

December 6, 2018

Samantha Deshommes  
Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue NW  
Washington, DC 20529-2140

RE: DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to  
Proposed Rulemaking on Inadmissibility on Public Charge Grounds

Dear Ms. Deshommes:

The State Council on Developmental Disabilities (SCDD) appreciates the opportunity to comment on this potential policy change in public charge determinations. SCDD has significant concerns with proposed rule on public charge determinations, and writes to share our strong opposition. The proposed rule is discriminatory and would result in harm to people with developmental disabilities, their families and communities.

Close to 50 years ago, Congress established the State Councils in every state and territory. The Councils are authorized by the Developmental Disabilities Assistance and Bill of Rights Act of 2000<sup>1</sup> to ensure that individuals with developmental disabilities and their families design and can access services and supports that “promote self-determination, independence, productivity, and integration and inclusion” in community life through advocacy, capacity building, and systemic change activities.

Federal law, including Section 504 of the Rehabilitation Act,<sup>2</sup> prohibits discrimination based on disability by federal agencies. Yet the proposed public charge rule will discriminate against people with disabilities. Many people with disabilities will be screened out as likely to become a “public charge” under the proposed rule. While the preamble asserts that “the mere presence of a medical condition would not render an individual inadmissible” to the United States, the proposed rule would effectively exclude many people with disabilities based on the proposed factors and how they are weighed.

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<sup>1</sup> Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 USC Section 15001 et. seq.

<sup>2</sup> Section 504 of the Rehabilitation Act prohibits disability-based discrimination in any program or activity of a federal executive branch agency, including DHS. 29 U.S.C. Section 794(a).



The current Immigration and Nationality Act <sup>3</sup>establishes the minimum factors for the Department of Homeland Security (DHS) to consider in public charge determinations: age; health; family status; assets, resources, and financial status; and education and skills. The proposed rule sets new strict standards for each of these factors, the evidence DHS examines when considering each of the factors, and specifies how these factors are weighed. The rule greatly expands the category of people who will be inadmissible as a “public charge” by considerably broadening the types of benefits included in the public charge test and dramatically lowering the threshold for being considered reliant on those benefits. The rule also significantly increases the consideration of an individual’s health and the negative impact that having a chronic health condition or disability has on being determined a public charge. The provisions in the proposed rule are based on an unreasonable and new interpretation of what it means to be a “public charge.” The proposed rule reflects an outdated and inaccurate prejudice that people with disabilities do not contribute to their communities. This is a perspective that Congress has explicitly rejected in multiple statutes including the civil rights law for persons with disabilities, the Americans with Disabilities Act (ADA) of 1990 which passed with overwhelming bipartisan support.

## **Factors in the Proposed Rule that Discriminate Against People with Disabilities**

### **Health**

Under the proposed rule, DHS will consider whether a person’s health makes them likely to become a public charge, including whether they have been “diagnosed with a medical condition that is likely to require extensive medical treatment or institutionalization or that will interfere with their ability to provide for and care for themselves, to attend school, or to work” (Section 212.22[b][2]). Whether a person’s health is considered likely to make them a public charge will be decided by DHS predicting outcomes of what a person can and will do based on their diagnosis and other information submitted to DHS, such as from their treating physician regarding whether a medical condition impacts the ability to work or go to school. The health factor with the proposed standards and related evidence singles out people with disabilities and perpetuates the false assumption that a medical diagnosis is solely determinative of an individual’s current abilities and future prospects.

While health has always been a factor in the public charge test, the proposed rule codifies and unduly weighs the specific standard for evaluating an individual’s health. The new standard includes any medical condition likely to require extensive medical treatment or institutionalization, or that will interfere with a person's ability to provide and care for themselves, to attend school, or to work. This standard will include many people with developmental disabilities. Most people with developmental disabilities will have this factor weigh against them in the public charge determination. The preamble to the rule states that absence of a diagnosis of such a condition would be a positive factor. The impact of this new

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<sup>3</sup> Immigration and Nationality Act, 8 USC Section 1182(a)(4)(B)



health standard is intensified against people with disabilities when combined with a person's ability to pay for their health care costs (which is an element in the assets factor) and with the ability to pay for medical costs or have them covered under private insurance (which is a "heavily weighed negative factor"), both described below. This new interpretation of the health factor, particularly when combined with the other components related to health in the proposed rule will exclude many people with developmental disabilities.

## **Assets, Resources, and Financial Status**

In the definition of "public benefit" in proposed Section 212.21(b) that is a key part of the assets, resources and financial status factor, the proposed rule dramatically expands the programs and benefits that will be considered in deciding who is a public charge. Many of the programs and benefits included in the new rule are benefits that people with disabilities and their families often utilize to help with healthcare and activities of daily living, including Medicaid-funded community services. The proposed rule uses a much lower standard than the current rule's "primarily dependent" on benefits standard. In addition, the complicated and confusing application of the multi-faceted formula in the public benefit definition will encourage more individuals and families to opt out of benefits they need.

### *Medicaid, as a part of the assets, resources, and financial status factor*

People with developmental disabilities will be particularly impacted by the broad inclusion of Medicaid-funded services as part of the public charge consideration. Medicaid is the largest insurer for long-term services and supports, mental health care and substance use disorder treatment, filling the gaps left by other insurance plans that are not required to cover many of these services. Many home and community based services are not available through private insurance and few people have the resources to pay for these costs out of pocket. Many people with disabilities utilize Medicaid to assist with activities of daily living that allow them to work and be in the community. The proposed rule would consider Medicaid-funded community services in the public charge (the current public charge rule only includes Medicaid-funded institutional long-term care). Medicaid is the only source for community living supports (like personal care services, nursing services, respite, intensive mental health services, and employment supports) for people with disabilities. These community services are not generally available under private insurance. Many people with disabilities rely on Medicaid to live, work, attend school, and participate in their communities.

The "assets, resources, and financial status" factor also specifically looks at whether a person's family can cover any likely medical costs of a person with a disability or health condition (Section 212.22[b][4][B]). In addition, it separately looks at whether a person with a disability or health condition has private health insurance or resources that would cover all medical costs related to the health condition or disability (Section 212.22[b][4][I]). Since private insurance does not cover many disability services and people on Medicaid must limit their



financial resources to remain eligible, this factor would count against many people with disabilities.

The gross income element of this factor is likely to have a disproportionately negative impact on people with disabilities and their families. People with disabilities are also more “asset poor,” in part due to economic disparities related to the higher costs associated with living with a disability, including costs for assistive technology, and the need for and expense of accessible housing and transportation.<sup>4</sup> The proposed rule would use a legacy of social and economic disadvantage as the basis for further discrimination.

## Education and Skills

Attaining education and employment are areas where many people with disabilities often face significant discrimination based on their disability. The rule acknowledges that working people with disabilities contribute significantly to the U.S. economy. However, data shows that the employment rate for people with developmental disabilities in competitive integrated employment (community-based employment at or above minimum wage) in California is 13.6 percent between the ages of 16 – 64 compared to the employment rate of the general population in the same age range at 75.7 percent. Many people with disabilities around the world have been denied access to equal educational opportunities, putting them at a disadvantage with respect to this factor. In the U.S., disparities in education and educational barriers for people with a disability have been ongoing for generations, resulting in lower rates of high school completion.<sup>5</sup> Great disparities also exist when comparing the attainment of higher degrees.<sup>6</sup> In addition, some people with disabilities need supports to be able to work or attend school that are typically only available under Medicaid, which would be counted against them under the “assets, resources and financial status” factor. Thus, many people with disabilities will also be negatively impacted by the “education and skills” factor. The evidence considered in the education and skills factor also includes a person’s proficiency in English. This factor adversely affects immigrants of color, and may also adversely impact the deaf community and people with hearing or speech disabilities, people who primarily communicate through assistive devices, people with less access to formal education, and others.

## Family Status

The family status factor, along with the assets, resources, and financial status factor, could result in a person’s disability impacting the public charge determination for other family

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<sup>4</sup> Katherine McDonald et al., "Poverty Among Adults with Disabilities: Barriers to Promoting Asset Accumulation in Individual Development Accounts" (2010). Public Health, Food Studies, and Nutrition. at <https://surface.syr.edu/nsd/>.

<sup>5</sup> American Psychological Association, "Disability & Socioeconomic Status," at <https://www.apa.org/pi/ses/resources/publications/disability.aspx>.

<sup>6</sup> According to the 2015 Census, about 15.1 percent of the population age 25 and over with a disability have obtained a bachelor’s degree or higher, while 33 percent of individuals in the same age category with no disability have attained the same educational status (U.S. Census Bureau, 2015).



members. Immigrants would be penalized for providing support for other individuals, such as a sibling with a disability.

### **Heavily Weighed Factors will Discriminate Against People with Disabilities**

The proposed rule includes additional factors that weigh heavily toward a finding that an individual is likely to become a public charge. Several of these heavily weighed negative factors will apply to many people with disabilities. Including that the person has a “medical condition that is likely to require extensive medical treatment or institutionalization” or will impact their ability to care for themselves, attend school or work; that the person does not have private insurance or the resources to pay for medical costs related to their condition; or that the person received public benefits (including Medicaid) Section 212.22(c)(1).

Although the proposed rule states that a person’s disability will not be the only basis for a public charge inadmissibility finding, the factors and heavily weighed negative factors make it clear it will be very difficult for a person with a significant disability to avoid being considered a public charge. For example, a person with a disability who would need Medicaid-funded community services (which are unavailable through private insurance) would be considered to have two heavily weighed negative factors.

The rule proposes one heavily weighed positive factor – that the household has or will make at least 250 percent of the Federal Poverty Guidelines (Section 212.22[c][2]). This means that low and middle income families will not have the benefit of a heavily weighed positive factor as part of their calculation to offset any negative factors.<sup>7</sup> Fewer people with disabilities and their families will have the benefit of this factor weighing in favor of their admissibility determination than for people without a disability.<sup>8</sup>

Finally, the proposed rule also allows for public charge bonds, which can overcome some negative factors in the totality of circumstances test. Some people who are initially refused based on public charge may be offered the opportunity to post a public charge bond so that they could still be admissible. Even where it is offered, the minimum amount of a bond is \$10,000, which means it would be beyond the means of most families. An even greater barrier, however, is that the proposed rule also says that, based on the agency’s discretion, the option of a public bond is unlikely to apply if a person has even one of the heavily weighed negative factors (Section 213.1[b]). For example, a person found to be a public charge based on their disability and the need to use Medicaid for services not covered by private insurance would

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<sup>7</sup> Kelly Whitener, “Administration Moves Forward with Proposed Public Charge Regulation; Comments Due in December” (Oct. 5, 2018) at <https://ccf.georgetown.edu/2018/10/05/administration-moves-forward-with-proposed-public-charge-regulation-comments-due-in-december/>.

<sup>8</sup> Results from the American Community Survey (Americans With Disabilities Act Participatory Action Research, 2016) reveal significant disparities in the median incomes for those with and without disabilities, suggesting that “many more people with disabilities and their families live in poverty than people without disabilities and their families, and may struggle to meet basic needs,” at [http://centerondisability.org/ada\\_parc/utills/indicators.php?id=38](http://centerondisability.org/ada_parc/utills/indicators.php?id=38).



probably be ineligible for the bond. This is another way that the proposed rule discriminates against people with disabilities.

### **Conclusion**

The Department's proposals are a significant change from current policy. The proposed rule is discriminatory and inconsistent with fundamental American principles, including equal opportunity. Current immigration policy provides sufficient protection for the nation's interests. As the preamble notes, there are already time limits and eligibility limits on public benefits. Please feel free to contact Cindy Smith, Deputy Director for Policy and Public Affairs at (916) 263-7919 with any questions about these comments, or for additional information.

Sincerely,

Sandra Smith, Chair  
State Council on Developmental Disabilities