UNIVERSITY OF PITTSBURGH LAW REVIEW
Vol. 85 ● Fall 2023

# THE UNITED STATES WOULD BE CLOSER TO FULFILLING THE TRUST RESPONSIBILITY IF PERMANENT SUPPORTIVE HOUSING WAS A COVERED MEDICAID BENEFIT

Molly Ennis

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

# THE UNITED STATES WOULD BE CLOSER TO FULFILLING THE TRUST RESPONSIBILITY IF PERMANENT SUPPORTIVE HOUSING WAS A COVERED MEDICAID BENEFIT

Molly Ennis*

## INTRODUCTION

The United States government entered into hundreds of treaties with Indian[1] tribes between 1778 and 1868.[2] A treaty is a legally binding "agreement formally

* JD 2023, University of Pittsburgh School of Law; MPH 2016, Tulane School of Public Health and Tropical Medicine; BA 2012, University of Michigan.

[1] In this Note, "American Indian," and "Native American" will be used interchangeably. "Alaska Native" will be used to refer to people who belong to one of the Alaska Native entities that are federally recognized Indian tribes. "Indian" is the preferred terminology in both court documents and legal scholarship. 25 U.S.C. § 5304 ("'Indian' means a person who is a member of an Indian tribe; (e) 'Indian tribe' or 'Indian Tribe' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians"). *See also* Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2441 (2021) ("[A] 'Tribal government' is the 'recognized governing body of an Indian tribe' as defined in the Indian Self-Determination and Education Assistance Act . . . ."); *see also* Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 HARV. BLACKLETTER L.J. 211, 211 (2002) ("A great deal of debate surrounds the terminology used to refer to the indigenous peoples of North America. The terms 'Native American,' 'American Indian,' and 'Native peoples' are all used, but the term 'Indian' appears most frequently in United States legislation that affects tribes."). *See also* TINA NORRIS, PAUL L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE NATIVE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 2 (2012) ("Indian," "American Indian," and "Native American" are used to "refe[r] to a person having origins in any of the original peoples of North . . . America and who maintain tribal affiliation or community attachment."). "Indian" will only be used with a modifier outside of direct quotes; for example, "Indian tribe." U.S. DEP'T OF THE INTERIOR, ABBREVIATIONS AND ACRONYMS, https://www.bia.gov/guide/editorial-guide#:~:text=You%20must%20always%20capitalize%20this,Native%20Americans%20people%20from%20India (last visited Nov. 27, 2023).

[2] Donald Warne & Linda Bane Frizzell, *American Indian Health Policy: Historical Trends and Contemporary Issues*, 104 AM. J. PUB. HEALTH S263, S263 (2014).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

signed, ratified, or adhered to between two countries or sovereigns."[3] The treaties generally provided[4] the United States with vast tracts of land in exchange for permanent reservations, and promises to respect tribal sovereignty and provide for tribal well-being.[5] The United States stopped entering into treaties with Indian tribes in 1871 pursuant to 25 U.S.C. § 71, but the validity and power of preexisting treaties was preserved.[6]

The Supreme Court described the relationship between the federal government and Indian tribes in *Cherokee Nation v. Georgia*, when Chief Justice John Marshall "articulated the roots"[7] of what later became known as the federal trust responsibility, and characterized the relationship as "unlike that of any other two people in existence."[8] That relationship has since been codified: "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government."[9] The trust responsibility "essentially entails duties of good faith, loyalty, and protection."[10] The Department of the Interior (DOI), which "maintains a government-to-government relationship with . . . Indian tribes,"[11] describes the trust responsibility as a "fiduciary trust," requiring the federal

[3] *Treaty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[4] Notably, many treaties were signed by Indian tribes solely to escape persecution or genocide. Washington State Dep't of Licensing v. Cougar Den, Inc., 586 U.S. 1, 11 (2019) (describing how the Yakama Tribe ceded millions of acres of land to the United States "under significant pressure [and] [i]n return, the government supplied a handful of modest promises").

[5] U.S. DEP'T HEALTH & HUM. SERVS., *American Indians and Alaska Natives—The Trust Responsibility*, ADMINISTRATION FOR CHILDREN & FAMILIES (2021).

[6] 25 U.S.C. § 71.

[7] U.S. DEP'T OF JUST.: ENV'T AND NAT. RES. DIV., *Federal Trust Doctrine First Described by Supreme Court*, JUSTICE, https://www.justice.gov/enrd/timeline-event/federal-trust-doctrine-first-described-supreme-court (last visited May 13, 2023).

[8] Cherokee Nation v. Georgia, 30 U.S. 1, 12 (1831).

[9] 25 U.S.C. § 3601(2).

[10] *See generally* Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397, 405–06 (2017).

[11] U.S. DEP'T OF THE INTERIOR, TRIBES, https://www.doi.gov/international/what-we-do/tribes (last visited Mar. 31, 2023).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

government "a duty to act for the benefit of the other as to matters within the scope of the relationship."[12]

Under the trust responsibility, the federal government promises to provide both health care and housing services to tribes.[13] The federal government delivers health care services to American Indians and Alaska Natives (AI/ANs) predominantly through the Indian Health Service (IHS).[14] The IHS is a federal agency that "provides a comprehensive health services delivery system for American Indians and Alaska Natives . . . [and] strives for maximum tribal involvement in meeting the needs of its service population."[15] Yet, there are longstanding issues concerning the IHS and reports of inadequate care have plagued the program since its inception.[16] Accordingly, other federal health programs, including Medicaid, have served an important secondary role in providing health care services for AI/AN persons.[17]

Similarly, the trust responsibility obligates the United States to provide housing or housing assistance to AI/ANs through various programs.[18] Still, housing instability and homelessness disproportionately impact AI/ANs:[19] the United States Department of Housing and Urban Development (HUD) reported that while "only 1.2% of the national population self-identifies as AI/AN, 4.0% of all sheltered homeless persons . . . and 4.8% of all sheltered homeless families self-identify as

[12] Rey-Bear & Fletcher, *supra* note 10.

[13] ELAYNE J. HEISLER, CONG. RSCH. SERV., THE INDIAN HEALTH SERVICE (IHS): AN OVERVIEW (2016); *see generally* Davis, *supra* note 1.

[14] HEISLER, *supra* note 13.

[15] INDIAN HEALTH SERVICES, U.S. DEP'T OF HEALTH AND HUM. SERVS., INDIAN HEALTH SERVICE: A QUICK LOOK (2017).

[16] Warne & Frizzell, *supra* note 2, at S263.

[17] MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N, MEDICAID'S ROLE IN HEALTH CARE FOR AMERICAN INDIANS AND ALASKA NATIVES 1 (2021) [hereinafter MACPAC].

[18] *See generally* Davis, *supra* note 1.

[19] DIANE K. LEVY, JENNIFER BIESS, ABBY BAUM, NANACY PINDUS & BRITTANY MURRAY, U.S. DEP'T OF HOUS. AND URB. DEV., HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES LIVING IN URBAN AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS 39 (2017).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

Native American or Alaska Native."[20] Rates of homelessness are higher among AI/AN veterans and youths as well.[21]

Permanent Supportive Housing (PSH) combines affordable housing and support services to help individuals with disabling physical or behavioral health conditions who are experiencing homelessness.[22] Utilizing stable housing as a platform for comprehensive medical and social services, PSH addresses the underlying causes of homelessness so beneficiaries achieve greater stability and improved health.[23] PSH is a "multidisciplinary approach that cuts across the traditionally disparate and disconnected systems involved in providing housing and health care-related services[,]" and so programs are funded through a combination of federal, state, and local resources.[24] In addition, states may use Medicaid to finance the health care and behavioral health services offered through PSH programs.[25] Under federal law, Medicaid is prohibited from covering the cost of room and board or housing capital for PSH.[26] Accordingly, the vagaries and constraints in PSH funding limit both the reach and capacity of most programs.[27]

However, if PSH became a fully covered Medicaid benefit, and Medicaid could finance the room and board of the housing programs, it would significantly expand the reach of PSH. In turn, PSH could become an effective means for the United States to fulfill the trust responsibility,[28] as many Native Americans who are eligible for

---

[20] U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, EXPERT PANEL ON HOMELESSNESS AMONG AMERICAN INDIANS, ALASKA NATIVES, AND NATIVE HAWAIIANS 5 (2012).

[21] *Id.* at 8; Matthew H. Mortton, Raúl Chávez & Kelly Moore, *Prevalence and Correlates of Homelessness Among American Indian and Alaska Native Youth*, 40 J. PRIMARY PREVENTION 643, 643 (2019).

[22] MARTHA BURT, CAROL WILKINS & GRETCHEN LOCKE, U.S. DEP'T HEALTH AND HUM. SERVS., MEDICAID AND PERMANENT SUPPORTIVE HOUSING FOR CHRONICALLY HOMELESS INDIVIDUALS: EMERGING PRACTICES FROM THE FIELD (2014).

[23] Evan Cole, *Permanent Supportive Housing and Medicaid Utilization and Spending in Pennsylvania*, U. PITT.: MEDICAID RSCH. CTR., Oct. 2019, at 4.

[24] THE NAT'L ACADS. OF SCI., ENG'G, & MED., PERMANENT SUPPORTIVE HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS (2018).

[25] Cole, *supra* note 23.

[26] *Id.*

[27] PATRICIA A. POST, CORP. FOR SUPPORTIVE HOUS., DEFINING AND FUNDING THE SUPPORT IN PERMANENT SUPPORTIVE HOUSING 3 (2008).

[28] Permanent Supportive Housing (PSH) programs should be developed in partnership with Indian tribes to promote self-determination and sovereignty by empowering tribes and AI/AN communities to design

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

Medicaid also qualify for PSH.[29] Indeed, AI/AN persons experience worse health outcomes when compared to the general population,[30] and one-in-four Native Americans live in poverty.[31] In addition, "a disproportionate number of American Indians and Alaska Natives have a disability . . . [a]ccording to the US Census, 24% of [AI/ANs] have a disability,"[32] and Native Americans are over-represented among the homeless population.[33]

Accordingly, this note will describe the federal trust responsibility and the legal and historical basis for providing both health care and housing to AI/AN persons. Next, this Note will explore the challenges facing the IHS, the population-level health status of Native Americans, as well as the role Medicaid plays in providing health coverage for members of Indian tribes. This Note then reviews the history of federal housing and housing assistance programs for AI/ANs in order to better understand the disproportionate rates of homelessness in AI/AN communities, before explaining the intersection of health and housing, and how PSH and Medicaid are at the center of this intersection. Last, this Note will argue that PSH should become a fully covered Medicaid benefit to help close the gap in services and increase access to health and housing for AI/AN persons, and in turn, bring the federal government closer to upholding the trust responsibility.

## I. THE FEDERAL TRUST RESPONSIBILITY: AN OVERVIEW

The trust responsibility is a legal principle that predates the United States.[34] In 1730, Great Britain signed a treaty with Cherokee Nation as British colonists

---

and implement housing programs that both center and reflect their unique cultural and historical perspectives.

[29] *See* JULIA PARADISE & DONNA COHEN ROSS, KAISER FAM. FOUND., LINKING MEDICAID AND SUPPORTIVE HOUSING: OPPORTUNITIES AND ON-THE-GROUND EXAMPLES 2 (2017).

[30] Rey-Bear & Fletcher, *supra* note 10, at 398.

[31] Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, PEW RSCH. CTR. (June 13, 2014), https://www.pewresearch.org/short-reads/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/#:~:text=About%20one%2Din%2Dfour%20American,rate%20was%2029.1%25%20in%202012.

[32] *Disabilities*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/policy-issues/education-health-human-services/disabilities (last accessed May 15, 2023).

[33] Ashley B. Cole, Emily T. Hébert, Lorraine R. Reitzel, Dana M. Carroll & Michael S. Businelle, *Health Risk Factors in American Indian and Non-Hispanic White Homeless Adults*, 44 AM. J. HEALTH BEHAV. 631, 631 (2020).

[34] *See generally* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

recognized that the Cherokee were both a "valuable trading partner and military threat."[35] Subsequent treaties between the British and the Cherokee acknowledged that the Tribe was "sovereign and independent," while simultaneously holding that the Crown "possessed 'centraliz[ed]' authority over diplomacy with Tribes to the exclusion of colonial governments."[36] This relationship was eventually enshrined in the United States Constitution, which consolidated the power over Indian Affairs with the federal government by granting Congress "broad general powers to legislate in respect to Indian tribes," namely through the Indian Commerce Clause and the Treaty Clause.[37] In addition, the Framers held that treaties would be "the supreme Law of the Land" and enforced by Congress through its enumerated powers.[38] The first treaties between the United States and Indian tribes reflected a desire to co-exist as sovereigns, while also subjecting tribes to federal laws.[39] Thus, treaties represent a trading of rights between two nations.[40] Taken together, the Constitution and treaties provide the legal foundation for the trust responsibility.[41]

The three branches of the federal government have recognized the trust responsibility throughout history.[42] For example, in 1787, the First Congress ratified the Northwest Ordinance, which stated that:

> The utmost good faith shall always be observed toward the Indians . . . and in their property, rights, and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity

[35] *Id.*

[36] *Id.*

[37] United States v. Lara, 541 U.S. 193, 200 (2004).

[38] U.S. CONST. art. VI, cl. 2.; U.S. CONST. art. I, § 8, cl. 18.

[39] *See* ROBERT T. ANDERSON, THE POWER OF PROMISES: RETHINKING INDIAN TREATIES IN THE PACIFIC NORTHWEST 321–38 (Alexandra Harmon ed., 2008); *see also* CHARLES F. WILKINSON, MESSAGES FROM FRANKS' LANDING: A STORY OF SALMON TREATIES, AND THE INDIAN WAY 11, 14 (2000).

[40] Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (May 1975). Really, treaties are a "reservation by the tribes of rights that they already owned." Robert J. Miller, Indian Treaties as Sovereign Contracts, 2006, last accessed Feb. 5, 2024.

[41] SEC'Y OF THE INTERIOR, ORD. NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES (2014).

[42] Brief for Law Professors as Amici Curiae Supporting Appellant at *25, Navajo Nation v. U.S. Dep't of Interior, 2023 U.S. Dist. LEXIS 4368 (D. Ariz. 2020) (No. 19-17088).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

> shall, from time to time, be made, for preventing wrongs being done to them . . . .[43]

In 1790, Congress passed the Trade and Intercourse Act to protect Indian tribes from both State and non-Indian peoples efforts to steal land.[44] This statute was eventually interpreted to ". . . impos[e] upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act."[45] Nearly a century later, the Senate report of the American Indian Policy Review Commission described the purpose of the trust responsibility as one:

> [T]o insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.[46]

And in 1970, in a speech to Congress regarding Indian Affairs, former President Richard Nixon explained the foundation of the trust relationship saying:

> The special relationship between Indians and the Federal government is the result instead of solemn obligations, which have been entered into by the United States Government. . . . For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, *the government has agreed to provide community services such as health, education and public safety*, services that would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans (emphasis added).[47]

---

[43] AN ORDINANCE FOR THE GOV'T OF THE TERRITORY OF THE U.S. NW.—OF THE RIVER OHIO, CONFEDERATION CONG. ART. 3 (1787).

[44] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting).

[45] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975).

[46] AM. INDIAN POL'Y REV. COMM'N FINAL REPORT 6 (1977).

[47] Robert T. Anderson, *Federal Treaty and Trust Obligations, and Ocean Acidification*, 6 WASH. J. ENV'T. L. & POL'Y 473, 479 (2016).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

Leo Krulitz, the former Solicitor of the DOI, articulated the federal government's official position that the United States owes a duty "of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property."[48] Moreover, the trust responsibility has been reaffirmed by the Supreme Court as an obligation to ensure the survival and welfare of Indian tribes and people. In *Seminole Nation v. United States*, the Court described the United States' obligation to American Indians as beyond "a mere contracting party" and instead as a "humane and self imposed policy" [to fulfill the trust responsibility].[49] Accordingly, Indian tribes have a legal and legitimate right to certain services and protections grounded in the trust responsibility.[50]

### *A. The Trust Responsibility and Health: A Brief History of the Federal Laws that Authorize the Provision of Health Care Services for AI/ANs*

Although the provision of health care services was an important component of the early treaties between the tribes and the United States,[51] the federal government failed to enact an official health care policy for AI/AN persons until 1832, when Congress paid physicians to administer vaccinations to Indian tribes.[52] Approximately forty years after the vaccination efforts, the Bureau of Indian Affairs (BIA) established a Division of Education and Medicine, to "centralize administrative control and coordinate medical services" for tribes, although funding was nearly non-existent.[53] Accordingly, until the 1920s, charities and religious organizations delivered most health services for Indian tribes.[54]

---

[48] Brief for Law Professors as Amici Curiae Supporting Appellant at *14, Navajo Nation v. U.S. Dep't of Interior, 2023 U.S. Dist. LEXIS 4368 (D. Ariz. 2020) (No. 19-17088).

[49] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

[50] Rey-Bear & Fletcher, *supra* note 10, at 397.

[51] *About IHS*, INDIAN HEALTH SERVS., https://www.ihs.gov/aboutihs/ (last visited Mar. 29, 2023) [hereinafter *About IHS*].

[52] MANUEL ALBA & MIREILLE ZIESENISS, U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 34 (2003); HEISLER, *supra* note 13.

[53] Betty Pfefferbaum, Rennard J. Strickland, Everett R. Rhoades & Rose L. Pfefferbaum, *Learning to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 369 (1995).

[54] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

In 1921, Congress passed the Snyder Act, which granted the federal government both the explicit authority, as well as funding, to support programs for Indian tribes; the law aimed to provide health care to AI/AN persons by paying physicians to work with Indian tribes and assist AI/AN communities in the "relief of distress or the conservation of health."[55] Specifically, the Snyder Act declared that "[t]he Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States."[56] The Snyder Act also permanently authorized the provision of health care services for American Indians.[57] However, the law did not create an actual health care program.[58]

In 1954, Congress determined that the Public Health Service (PHS) within the Department of Health, Education, and Welfare (today, the United States Department of Health and Human Services (HHS)) should manage health care services for AI/AN persons.[59] The IHS was established on July 1, 1955, as a "special branch of the PHS,"[60] to deliver primary health care to Indian tribes.[61] The mission of the IHS is to "raise the physical, mental, social, and spiritual health of American Indians and Alaska Natives to the highest level."[62] Today, the IHS is "responsible for providing federal health services to American Indians and Alaska Natives."[63] The IHS is not a health insurer and does not have a "defined medical benefit package"; the agency

[55] ALBA & ZIESENISS, *supra* note 52, at 34; HEISLER, *supra* note 13, at 17.

[56] 25 U.S.C. § 13.

[57] HEISLER, *supra* note 13, at 17.

[58] Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 120–21 (2004).

[59] HEISLER, *supra* note 13, at 17.

[60] Pfefferbaum et al., *supra* note 53, at 382.

[61] ALBA & ZIESENISS, *supra* note 52, at 39.

[62] *About IHS*, *supra* note 51.

[63] *Id.* The Snyder Act of 1921, 25 U.S.C. § 13, provides general statutory authority for the Indian Health Service. *See Basis for Health Services*, INDIAN HEALTH SERVS. (Jan. 2015), https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/factsheets/BasisforHealthServices.pdf.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

provides medical services directly to AI/AN persons in collaboration with Indian tribes.[64]

By the 1970s, federal policymakers aimed to expand services for Indian tribes, evidenced by the passage of both the Indian Self-Determination and Education Assistance Act (ISDEAA) and the Indian Health Care Improvement Act (IHCIA).[65] The ISDEAA granted Indian tribes the power to administer and manage their own health care programs, as well as develop health priorities.[66] The IHCIA became the most significant authorizing legislation for the IHS, declaring "it is the policy of the Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians to ensure the highest possible health status for Indians and urban Indians and to provide all the resources necessary to effect that policy."[67] The IHCIA enabled IHS providers to bill Medicare, Medicaid, and private payors for health services rendered to AI/AN persons for the first time in the nation's history.[68] The law also granted IHS the authority to fund Urban Indian Organization, health clinics in urban areas for AI/AN persons living in cities and off reservations.[69] Most recently, the Patient Protection and Affordable Care Act (ACA) permanently reauthorized the provisions of the IHCIA, including the IHS.[70] The ACA increased services offered to Indian tribes through the IHS including long-term care and behavioral health care, and also increased AI/AN persons access to Medicaid and private health insurance.[71]

### 1. The IHS and AI/AN Health Outcomes

Today, the IHS is the primary health service provider for AI/AN persons.[72] The IHS is separated into twelve geographic areas where an "Area Office" oversees the provision of health services.[73] There are 170 individual IHS facilities within the twelve regions that provide health care services to members of 566 federally

[64] HEISLER, *supra* note 13.

[65] *Id.* at 18.

[66] *Id.*

[67] 25 U.S.C. § 1602.

[68] HEISLER, *supra* note 13, at 18.

[69] *Id.* at 19–20.

[70] *Id.*

[71] *Id.*

[72] ALBA & ZIESENISS, *supra* note 52, at 35.

[73] *Id.* at 39.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

recognized Indian tribes.[74] The IHS provides services through various health care facilities including hospitals, youth regional treatment centers, health stations, and Alaska village clinics (150 clinics in Alaska that deliver services using telehealth technology).[75] In addition, the IHS contracts with private health care providers.[76] Tribes control over 50% of the federal funds allocated to the IHS.[77]

There are myriad challenges facing the IHS, including inadequate funding, geographic remoteness of IHS facilities, and extreme discrepancies between services provided across facilities.[78] IHS funding is not predetermined but instead is subject to annual discretionary appropriations.[79] This means that Congress negotiates and reappropriates IHS funding every fiscal year, oftentimes exposing the program to federal budget cuts.[80] Further, after Congress enacted the Budget Control Act in 2011, which limited the level of discretionary spending for federal programs through 2021, IHS funding has been forced to "compete" with other programs funded by discretionary appropriations.[81] IHS funding has also failed to adjust for inflation, population growth, or the specific needs in AI/AN communities.[82] For example, over one five-year period, medical inflation increased by over 20%, but IHS funding increased by only 8%.[83] In 2017, a report conducted by the National Congress of American Indians found the IHS only spent $3,332 per patient annually, compared with Medicare, which spent $12,829 per patient, and Medicaid, which spent $7,789 per patient each year.[84] Indeed, the IHS spends "less on its service users than the government spends on any other group receiving public health care."[85] As a result,

---

[74] HEISLER, *supra* note 13, at 1, 5.

[75] *Id.* at 6–7.

[76] ALBA & ZIESENISS, *supra* note 52, at 39.

[77] *Id.* at 40.

[78] *See generally* Holly E. Cerasano, *The Indian Health Service: Barriers to Health Care and Strategies for Improvement*, 24 GEO. J. ON POVERTY L. & POL'Y 421 (2017).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 435–36.

[82] Warne & Frizzell, *supra* note 2, at S265.

[83] *Id.*

[84] Mark Walker, *Fed Up With Deaths, Native Americans Want to Run Their Own Health Care*, N.Y. TIMES (Oct. 8, 2021), https://www.nytimes.com/2019/10/15/us/politics/native-americans-health-care.html.

[85] ALBA & ZIESENISS, *supra* note 52, at 43.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

IHS providers report that service demands exceed funding, forcing health care providers to ration care and prioritize certain patients and conditions.[86]

The geographic inaccessibility of IHS facilities is also a barrier to care for AI/AN persons.[87] Approximately 1.6 million Native Americans (out of 2.2 million eligible AI/ANs) receive health care from the IHS, a majority of whom live on, or near, a reservation.[88] However, for AI/AN persons without an IHS facility in their community, the geographic remoteness of the nearest provider may be prohibitive to obtaining care.[89] Moreover, because the IHS does not offer a standard set of health services, many AI/ANs may not receive necessary medical care[90] even if they can access an IHS provider;[91] while some IHS facilities offer radiology and obstetrics, others only provide preventive services intermittently administered by visiting physicians.[92] IHS hospitals have reported that retaining providers is one of its greatest challenges.[93]

Given its limitations, the IHS contracts for health services with non-tribal health care providers through a program called Contract Health Services (CHS).[94] However, the CHS Program is financed through the "clinical services category" within the IHS budget.[95] Accordingly, CHS is subject to the same financial constraints as the IHS, and therefore most CHS funding is reserved for treating life-

[86] *See generally* Jennie R. Joe, *The Rationing of Healthcare and Health Disparity for the American Indians/Alaska Natives*, NAT'L ACAD. OF SCIS., 2003, at 528.

[87] HEISLER, *supra* note 13, at 2.

[88] *Id.* at 2, 4.

[89] Cerasano, *supra* note 78, at 431.

[90] *Id.*

[91] HEISLER, *supra* note 13, at 2.

[92] *Id.* at 7, 10, 12.

[93] U.S. DEP'T OF HEALTH AND HUM. SERV. OFF. OF INSPECTOR GEN., OEI-06-14-00011, INDIAN HEALTH SERVICE HOSPITALS: LONGSTANDING CHALLENGES WARRANT FOCUSED ATTENTION TO SUPPORT QUALITY CARE 11 (2016) [hereinafter OFF. OF INSPECTOR GEN.].

[94] ALBA & ZIESENISS, *supra* note 52, at 45.

[95] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

threatening illnesses.[96] In 2019, CHS denied approximately $616 million in care for AI/AN persons.[97]

The chronic underfunding of the IHS, as well as poor access to health services for AI/AN persons, has led to disparities in health outcomes that "have been a concern to the Federal Government for almost a century."[98] AI/ANs experience poorer health when compared with other Americans.[99] Disproportionate chronic, physical, and behavioral health conditions have contributed to lower life expectancy for AI/AN persons; AI/ANs live on average over five years less than other races in the United States and die at higher rates than other races in categories including diabetes and suicide.[100] In addition, AI/AN youth are more than twice as likely to commit suicide than other races, and almost 70% of all suicides in Indian Country are alcohol-related.[101] AI/AN persons are 650% more likely to die from tuberculosis than the general population; 318% more likely to die from diabetes; and 204% more likely to die accidentally than the general population in the United States.[102]

### 2. Medicaid's Role in Providing Health Care for AI/AN Persons

The Social Security Act of 1965 established Medicaid, a public health insurance program that provides health coverage to "mandatory categorically needy" individuals including low-income adults, children, pregnant women, elderly adults, and people with disabilities.[103] Medicaid is mostly free for beneficiaries; cost sharing is nominal and explicitly barred for certain services.[104] Notably, states cannot impose cost sharing on AI/AN Medicaid beneficiaries.[105] Each state operates its own

[96] *Id.*

[97] MACPAC, *supra* note 17, at 5.

[98] OFF. OF INSPECTOR GEN., *supra* note 93, at 1.

[99] ALBA & ZIESENISS, *supra* note 52, at 34.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 35.

[103] *Policy Basics: Introduction to Medicaid*, CTR. ON BUDGET AND POL'Y PRIORITIES (Apr. 14, 2020), https://www.cbpp.org/research/health/introduction-to-medicaid [hereinafter CTR. ON BUDGET AND POL'Y PRIORITIES].

[104] MACPAC, *supra* note 17, at 6.

[105] *Id.* at 6.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

Medicaid program but follows federal guidelines to provide a minimum set of medical benefits (e.g., hospital and physician care, laboratory and x-ray services, home health services).[106] Medicaid is an entitlement program, which means eligible individuals have a right to the insurance; if demand for insurance increases, the Medicaid program automatically expands.[107] Further, states are guaranteed funding to operate a Medicaid program.[108] Specifically, the Medicaid program requires state Medicaid agencies to reimburse health care providers for delivering services to Medicaid beneficiaries.[109] The federal government then reimburses the state for all or part of those expenditures at a rate called the "federal medical assistance percentage" (FMAP), which typically ranges from 50–73% of total expenditures based on the state's per capita income.[110] For AI/AN providers, the IHCIA establishes a 100% FMAP rate for services which are received through an IHS facility.[111] Thus, when a AI/AN Medicaid beneficiary receives a health service through the IHS, the state in which that IHS facility is located will be reimbursed entirely, regardless of what the FMAP percentage would have been for identical services provided by a non-IHS provider.[112] Medicaid provides health insurance for 36% of AI/ANs.[113]

### *B. The Trust Responsibility and Housing: A Brief History of Federal Laws that Authorize the Provision of Housing and Housing Assistance for AI/AN Person*

Similar to health care, the trust responsibility obligates the United States to provide housing or housing assistance to AI/AN persons.[114] Notes recovered from

[106] CTR. ON BUDGET AND POL'Y PRIORITIES, *supra* note 103.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Warne & Frizzell, *supra* note 2, at S265.

[112] *See* MACPAC, *supra* note 17, at 6–8 ("There are a number of restrictions on when the 100 percent FMAP may apply for Medicaid services that AIAN beneficiaries receive. These restrictions are designed to ensure that the 100 percent FMAP is only provided for services furnished to AIAN individuals by or under the care of Indian health providers. However, some states, tribes, and advocates have suggested that access could be improved if restrictions on enhanced Medicaid FMAP were changed . . . .").

[113] *Id.* at 3.

[114] *See generally* Davis, *supra* note 1, at 234.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

treaty negotiations, as well as the treaties themselves, reflect the federal government's early purported commitment to provide tribes with housing in return for their land.[115] For example, one Treaty between the United States and the Sauk and Foxes of Missouri stated that "sums shall be paid directly to the Indians, or otherwise, as the President may deem advisable, for building houses. . . ."[116] The United States promised the Osage Indian Tribe that it would build the Osage houses using the money from the sale of tribal land.[117] Moreover, the Bureau of Indian Affairs (BIA) closely tracked AI/AN housing statistics from 1867–1904.[118] Indeed, the federal government has been concerned with AI/AN housing for centuries, as evidenced by:

> [R]eports from reservation superintendents and Indian agents from the late 1800s concerning housing programs and needs; [Bureau of Indian Affairs] circulars assessing housing problems and providing plans for potential development; surveys documenting the substandard conditions of Indian housing; and detailed documentation of a large scale federal Indian housing program in the 1930s . . . .[119]

In 1926, the government commissioned the Meriam Report, a survey of the conditions of the AI/ANs that focused on tribal economic and social wellbeing.[120] The report collected information from reservations, AI/AN agencies, health service providers, schools, and off-reservation communities where AI/ANs persons had moved.[121] The findings described extreme poverty, including inadequate living conditions and overcrowded housing, which exacerbated poor health outcomes for Native Americans.[122] In response, Congress passed the Indian Reorganization Act

[115] *Id.* at 213.

[116] Treaty with the Sauk and Foxes of Missouri, art. 2, May 18, 1854, 10 Stat. 1074.

[117] Treaty with the Osage, art. 2, Sept. 29, 1865, 14 Stat. 687.

[118] Davis, *supra* note 1, at 219.

[119] *Id.* at 213.

[120] *See* INST. FOR GOV'T RSCH., THE PROBLEM OF INDIAN ADMINISTRATION 3 (1928) (Lewis Meriam, Technical Director) [hereinafter MERIAM REPORT].

[121] *Id.* at 63.

[122] Davis, *supra* note 1, at 225–26.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

(IRA) in 1934.[123] Among various provisions, the IRA created the Revolving Loan Fund, "in order to provide capital for long-term improvements, sawmills, and homes."[124] However, the funding for housing proved inadequate.[125] President Roosevelt then issued over $1.3 million to the Office of Indian Affairs to "finance the rehabilitation of Indians . . . by means of loans or grants, or both, to enable them to construct or repair houses, barns, outbuildings, and root cellars."[126] This money became the foundation of the Indian Relief and Rehabilitation Program, "the first major federally funded program specifically aimed at improving housing conditions for reservation Indians."[127] After the Great Depression and amidst the influx of New Deal legislation and programs, Congress passed the United States Housing Act of 1937, declaring that decent, safe, and affordable housing was a basic need for all Americans.[128] However, the law did not establish specific housing programs for Indian tribes.[129]

In 1996, the Native American Housing Assistance and Self-Determination Act (NAHASDA) became the first piece of federal legislation that specifically recognized housing as a component of the trust responsibility to AI/AN people.[130] NAHASDA overhauled multiple funding streams for AI/AN housing and replaced them with a single block grant program, the Native American Housing Block Grant (NAHBG).[131] NAHASDA amplified tribal self-determination, granting tribes the authority to decide how to deploy housing funds.[132] For example, through NAHBG, the Department of Housing and Urban Development (HUD):

---

[123] 25 U.S.C. § 461.

[124] Davis, *supra* note 1, at 227.

[125] *Id.* at 227–28.

[126] *Id.* at 228.

[127] *Id.*

[128] *See* 42 U.S.C. § 1437 (originally enacted as United States Housing Act of 1937, § 2, 50 Stat. 888).

[129] *Id.*

[130] KATIE JONES, CONG. RSCH. SERV., R43307, THE NATIVE AMERICAN HOUSING ASSISTANCE AND SELF-DETERMINATION ACT OF 1996 (NAHASDA): BACKGROUND AND FUNDING, Summary (2015).

[131] *Id.*

[132] *Id.*

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

> [D]istributes formula funding to Native American tribes and Alaska Native villages, or to organizations the tribes have designated to administer the funding (known as tribally designated housing entities (TDHEs)). Tribes and TDHEs, in turn, use the funding for a range of affordable housing activities to benefit low-income tribal households. These activities include developing new housing for rental or homeownership, maintaining or operating existing housing units, providing infrastructure, and offering housing-related services.[133]

NAHASDA also created a program to help tribes secure private financing for housing.[134] After NAHASDA was enacted, Indian tribes "indicate[d] that the law had a positive impact on their ability to address housing needs in tribal areas."[135] However, NAHASDA expired in 2013 and despite a reauthorization bill introduced in 2021, it has yet to pass.[136] The inadequate housing conditions experienced by AI/ANs represents an abandonment of the United States' duty to fulfill the trust responsibility. The Congressional Research Service has described tribal housing issues as "particularly severe compared to the rest of the country," and reported that Indian tribes experience "some of the poorest housing conditions in the United States.[137] AI/ANs are disproportionately low-income, which compounds housing-related issues by making affording adequate housing a challenge.[138] In addition, the legal status of tribal land makes it difficult for AI/AN persons to obtain loans or mortgages from banks to invest in affordable housing; most tribal land is held in trust and generally cannot be "alienated . . . or encumbered without BIA approval"[139] Thus, it is difficult for banks to use the land as guaranty for a loan, since they cannot take the land if a borrower does not pay back the loan.[140] Geographic remoteness of

[133] *Id.*

[134] *Id.*

[135] *Id.* at 5.

[136] *See* U.S. SENATE COMM. ON INDIAN AFFS., SCHATZ, MURKOWSKI LEAD COMMITTEE PASSAGE OF BIPARTISAN BILL TO ADVANCE NATIVE AMERICAN HOUSING PROGRAMS (2022), https://www.indian.senate.gov/news/press-release/schatz-murkowski-lead-committee-passage-bipartisan-bill-advance-native-american-0.

[137] JONES, *supra* note 130, at Summary, 4.

[138] *Id.* at 1.

[139] U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., MORTGAGE LENDING ON TRIBAL LAND: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS viii (2017) [hereinafter HUD ASSESSMENT].

[140] *See id.* at vii–viii.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

Indian Country also contributes to the housing crisis experienced by AI/ANs; housing construction is more expensive the farther the construction is from building materials or building labor.[141]

In 2010, the United States Census found:

> [Five percent] of housing units on tribal lands lack complete plumbing facilities, and 5% lack complete kitchen facilities, compared to less than 1% of housing units nationally that lack each of these features. Eight percent of housing units on tribal lands are overcrowded, compared to 3% nationally.[142]

AI/AN households are most cost burdened.[143] In addition, the AI/AN population needs 68,000 new housing units, 33,000 to reduce overcrowding and 35,000 to "replace severely inadequate units."[144] In the AI/AN community, 8.1% of households are overcrowded (compared to 3.1% in the general population).[145] There is also an insufficient supply of affordable housing stock on tribal land.[146]

One consequence of this housing crisis is that AI/AN persons disproportionately experience homelessness.[147] In a 2017 HUD survey, 99.8% of tribal respondents reported that all AI/AN households "double up," or take in family members or friends who would otherwise live in a shelter, someplace not meant for human habitation, or remain unsheltered.[148] Still, tribes reported that literal homelessness is prevalent; some tribes consider doubling up as literal

[141] *Id.* at vii.

[142] JONES, *supra* note 130, at 5.

[143] U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES LIVING IN URBAN AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS 62 (2017).

[144] U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES IN TRIBAL AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE, AND NATIVE HAWAIIAN HOUSING NEEDS 5–6 (2017).

[145] U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., CONTINUITY AND CHANGE: DEMOGRAPHIC, SOCIOECONOMIC, AND HOUSING CONDITIONS OF AMERICAN INDIANS AND ALASKA NATIVES xv (2014).

[146] *Id.* at 79.

[147] SUZANNE ZERGER, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, HEALTH CARE FOR HOMELESS NATIVE AMERICANS ii (2004).

[148] U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., *supra* note 145, at 77.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

homelessness.[149] In 2015, HUD's annual Point-in-Time Count[150] recorded that 15,136 AI/AN persons were literally homeless.[151] In addition, not all tribes offer homeless services on tribal lands; nationally, only 46% of tribes report that their community offers shelters.[152]

## II. THE INTERSECTION OF HEALTH AND HOUSING: PERMANENT SUPPORTIVE HOUSING

Housing is a strong correlate of health: lack of housing can cause or exacerbate health problems and health problems can contribute to housing instability.[153] Poor housing can "worsen health outcomes related to infectious and chronic disease, injury, mental health, and may also affect childhood development through exposure to harmful toxins."[154] Research indicates that individuals who experience unstable, indecent, or unsafe housing, are increasingly at risk for poor health outcomes when compared to stably housed individuals.[155] In addition, individuals experiencing chronic homelessness are significantly more likely to suffer from co-morbidities including physical and behavioral health conditions and increased mortality.[156] The federal definition of chronically homeless is:

> A "homeless individual with a disability," as defined in section 401(9) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11360(9)), who: (i) Lives in a place not meant for human habitation, a safe haven, or in an emergency

[149] *Id.* at 80. Literal homelessness is a condition in which an individual or family lacks fixed, regular, and adequate nighttime residence. *See* The McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11302(a).

[150] "The Point-in-Time (PIT) count is a count of sheltered and unsheltered people experiencing homelessness that HUD requires each Continuum of Care (CoC) nationwide to conduct in the last 10 days of January each year." *Point-in-Time (PIT) Count Standards and Methodologies Training*, HUD EXCH., https://www.hudexchange.info/trainings/courses/point-in-time-pit-count-standards-and-methodologies-training/ (last visited Apr. 22, 2023).

[151] U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., *supra* note 145, at 84.

[152] *Id.*

[153] NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, HOMELESSNESS & HEALTH: WHAT'S THE CONNECTION? (2019).

[154] MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N, MEDICAID'S ROLE IN HOUSING 1 (2021) [hereinafter MACPAC 2021]; NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, *supra* note 153.

[155] LAUREN A. TAYLOR, HEALTH POL'Y BRIEF, HOUSING AND HEALTH: AN OVERVIEW OF THE LITERATURE 2 (2018).

[156] *Id.* at 3.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

> shelter; and (ii) Has been homeless and living as described in paragraph (1)(i) of this definition continuously for at least 12 months or on at least 4 separate occasions in the last 3 years.[157]

In 2010, 26.2% of individuals experiencing homelessness but living in a temporary shelter had a mental health condition and 34.7% had a substance use disorder.[158] Accordingly, individuals experiencing homelessness often struggle with medical and social complexities causing increased risk for both hospitalization and incarceration; the United States Interagency Council on Homelessness reports that the misuse of emergency services and the jail costs between $30,000 and $50,000 per person each year.[159] Costs associated with unstable housing "disproportionately accrue to Medicaid."[160] In comparison, stable housing generally promotes physical and mental health because adequate housing allows people to better manage acute and chronic conditions.[161] Physicians have even concluded that "housing is similar to drug prescription."[162]

Permanent Supportive Housing[163] combines affordable housing with intensive and coordinated supportive services for people experiencing both homelessness and a disabling physical or mental health condition.[164] Specifically, PSH provides

[157] 24 C.F.R. § 578.3(1).

[158] SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., CURRENT STATISTICS ON THE PREVALENCE AND CHARACTERISTICS OF PEOPLE EXPERIENCING HOMELESSNESS IN THE UNITED STATES 2 (2011).

[159] U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, ENDING CHRONIC HOMELESSNESS IN 2017, at 1 (2015).

[160] Mara A.G. Hollander, Evan S. Cole, Julie M. Donohue & Eric T. Roberts, *Changes in Medicaid Utilization and Spending Associated with Homeless Adults' Entry into Permanent Supportive Housing*, 36 J. GEN. INTERN. MED. 2353, 2353 (2021).

[161] Thomas Kottke, Andriana Abariotes & Joel B. Spoonheim, *Access to Affordable Housing Promotes Health and Well-Being and Reduces Hospital Visits*, 22 PERMANENTE J. 1, 3 (2018).

[162] Megan Sandel & Matthew Desmond, *Investing in Housing for Health Improves Both Mission and Margin*, 318 JAMA 2291, 2291 (2017).

[163] Permanent Supportive Housing (PSH) is permanent housing in which housing assistance (e.g., long-term leasing or rental assistance) and supportive services are provided to assist households with at least one member (adult or child) with a disability in achieving housing stability." *Permanent Supportive Housing*, HUD EXCH., https://www.hudexchange.info/homelessness-assistance/coc-esg-virtual-binders/coc-program-components/permanent-housing/permanent-supportive-housing/ (last visited Apr. 23, 2023).

[164] EHREN DOHLER ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, SUPPORTIVE HOUSING HELPS VULNERABLE PEOPLE LIVE AND THRIVE IN THE COMMUNITY 1 (2016).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

community-based housing with "indefinite leasing or rental assistance paired with supportive services to assist homeless persons with a disability or families with an adult or child member with a disability achieve housing stability."[165] PSH includes a "core set of service principles" such as services that help tenants retain housing; address physical and behavioral health conditions; and social services including employment assistance.[166] For decades, research has indicated that PSH helps people live stably in their communities and reduces the use of emergency services.[167]

PSH program costs include, at the very least, case management services, administrative costs, financing the development of the program, and rent subsidies.[168] Critically, funding for PSH is limited, and programs often braid multiple funding streams to operate.[169] Continuum of Care (CoC) grants, awarded to local governments, are one of the largest federal funding source for homelessness assistance and can be used for PSH programs.[170] The Veterans Affair Supportive Housing Program also provides rental assistance to veterans experiencing homelessness, including covering PSH activity,[171] while some counties take advantage of the Low-Income Housing Tax Credit Program and incentivize private housing developers to build PSH units.[172] Notably, these funding mechanisms are discretionary and limited, and therefore in most states, the demand for PSH exceeds programs' capacities.[173]

---

[165] Cole, *supra* note 23 (quoting *Continuum of Care (CoC) Program Eligibility Requirements*, HUD EXCHANGE (2018), https://www.hudexchange.info/programs/coc/coc-program-eligibility-requirements/).

[166] DOHLER ET AL., *supra* note 164, at 2.

[167] *Id.* at 3.

[168] THE NAT'L ACADS. OF SCI., ENG'G, & MED., *supra* note 24, at 60.

[169] *Id.* at 35.

[170] *CoC: Continuum of Care Program*, HUD EXCHANGE, https://www.hudexchange.info/programs/coc/ (last visited Apr. 23, 2023).

[171] *VA Homeless Programs: U.S. Department of Housing and Urban Development—VA Supportive Housing (HUD-VASH) Program*, U.S. DEP'T OF VETERANS AFF., https://www.va.gov/homeless/hud-vash.asp (last visited July 5, 2023).

[172] *Low-Income Housing Tax Credit (LIHTC)*, U.S. DEP'T OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., https://www.huduser.gov/portal/datasets/lihtc.html (last visited Apr. 23, 2023).

[173] NAT'L ASS'N OF STATE MENTAL HEALTH PROGRAM DIRS., THE ROLE OF PERMANENT SUPPORTIVE HOUSING IN DETERMINING PSYCHIATRIC INPATIENT BED CAPACITY 11 (2017); *Grants Information*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo (last visited Apr. 23, 2023).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

## III. MEDICAID'S ROLE IN PERMANENT SUPPORTIVE HOUSING

Medicaid and PSH programs benefit many of the same people.[174] Yet, health care services and housing programs are often administered separately.[175] However, given the proven impact of stable housing on health, and because PSH funding is limited while Medicaid funding is mandatory, Medicaid programs are "increasingly collaborating with state and local housing authorities to assist beneficiaries in need of supportive housing."[176] For example, Medicaid is being used to pay for home-accessibility modifications, community transition costs, and housing and tenancy supports for beneficiaries in PSH programs.[177] However, Medicaid's reach is constrained: federal law prohibits Medicaid programs from using federal dollars for actual "room and board" (i.e., rent) or housing capital, excluding nursing facilities,[178] as room and board is allegedly outside the mission and statutory purpose of Title XIX of the Social Security Act.[179]

## IV. PERMANENT SUPPORTIVE HOUSING SHOULD BECOME A COVERED MEDICAID BENEFIT TO HELP THE UNITED STATES MOVE CLOSER TO FULFILLING THE TRUST RESPONSIBILITY

Federal Medicaid dollars should cover the cost of room and board or housing capital for PSH programs. Utilizing Medicaid—and its guaranteed funding—to finance PSH will increase the capacity of programs. In turn, AI/ANs enrolled in Medicaid and eligible for PSH will have greater opportunity to obtain stable housing with supportive services. Increasing access to housing can help address the

[174] MACPAC 2021, *supra* note 154, at 1.

[175] *Id.*

[176] *Id.*

[177] *Id.* at 2.

[178] *Id.* at 1.

[179] Mary Crossley, *Bundling Justice: Medicaid's Support for Housing*, 46 J.L. MED. & ETHICS 595, 596 (2018). Notably, Medicaid is the "single largest payer for nursing home care in the United States . . ." and therefore Medicaid is literally already financing certain kinds of room and board. Nicole Stern & Lisa I. Iezzoni, *Poor housing harms health in American Indian and Alaska Native communities*, HARV. HEALTH (Apr. 6, 2022), https://www.health.harvard.edu/blog/poor-housing-harms-health-in-american-indian-and-alaska-native-communities-202204062721#:~:text=Today%2C%20as%20a%20result%20of,Mental%20distress%20is%20common.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

underlying causes of homelessness and improve health outcomes for AI/ANs, and thus bring the United States closer to fulfilling the trust responsibility.

Twenty-seven percent of non-elderly AI/ANs are covered by Medicaid,[180] as the federal health insurance "fills gaps in employer-sponsored coverage for them and providing them access to a broader array of services and providers than available to them solely through IHS-funded services."[181] In some states, AI/ANs are the largest racial or ethnic group enrolled in the Medicaid program.[182] Notably, many AI/ANs who are eligible for Medicaid are not enrolled.[183] Also, AI/ANs who do not qualify for IHS services because they may not belong to a federally recognized tribe, may still qualify for Medicaid.[184] By virtue of the disproportionate rates of low incomes, disabling health conditions, and high rates of homelessness, many AI/ANs who qualify for Medicaid may also qualify for PSH.[185] Over ten percent of AI/ANs eighteen years or older had a substance use disorder; 3.8% of AI/ANs eighteen years or older had both a substance use disorder and a mental illness; and 18.7% of AI/ANs aged eighteen years or older had a mental illness.[186] AI/AN persons also disproportionately grapple with disabling health conditions: the CDC found that AI/AN people are "50.3% more likely to have a disability, when compared to the national average."[187] AI/AN children have the highest disability rates in the country.[188] These numbers indicate that if Medicaid benefits were enhanced to cover PSH room and board or housing capital, more AI/ANs would have access to housing

[180] SAMANTHA ARTIGA, PETRY UBRI & JULIA FOUTZ, KFF, MEDICAID AND AMERICAN INDIANS AND ALASKA NATIVES 3 (2017).

[181] *Id.* at 7.

[182] *Id.* at 4.

[183] *Id.* at 4.

[184] *Id.*

[185] PARADISE & COHEN ROSS, *supra* note 29, at 1.

[186] U.S. DEP'T OF HEALTH & HUM. SERVS. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., 2019 NATIONAL SURVEY ON DRUG USE AND HEALTH: AMERICAN INDIANS AND ALASKA NATIVES (AI/ANS) 4 (2020).

[187] *AI/AN Age and Disability*, CTRS. FOR MEDICARE & MEDICAID SERV., https://www.cms.gov/outreach-and-education/american-indian-alaska-native/aian/ltss-ta-center/info/ai-an-age-and-disability (last visited Sept. 5, 2023).

[188] NATALIE A.E. YOUNG, U.S. CENSUS BUREAU, CHILDHOOD DISABILITY IN THE UNITED STATES: 2019, at 2–3 (2021).

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu

and health care.[189] As the trust responsibility includes providing health care and housing, PSH, funded by federal Medicaid dollars, can be an effective approach to fulfilling the federal trust responsibility to Indian tribes.

## V. CONCLUSION

The trust responsibility obligates the federal government to meet both the health and housing needs of AI/AN persons.[190] Yet, despite numerous laws and programs over the last two centuries, the United States has failed to fulfill its promises; AI/AN persons experience disproportionate poor health status and higher rates of inadequate housing and homelessness than the general population. Accordingly, PSH should become a Medicaid covered service. This would improve AI/AN access to health care and housing and help the United States fulfill the trust responsibility.

[189] PARADISE & COHEN ROSS, *supra* note 29.

[190] HEISLER, *supra* note 13, at 1.

ISSN 0041-9915 (print) 1942-8405 (online) ● DOI 10.5195/lawreview.2023.982
http://lawreview.law.pitt.edu