



# NAVIGATING THE LATEST FEDERAL IMMIGRATION ACTIONS

*What the Census and Public Charge Rule  
Mean for Schools and Students*







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Published January 2020

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# FOREWORD

In July 2017, the National School Boards Association (NSBA) published a guide to assist schools in handling issues surrounding undocumented students. That guide also addressed many issues regarding the education of undocumented students, including the legal challenges to the Deferred Action for Childhood Arrivals program (DACA). As we write, the U.S. Supreme Court is considering a lawsuit involving the legality of the DACA program, and the issue most likely will be resolved by June 2020.

But, while the DACA litigation is at the fore of immigration issues, other federal actions in this area, from the now-defunct “citizenship question” on the U.S. census to changes in federal regulations narrowing immigrant access to public benefits, also will impact schools and the communities they serve. This guide is intended to help answer questions that may arise from these recent federal actions. It seeks to assist schools in dispelling misinformation to ensure federal funding is not adversely impacted by “uncounted” families so that schools can continue to provide critical federally funded services and programs, such as school lunches and school-based Medicaid, and to continue the ever important mission of educating all children.





### **1 What is the public charge ground of inadmissibility?**

The public charge ground of inadmissibility (public charge rule) is a rule that prevents certain noncitizens from coming into the U.S. or adjusting their immigration status. The rule applies to a person who:

- seeks admission to the U.S.;
- seeks to adjust his or her status to that of a lawful permanent resident from within the U.S.; or
- is an alien within the country seeking to change his or her status to a different nonimmigrant classification.\*

The rule prevents such a person from gaining admission if he or she is or is likely to become primarily dependent upon the receipt of cash public assistance for income maintenance or institutionalization for long-term care at government expense.<sup>1</sup>

Although the law does not specifically indicate what constitutes a “public charge,” the regulations that interpret the term indicate that consular offices are to use a “more likely than not” standard when considering the likelihood of an alien becoming a public charge. In using this standard, officials are to consider the totality of the person’s circumstances at the time of the visa application. They are to look at the person’s age, health, family status, assets, resources, financial status, education, and skills in determining whether the person is likely to become a public charge.<sup>2</sup>

### **2 To whom does the public charge rule apply?**

The public charge rule applies to applicants for admission to the U.S., aliens within the U.S. seeking to adjust their status to that of lawful citizens, aliens within the U.S. who hold nonimmigrant visas and seek to extend their stay in the same nonimmigrant classification, or aliens who hold nonimmigrant visas and wish to change their status to a different nonimmigrant classification.<sup>3</sup>

### **3 Who is exempt from the provisions of the public charge rule?**

The public charge rule does not apply to U.S. citizens. Congress also has exempted refugees, asylees, Afghans and Iraqis with special immigrant visas, certain nonimmigrant trafficking and crime victims, individuals applying under the Violence Against Women Act, special immigrant juveniles, or those to whom the Department of Homeland Security (DHS) has granted a waiver of public charge inadmissibility. Additionally, while lawful permanent residents generally are not subject to public charge inadmissibility, some lawful permanent residents may be subject to the public charge ground of inadmissibility because specific circumstances dictate that they be considered as new applicants for admission.<sup>4</sup>

\* Applicable federal law defines an “alien” as “any person not a citizen or national of the United States.” <https://www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms#1>.

#### 4 **What changes were made to the public charge rule in 2019?**

The final public charge rule makes three primary changes to the prior rule. First, it adds factors to the “totality of circumstances” test that is used to determine whether a person is ineligible based upon the potential of becoming a public charge. Those changes will make it more difficult for low-income persons to be admitted to the U.S. or change their status.

Second, it changes the definition of “public charge.” Prior to the change in the public charge rule, DHS only looked at persons who were *primarily dependent* on government resources to determine whether or not they were inadmissible on public charge grounds. The new rule now indicates that an alien who has received one or more public benefits for more than 12 months (in the aggregate) in a 36-month period may be considered inadmissible on public charge grounds, without regard to whether the person has been primarily dependent on government resources.

The new rule also adds benefits to the list of those that can be considered in making a public charge determination. Prior to the change in the rule, the only benefits that could be considered in public charge determinations were cash assistance programs such as Supplemental Social Security Income (SSI), Temporary Assistance for Needy Families (TANF), and government-funded long-term care. The final rule includes Medicaid and other benefits that will be outlined in greater detail in the response to question Number 6 below.<sup>5</sup>

#### 5 **When do the changes go into effect?**

The changes were to have gone into effect on Oct. 15, 2019. However, judges in U.S. District Courts for the Southern District of New York, the Northern District of California, the Eastern District of Washington, the Northern District of Illinois, and the District of Maryland (Southern Division) had enjoined DHS from implementing and enforcing the final public charge rule until there is a final resolution of their lawsuits challenging the implementation. Most of the injunctions were nationwide, so the U.S. Citizenship and Immigration Service was not able to implement the new rule anywhere in the U.S. It filed an application to stay the U.S. District Court for the Southern District of New York’s decision enjoining implementation of the rule with the U.S. Supreme Court and on Jan. 27, 2020, the Supreme Court granted a stay of the lower court’s ruling, which will allow the rule to go into effect in every state except for Illinois.<sup>6</sup>

#### 6 **Which benefits are considered in public charge inadmissibility determinations?**

DHS will now consider the following benefits in making its public charge inadmissibility determinations:

- Any federal, state, local, or tribal cash assistance for income maintenance;
- Supplemental Security Income;
- Temporary Assistance for Needy Families;
- Federal, state, or local cash benefit programs for income maintenance, which are often called “General Assistance” by states but may exist under other names;
- Supplemental Nutrition Assistance Program (SNAP or food stamps);

- Section 8 housing assistance under the Housing Choice Voucher Program;
- Section 8 Project-Based Rental Assistance, which includes Moderate Rehabilitation;
- Public Housing under Section 9 of the Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*; and
- Federally funded Medicaid (with certain exceptions).

DHS will not consider the receipt of these public benefits in applications received by aliens who at the time they received the benefits or at the time they filed an application for admission, adjustment of status, extension of stay, or change of status, were enlisted in the U.S. armed forces or the Ready Reserve component. DHS also will not include the public benefits received by the spouses or children of members of the armed forces or reserves in its final charge determinations. The rule further provides that DHS will not consider public benefits received by children, including adoptees, who will acquire U.S. citizenship under INA 320, 8 U.S.C. § 1431 or INA 322, 8 U.S.C. § 1433.<sup>7</sup>

**7 Which benefits will not be considered in public charge inadmissibility determinations?**

DHS will not consider the following benefits in determining whether an alien is likely to become a public charge:

- The receipt of Medicaid for the treatment of an emergency medical condition;
- Services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act;
- School-based services or benefits provided to individuals who are at or below the oldest age eligible for secondary education as determined under state or local law (this would include the federal school lunch program);
- Medicaid benefits received by an alien under 21 years of age; or
- Medicaid benefits received by a woman during pregnancy and during the 60-day period beginning on the last day of pregnancy.

Applications for or receipt of free and reduced-price meals and school-based services such as Medicaid will not negatively impact immigration status under the rule.

Information that is provided in applications for free meals and school-based services such as Medicaid cannot legally be used for Immigration and Customs Enforcement (ICE) purposes.

DHS only will consider benefits that are provided directly to the applicant for the applicant's benefit. It will not consider benefits that the applicant receives on behalf of another, such as a guardian or power of attorney. It also will not consider receipt of benefits received by members of the applicant's household unless the applicant also is listed as a beneficiary.<sup>8</sup>

**8 Does accessing benefits through school increase the risk of ICE enforcement?**

No. Accessing benefits through schools should not increase the risk of ICE involvement. Child and family information provided to schools for Medicaid purposes may not be used for ICE enforcement. Likewise, information provided to schools for participation in school meal programs cannot be provided to other agencies or used by ICE.<sup>9</sup>

**9 Does the change in the public charge rule affect a school district's obligation to provide educational services to immigrant students?**

No. The changes in the public charge rule have no impact on a school district's obligation to provide educational services. The U.S. Supreme Court in *Plyler v. Doe* clearly established that undocumented children have the constitutional right under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to receive a free public education from kindergarten through the 12th grade.<sup>10</sup> This means that public schools have to enroll students who live within their jurisdiction and provide them with educational services. NSBA's publication, *Lifting the Lamp Beside the Schoolhouse Door*, provides answers to specific questions you may have about your school districts' obligations to educate undocumented children.<sup>11</sup>

**10 Will the 2020 census have a citizenship question on it?**

No. The 2020 census will not have a citizenship question on it. The Department of Commerce attempted to place a citizenship question on the 2020 census; however, the Solicitor General of New York state, joined by several other states, filed a lawsuit, which NSBA supported through multiple amicus (friend of the court) briefs, requesting that the court enjoin or stop the administration from adding the question to the census. The court granted the relief requested by the states.

The administration appealed the lower court's ruling directly to the U.S. Supreme Court. On June 27, 2019, the Supreme Court ruled that the administration's justification for asking the question was pretextual—not the real reason it wanted to add the question.<sup>12</sup> The Supreme Court remanded the case, sending it back to the lower court so that it could determine the real justification for the question. The administration decided it would not continue to pursue the issue. On July 16, 2019, a lower court issued a ruling permanently enjoining, or stopping, the administration from putting the citizenship question on the census. The administration did not appeal, and the lower court's ruling is final.<sup>13</sup>

**11 How can school districts help parents understand that they do not need to be frightened about responding to the census?**

School districts can tell parents and guardians that there is no citizenship question on the upcoming census. Schools also can communicate to their communities that their status or the status of those with whom they reside will not be revealed if they respond to the questions on the census.



Additionally, school districts can educate parents on the importance of the census and can advise that an accurate census count is critical for their schools. Being counted in the census helps young children thrive. When they are counted, their communities get their fair share of over \$800 billion per year in federal funding that is allocated using data derived from the census.<sup>14</sup> Schools operate in large part on funds that are distributed by the federal government to local schools and states through myriad federal programs. Those funds are linked directly to the population count obtained during the census. For example, in fiscal year 2015, Census Bureau data was used to distribute more than \$675 billion in federal funds across 132 programs.<sup>15</sup>

Because states use much of the money they receive from the federal programs on schools, census data has a direct impact on federal funding for education. In fiscal year 2015, of the top 11 programs ranked by federal assistance distributed using census data, three major programs specifically involved educational programs for young children. The National School Lunch Program, which provides free or reduced-cost lunches to children each school day, distributed \$18.9 billion.<sup>16</sup> Title I grants, which are used to provide services to students in schools that have the highest percentages of low-income students, disbursed \$14.2 billion. Special education grants to states, which assist schools in providing education and related services to children with disabilities, were responsible for providing \$11.3 billion to schools.<sup>17</sup>

These funds are apportioned to states and local agencies based upon population statistics obtained through the census. If people are not counted, the resulting census undercount will harm schools and students. Schools will not have the funds to provide all of the critical services, such as special education and school meals, that students need. The December 2019 issue of *American School Board Journal* features an article on how districts are educating their communities about the census: "A Full Count" <https://www.nsba.org/ASBJ/2019/December/Full-Count>.

Schools can play a substantial role in helping to ensure their students and families have accurate information about recent federal actions such as the proposed changes to the public charge rule and the now defunct "citizenship question" in the 2020 census. In working with their state school board associations and their COSA attorneys to determine and disseminate that information, school leaders can ensure that all families and students, especially those most in need, have access to essential federal and state programs such as meal and school-based Medicaid programs. Accurate counts and high participation in these efforts are key to safeguarding valuable federal funding streams that permit schools to serve not only those in need, but all students.

## Endnotes

- <sup>1</sup> Immigration and Nationality Act of 1965 § 212 (a)(4), 8 U.S.C. § 1182, (2019); <https://www.uscis.gov/greencard/public-charge>.
- <sup>2</sup> 22 CFR 40.41 (2019).
- <sup>3</sup> *Id.*
- <sup>4</sup> *Id.*
- <sup>5</sup> <https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility>.
- <sup>6</sup> *State of New York v. DHS*, \_\_\_ F.Supp.3d \_\_\_ 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019); *City and County of San Francisco v. USCIS* \_\_\_ F.Supp.3d \_\_\_ 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019); *State of Washington v. DHS*, \_\_\_ F.Supp.3d \_\_\_ 2019 WL 5100717 (E.D. Wash. Oct. 11, 2019); *Cook County, Ill. V. McAleenan*, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019); *Casa De Maryland v. Trump*, \_\_\_ F.Supp.3d \_\_\_ 2019 WL 5190689 (Md. Oct. 14, 2019); 589 U.S. \_\_\_ (2020).
- <sup>7</sup> <https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility>.
- <sup>8</sup> *Id.*
- <sup>9</sup> National Immigration Law Center, *Privacy Protections in Selected Federal Benefits Programs* (Feb. 2018), <https://www.nilc.org/wp-content/uploads/2018/03/privacy-protections-fed-programs-tbl-2018.pdf>.
- <sup>10</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).
- <sup>11</sup> <https://www.nsba.org/-/media/NSBA/File/legal-lifting-the-lamp-beside-the-schoolhouse-door-guide.pdf>.
- <sup>12</sup> No. 18–966, 588 U.S. \_\_\_ (2019).
- <sup>13</sup> *New York v. Department of Commerce*, No. 18-CV-2921, 2019 WL 3213840 (S.D.N.Y. Jul. 16, 2019).
- <sup>14</sup> Deborah Stein, *Counting all Children in the 2020 Census Would Benefit Poor Children: State and Local Advocates Can Help* (June 2019), <https://countallkids.org/counting-children-benefits-poor-children-local-advocates-can-help/>.
- <sup>15</sup> Marie Hotchkiss & Jessica Phelan, *U.S. Census Bureau, Uses of Census Bureau Data in Federal Funds Distribution 3* (Sept. 2017) (“Uses of Census Bureau Data”), <https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf>.
- <sup>16</sup> *Id.*
- <sup>17</sup> *Uses of Census Bureau Data 3*, supra note 3.



The National School Boards Association (NSBA) is the leading advocate for public education. For 80 years, we have been leading the effort to support and enhance public education. We are succeeding in creating the best possible environment in which students can realize their dreams.

NSBA is a federation of 49 state associations and the U.S. territory of the Virgin Islands, representing their more than 90,000 school board officials. These local officials govern more than 13,600 local school districts serving more than 50 million public school students. Working with and through our state associations, and serving as their Washington, D.C., office, NSBA advocates for equity and excellence in public education through school board governance.

We believe public education is America's most vital institution. It is a civil right necessary to the dignity and freedom of the American people, and all children deserve equal access to an education that allows them to reach their potential.

In pursuit of these beliefs, NSBA and our members will continue to lead the national conversation about public education, advocate for public policies that ensure all students everywhere have access to a great public education where they live, create a better understanding of the importance of school boards and the benefits of local governance, and enhance the effectiveness of school boards.



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