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April 25, 2022

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

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

Dear Ms. Deshommes,

I am writing on behalf of First Focus on Children in response to the Department of Homeland Security's (DHS, or the Department) Notice of Proposed Rulemaking (NPRM or proposed rule) to express recommendations to improve the public charge NPRM published in the Federal Register on February 24, 2022. We believe that there should be no public charge barrier to immigrate to the U.S. and that the policy is harmful to children and their families, and we and our partner organization, The First Focus Campaign for Children, will continue to work to change the statute. Until then, this rule represents a common sense approach to implementing the law. If finalized with our recommendations, the rule would provide much needed clarity and stability for immigrants and their families and promote the well-being of millions of children in mixed-status families. We urge that you finalize a rule that includes our recommendations as soon as possible.

Introduction

First Focus on Children is a bipartisan child advocacy organization dedicated to making children and families the priority in federal policy and budget decisions. As advocates for children, we are committed to ensuring that all immigration policies are in the best interests of children and promote family unity and child well-being. First Focus on Children and its partner organization, The First Focus Campaign for Children, have been advocating for both legislative and administrative solutions to support access to legal status and critical benefits for children in immigrant families. We strongly opposed the Trump Administration's 2018 public charge proposed rule¹ and the 2019 final rule²

¹ DHS Docket No. USCIS-2010-0012, RIN 1615-AA22, Comments in Response to Proposed Rulemaking: Inadmissibility on Public Charge Grounds, First Focus on Children [*hereinafter* First Focus 2018 Public Charge Comments] (Dec. 7, 2018), <https://firstfocus.org/wp-content/uploads/2018/12/FF-Comments-PublicCharge-12.7.18-Final.pdf>.

² State of California v. DHS, Brief for amici curiae National Housing Law Project et al, Case No. 19-17214 (9th Cir. Jan. 23, 2020), https://oag.ca.gov/system/files/attachments/press_releases/National%20Housing%20Law%20Project.pdf.

which chilled both families' applications for lawful permanent residence and children's enrollment in programs that support their healthy development.

Approximately one in four children in the United States have an immigrant parent, and children of immigrants are the fastest growing group of American children.³ However, due to their immigration status, immigrant families face barriers to thriving in the United States, including barriers to accessing federal benefits that would support children's well-being. Although the vast majority of children with an immigrant parent are citizens and are not subject to restricted access to benefits based on their immigration status, their access to health care, housing, nutrition, and income supports are impacted if one or both parents are ineligible for benefits.⁴ Even before the COVID-19 pandemic, children in immigrant families were less likely to have health insurance, more likely to experience food insecurity, and more likely to be living in low-income households than children with U.S.-born parents.⁵ The COVID-19 pandemic disproportionately harmed immigrant families, as many experienced hardship even while they were serving our communities as essential workers.⁶

First Focus believes that the nation is stronger and our future is brighter when we promote children's well-being and healthy development, including through access to public benefits that support families' income and resources. Additionally, research shows that access to lawful permanent residence, for which many immigrants are applying when facing a public charge determination, can help lift families out of poverty and create economic prosperity for immigrants and their children,⁷ leading to better educational and workforce outcomes when children reach adulthood.⁸ Thus, a fair and clear public charge rule is critical to ensuring families' equitable access to legal status, which supports family unity and children's well-being.

We appreciate that this proposed rule recognizes that core health, nutrition, and housing assistance programs help nearly half of Americans make ends meet and help families succeed, and therefore should in no way be linked to a determination of whether an individual is likely to be a public charge. In particular, we appreciate that the proposed rule acknowledges the effects of public charge

³ *Children in U.S. Immigrant Families*, Migration Policy Institute, <https://www.migrationpolicy.org/programs/data-hub/charts/children-immigrant-families?width=1000&height=850&iframe=true>. (Accessed Apr. 19, 2021).

⁴ *Id.*

⁵ *Health Coverage of Immigrants*, Kaiser Family Foundation (July 15, 2021), <https://www.kff.org/racial-equity-and-health-policy/fact-sheet/health-coverage-of-immigrants/>. Mariana Chilton, et al., *Food Insecurity and Risk of Poor Health Among US-Born Children of Immigrants*, American Journal of Public Health (Mar. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661461/>. Jeanne Batalova, Mary Hanna, and Christopher Levesque, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute (Feb. 11, 2021), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020#children-immigrants>.

⁶ Nicole Prchal Svajlenka, *Demographic and Economic Profile of Undocumented Workers on the Pandemic's Front Lines*, Center for American Progress (Feb. 18, 2021), <https://www.americanprogress.org/issues/immigration/news/2021/02/18/495992/demographic-economic-profile-undocumented-workers-pandemics-front-lines/>. Hamutal Bernstein et al., *Immigrant-Serving Organizations' Perspectives on the COVID-19 Crisis*, Urban Institute 8-11 (Aug. 2020), <https://www.urban.org/research/publication/immigrant-serving-organizations-perspectives-covid-19-crisis>.

⁷ Demitrios G. Papademetriou, Madeleine Sumption, and Will Somerville, *The Social Mobility of Immigrants and Their Children*, Migration Policy Institute 20 (June 2009), <https://www.migrationpolicy.org/research/social-mobility-immigrants-and-their-children>.

⁸ Lisa A. Keister, Jody Angius Vallejo, and E. Paige Borelli, *Mexican American Mobility: An Exploration of Wealth Accumulation Trajectories*, Stanford Center on Poverty and Inequality (Apr. 2013), https://inequality.stanford.edu/sites/default/files/media/media/working_papers/keister_angius-vallejo_borelli_mexican-american-mobility.pdf.

policy on children, including U.S. citizen children, and seeks to mitigate the adverse impacts of the policy on children while adhering to current law.⁹

Clear, administrable regulations are needed so that immigrants and their children and family members, along with U.S. Citizenship and Immigration Services (USCIS) adjudicators, benefits granting agencies, and community organizations serving immigrants can understand how a public charge assessment will be determined. This is particularly important because lack of clarity can cause the same damage as an overly broad rule. It can cause immigrant families to avoid interacting with the government and forgo either adjustment of status or critical public benefits for which they are eligible because of fear and confusion, such as a parent fearful of seeking health care for their child.

We offer the following comments in support of the proposed rule and provide recommendations to DHS to ensure the rule promotes children's well-being.¹⁰

1. DHS should issue a family well-being assessment for the proposed rule.

Section 654 of the Treasury and General Government Appropriations Act of 1999 directs federal agencies to issue a family policymaking assessment for any rule that may affect family well-being.¹¹ Under the law, the agency must evaluate a regulatory action's impact on the stability or safety of the family, on the family's ability to perform its function, and on disposable income, poverty, or any other financial impact for families and children. In the proposed rule, DHS does not issue a family policymaking assessment, stating that "the proposed rule does not affect family well-being."¹² We urge DHS to issue an assessment explaining the benefits of the proposed rule on family well-being.

By its statement, DHS appears to incorrectly assume that a family well-being assessment must only be issued if a rule negatively impacts family well-being. However, the legislative language makes clear that agencies' assessments should look at both positive and negative impacts. The statute directs agencies to determine whether a regulatory action would "strengthen[] or erode[]" or "help" certain aspects of family life.¹³ DHS has included an assessment of a regulation's positive impact on family well-being in previous notices of proposed rulemaking. For example, in its September 2021 proposed rule on the Deferred Action for Childhood Arrivals Program, DHS states that the proposed rule would "not negatively affect family well-being, but rather would strengthen it," as it would facilitate family unity and stability.¹⁴

As discussed throughout this comment, the proposed rule supports children and families' access to health care, nutrition, and housing assistance by excluding those benefits from consideration for a public charge determination. It further takes steps to clarify that parents and caregivers will not face negative immigration consequences where they apply for, get approval for, or receive benefits on behalf of their child. These key steps in fact support family well-being. Families' access to health coverage, nutrition, and housing assistance enhances family stability by supporting children's healthy development, protecting families from high medical and housing costs, and increasing disposable income for parents to spend on their children's needs. Given the evidence that the proposed rule

⁹ 87 Fed. Reg. 10611.

¹⁰ We request that our comment and all sources cited within it be considered part of the formal administrative record.

¹¹ 5 U.S.C. sec. 601, <https://www.govinfo.gov/content/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf>.

¹² 87 Fed. Reg. 10667.

¹³ 5 U.S.C. sec. 601(c).

¹⁴ 86 Fed. Reg. 53813.

would positively advance family well-being, we recommend that DHS issue a family well-being assessment for the proposed rule that accurately describes its positive impacts on children and families.

2. We support DHS's decision to exclude non-cash assistance (apart from long-term institutionalization), such as health care, nutrition, and housing assistance, from the public charge determination.

DHS requests comment on its proposal to no longer consider non-cash benefits (apart from long-term institutionalization), in determining whether a noncitizen is likely at any time to be a public charge.¹⁵ We support DHS's decision to exclude non-cash benefits, particularly those that were included in the 2019 public charge rule. The fact that the 2019 rule resulted in only three denials based on a public charge inadmissibility determination¹⁶ shows that these benefits are not relevant to a public charge determination, while their inclusion results in serious harms to children's healthy development.

In our comments for the NPRM for the 2019 public charge rule, we outlined for the agency that the consideration of benefits like Medicaid, the Children's Health Insurance Program (CHIP), the Supplemental Nutrition Assistance Program (SNAP), and housing assistance would result in a chilling effect that would negatively impact children and their families.¹⁷ Qualitative and quantitative research conducted since that rule was first rumored confirmed this to be true. As early as 2017, providers on the ground noticed that families were not using Medicaid or benefits under SNAP by as much as 42 percent.¹⁸ A December 2019 survey found that of respondents who were adults in immigrant families, approximately 48 percent avoided SNAP, 45 percent avoided Medicaid and CHIP, 35 percent avoided housing subsidies, and approximately 25 percent avoided programs not included in the 2019 public charge rule like the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) and free or reduced price school lunches.¹⁹ More details of the impact of the 2019 public charge rule can be found in our comments on the previous administration's November 2020 proposed rule on the affidavit of support and our response to USCIS's May 2021 request for public input.²⁰

The impact of the COVID-19 pandemic on immigrant families provides further justification for excluding non-cash means-tested benefits from the public charge determination. The 2019 public charge rule took effect just weeks after the declaration of the public health emergency related to the COVID-19 pandemic and amplified the pandemic's health and economic harm to children. Despite

¹⁵ 85 Fed. Reg. 10611.

¹⁶ 85 Fed. Reg. 10571.

¹⁷ First Focus 2018 Public Charge Comments, *supra* note 1.

¹⁸ Cheasty Anderson, *Public Charge and Private Dilemmas: Key Challenges and Best Practices for Fighting the Chilling Effect in Texas, 2017-2019*, Children's Defense Fund - Texas 3-4 (Nov. 6, 2020), https://cdf-texas.org/wp-content/uploads/sites/8/2021/01/Public-Charge-and-Private-Dilemmas_report_020.pdf.

¹⁹ Hamutal Bernstein et al., *Amid Confusion Over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019*, Urban Institute (May 2020), https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_3.pdf.

²⁰ DHS Docket No. USCIS-2019-0023, RIN 1615-AC38: Comments in Opposition to Proposed Rulemaking "Affidavit of Support on Behalf of Immigrants," First Focus on Children (Nov. 2, 2020), <https://www.regulations.gov/comment/USCIS-2019-0023-0210>. DHS Docket No. 2021-0004, RIN 1615-ZB87: Identifying Barriers Across U.S. Citizenship and Immigration Services (USCIS) Benefits and Services; Request for Public Input," First Focus on Children (May 19, 2021), <https://www.regulations.gov/comment/USCIS-2021-0004-7076>.

the fact that many immigrants were more exposed to COVID as essential workers and families reported that cash, food and employment were their most pressing needs during the pandemic, immigrant families have been hesitant to access COVID-19 testing, treatment and vaccines, unemployment insurance, the Paycheck Protection Program, and Pandemic EBT because of the 2019 public charge rule.²¹ The COVID-19 pandemic continues to be unpredictable and unprecedented in nature, and has provided a case study of the harms of excluding immigrant families from key benefits during national emergencies and disasters. Thus, it is in the public health and national interest, as well as in the best interests of children and their families, that DHS adopt a public charge rule that excludes receipt of key benefits like Medicaid, CHIP, SNAP, and housing assistance benefits.

3. We recommend that DHS only consider an applicant's current use of Supplemental Security Income (SSI) and cash assistance under Temporary Assistance for Needy Families (TANF) as relevant to a public charge determination and exclude children's use of benefits from the public charge determination.

DHS should only consider SSI and cash assistance under TANF for the public charge determination. The 1999 Field Guidance indicated that both TANF and SSI programs should be considered in a public charge determination, and in its letter to the DHS, HHS agreed that these programs should be included.²² Additionally, TANF and SSI are the only programs that fit the long history of considering cash assistance for income maintenance in a public charge determination.²³ However, receipt of TANF or SSI alone should **not** lead to determination that someone is likely to become a public charge, as the proposed rule itself acknowledges.²⁴ HHS also acknowledged this, stating that “cash receipt does not necessarily mean an individual is primarily dependent on the government.”²⁵ In particular, we note that despite the critical assistance TANF provides to some families, the program's status as a fixed block grant that is not indexed to inflation means the value of assistance under TANF has fallen significantly over time and that families with children are unable to depend on the program alone to support their household.²⁶ For the funds that are allocated towards cash assistance, which are often low as states have discretion to spend funds for other purposes, the monthly amounts are usually not enough for children and their families to meet their basic needs and states have placed harsh restrictions on these small amounts that severely limit access to these funds.

²¹ Marion Davis, *The Impact of COVID-19 on Immigrants in Massachusetts: Insights from our Community Survey*, Massachusetts Immigrant and Refugee Commission (Aug. 2020), <https://www.miracoalition.org/wp-content/uploads/2020/08/MIRA-COVID-19-survey-report-Aug2020.pdf>, Hamutal Bernstein et al., *supra* note 6, 8-11.

²² Department of Justice, Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999), <https://www.govinfo.gov/content/pkg/FR-1999-05-26/pdf/99-13202.pdf>. Deputy Secretary of Health and Human Services, Letter to Secretary Mayorkas (Feb. 16, 2022), <https://www.regulations.gov/document/USCIS-2021-0013-0206>.

²³ Torrie Hester, et al, Comment on DHS Notice of Proposed Rule Inadmissibility on Public Charge Grounds, FR 2018021196, (Oct. 5, 2018), <https://www.regulations.gov/comment/USCIS-2010-0012-598>.

²⁴ Proposed 8 CFR sec. 212.22(a)(3).

²⁵ Deputy Secretary of Health and Human Services, *supra* note 22.

²⁶ Cara Baldari, *TANF Turns 25: Let's Maximize Its Reach to Children in Need*, First Focus on Children (Aug. 17, 2021), <https://firstfocus.org/blog/tanf-turns-25-lets-maximize-its-reach-to-children-in-need>.

In addition, as we have recommended before,²⁷ children’s use of these benefits should altogether be excluded from the public charge determination. Receipt—past or present—of public benefits is not one of the statutory factors that adjudicators must consider when determining the likelihood of becoming a public charge. For TANF, this includes excluding child-only TANF cases from a public charge determination as in the current proposed rule. Child-only cases provide roughly \$64 million²⁸ in support to about 200,000 children per month and immigration-related concerns should not impede children from receiving these critical benefits. For further recommendations on consideration of the receipt of TANF or SSI for a public charge determination, see our comments below about the “totality of the circumstances” language in the proposed rule and its particular application for children.²⁹

We further recommend that DHS only consider current use of SSI or TANF. Any consideration of past receipt of benefits sends a chilling message to immigrant families and will likely continue the harmful chilling effects of the 2019 rule that led children and families to avoid use of benefits for which they were eligible. This chilling effect not only harms immigrants and their families but also puts public health at risk. In addition, focusing on the present use of benefits helps ensure that people caring for children or in a temporary crisis or vulnerable situation can secure stability and safety for their families. When an immigrant’s situation has improved, the use of TANF or SSI during a past crisis should not count against them in assessing their likelihood of becoming a public charge in the future.

a. DHS should exclude consideration of state, local, tribal, and territorial benefits.

Under the proposed rule, DHS proposes to consider a noncitizen’s use of state, tribal, territorial or local benefits, including programs providing cash assistance for income maintenance, for the public charge determination.³⁰ We recommend that DHS delete the proposed rule’s section 212.21(b)(3) and section 212.21(e) defining “government” to exclude consideration of state, local, tribal, and territorial benefits from the public charge determination.

Programs funded by state and local governments, territories, or tribes, including cash assistance they choose to provide, are an exercise of the powers traditionally reserved to the states. Counting programs provided by Native American tribes is particularly egregious, as it is a violation of tribal sovereignty and self-determination. States, localities, territories, and tribes have a compelling interest in promoting the health and safety of their child residents and their families. An increasing number of states are extending benefits to individuals regardless of their immigration status. For example,

²⁷ DHS Docket No. USCIS-2021-0013: Comments on Public Charge Ground of Inadmissibility, AASA et al. (Oct. 22, 2021), <https://secureservercdn.net/104.238.69.231/kpc.ccc.myftpupload.com/wp-content/uploads/2021/10/Child-Focused-Public-Charge-Sign-On-Comment-FINAL.pdf>.

²⁸ Administration for Children and Families, U.S. Department of Health and Human Services, Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2020 (Nov. 1, 2021), <https://www.acf.hhs.gov/ofa/data/characteristics-and-financial-circumstances-tanf-recipients-fiscal-year-2020>.

²⁹ See *infra* section 6, pp. 12-13.

³⁰ Proposed 8 CFR sec. 212.21(b)(3).

California, Maine, New Jersey, New York, and Pennsylvania provide state-funded cash assistance to immigrants beyond the definition of “qualified” immigrants under federal law.³¹

States and localities are also experimenting with new ways to support their residents, including U.S. citizen and noncitizen children. For example, 31 states plus DC, Puerto Rico, and some municipalities have their own state Earned Income Tax Credit³² and eight states have enacted a state Child Tax Credit to combat child poverty and promote family economic mobility in their states.³³ In addition, states and local governments are increasingly considering unconditional cash program demonstration projects, which are already proving to have positive impacts on health, education, employment and other outcomes for household members and help families plan for their future.³⁴

These programs vary from state to state and locality to locality, and including them will likely create confusion about which programs could be considered for a public charge determination and result in children and families avoiding assistance for which they are eligible. Given the many types of programs operated by states and localities, families are more likely to avoid programs that are not even part of the public charge determination and miss out on benefits intended for them by states and localities. Additionally, immigration attorneys, who are not experts in the intricacies of public benefits programs, might advise their clients to not to use programs for which they are eligible.

Lastly, limiting consideration to federal benefits is in the government’s interest, as it will result in a single uniform standard that is easier for adjudicators to apply. If state, local, tribal, and territorial benefits are included, it would require adjudicators to understand the details of over 50 systems of benefits and parse whether those benefits fit the definition of a public charge. Additionally, consideration of these benefits would complicate individual cases as well. If DHS maintains consideration of past use of benefits, adjudicators would have to consider use of benefits in states where an applicant has resided in the past and where they currently reside. As states and localities continue to pilot programs or expand existing programs, developing and updating guidance on all the programs and whether or not they are considered for public charge will be complex and burdensome for the government. Excluding these benefits would be best to support children, states, tribes, territories, localities, and the federal government.

In the alternative, if DHS chooses to retain consideration of state and local benefits, DHS should explicitly distinguish state, local, territorial, or tribal tax credits and other cash assistance programs from “cash assistance for income maintenance.”

³¹ *Table 8: State-Funded TANF Replacement Programs*, National Immigration Law Center (Apr. 2020), https://www.nilc.org/wp-content/uploads/2015/11/tbl8_state-tanf.pdf.

³² *Earned Income Tax Credit Overview*, National Conference of State Legislatures, <https://www.ncsl.org/research/labor-and-employment/earned-income-tax-credits-for-working-families.aspx> (last updated Apr. 14, 2022).

³³ *Child Tax Credits Enactments*, National Conference of State Legislatures, <https://www.ncsl.org/research/human-services/child-tax-credit-enactments.aspx> (last updated Apr. 14, 2022).

³⁴ *Guaranteed Income: States Lead the Way in Reimagining the Social Safety Net*, Shriver Center on Poverty Law and the Economic Security Project (Apr. 2022), <https://www.economicsecurityproject.org/wp-content/uploads/2022/04/220404-GI-States-Lead.pdf>.

b. DHS should exclude consideration of Medicaid for long-term institutionalization.

Access to health coverage is critical to children’s healthy development. Together, CHIP and Medicaid serve more than a third of all children in the United States.³⁵ Having health insurance shields families from high medical costs, ensures children use preventative care, and frees up money for parents to spend on their children’s needs. As mentioned above, the 2019 rule’s inclusion of Medicaid in the public charge determination resulted in a chilling effect that set children’s health coverage back a decade.³⁶ Continuing to include consideration of Medicaid coverage, even for the limited purpose of long-term institutionalization at government expense, will cause confusion and likely continue the harmful chilling effects of the 2019 rule.

Additionally, Medicaid supports many children with special health needs, some of whom may need institutionalized long-term care. Medicaid and Children’s Health Insurance Program cover almost half of all U.S. children with special health needs, and these children are more likely to be low-income, from marginalized communities, and younger than children on private insurance only.³⁷ Considering children’s use of Medicaid for institutional long-term care is likely to discriminate against children with disabilities and children from marginalized communities.

As also noted in the arguments raised by Justice in Aging and the National Health Law Program on this proposal, parents’ lack of access to health coverage also impacts children. Children and parents tend to share the same insurance status, meaning that if a parent is uninsured, so is their child. Several studies have shown that if parents have public health insurance, their children are eight times more likely to also have public insurance.³⁸ The shared aspect of coverage between parents and children means that reducing access to parents will subsequently reduce access to their children.³⁹ Parents and children’s loss of access would put families at greater risk of medical debt, unpaid bills, and bankruptcy. Given the unique impact of the 2019 rule on children’s access to health coverage, the importance of health coverage for children with special health needs, and the role parents’ coverage plays in children’s access to health care, the best way to advance children’s access to health coverage is to exclude Medicaid from the public charge determination altogether.

³⁵ Joan Alker and Alexandra Corcoran, *Children’s Uninsured Rate Rises by Largest Annual Jump in More Than a Decade*, Georgetown University Center for Children and Families (Oct. 2020), https://ccf.georgetown.edu/wp-content/uploads/2020/10/ACS-Uninsured-Kids-2020_10-06-edit-3.pdf.

³⁶ Uninsured rates among Hispanic children widened for the first time in a decade, rising to 8.1 percent compared to 5.2 percent for all children and 4.2 percent for non-Hispanic children in 2018 and to 9.2 percent in 2019. Kelly Whitener et al., *Decade of Success for Latino Children’s Health Now in Jeopardy*, Georgetown University Center for Children and Families (Mar. 2020), <https://ccf.georgetown.edu/wp-content/uploads/2020/03/Latino-Childrens-Health-Care-Coverage.pdf>.
Joan Alker and Alexandra Corcoran, *supra* note 35.

³⁷ Elizabeth Williams and MaryBeth Musumeci, *Children with Special Health Care Needs: Coverage, Affordability, HCBS Access*, Kaiser Family Foundation (Oct. 4, 2021), <https://www.kff.org/medicaid/issue-brief/children-with-special-health-care-needs-coverage-affordability-and-hcbs-access/>.

³⁸ Carolyn L. Yocom et al., *Medicaid and CHIP: Given the Association between Parent and Child Insurance Status, New Expansions May Benefit Families*, U.S. Government Accountability Office Report to Congressional Committees (Feb. 2011), <https://www.gao.gov/assets/gao-11-264.pdf>.

³⁹ Leighton Ku and Matthew Broaddus, *Coverage of Parents Helps Children, Too*, Center on Budget and Policy Priorities (Oct. 2006), <https://www.cbpp.org/sites/default/files/atoms/files/10-20-06health.pdf>.

c. DHS should amend the regulatory text to explicitly provide a non-exclusive list of cash assistance benefits excluded from the public charge determination.

DHS should include language directly in the regulatory text that differentiates other federal, state, and local programs from federally funded cash assistance like SSI and TANF. While DHS currently has a list of distinguished and excluded benefits in the preamble, adding this language to the regulatory text would provide further clarity for both families and those helping them determine whether there are any immigration consequences for use of certain benefits. For example, DHS should ensure the following programs are part of a non-exclusive list of excluded programs:

- Special purpose cash assistance, like child care assistance, Low Income Home Energy Assistance Program (LIHEAP) assistance, nutrition assistance, rental assistance, or crime victim compensation or restitution;
- Disaster assistance;
- Pandemic cash assistance, such as federal, state, local, tribal or territorial cash assistance, economic impact payments, state pandemic emergency assistance funds, paycheck protect action assistance, or other types of public health relief payments;
- Non-cash services under TANF or short-term non-recurring benefits under TANF as defined at 45 CFR 260.31(b)(1);
- Tax-related benefits, such as the child tax credit, the earned income tax payments, or any other tax credit or reduction at the federal, state, local, tribal or territorial level;
- Programs that provide temporary, universal, or “guaranteed” income to a targeted or selected group of people, including families with children. These programs are, by their nature, to raise income in the community across the board and do not address individual needs or personal circumstances.

4. We support DHS’s narrow definition of “receipt” of countable benefits in the proposed rule and recommend that DHS make further changes to ensure that children in mixed-status families continue to access benefits for which they are eligible.

The proposed rule defines what constitutes receipt of public benefits.⁴⁰ The definition states that a noncitizen is considered to have received a benefit when that noncitizen is listed as a beneficiary by a public benefits granting agency for one of the types of benefits listed as part of the public charge assessment under the proposed rule.⁴¹ Importantly, the proposed rule makes clear that applying for a public benefit, approval for a public benefit, or actual receipt of a public benefit on behalf of another does **not** constitute receipt of public benefits.⁴² It also states that receipt of benefits by another individual, even if the noncitizen assists with the application process, does **not** constitute receipt of benefits for the noncitizen.⁴³ This definition is a critical clarification for children in immigrant families, as it makes clear that a child’s receipt of benefits will not impact their caregiver’s immigration application and that a caregiver can apply for, get notice of approval of, or actually receive benefits on a child’s behalf without immigration consequences.

⁴⁰ Proposed 8 CFR 212.21(d).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

Many U.S. citizen and lawful permanent resident children use public health services. Research shows that children of immigrants account for over 30 percent of all children under 18 in benefits receiving families, and 90 percent of these children are U.S. citizens.⁴⁴ Together, CHIP and Medicaid serve more than one in three children in the United States.⁴⁵ Children made up 44 percent of SNAP beneficiaries in 2018,⁴⁶ and 72 percent of TANF recipients as of September 2019.⁴⁷ As explained earlier, the 2019 rule created confusion about whether a family member's use of benefits would impact an applicant, leading families to disenroll their children from benefits for which they were eligible, even if their child was not subject to the public charge determination. Even before the 2019 rule, the 1999 Guidance had language that created confusion, stating that if a family relied on a child's use of TANF or SSI as their "sole means of support," that use could count against a family member for the public charge determination.⁴⁸

Since one in four children have an immigrant parent,⁴⁹ many noncitizens may receive benefits on behalf of their dependent child without being the beneficiary for the benefit. For example, in the most recent year for which TANF data is available, over 10 percent of all households receiving TANF benefits were child-only cases in which an ineligible immigrant parent was excluded in determining the amount of the assistance.⁵⁰ The proposed rule's definition of receipt will mitigate families' avoidance of benefits and advance children's use of benefits that support their health and development. Additionally, this clarification of what is considered "receipt" of benefits helps adjudicators understand whose receipt of a relevant benefit counts towards the public charge determination and apply the proposed rule in a more consistent and objective manner.

To further clarify the definition of "receipt," the proposed rule should state outright that a noncitizen who is not eligible for a particular benefit will not be considered to have received that benefit themselves, even if they are listed as a member of the household by the benefits granting agency for a benefit given to their child. This is important because states and localities administer benefits differently, including how they handle non-recipient family members on applications. As a result, a family member for a child may be listed as part of a child's household for a benefit even when they are not a beneficiary, creating confusion for both families and USCIS adjudicators. Because public benefits are complex, a caregiver who applied for the benefit on behalf of their child or is spending the benefit to meet their child's needs may believe that they have in fact received a benefit. Clarifying that a person who is not eligible will not be considered to have received a benefit will ensure that caregivers feel comfortable accessing benefits on behalf of their children. The proposed rule should also provide a non-exclusive list of examples of what does not count as receipt

⁴⁴ Jeanne Batalova, Michael Fix, and Mark Greenberg, *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, Migration Policy Institute 4 (June 2018),

<https://www.migrationpolicy.org/sites/default/files/publications/ProposedPublicChargeRule-Final-Web.pdf>.

⁴⁵ Carrie Fitzgerald, *Medicaid: Cost-Effective Coverage that Works for Kids*, First Focus on Children (Apr. 2018),

<https://firstfocus.org/wp-content/uploads/2018/04/Medicaid-and-Kids-April-2018-.pdf>.

⁴⁶ U.S. Department of Agriculture, *Characteristics of USDA Supplemental Nutrition Assistance Program Households: Fiscal Year 2018* (Nov. 2019), <https://fns-prod.azureedge.net/sites/default/files/resource-files/Characteristics2018.pdf>.

⁴⁷ *Temporary Assistance for Needy Families Block Grant: Responses to Frequently Asked Questions*, Congressional Research Service, (July 16, 2020), <https://fas.org/sgp/crs/misc/RI.32760.pdf>.

⁴⁸ 64 Fed. Reg. 28689, 28692.

⁴⁹ *Children in U.S. Immigrant Families supra* note 3.

⁵⁰ Administration for Children and Families, *Characteristics and Financial Circumstances of TANF Recipients, Fiscal Year 2020, supra* note 28.

of benefits for a noncitizen, such as child-only TANF cases or someone who is the “representative payee” for someone under the SSI program.

Lastly, DHS should clearly communicate to parents and caregivers that their own use of benefits other than TANF and SSI will not be considered in a public charge determination. Parent’s access to health care, nutrition, and housing benefits is important for children. As discussed earlier, if a parent is insured, their child is more likely to be insured. SNAP benefits grow with the size of the household as the program is intended to support the whole family, so parent’s access to the program improves food access for children. Similarly, access to housing assistance supports the whole family. By clearly communicating that parents and caregivers can access these programs without fear of immigration consequences, DHS will address the chilling effect of the 2019 rule and support children’s access to critical benefits.⁵¹

5. We support DHS’s decision to acknowledge but not define the statutory factors, but rather favorably consider the affidavit of support.

DHS requests comment on how it should consider the statutory minimum factors in the totality of the circumstances for a public charge determination.⁵² We support DHS’s proposed language, which simply acknowledges the statutory language and does not define the five factors, but instead favorably considers the affidavit of support.

The statutory factors are of relatively low importance compared to the affidavit of support, which is required under federal law for many immigration benefits and directly addresses the public charge determination. Additionally, the previous administration’s attempt to define the statutory factors as negative or positive on a weighted scale had a disproportionately negative impact on children. Factors like age, lack of a high school degree, and large household sizes counted as negative factors, discriminating against children and inaccurately making them appear more likely to be public charges.⁵³

We support language in the NPRM that favorably considers the affidavit of support in the public charge determination. This is consistent with the USCIS adjudicator’s field manual under the 1999 field guidance, the current Foreign Affairs Manual instructions, and legislative history. An immigrant who has a sponsor who has committed to providing financial support if needed can be safely assumed to not be likely “to become primarily dependent on the government for subsistence.” It is particularly normal for children to be supported by their family members.

DHS requests comments on how each of the statutory factors should be considered in the totality of the circumstances.⁵⁴ We urge DHS to include a child-specific framework for the statutory factors for cases that involve children in guidance to adjudicators. Contrary to DHS’s concern stated in the proposed rule, this recommendation is not to ignore the statutory factors,⁵⁵ but rather to interpret them in a child-appropriate manner. Children are different from adults, and thus the statutory factors should not be interpreted the same for them as it would be for adults. For example, by virtue of their age and status, children and youth are legally and often inherently dependent on others to

⁵¹ See *infra* at section 7, pp. 13-16 for more recommendations on outreach and education for families on the new rule.

⁵² 85 Fed. Reg. 10617.

⁵³ See First Focus on Children 2018 Public Charge Comments, *supra* note 1.

⁵⁴ 87 Fed. Reg. 10617.

⁵⁵ 87 Fed. Reg. 10611.

provide their basic needs. At their age, children’s dependence on family is normal and is not an indication of their likelihood to be a public charge in the future. As such, factors such as age and financial and educational status should consider that children’s access to economic support or education is often out of their control. Furthermore, DHS should view being in school and having strong family support as factors in children’s favor, as research shows that the earlier a child has access to strong social networks and educational opportunities the better their future earnings and outcomes.⁵⁶ In guidance to adjudicators regarding how to apply the statutory factors, we urge DHS to ensure the adjudicators view the factors positively rather than only negatively, and also to include child-specific data and considerations for each factor.

6. We support language in the proposed rule that the public charge determination will be determined based on the “totality of the circumstances,” and that use of benefits and any one factor, other than an insufficient affidavit of support if required, are not dispositive of whether an applicant is likely to become a public charge.

USCIS should provide common-sense guidance to adjudicators that when considering the totality of the circumstances, they should adopt a child-specific framework similar to that mentioned above for the statutory factors. Children are normally dependent on their family and school, and the fact that a child is young or receives assistance today provides no indication that a child is likely to be a public charge in the future. Rather, data shows that in the totality of the circumstances, children who have access to critical benefits are unlikely to ever be a public charge. We therefore urge DHS to establish a presumption that children are unlikely to become a public charge.

Children’s use of benefits in fact is likely to lead to increased income throughout their lifetimes and gains for our economy. Child development research shows that children earn more as adults when they benefit from resources at an earlier age.⁵⁷ This includes children’s use of TANF and SSI, which would be considered for the public charge determination under the proposed rule.

The TANF program is one of the only federal programs that provides cash assistance to families with very low incomes. The majority of TANF recipients – 72 percent – are children,⁵⁸ and in 2020 the program lifted over 200,000 children above the federal poverty line.⁵⁹ Similarly, due to SSI benefits over 350,000 fewer children experienced poverty in 2020⁶⁰ and over half of SSI child recipients are found to not qualify for SSI when they turn 18 and are evaluated using the adult standards of eligibility.⁶¹ A 2019 landmark study from the National Academy of Sciences confirmed that cash assistance like TANF and SSI reduces child poverty and improves children’s long-term health and educational and economic outcomes.⁶² These programs improve children’s outcomes by

⁵⁶ Raj Chetty, Nathaniel Hendren, Lawrence Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, *American Economic Review*, 106(4): 855-902 (2016), <https://opportunityinsights.org/paper/newmto/>.

⁵⁷ Raj Chetty, John N. Friedman, and Jonah Rockoff, *New Evidence on the Long-Term Impacts of Tax Credits*, Internal Revenue Service (Nov. 2011), <https://www.irs.gov/pub/irs-soi/11rpchettyfriedmanrockoff.pdf>.

⁵⁸ *Temporary Assistance for Needy Families Block Grant: Responses to Frequently Asked Questions*, *supra* note 47, at 4.

⁵⁹ Liana E. Fox and Kalee Burns, *The Supplemental Poverty Measure: 2020*, The United States Census Bureau 12 (Sept. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-275.pdf>.

⁶⁰ *Id.*

⁶¹ Social Security Administration, 2016 Annual Report of the SSI Program, *D. Historical Redetermination and Continuing Disability Review Data* (July 29, 2016), https://www.ssa.gov/oact/ssir/SSI16/V_D_Redet_CDRdata.html#389380.

⁶² National Academies of Sciences, Engineering, and Medicine, *A Roadmap to Reducing Child Poverty* (2019), <https://www.nap.edu/catalog/25246/a-roadmap-to-reducing-child-poverty>.

increasing access to resources that support children’s healthy development and reducing household stress, giving parents and caregivers more mental and emotional bandwidth for their children.⁶³ Cash assistance has a two-generation effect in promoting economic mobility: in addition to supporting children, the assistance helps adults in the household afford child care, transportation to work, higher education, or job training programs that lead to steady employment and higher-paying jobs. Additionally, research shows that poverty and unequal access to wealth falls hardest on people of color, including immigrants. The poverty rate for children in immigrant families is more than twice as high as the rate for children in nonimmigrant families, and the rate is three times as high if a child is a noncitizen.⁶⁴ If this rule and the government’s outreach efforts are successful in addressing the chilling effects of the 2019 rule, children in immigrant families could have better access to supports that prevent intergenerational poverty and reduce racially unequal access to wealth in the long run.⁶⁵

Based on research finding that a child’s use of benefits, including use of TANF and SSI, actually increases their long-term economic contributions, a child’s past or present use of benefits can in no way be an accurate indication of whether a child will be a public charge.

7. DHS, other federal agencies, and states and localities should coordinate to undertake a joint outreach and education campaign about the final public charge rule that takes children and families into account.

DHS requests public comment about ways to shape public communications about the final rule that mitigate chilling effects, including ways to communicate to parents of children that their child’s receipt of benefits will not be considered for their parent’s public charge determination.⁶⁶ We appreciate DHS’s commitment to ensuring that the rule does not cause confusion to immigrants and their families, and the steps DHS has already taken in partnership with other federal agencies to communicate that the 2019 public charge rule is no longer in effect.⁶⁷

However, much work remains to communicate these important changes and build trust so that immigrant families are better able to access critical benefits for which they are eligible and secure lawful permanent residence, especially once the proposed rule is finalized. As DHS acknowledges and as outlined earlier in this comment, the 2019 public charge rule created fear and confusion that deterred eligible immigrants and their children from receiving health, nutrition, and housing assistance programs. In a survey of adults with family or friends who are noncitizens done in

⁶³ *Id.*

⁶⁴ Dolores Acevedo-Garcia et al., *Including Children in Immigrant Families in Policy Approaches to Reduce Child Poverty*, 21 *Academic Pediatrics* 117, 118 (2021), <https://reader.elsevier.com/reader/sd/pii/S1876285921003752?token=DD9DAD642E5C788BDE25A1057A694672BAED26790401860D6D7B9DEE889313B0F45E27E01EC4B797D457F4367C73E463&originRegion=us-east-1&originCreation=20220412183152>.

⁶⁵ *Id.*

⁶⁶ 87 Fed. Reg. 10592, 10615.

⁶⁷ *Public Charge Resources*, U.S. Citizenship and Immigration Services, Department of Homeland Security <https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/public-charge-resources> (last updated Nov. 17, 2021). U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Public Charge Interagency Letter* (Nov. 16, 2021), https://www.uscis.gov/sites/default/files/document/legal-docs/USCIS_Public_Charge_Interagency_Letter_11.16.21.pdf. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *Public Charge and Safeguarding Beneficiary Information* (July 22, 2021), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib072221.pdf>. U.S. Department of Agriculture, Food and Nutrition Service, *Joint Letter on Public Charge 2022* (Jan. 5, 2022), <https://www.fns.usda.gov/snap/joint-letter-public-charge>.

September 2021, 50 percent of respondents said that knowledge about changes to the public charge rule would make them more likely to use safety net programs when necessary, highlighting the importance of continued outreach to immigrant communities about changes to the policy.⁶⁸ The ways that DHS communicates the final rule resulting from this NPRM creates the possibility to rebuild trust with immigrant communities, support children's access to critical benefits, and help our country get back on track after the COVID-19 pandemic.

a. DHS, in partnership with benefits granting agencies, should launch an interagency campaign to clearly communicate the new public charge rule in multiple languages.

DHS should update its current Frequently Asked Questions (FAQ) explaining the new public charge rule, particularly where the new rule differs from the 1999 Field Guidance, which is current policy. Additionally, DHS should work with key partner agencies, such as the Departments of Health and Human Services, Agriculture, Housing and Urban Development, Education, Treasury, and other agencies that administer children and family programs to create public charge resource pages on the agency websites, like the public charge webpage that DHS currently has, explaining the new rule and its limited applicability to benefits programs. These websites must be available in multiple languages and have clear links to translated versions in the upper righthand corner of the webpage. Additionally, DHS and benefits granting agencies should create co-branded materials to state benefits agencies, legal aid and other consumer-advocacy groups, health centers, schools, and other community immigrant-serving organizations to inform them of the new rule.⁶⁹ These materials should be followed up by the provision of training and training materials to ensure that these entities' personnel have updated and accurate information about the new rule. DHS and partner agencies should share responses to questions and feedback received from the field and use that feedback to further refine training and outreach materials.

Research shows that TV news, social media, and friends and family are the sources of information immigrant families trust the most.⁷⁰ To communicate the new public charge rule effectively, DHS and partner agencies should also launch a public relations campaign. This campaign should meet immigrant communities where they are through by using all available communications channels, including social and ethnic media. Since immigrant families also tend to trust government agencies for information,⁷¹ high-level administration officials should be visible messengers in media and posts, including in various languages where possible, and federal agencies should encourage states to undertake similar media campaigns.

b. DHS and benefits granting agencies should support states and service providers to provide outreach and education to immigrants and their families.

Research shows that community organizations are trusted sources of services and information for immigrant families.⁷² DHS and benefits granting agencies should provide funding to these organizations, particularly organizations serving families with children, so that trusted community leaders can share information about the new public charge rule directly to families and in public

⁶⁸ *Public Charge was Reversed, But Not Enough Immigrant Families Know*, No Kid Hungry (Dec. 2021), https://www.nokidhungry.org/sites/default/files/2021-12/NKH_Public%20Charge_Micro-Report_English_0.pdf.

⁶⁹ See *Joint Letter on Public Charge 2022*, *supra* note 67.

⁷⁰ *Public Charge was Reversed, But Not Enough Immigrant Families Know*, *supra* note 68.

⁷¹ *Id.*

⁷² *Id.*

settings like the media. HHS recently announced outreach grants to a wide range of organizations to connect eligible children to Medicaid and CHIP.⁷³ Programs like community health workers or the Parent Mentor outreach program reach families through others in their community that share their cultural and linguistic backgrounds and are good models for intensive person-to-person outreach.⁷⁴ DHS, HHS, and other agencies could provide similar grants for organizations and community programs to educate people about the final public charge policy.

Federal agencies should also provide states and organizations with sample materials to communicate with families. States and community groups that work directly with families must be given outreach materials suited to their populations and their ways of interacting with clients. These materials should use language that is accessible to immigrant communities and 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.

Key messages should include:

- Only actual receipt of Supplemental Security Income and Temporary Assistance for Needy Families are considered in the public charge test.
- Even if you use Supplemental Security Income or Temporary Assistance for Needy Families, that does not automatically mean that the government will decide you are likely to become a public charge. The government has to look at the circumstances of your life in making that decision.
- Many categories of immigrants are exempt from public charge, including humanitarian immigrants like asylees, refugees, and survivors of trafficking or crime, special immigrant juveniles, lawful permanent residents who are renewing their green card or applying for citizenship, and many others.
- COVID testing, vaccination, and care won't affect your immigration status or any immigration status you may apply for in the future.
- Getting help with health care, food, education, job training, or housing also won't affect your immigration status or applications.
- While this rule is in place, you can get health care, food, education, job training, and housing assistance without immigration consequences.
- Benefits received by your children or other members of your household won't affect your own immigration status or applications.
- If you have an immigrant family member, let them know they can seek health care, food, or housing assistance without fear of immigration consequences.⁷⁵

⁷³ Maggie Clark, *Outreach for Pregnant People Included in Latest CMS Grant Funding Opportunity*, Georgetown Center for Children and Families (Feb. 22, 2022), available at <https://ccf.georgetown.edu/2022/02/22/outreach-for-pregnant-people-included-in-latest-cms-grant-fund>.

⁷⁴ Glenn Flores, MD, *Mothers Mentoring Mothers*, First Focus on Children (May 17, 2016), <https://firstfocus.org/blog/mothers-mentoring-mothers>.

⁷⁵ Research shows that 47 percent of U.S.-born family members in mixed status families believe that applying for assistance programs could cause immigration problems. Thus, U.S. citizen family members in mixed-status families are important targets to let their family members know they can safely access public benefits. *Public Charge was Reversed, But Not Enough Immigrant Families Know*, *supra* note 68.

The following are examples of the types of materials DHS and other agencies could provide to states and community groups, who could then adjust the language to reach their specific immigrant communities:

- Sample language for fact sheets;
- Training materials, including “Train the Trainer” programs for community health workers and other community outreach efforts;
- Social media posts and graphics;
- SMS or other direct message application language;
- Mailings;
- Flyers and posters, with the DHS and benefits granting agencies’ “seal” on them;
- Sample language for states to include on their application forms and public-facing websites (for example, DHS and USDA provided a sample chart for states to include on its forms and agency websites clarifying that applying or receiving SNAP is not considered in a public charge determination).⁷⁶

Conclusion

With the changes recommended above, this proposed rule will represent a common-sense approach to implementing the current public charge law and advance immigrant families’ access to green cards, visas, and benefits that support their basic needs. Beyond quickly finalizing a clearer public charge rule, clear communication to families and those that support them will also ensure that families are able to access both legal status and programs that support their children’s healthy development.

Thank you for the opportunity to submit a comment in response to the proposed rule. Please do not hesitate to contact Miriam Abaya at miriama@firstfocus.org, Cara Baldari at carab@firstfocus.org, Carrie Fitzgerald at carrief@firstfocus.org, and Olivia Gomez at oliviag@firstfocus.org to obtain further information.

Sincerely,



Bruce Lesley
President

⁷⁶ See *Joint Letter on Public Charge 2022*, *supra* note 67.