



April 25, 2022

Samantha Deshommes, Chief
Regulatory Coordination Division, Office of Policy and Strategy
U.S. Citizenship and Immigration Services

Re: Re: DHS Docket No. USCIS-2021-0013, Comments in Response to
Rulemaking, Public Charge Ground of Inadmissibility

Dear Chief Deshommes:

The undersigned members of the Rights, Health, and Long-Term Services and Supports (LTSS) Task Forces of the Consortium for Constituents with Disabilities (CCD) submit the following comments in response to the above-captioned Notice of Proposed Rulemaking. We commend the Department of Homeland Security (DHS) for rescinding the 2019 Public Charge rule, and for considering impacted communities' comments to the proposed rule.

CCD is the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society free from racism, ableism, sexism, and xenophobia, as well as LGBTQ+ based discrimination and religious intolerance. CCD firmly believes that immigrants with disabilities provide the same diverse range of strengths and benefits to the country as

all other immigrants, and therefore takes an interest in immigration policy. Although CCD's comments focus on recommendations for amending public charge regulations, we express our opposition to the Immigration and Nationality Act (INA)'s public charge rule. We believe that Section 212(a)(4) of the INA should be modified through legislation to eliminate public charge. The public charge rule is based on a racist and ableist clause in the INA that has existed since the 19th century in some form. The public charge rule has been of grave concern to the disability community because it has been used to target immigrants for adverse treatment based on disability.

Nonetheless, CCD provides our comments in order to develop a fair and nondiscriminatory approach to the public charge rule within the new regulations. We urge you to finalize a proposed rule that considers the rule's potential impact on people with disabilities.

Recommendation: Exclude long-term institutionalization from the definition of "Likely at any time to become a public charge" in § 212.21(a).

Justification: The proposed definition of public charge includes both receipt of Supplemental Security Income (SSI) and long-term institutionalization, which are factors that solely apply to people with disabilities. As discussed more fully below, we urge DHS not to consider either in the public charge test, and therefore, these factors should be removed from the definition in § 212.21(a).

Recommendation: We agree with DHS that "primarily dependent" rather than a lesser level of dependence is the right standard. We recommend a slight modification that respects the previous 1999 Field Guidance: "...primarily dependent for a recent and sustained amount of time with little prospect for change."

Justification: The 1999 Field Guidance indicates that "*primarily* dependent" does not mean that any individual who receives any amount of cash assistance for income maintenance would require a denial on public charge grounds. It also indicated that benefits received recently or for a longer time period are more predictive that a person will become primarily dependent. It says, "The longer ago an [individual] received such cash benefits [...], the less weight these factors would have as a predictor of future receipt." It also says that the "length of time an applicant has received cash assistance is a significant factor."^[1] The 1999 Field Guidance clarifies that subsistence should not be defined by benefits that families use to support work, such as health care, nutrition, or housing assistance. The definition – and its focus on a limited set of benefits – is aligned with the longstanding interpretation of the law.

Recommendation: We agree that the presence of a disability as defined by Section 504 of the Rehabilitation Act, or any other medical condition is not alone a sufficient basis to determine that a noncitizen is likely at any time to become a public charge, including that the individual is likely to require long-term institutionalization at government expense.

Justification: Many disabilities do not impact an individual's health or require extensive medical care, and data from the American Community Survey shows the vast majority of people with disabilities do not use institutional care (available at, https://www.centerondisability.org/ada_parcs/utills/indicators.php?id=1). For many of our constituents the presence of a disability is a life condition, rather than a health condition that requires medical care for a chronic illness.

Moreover, disability is not a subset of health. Many people have disabilities that either do not result in co-occurring illnesses or long-term health-related conditions. For example, people with intellectual and developmental disabilities (IDD) may have any number of co-occurring disabilities or none at all, depending on their specific health circumstances. The presence of IDD is not by itself a health condition and does not necessarily lead to health effects and/or poor health. IDD may be related to the condition of the pregnant person before, during, or after pregnancy, but this is not always the case, nor does it make the presence of IDD a health condition. Moreover, immigration officers are not trained to make disability or health diagnoses and should not assume that people who present with disability have severe health issues. We therefore strongly support DHS' language in the proposed rule and recommend that DHS take specific steps, such as by releasing guidance for US Citizenship and Immigration Services (USCIS), that ensures that the proposed rule's language is properly implemented and that no disability is considered, by itself, relevant to the "health" mandatory factor.

Recommendation: We agree with DHS's proposal that the "[t]he determination of an alien's likelihood of becoming a public charge at any time in the future must be based on the totality of the alien's circumstances." Specifically, we support and recommend that DHS retain the proposed rule's language that an applicant's use of countable benefits and any one statutory factor do not automatically make an individual a public charge. In addition, we recommend explicit language that warns of the degree to which implicit bias and stereotypes about the quality of life of people with significant disabilities could color any assessment of the total circumstances of a disabled person's life, including an undervaluation of that person's education, skills, and present state of health.

Justification: It is clear that DHS is limiting the term "totality of the circumstances" to the five statutory factors and the affidavit of support, which the regulation references as those "outlined in paragraph (a) of this section." However, there is little guidance on how those five factors should interrelate. A 2021 study of over 700 practicing physicians in the U.S. revealed that over 82% believed that people with significant disabilities have a worse quality of life than people without disabilities and only 56% strongly agreed that they welcomed patients with disabilities into their practice.^[2] Immigration officers are

highly unlikely to be free of the same implicit biases and assumptions about the life prospects of people with disabilities held by physicians. Many people with disabilities seeking to immigrate to the U.S. have never had the protection of disability nondiscrimination laws or opportunities to achieve educational, family, and career goals. Like others with and without medical needs, a disabled person's capacity to learn, work, and contribute to this country should not be overwhelmed by the assumption that medical needs will necessarily and constantly undermine other factors in the individual's life, including the resourcefulness, skills, and survival instinct needed to seek immigration.

Recommendation: We agree that Medicaid benefits should not be considered, including the provision of home and community based services (HCBS). However, we disagree that long term institutionalization is a suitable exception in determining whether one is likely to become a public charge. If DHS does continue to consider long-term institutionalization, it should not consider such institutionalization, unless, DHS can demonstrate that the individual had a meaningful, affordable, and available option, known to them, to receive HCBS instead of institutionalization; and, that institutionalization is current and has lasted for at least five years.

Justification: Including long-term institutionalization at government expense would also discriminate against people with disabilities and older adults. Only people with disabilities and older adults experience long-term institutionalization at government expense as defined by DHS. By considering a public benefit heavily relied upon by people with disabilities and older adults, disability and/or age are adversely considered multiple times as factors in the totality of the circumstances. Because public charge is a forward looking test, it is difficult to provide clear messages to people who need Medicaid that their enrollment for non-institutional purposes now will not be used to indicate that they will rely on Medicaid should they need long-term care in the future.

Excluding Medicaid from consideration is the best way to avoid confusion. Medicaid is the primary payer of long-term care in the U.S. and covers 6 in 10 nursing home residents.^[3] Many people living in the U.S. will one day rely on Medicaid for their long-term care needs. Additionally, Medicaid is the primary payer for home and community-based services (HCBS).^[4] HCBS provide many different kinds of services and supports to people with disabilities, including transportation, long term personal care assistant services, long term medical care, support for adaptive functioning and instrumental activities of daily living, and other services critical for life in the broader community. If Medicaid were included, immigrants with disabilities who have used Medicaid for the funding of LTSS, or immigrants who may need HCBS in the future, would be effectively discriminated against for pursuing community living.

Recommendation: We agree that a person institutionalized in violation of federal law should not be subject to the public charge rule.

Justification: In 1999, the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999) held that unjustified institutionalization of individuals with disabilities by a public entity is a form of discrimination under the Americans with Disabilities Act and Section 504 of the

Rehabilitation Act. The expansion of HCBS services has enabled many people with disabilities to transition from institutions into independent community living. However, HCBS are state-based and generally underfunded, rendering too many people dependent upon years' long waitlists before they can access such services.^[5] Another factor is the lack of access to affordable and accessible housing in a community. Therefore, due to the state-based nature of HCBS funding, a person may wish to receive care in the community via HCBS, but may nonetheless receive care in an institution instead due to underfunding and their position on the waiting list. It is our position that individuals with disabilities should not be penalized based upon how and whether the state chose to pay for their care in community settings.

Recommendation: DHS should also avoid consideration of cash benefit programs that specifically target people with disabilities, such as Supplemental Security Income (SSI). Consideration of such disability-based benefits targets people for adverse consideration on the basis of their disability.

Justification: Consistent with DHS' intent to create a public charge rule that does not discriminate on the basis of disability, we recommend that DHS avoid consideration of benefit programs that specifically target people with disabilities, such as SSI. Fundamentally, the primary recipients of SSI are older adults and people with disabilities. Any public charge rule that considers these benefits negatively will therefore have the effect of discriminating on the basis of disability.

Recommendation: We agree that the new rule needs to clarify that only the receipt of specific benefits covered by the rule, only by the noncitizen applying for the immigration benefit, and only where such noncitizen is a named beneficiary would be taken into consideration. By extension, DHS would not consider public benefits received by the noncitizen's relatives (including U.S. citizen children or relatives). DHS and its benefit granting agencies could mitigate this confusion by creating materials in multiple languages and accessible formats ready for states and service providers to use. States and community groups who work directly with families must be given outreach materials suited to their populations and their ways of interacting with their clients. These materials should use language that is accessible to immigrant communities and should be available in multiple languages for communities with limited English proficiency. These materials must communicate key messages about the public charge rule and be available in multiple forms.

Justification: We reference but do not repeat here the extensive research cataloged in the comments submitted by the Protecting Immigrant Families coalition demonstrating the chilling effect that the prior Administration's public charge rule has had on immigrants who are eligible for, but have chosen to forgo Medicaid, SNAP and other public benefits. The effects of that policy continued even after it was rescinded by the current Administration. Not only does this chilling effect amount to appalling public policy--encouraging individuals to forgo help with basic nutrition, basic healthcare, and housing during crises events such as a public health emergency--but it also results in needless costs in the form of preventable physical and mental healthcare costs, repeated emergency room visits, hospitalizations, and shelter costs. We have decades

of evidence demonstrating that the provision of housing assistance, preventative care, and nutrition assistance saves lives and saves costly crisis and late-stage care. Such assistance is especially critical for people with disabilities who face higher costs of living, a greater likelihood of needing some level of ongoing healthcare need, and barriers to full employment and just compensation. The continuation of the COVID-19 pandemic makes these public policy concerns even more significant. Discouraging eligible individuals from seeking needed help with housing, food and medical care increases their risk of infection and death. Further, it results in more individuals filling hospital beds at a time when resources are scarce in many places; we can ill afford to continue that policy. DHS should do everything in its power to ensure that eligible immigrants are encouraged to apply for benefits and that the public charge rule is sufficiently narrowed so that it ceases to serve as a significant deterrent to individuals seeking benefits to which they are entitled.

CCD again thanks DHS for the opportunity to comment on its proposed rule. We will continue to engage and submit comments on DHS' application of immigration laws and their impact on people with disabilities.

Sincerely,

Access Ready

American Association of People with Disabilities

American Occupational Therapy Association (AOTA)

Association of People Supporting Employment First (APSE)

Autistic Self Advocacy Network

Autism Society of America

Autistic Women & Nonbinary Network (AWN)

Bazelon Center for Mental Health Law

Caring Across Generations

Center for Medicare Advocacy

Center for Public Representation

CommunicationFIRST

Disability Rights Education and Defense Fund

Easterseals

Epilepsy Foundation

Justice in Aging

Muscular Dystrophy Association

National Association of Councils on Developmental Disabilities

National Center for Learning Disabilities

National Center for Parent Leadership, Advocacy, and Community Empowerment
(National PLACE)

National Consumer Law Center (on behalf of its low-income clients)

National Women's Law Center

RespectAbility
The Arc of the U.S
The Kelsey
The Partnership for Inclusive Disaster Strategies
United Spinal Association
World Institute on Disability

[1] See Department of Justice, “Field Guidance on Deportability and Inadmissibility on Public Charge Grounds,” 64 Fed. Reg. 28689, May 26, 1999, available at: <https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf>

[2] Lisa I. Iezzoni, et al., Physicians’ Perceptions of People with Disability and Their Health Care, 40:2 Health Affairs, February 2021, available at: <https://doi.org/10.1377/hlthaff.2020.01452>.

[3] Kaiser Family Foundation, Medicaid’s Role In Nursing Home Care, 2017, available at: <https://files.kff.org/attachment/Infographic-Medicoids-Role-in-Nursing-Home-Care>.

[4] Molly O’Malley Watts, MaryBeth Musumeci, and Priya Chidambaram, Medicaid Home and Community-Based Services Enrollment and Spending, February 4, 2020, available at <https://www.kff.org/medicaid/issue-brief/medicaid-home-and-community-based-services-enrollment-and-spending/>.

[5] Care Can’t Wait: How Do Inadequate Home- and Community-Based Services Affect Community Living and Health Outcomes? Community Living Policy Center. Gardiner, F.M., Brandeis University, Waltham, MA, (2021) available at: <https://heller.brandeis.edu/community-living-policy/images/pdfpublications/care-cant-wait.pdf>