moratorium in 1991, 1993, 1995, and 2000, with the current extension in effect until 2005 (codified at SDCL 34-12-35.3 and 34-12-39.1).

The moratorium does not directly affect the establishment of nursing homes on Indian reservations. South Dakota law (SDCL 34-12-2) requires that health care facilities, including nursing homes, be licensed by the state; and SDCL 34-12-2.1 prohibits the payment of state funds or federal funds passing through the state to any unlicensed facility. Tribes are not subject to this state regulation and are free to construct and operate nursing homes. The problem is that most residents at nursing homes that may be built on the reservation, like those off the reservation, would

eventually need Medicaid funding, and the state will not provide Medicaid funding for residents at facilities that are not licensed or that exceed the moratorium, as any new facility would. The possibility of tribal nursing homes receiving funding from the state's Medicaid program raises additional legal questions. Since state law cannot be enforced on tribal land, a tribal nursing home would not be subject to state regulation or state licensure. Therefore, any tribal nursing home that would somehow receive Medicaid payments would not be subject to the licensing requirements applied to facilities elsewhere in the state, which means that the state could not guarantee that the care it pays for is provided in an acceptable manner.

It is possible at the state level to draft legislation that would exempt tribal nursing homes from state licensure requirements and would allow the use of state-administered Medicaid funds for such facilities regardless of the status of the moratorium (although federal Medicaid requirements for licensure of facilities would also have to be worked out). However, legislation such as this would obligate the state to pay the Medicaid matching funds that would amount to significant costs for the state. A 1995 legislative fiscal note estimated that sixty new nursing home beds on tribal land would increase the state's share of Medicaid payments for nursing home care by more than \$300,000 per year. This approach would also violate the state's basic policy that long-term care for the elderly on Indian reservations is a federal responsibility.

Tribal Needs for Long-Term Care

The impasse between the state and the federal government as to whose responsibility it is to pay the cost of care

for the elderly on Indian reservations leaves tribes and tribal members in a difficult situation. They are free to construct and operate nursing homes; but without Medicaid funding, nursing homes cannot function. The federal government, because it does not want to pay the costs of elderly care for Native Americans, directs the tribes toward the state and the conventional Medicaid system for financing long-term care; but the state's policies make it impossible for them to access Medicaid funding for nursing homes on the reservation. The federal Indian Health Service would be the appropriate entity to handle long-term care, but IHS lacks sufficient funding to meet its current missions let alone long-term care for the elderly. There are programs in which the federal government pays 100% of Medicaid costs, with no state match, but nursing home care for Native Americans is not one of them.

The current system finds the state underwriting a part of the cost of off-reservation nursing home care for Native Americans, some of whom were reservation residents but were forced to leave the reservation for nursing home care. The system is financially burdensome to the state and provides fragmented services to elderly Native Americans who find themselves far from home and culturally isolated in a facility that may be well-run but clearly does not fit their unique situation. Unfortunately, things are not likely to change in the near future. Federal legislation to authorize the Indian Health Service to provide long-term care is stalled, and state policy precludes state funding of elderly care on the reservations, something that it considers to be a federal responsibility. In both cases, the basic issue is money.

Other Problems

It is important to understand that there are other critical problems that hamper the provision of care for Native American elders. Sometimes these other factors are overshadowed by the debate about nursing homes and nursing home funding, but their importance cannot be understated. Of special concern is the difficulty in staffing elderly care facilities, which is a problem in most rural areas and is not associated only with Native Americans. Attracting medical personnel to reservations continues to be a problem on many reservations in most health care fields and is a critical factor in the provision of care for the elderly. The need to attract and retain staff is a serious problem and deserves more emphasis.

Another problem is that as alternative methods of elderly care proliferate, such as assisted living centers and various types of in-home services, nursing homes are left with a higher percentage of residents who are in need of more intensive care and who require more highly qualified staff. Another potential problem that could arise if long-term care were to somehow be provided on Indian reservations would be negative financial impacts on existing off-reservation nursing homes that currently house significant percentages of Native Americans. Financing is not the only challenge to be overcome in providing long-term care for Native American elderly.

Alternatives

There is no simple solution to the problem of providing care for the Native American elderly population, and at this point the future of nursing homes on reservations does not appear

encouraging. The federal government is unlikely to expand the services provided by the Indian Health Service, and state policymakers firmly believe that financing tribal health care is a federal responsibility. However, there are a few options for providing appropriate care if the political climate would change.

The most logical approach is for the federal Indian Health Service to provide long-term care for the elderly on Indian reservations in view of its other health care activities and the historic commitment by the federal government to provide for the well-being of tribal members on reservations. For this to happen, Congress would need to authorize such activity by the IHS, and appropriations would be needed to finance the additional activity. Another option that would primarily rely on federal funding would be to use the existing Medicaid system but authorize 100% payment of Medicaid costs by the federal government in lieu of state matching funds. State officials would likely approve of such an approach.

Tribes may also investigate the possibility of financing a portion of the care provided to patients with tribal revenue. Offering to split the state share of Medicaid payments might make the state more receptive to a proposal to place homes on tribal land. Tribal gaming revenues may be a possible source of such cost sharing, although it sometimes appears that the tribes with the least developed gaming resources are often the ones with the most serious needs for elderly care. This option would require a funding agreement between the state and the tribes and state exceptions to licensing requirements and nursing home limits under the moratorium for nursing homes on reservations.

Another proposal would attempt to develop state-supported nursing homes on reservations without impacting the state budget. Such a situation could come about if a system of transferring beds from existing homes to high need areas is devised, but no such plan has been developed, and any plan of this type would be complex, difficult to administer, and potentially vulnerable to future disputes and disagreements.

A final option would be for the state to reverse its policy and agree to pay the Medicaid match for nursing home patients on the reservations. This would require that the state provide an exception to the nursing home moratorium in reservation areas and exceptions to its licensure requirements, or that the tribes agree to state licensure of nursing homes in return for participation in the state Medicaid system. So far, the state has viewed this option as inequitable and a failure by the federal government to live up to its responsibilities. This option too could be complex and difficult to administer.

The mechanics of establishing nursing homes on reservations can be worked out if the basic policy differences between the state and the federal government could be resolved. Unfortunately, progress is not likely unless the issues of cost and

assignment of responsibility for elderly care for Native Americans can be resolved.

Summary

Despite various commitments by the federal government to provide health services to tribes, the Indian Health Service, because it is not adequately funded and does not have the necessary legal authority, does not provide any in-home or nursing home services to elderly Native Americans. This omission in the federal health care system, which is as much a historical accident as anything, passes a significant cost burden to state governments, which are required to provide Medicaid services to all eligible individuals. Thus, elderly Native Americans in South Dakota will continue to depend on the state's social services programs, which do not include institutional care for the elderly on reservations. The resulting need for Native Americans to use nursing homes off the reservation works a personal hardship on them and their families and places them in a situation that is insensitive to their personal needs and cultural background. This situation can be expected to continue as long as the federal and state governments refuse to fund facilities on the reservations.

This issue memorandum was written by Tom Magedanz, Principal Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
