



DHS' Public Charge Rule: An Explanation of Current Litigation and the Rule's Effect on People with Disabilities

The Department of Homeland Security (DHS) finalized a new public charge rule on August 14, 2019, which had been set to go into effect on October 15, 2019. DHS claims the purpose of the rule is to keep out people who have used, or may even one day use, certain government benefits. The rule has already created confusion and fear about using critical government benefits to which people are entitled. In light of those concerns, it is important to understand what the public charge rule does and does not mean. The rule only applies to certain changes in immigration status, to the use of specific government benefits, and only to immigration (and not deportation) determinations.

While it was set to go into effect on October 15, 2019, implementation of the rule was initially delayed due to preliminary injunctions issued in lawsuits challenging the rule. However, on January 27, 2020, the Supreme Court issued an order staying the nationwide preliminary injunctions and allowing the rule to go into effect while the lawsuits make their way through the courts and on February 21, 2020, the Court stayed the statewide injunction that had been in place in Illinois, meaning that no injunctions remained in effect anywhere in the country. Following the Supreme Court's January ruling, the Administration announced the rule would go into effect on February 24, 2020.

After the COVID-19 pandemic began, litigants urged the Court to reconsider its stay but the Court declined, though it did state that lower courts could consider the issue. In July, the U.S. District Court for the Southern District of New York issued a temporary injunction against the rule due to COVID-19. However, in September, the Second Circuit Court of Appeals allowed the rule to go back into effect.

On November 2, 2020, the U.S. District Court for the Northern District of Illinois issued a decision that the rule was illegal and should be vacated nationwide, however that decision was stayed only a day later by the Seventh Circuit Court of Appeals, meaning the rule is currently in effect nationwide.

Below, we discuss what the rule means for people with disabilities and the lawsuits challenging the rule, with a particular focus on the five cases that claim disability discrimination and argument furthered by amicus briefs filed by disability organizations, including CPR, in support of the litigants.

I. Background on the Public Charge Rule

Whether someone is considered likely to become a public charge has long been used as a basis to deny someone admission to the United States.¹ Prior to the new rule, public charge had been interpreted to mean someone who is likely to become primarily or completely dependent on the government long term. Guidance issued in 1999 by the Immigration Naturalization Service (the predecessor agency to DHS), specifically defined a public charge as “an alien who has become (for deportation purposes) or who is likely to become (for admission/adjustment purposes) *primarily dependent* on government assistance, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense.”² The guidance specifically excluded non-cash benefits, like nutrition and housing assistance, and non-institutional Medicaid-funded services in the public charge consideration.³

In October of 2018, DHS proposed a new public charge rule that would radically alter how public charge determinations are made.⁴ The proposed rule was strongly opposed by disability rights groups (including CPR⁵), immigrant rights groups, and others, who submitted over 250,000 comments in opposition. Nevertheless, the public charge rule finalized by DHS in August 2019⁶ was nearly identical to the proposed rule.

The new rule greatly expands the definition of public charge beyond its longstanding interpretation in a way that will have a detrimental impact on people with disabilities. It includes a list of factors that weigh negatively, positively, or heavily negatively or positively – including around an individual’s health – in considering an applicant and sets a strict test for balancing those factors.⁷ The rule also greatly expands the benefits that must be considered in making the determination about whether an applicant is or is likely to become a public charge.⁸

A. Additional Public Benefits and New Thresholds for Being Considered a “Public Charge”

Under the prior policy as part of the consideration of “resources,” only substantial reliance on cash benefits or Medicaid-funded long-term institutional care counted against someone in

¹ See e.g. Immigration Act of 1882, 47th Cong., Sess. 1, Ch. 376, <https://www.loc.gov/law/help/statutes-at-large/47th-congress/session-1/c47s1ch376.pdf>.

² Field Guidance on Deportability and Inadmissibility on Public Charge Grounds (“1999 Field Guidance”), 64 Fed. Reg. 28689, 28689 (May 26, 1999) (emphasis added) (internal quotation marks omitted).

³ *Id.* at 28693.

⁴ Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018).

⁵ Ctr. for Pub. Representation Comments in Response to Proposed Rulemaking on Inadmissibility on Public Charge Grounds (Dec. 10, 2018), <https://medicaid.publicrep.org/wp-content/uploads/2018/05/CPR-Public-Charge-NPRM-Comments.pdf>.

⁶ Inadmissibility on Public Charge Grounds (“Final Public Charge Rule”), 84 Fed. Reg. 41292 (Aug. 14, 2019).

⁷ *Id.* at 41295.

⁸ *Id.*

determining if they might become a public charge.⁹ Cash benefits include state and local cash assistance programs, Supplemental Security Income (SSI), and Temporary Assistance for Needy Families (TANF). Reliance on Medicaid (other than for long-term institutionalization) or other non-cash supportive programs did not affect a person’s eligibility for a green card or visa.¹⁰

The new rule adds to the list of benefits to be considered. Specifically, non-emergency Medicaid services (including HCBS), federal nutrition assistance (called SNAP), and housing assistance will now count against someone in considering that person’s application for a visa or green card.¹¹ As discussed above, many people with disabilities rely on Medicaid-funded HCBS to live and participate in their communities because HCBS is generally not covered by private insurance. In addition, people with disabilities disproportionately rely on federal nutrition and housing assistance, in part because of the need to stay within the financial limitations to be eligible for Medicaid. The new rule also moves away from the “primarily dependent”¹² standard and instead sets a much lower threshold: the receipt of *any* amount of these expanded benefits for more than 12 months in the aggregate within any 36-month period (and if an individual receives more than one type of benefit, each counts separately for the duration calculation) will deem someone a public charge.¹³

It is important to note that the new public charge rule does not apply to benefits received by active duty service members, their spouses, or their children.¹⁴ It also does not consider the use of Medicaid by pregnant women or children under 21,¹⁵ nor does it include non-cash benefits that are funded only by state or local governments.¹⁶ Furthermore, it does not apply to benefits received prior to implementation of the rule that would not have been considered under prior guidance.¹⁷ Finally, seeking benefits on behalf of eligible family members is not counted against an applicant; only benefits received by the individual are considered in public charge determinations.¹⁸

In March 2020, in response to the coronavirus pandemic, the US Citizenship and Immigration Services (USCIS) announced that it “will neither consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19” in making public charge determinations, “even if such treatment is provided or paid for by one or more public

⁹ 1999 Field Guidance, 64 Fed. Reg. at 28690, 28692.

¹⁰ *Id.* at 28693.

¹¹ 8 C.F.R. § 212.21(b).

¹² 1999 Field Guidance, 64 Fed. Reg. at 28689.

¹³ 8 C.F.R. § 212.21(a).

¹⁴ *Id.* at § 212.21(b)(7)(i-iii).

¹⁵ *Id.* at § 212.21(b)(5)(iv)

¹⁶ *Id.* at § 212.21(b).

¹⁷ *Id.* at § 212.22(d).

¹⁸ *Id.* at § 212.21(e).

benefits, as defined in the rule (e.g. federally funded Medicaid).¹⁹ This means that immigrants can receive treatment without an impact on their immigration status. USCIS has also stated that if a person subject to the rule “lives and works in a jurisdiction where disease prevention methods such as social distancing or quarantine are in place” or the person’s “employer, school, or university voluntarily shuts down operations to prevent the spread of COVID-19” that the person can provide a statement explaining “how such methods or policies have affected” the person “as relevant to the factors” considered under the rule.²⁰ USCIS says that “[t]o the extent relevant and credible [it] will take all such evidence into consideration.”²¹ However, please note that does not mean use of benefits in those circumstances will not count against someone in public charge determinations.

B. Expanded Health Factor

As part of the consideration of “health,” the new public charge rule includes as a negative factor that the individual has a medical condition that is “likely to require extensive medical treatment or institutionalization or that will interfere with the [person’s] ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status.”²² Many people with disabilities, and virtually all people with significant disabilities, will fall under this new broad definition.

Having a medical condition becomes a heavily weighted negative factor if an applicant does not have private insurance that can cover all expected future medical costs.²³ Home and community-based services (HCBS), which are critical services that help people with disabilities live and participate in their communities, are almost exclusively provided through Medicaid, since private insurance does not cover HCBS. As a result, many people with disabilities (and likely virtually all people with significant disabilities) will have this heavily weighted negative factor assigned to them.

According to DHS, an applicant may only be approved if the positive factors the applicant is assigned outweigh the negative factors.²⁴ Someone assigned a heavily weighted negative factor, for example, an applicant with disabilities who uses Medicaid-funded HCBS, will be deemed a public charge under the rule unless that person is also assigned at least two positive factors or one heavily weighted positive factor. Not having a medical condition is one of the

¹⁹ US Citizenship and Immigration Servs., Public Charge, <https://www.uscis.gov/greencard/public-charge> (last visited Apr. 2, 2020).

²⁰ *Id.*

²¹ *Id.*

²² 8 C.F.R. § 212.22(b)(2).

²³ *Id.* at § 212.22(c)(1)(iii).

²⁴ Final Public Charge Rule, 84 Fed. Reg. at 41370 .

few positive factors under the new rule,²⁵ and virtually all people with disabilities will be unable to avail themselves of it.

C. Immigration Categories Covered

The public charge rule only applies to certain changes in immigration status. The rule applies if a person is trying to obtain a visa to immigrate to the United States or obtain a green card in order to become a legal permanent resident.²⁶ It also applies to someone trying to extend or adjust a non-immigrant visa.²⁷

The rule excludes a number of immigration categories from the public charge test. Specifically, the rule does not apply to people who are seeking a change in their immigration status if they are refugees, asylees, or domestic violence survivors, Special Immigrant Juveniles, or T or U visa holders, among others.²⁸ It also does not apply to anyone who already has a green card and is seeking US citizenship.²⁹

Finally, the DHS public charge rule only applies to immigration; it does not apply to deportation. The Department of Justice (DOJ), which oversees deportations, has announced that it will soon be releasing a proposed public charge deportation rule.³⁰ Litigation around DHS' final public charge rule could impact the timing or even whether the DOJ deportation rule will be released.

II. Current Litigation

Shortly after the new public charge rule was finalized, lawsuits were filed in federal courts across the country. There are currently nine lawsuits challenging the legality of the rule, involving 21 states and the District of Columbia; New York City and the cities of Baltimore and Gaithersburg, MD; the counties of Santa Clara and San Francisco, CA and Cook County, IL; and a variety of public interest organizations.³¹ Eight of the lawsuits are currently on appeal.³² Each of these lawsuits claim that DHS' new rule is an arbitrary and unlawful departure from the long-standing interpretation of public charge and conflicts with Congressional intent reflected in immigration, public benefit, and other laws. The lawsuits claim that DHS has violated the Administrative Procedure Act (APA) by issuing a rule that exceeds its statutory authority, is inconsistent with federal laws, and is arbitrary and capricious. The lawsuits seek an injunction

²⁵ 8 C.F.R. § 212.22(b)(2).

²⁶ *Id.* § 212.20.

²⁷ *Id.*

²⁸ *Id.* at § 212.23(a).

²⁹ *Id.* at § 212.20.

³⁰ Office of Mgmt. and Budget, Pending EO 12866 Regulatory Review- Inadmissibility and Deportability on Public Charge Grounds (July 3, 2019), <https://www.reginfo.gov/public/do/eoDetails?rriid=129247>.

³¹ Complaints available at <https://medicaid.publicrep.org/feature/public-charge-litigation>.

³² Litigation updates and case filings available at <https://medicaid.publicrep.org/feature/public-charge-litigation>.

striking down the new public charge rule, and in each of the lawsuits the plaintiffs filed a preliminary injunction seeking to stop the rule before its effective date on October 15, 2019.³³

As discussed further below, all five federal courts (in eight of the nine cases) issued preliminary injunctions on the eve of the effective date of the rule. Those decisions were appealed and, while some of the Circuit Courts agreed to stay the injunctions, the nationwide injunction remained in effect until January 27, 2020, when the Supreme Court ordered the final existing nationwide injunction to be stayed pending appeal.³⁴ As of that decision, the only injunction remaining in effect was a statewide injunction in Illinois, however, on February 21, 2020, the Court stayed that injunction as well.³⁵ Following the Supreme Court's January ruling, the Administration announced the rule would go into effect on February 24, 2020.³⁶ Arguments in the appeals of the lawsuits will be heard in the coming months and it is likely that the case will eventually go to the Supreme Court.

A. Public Charge Rule as Disability Discrimination Under Section 504

Five of these lawsuits contain claims that DHS' new public charge rule violates the APA because it is inconsistent with Section 504 of the Rehabilitation Act.³⁷ The Center for Public Representation and the American Civil Liberties Union have led an amicus effort on behalf of the disability community to support the Section 504 claims in these cases and will continue to do so throughout the litigation.³⁸

Section 504 prohibits discrimination on the basis of disability by federal agencies in any program or activity. This includes "all forms of disability discrimination, including invidious animus and benign neglect," as the Supreme Court clarified in *Alexander v. Choate*, and discrimination may be found in either the purpose or the effect of a program or activity.³⁹

³³ *Id.*

³⁴ Order Granting Application for Stay, *Dep't of Homeland Sec. v. New York*, No. 19A785 (Jan. 27, 2020), available at <https://medicaid.publicrep.org/wp-content/uploads/2017/06/SCOTUS-Order-1-27-20.pdf>.

³⁵ Order Granting Application for Stay, *Wolf v. Cook Cnty.*, No. 19A905 (Feb. 21, 2020), available at https://www.supremecourt.gov/opinions/19pdf/19a905_7m48.pdf.

³⁶ US Citizenship and Immigration Servs., *USCIS Announces Public Charge Rule Implementation Following Supreme Court Stay of Nationwide Injunctions* (Jan. 30, 2020), <https://www.uscis.gov/news/news-releases/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-nationwide-injunctions>.

³⁷ Complaint at 160-162, *State of Washington v. US Dep't of Homeland Sec.*, No. 4:19-cv-05210 (E.D. Wash. Aug. 14, 2019); Complaint at 56-57, *State of California v. US Dep't of Homeland Sec.*, No. 3:19-cv-04975 (N.D. Cal. Aug. 16, 2019); Complaint at 20, 42-44, *State of New York v. US Dep't of Homeland Sec.*, No. 1:19-cv-07777 (S.D.N.Y. Aug. 20, 2019); Complaint at 63-69, *Make the Road New York v. Cuccinelli*, No. 1:19-cv-07993 (S.D.N.Y. Aug. 27, 2019); Complaint at 22, 23, 45, 48, *Cook Cnty. v. McAleenan*, No. 1:19-cv-06334 (N.D. Ill. Sept. 23, 2019), all available at <https://medicaid.publicrep.org/feature/public-charge-litigation>.

³⁸ Case filings available at <https://medicaid.publicrep.org/feature/public-charge-litigation>.

³⁹ Brief filed by the American Civil Liberties Union, Center for Public Representation, *et al.* as Amici Curiae Supporting Plaintiffs' Motion for Preliminary Injunction at 9, *State of Washington v. US Dep't of Homeland Sec.*, No. 4:19-cv-05210-RMP (E.D. Wash. Sept. 9, 2019) ("Disability Amicus Brief"), available at <https://medicaid.publicrep.org/wp-content/uploads/2018/05/Dkt.-102-1-Proposed-Amici-Brief-WA-state.pdf>.

Section 504's implementing regulations for DHS specifically prohibit the use of discriminatory "criteria or methods" meaning those that "[s]ubject qualified individuals with a disability to discrimination on the basis of disability" or "[d]efeate or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities."⁴⁰

The amicus briefs describe the history of immigration and disability laws. Early immigration laws specifically excluded people with disabilities. As Congress passed disability discrimination laws, like Section 504 and then the Americans with Disabilities Act, Congress simultaneously removed the per se exclusions of people with disabilities from immigration laws. The amici argue that the new public charge rule is, in effect, a return to the per se exclusion of people with disabilities.⁴¹

In the preamble to the final public charge rule, DHS claimed that "it is not the intent, nor is it the effect of this rule to find a person a public charge solely based on his or her disability" despite admitting the "outsized impact the rule is expected to have on immigrants with disabilities."⁴² DHS also claimed that because the rule includes a multi-factor "totality of the circumstances" test, "disability itself would not be the sole basis for an inadmissibility finding" as is required by Section 504.⁴³ However, amici argue that the health and resources criteria discussed above "make anyone with a significant disability virtually certain to be excluded in a public charge determination" and therefore the rule's purpose or effect "is to selectively exclude immigrants with disabilities from admission into the United States or adjustment of status in violation of Section 504 of the Rehabilitation Act."⁴⁴

As discussed above, the rule negatively weighs a medical condition that is "likely to require extensive medical treatment or institutionalization or that will interfere with the [person's] ability to provide and care for himself or herself, to attend school, or to work upon admission or adjustment of status."⁴⁵ Amici argue this definition will automatically apply a negative factor to nearly all applicants with disabilities because "people with disabilities experience functional limitations that often have underlying medical diagnoses. When these medical diagnoses are inadequately treated or accommodated, they can interfere with an individual's ability to provide self-care, attend school, or work."⁴⁶ For anyone with a disability who lacks private insurance, this factor is heavily weighted.⁴⁷ On top of that, people with disabilities are almost invariably barred from the positive factor of lacking a medical condition of the sort described by

⁴⁰ 6 CFR § 13.50(b)

⁴¹ Disability Amicus Brief at 4-6.

⁴² Final Public Charge Rule, 84 Fed. Reg. at 41368.

⁴³ *Id.*

⁴⁴ Disability Amicus Brief at 10-11.

⁴⁵ 8 C.F.R. § 212.22(b)(2).

⁴⁶ Disability Amicus Brief at 11.

⁴⁷ 8 C.F.R. § 212.22(c)(1)(iii).

the rule.⁴⁸ Thus, the rule triple counts the same factual circumstances of disability against individuals.

In addition, amici point to evidence that HCBS increases the self-sufficiency and employment of people with disabilities, the exact opposite of making them a public charge.⁴⁹ Therefore amici conclude, “all other factors being equal, individuals with disabilities will be severely disadvantaged by automatically being assigned one or more negative factors, and automatically be disqualified from one of the few positive factors DHS will consider in making a public charge determination. This sharply different treatment of individuals who are similarly situated ‘but for their disability’ amounts to discrimination under Section 504.”⁵⁰

Finally, amici argue that the rule “will cause irreparable harm to immigrants with disabilities who will either be denied admission or an adjustment of status. Conversely, in order to avoid a public charge determination, immigrants with disabilities will be forced to forego necessary medical services.”⁵¹ Amici also note that the confusion surrounding the rule and its application will lead immigrants to disenroll or fail to enroll themselves or their citizen children in even benefits that are not considered under the rule, “out of fear that accessing those benefits would adversely impact their immigration status.”⁵²

B. Preliminary Injunction Decisions

On the eve of the effective date for the new rule, five district courts issued decisions granting preliminary injunctions enjoining the new rule. The courts in the Southern District of New York, the Eastern District of Washington, and the District of Maryland issued nationwide preliminary injunctions,⁵³ while the courts in the Northern District of California and Northern District of Illinois limited its injunctions to the specific states that are parties in the cases (California, Oregon, Pennsylvania, Maine, and the District of Columbia in the former and Illinois in the latter).⁵⁴ All five of the district courts found that the new public charge rule likely violates the

⁴⁸ *Id.* at § 212.22(b)(2).

⁴⁹ Disability Amicus Brief at 12-16.

⁵⁰ *Id.* at 12.

⁵¹ *Id.* at 16-17.

⁵² *Id.* at 19.

⁵³ Memorandum and Order in *State of New York v. US Dep’t of Homeland Security*, No. 19 Civ. 7777 (S.D.N.Y. Oct. 11, 2019) (“New York PI decision”); Order Granting Plaintiffs’ Motion for Preliminary Injunction in *Make the Road New York v. Cuccinelli*, No. 1:19-cv-07993 (S.D.N.Y. Oct. 11, 2019); Order Granting Plaintiff States’ Motion for Section 705 Stay and Preliminary Injunction in *State of Washington v. US Dep’t of Homeland Security*, No. 4:19-cv-05210 (E.D. Wash. Oct. 11, 2019) (“Washington PI decision”); Memorandum Opinion and Order in *CASA de Maryland v. Trump*, No. 8:19-cv-02715-PWG (D. Md. Oct. 14, 2019) (“CASA PI decision”), available at <https://medicaid.publicrep.org/feature/public-charge-litigation>.

⁵⁴ Preliminary Injunction in *City and Cnty. of San Francisco v. US Citizenship and Immigration Servs.*, 19-cv-04717-PJH, *State of California v. US Dep’t of Homeland Security*, 19-cv-04975-PJH, *La Clinica De La Raza v. Trump*, 19-cv-04980-PJH (N.D. Cal. Oct. 11, 2019) (“California PI decision”), *Cook Cnty., IL v. McAleenan*, 19 C 6334 (N.D. Ill. Oct. 14, 2019) (“IL PI decision”), available at <https://medicaid.publicrep.org/feature/public-charge-litigation>.

Administrative Procedure Act because the rule is likely to be found to be contrary to federal law, and all except for the District of Maryland found the rule is likely arbitrary and capricious as well. The District of Maryland declined to determine that for the purposes of issuing a preliminary injunction, as it had already determined that the rule was likely to be found contrary to federal law, which was sufficient to issue a preliminary injunction.⁵⁵

The courts in New York, Washington state, and California specifically examined whether the plaintiffs were likely to succeed on their claims that the public charge rule violates Section 504, with the New York and Washington state courts answering in the affirmative and the California court in the negative. The court in Illinois did not address the disability discrimination claims directly.⁵⁶

In finding that plaintiffs had a likelihood of succeeding on their claim that the public charge violates Section 504, the Washington court stated that “[a]mici provide a compelling analysis of how the factors introduced by the Public Charge Rule disproportionately penalize disabled applicants by ‘triple counting’ the effects of being disabled.”⁵⁷ The court found that there was “a significant possibility that disabled applicants who currently reside in the Plaintiff states . . . would be deemed inadmissible primarily on the basis of their disability.”⁵⁸ The court also described the harms from “the chilling effect arising out of predictable confusion from the changes in the Public Charge Rule [causing] immigrant parents to refuse benefits for their disabled U.S. children or legal permanent resident children.”⁵⁹

In rejecting the government’s argument that Section 504 was not violated because disability is just “one factor (among many) that may be considered,” the court found that disability is a factor that an immigration officer *must*, not may, consider and that it is in practice counted at least twice as a negative factor. Again citing to the amicus brief, the court also noted that Medicaid assists people with disabilities to work and be independent and found that “accessing

⁵⁵ CASA PI decision at 32-33.

⁵⁶ The Illinois district court stated that “[t]he parties (to a lesser extent) and their amici (to a greater extent) appeal to various public policy concerns in urging the court to rule their way” but that the court’s analysis “rests exclusively on a dry and arguably bloodless examination of the authorities that precedent requires courts to examine—and the deployment of the legal tools that precedent requires courts to use—when deciding whether executive action complies with a federal statute.” Illinois PI at 31-32. Much of the court’s analysis relies on the meaning of “public charge” in the early 20th century, including its exclusion of people with physical or mental disabilities, suggesting that the court may not be receptive to the plaintiffs’ Section 504 claims. Relying on a Supreme Court decision from 1915, the district court said, “*Gegiow* teaches that ‘public charge’ does not, as DHS maintains, encompass persons who receive benefits, whether modest or substantial, due to being temporarily unable to support themselves entirely on their own. Rather, as Cook County and ICIRR maintain, *Gegiow* holds that “public charge” encompasses only persons who—like “idiots” or persons with “a mental or physical defect of a nature to affect their ability to make a living”—would be substantially, if not entirely, dependent on government assistance on a long-term basis.” *Id.* at 18-19.

⁵⁷ Washington PI decision at 18, quoting disability community amicus brief at 23.

⁵⁸ *Id.* at 19.

⁵⁹ *Id.*

Medicaid logically would assist immigrants, not hinder them, in becoming self-sufficient, which is DHS' states goal in the Public Charge Rule."⁶⁰

The court in New York also ruled in favor of plaintiffs, finding that "Plaintiffs have raised at least a colorable argument that the Rule as to be applied may violate the Rehabilitation Act...."⁶¹ The court noted defendants acknowledge that disability is a factor that may be considered and that they claim disability is relevant because it "tends to show that [an immigrant] is more likely than not to become a public charge." The court rejected this argument, stating that:

Defendants do not explain how disability alone is a negative factor indicative of being more likely to become a public charge. In fact, it is inconsistent with the reality that many individuals with disabilities live independent and productive lives.⁶²

In contrast, the court in California rejected plaintiffs' Section 504 argument, relying on a strict interpretation of the "solely on the basis of" disability language in the statute.⁶³ The court found that:

The Rule does not deny any alien admission into the United States, or adjustment of status, 'solely by reason' of disability. All covered aliens, disabled or not, are subject to the same inquiry Even though a disability is likely to be an underlying cause of some individuals qualifying for additional negative factors, it will not be the sole cause. As such, disability is one non-dispositive factor.⁶⁴

The California court also noted that the statute specifically lists health as a factor that must be considered, and that health has long included disability.⁶⁵

As noted above, the preliminary injunctions were appealed, with the Administration seeking stays of the injunctions to allow them to implement the rule while the litigation is ongoing and those appeals met mixed results, with some courts granting the stays and others denying them.⁶⁶ Three of those injunctions were nationwide and in December, the Fourth and Ninth Circuit Courts of Appeals stayed the nationwide injunctions⁶⁷ issued by federal district courts in

⁶⁰ *Id.* at 47.

⁶¹ New York PI decision at 18.

⁶² *Id.*

⁶³ California PI decision at 50-51. It is worth noting that the California district court, unlike the New York, Washington and Illinois courts, did not accept the amicus brief filed by the disability community (as well as a number of other amicus briefs).

⁶⁴ *Id.* at 50.

⁶⁵ *Id.* at 51.

⁶⁶ Litigation updates available at <https://medicaid.publicrep.org/feature/public-charge-litigation>.

⁶⁷ Order Granting Stay of Injunction, *City and Cnty. of San Francisco v. US Citizenship and Immigration Servs., State of California v. US Dep't of Homeland Sec., and State of Washington v. US Dep't of Homeland Sec.*, No. 19-17213

Maryland⁶⁸ and Washington⁶⁹ in October, leaving only the nationwide injunction issued by a federal district court in New York⁷⁰ in effect. The Second Circuit Court of Appeals denied the stay⁷¹ in early January, however, the Administration sought an emergency appeal of the decision to the Supreme Court, which granted the stay⁷² in a 5-4 decision on January 27, 2020. On February 21, 2020, the Court stayed the final remaining statewide injunction, in Illinois, as well, also in a 5-4 decision.⁷³ Following the Supreme Court's January ruling, the Administration announced the rule would go into effect on February 24, 2020.⁷⁴

After the COVID-19 pandemic began, litigants urged the Court to reconsider its stay. On April 24, 2020, the Court declined,⁷⁵ though it did state that lower courts could consider the issue.⁷⁶ In July, the U.S. District Court for the Southern District of New York issued a temporary injunction against the rule, halting it nationwide for the duration of the national public health emergency declared by the Trump Administration.⁷⁷ However, that victory was short-lived and on August 12, 2020, the Second Circuit Court of Appeals partially stayed the injunction, placing the rule back in effect nationwide, except in the states of New York, Connecticut, and

(9th Cir. Dec. 5, 2019), <https://medicaid.publicrep.org/wp-content/uploads/2017/06/Public-Charge-9th-Cir-Stay.pdf>; Order Granting Stay of Injunction, *Casa de Maryland v. Trump*, No. 19-2222 (4th Cir. Dec. 9, 2019), <https://medicaid.publicrep.org/wp-content/uploads/2017/06/4th-Circuit-Stay-of-Preliminary-Injunction-12.09.19.pdf>.

⁶⁸ CASA PI decision.

⁶⁹ Washington PI decision.

⁷⁰ New York PI decision.

⁷¹ Order Denying Stay of Injunction, *State of New York v. US Dep't of Homeland Sec. and Make the Road v. Cuccinelli*, No. 19-3591 (2nd Cir. Jan. 8, 2020), <https://medicaid.publicrep.org/wp-content/uploads/2017/06/Stay-Denial-NYS-MTR-1-8-20.pdf>.

⁷² Order Granting Application for Stay, *Dep't of Homeland Sec. v. New York*, No. 19A785 (Jan. 27, 2020), available at <https://medicaid.publicrep.org/wp-content/uploads/2017/06/SCOTUS-Order-1-27-20.pdf>.

⁷³ Order Granting Application for Stay, *Wolf v. Cook Cnty.*, No. 19A905 (Feb. 21, 2020), available at https://www.supremecourt.gov/opinions/19pdf/19a905_7m48.pdf.

⁷⁴ US Citizenship and Immigration Servs., *USCIS Announces Public Charge Rule Implementation Following Supreme Court Stay of Nationwide Injunctions* (Jan. 30, 2020), <https://www.uscis.gov/news/news-releases/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-nationwide-injunctions>.

⁷⁵ Amy Howe, *No pause from Supreme Court for "public charge" rule during COVID-19 pandemic*, SCOTUS Blog, Apr. 24, 2020, <https://www.scotusblog.com/2020/04/no-pause-from-supreme-court-for-public-charge-rule-during-covid-19-pandemic>.

⁷⁶ Order in Pending Case, *Dep't of Homeland Sec. v. New York*, No. 19A785 (Jan. 27, 2020), available at https://www.supremecourt.gov/orders/courtorders/042420zr_o7jp.pdf; Order in Pending Case, *Wolf v. Cook Cnty.*, No. 19A905 (Feb. 21, 2020), available at https://www.supremecourt.gov/orders/courtorders/042420zr1_c18e.pdf.

⁷⁷ Memorandum Decision and Order, *State of New York v. US Dep't of Homeland Sec.*, No. 1:19-cv-07777 (S.D.N.Y. July 29, 2020), available at <https://www.courtlistener.com/recap/gov.uscourts.nysd.521356/gov.uscourts.nysd.521356.195.0.pdf>.

Vermont.⁷⁸ Then, on September 11, the Second Circuit Court of Appeals decided to allow the rule to go back into effect nationwide, including in those states.⁷⁹

On November 2, 2020, The U.S. District Court for the Northern District of Illinois determined the rule was illegal on its merits, and therefore should be vacated nationwide.⁸⁰ However, DHS quickly appealed the decision and only a day later, on November 3, 2020, the Seventh Circuit Court of Appeals issued a stay, allowing the rule to go back into effect while litigation continues.⁸¹

III. Conclusion

The public charge rule represents a sharp departure from longstanding immigration policy and will substantially impact immigrants with disabilities. CPR is continuing to monitor the litigation and will continue to support the disability community's interests in the lawsuits as they work their way through the courts. For more information about the rule and its impact on people with disabilities, as well as updates on litigation challenging the rule, visit our website at: <https://medicaid.publicrep.org/feature/public-charge>.

The Protecting Immigrant Families Campaign has additional resources for individuals who may be impacted and for people working with individuals who may be impacted that can be found at: <https://protectingimmigrantfamilies.org/know-your-rights>. Because of the complexities surrounding the exact parameters of the public charge rule, we encourage anyone with questions regarding specific individual cases to consult with an immigration attorney.

⁷⁸ Order, *State of New York v. US Dep't of Homeland Sec.*, No. 20-2537 (2nd Cir. Aug. 12, 2020), available at <https://medicaid.publicrep.org/wp-content/uploads/2C2-partial-stay-8.12.20.pdf>.

⁷⁹ Order, *State of New York v. US Dep't of Homeland Sec.*, No. 20-2537 (2nd Cir. Sept. 11, 2020), available at <https://medicaid.publicrep.org/wp-content/uploads/2nd-Cir-Stay-9-11-20.pdf>.

⁸⁰ Memorandum Opinion and Order, *Cook Cnty. v. Wolf*, No. 1:19-cv-06334 (N.D. Ill. Nov. 2, 2020), available at <https://medicaid.publicrep.org/wp-content/uploads/IL-district-court-Memorandum-Opinion-vacating-public-charge-rule-11.2.20.pdf>.

⁸¹ Order, *Cook Cnty. v. Wolf*, No. 20-3150 (7th Cir. Nov. 3, 2020), available at <https://medicaid.publicrep.org/wp-content/uploads/2020.11.03-Seventh-Circuit-Stay-in-Wolf-v-Cook-County.pdf>.