California Community Colleges

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Chief Executive Officers
Chief Business Officers
Chief Instructional Officers
Chief Student Services Officers
Chief Public Information Officers

RE: Impacts of Federal Public Charge Rules Changes on California Community College Students Legal Advisory 2019-03[1]

The Chancellor's Office has received a number of inquiries regarding the federal Department of Homeland Security's changes to the "public charge" rules governing a person's admissibility under the Immigration and Nationality Act. In particular, there are questions regarding whether the acceptance of educational benefits, including tuition benefits, might jeopardize a person's ability to adjust their immigration status.

Conclusion. The public charge rule changes do not include educational benefits, non-cash state and local benefits, or benefits not expressly listed in the rule within the rule's definition of "public benefits." The Department of Homeland Security states in its commentary of the Final Rule that "Pell grants and student aid programs will not be considered in the public charge inadmissibility determination." Accordingly, application for or receipt of such benefits should not be considered by the Department of Homeland Security in making an admissibility determination.

The Final Rule establishes a complex analytical framework for making public charge determinations, and includes a number of exemptions for categories of foreign nationals in the United States. The framework will be applied on a case-by-case basis based upon the "totality of the circumstances" facing an individual foreign national. It is therefore impossible for this office to determine the impact of the rule changes on

[1] The General Counsel's legal opinions and advisories on the implementation and interpretation of laws affecting community colleges do not form an attorney-client relationship, and are not a substitute for community college districts obtaining legal advice in appropriate circumstances. (Ed. Code, §70901, subd. (b)(14).)

any particular person or group of persons within the California Community Colleges. Accordingly, individuals who believe they may be affected by the Final Rule should refer to the materials cited here and seek individualized legal advice.

A. Background

On August 14, 2019, the Department of Homeland Security published the Final Rule amending the public charge ground for inadmissibility, which will go into effect on October 15, 2019, unless its effectiveness is stopped by a court prior to that date. The Final Rule is a reinterpretation of what is required by several federal statutes that govern when a foreign national is entitled to an adjustment of status within the United States. Taken together, these laws establish a principle of self-sufficiency under which it is United States policy that immigrants should "not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."[2] The United States considers a number of factors to determine admissibility under the public charge test, including age, health, family status, assets, education and skills.[3] The self-sufficiency principle also dictates that "the availability of public benefits not constitute an incentive for immigration to the United States."[4] The purported rationale behind the public charge test is to meet these policy objectives.

B. Analysis

The Final Rule provides definitions of "public charge" and "public benefit" that significantly expand the impact of the public charge test, but do not reach educational benefits.[5] Under a 1999 Field Guidance, a "public charge" was a person who is "primarily dependent on the Government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization

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[2] 8 U.S.C. § 1601(1), (2)(A).

[3] 8 U.S.C. § 1182(a)(4).

[4] 8 U.S.C. § 1601(2)(B).

[5] Text of the Final Rule, and Department of Homeland Security commentary are available here Federal Register).

for long-term care at Government expense."[6] This approach will no longer be in effect after October 15, 2019.

Under the Final Rule, the term "public charge" is expanded to mean a person "who receives one or more designated public benefits for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)." The Final Rule defines the term "public benefit" to include the following programs:

- Any federal, state, local, or tribal governmental cash benefit for income maintenance, including:
    - Supplemental social security;
    - Temporary Assistance for Needy Families (TANF);
    - Any federal, state, or local cash benefit program for income maintenance;
- Supplemental Nutrition Assistance Program (SNAP);[7]
- Section 8 Housing Assistance under HUD's Housing Choice Voucher (HCV) Program;
- Section 8 Project-Based Rental Assistance;
- Medicaid and CHIP Payment and Access Commission (MACPAC), except for:
    - Certain benefits for emergency medical conditions;
    - Medicaid under the Individuals with Disabilities Education Act (IDEA);
    - School-based services or benefits provided to individuals at or below the oldest age eligible for secondary education under state or local law
    - Benefits received by foreign nationals under the age of 21 or women during pregnancy; and
- Public housing under section 9 of the U.S. Housing Act of 1937.[8]

A "public charge" determination will not be based solely upon the past receipt of public benefits, but also upon whether, in "the opinion of" the officer, the person is

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[6] See Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 FR 28689, 28692 (May 26, 1999).

[7] In California, SNAP is known as CalFresh. Accordingly, CalFresh benefits are "public benefits" subject to the final rule.

[8] 8 CFR § 212.21(b). Only public benefits as defined in will be considered in a public charge inadmissibility determination.

more likely than not, at any time in the future, to become a public charge. The officer is to make this determination based on a number of weighted factors that comprise "the totality" of the person's circumstances.

C. Department of Homeland Security Responses to Comments

Some clarification of the Final Rule's intent is available in the Department of Homeland Security's responses to comments made about the draft rule, and included in the Final Rule's publication. The following are excerpts from the Department of Homeland Security commentary that will be of interest to the California Community Colleges and are provided here solely for informational purposes. Again, individuals who believe they may be affected by the Final Rule are encouraged to seek individualized legal advice.

1. *Pell Grants and Student Aid.*

> "Pell grants and student aid programs will not be considered in the public charge inadmissibility determination. As previously discussed, DHS's list of public benefits included in the regulation is an exhaustive list and only those benefits listed will be considered in a public charge inadmissibility determination. The focus of the rule is public benefits programs that provide cash assistance for income maintenance or support food nutrition, housing and healthcare with a relatively high overall expenditure. Pell grants and student aid programs are education-based and DHS is not considering them in the public charge inadmissibility determination. DHS decided to not include a list of those benefits that are not considered for public charge purposes because they are too numerous and benefits programs may change over time."[9]

2. *State and Local Benefits*

> "In addition, including all state and local benefits would add vagueness and confusion as to what public benefits would be considered. Consistent with the proposed rule, DHS will continue to exclude state, local, and tribal benefits that are not cash-benefits for these reasons. Further, DHS would not consider federal and state retirement, Social Security retirement benefits, Social

[9] 84 Fed. Reg. 41292, 41391 (Aug. 14, 2019), emphasis added.

Security Disability, postsecondary education, or unemployment benefits as public benefits under the public charge inadmissibility determination as these are considered to be earned benefits through the person's employment and specific tax deductions."[10]

3. *Applications for Extension of Status*

"However, when seeking an extension of stay or change of status as a nonimmigrant student [201] or nonimmigrant exchange visitor,[202] the alien will not need to establish that he or she is not likely at any time in the future to become a public charge because those seeking extension of stay or change of status are not subject to the public charge ground of inadmissibility. However, the alien will need to demonstrate that he or she has sufficient funds to pay tuition and related costs as part of the application for extension of stay or change of status to a nonimmigrant. Further, the alien must demonstrate that he or she has not received, since obtaining the nonimmigrant status he or she seeks to extend or change and through the time of filing and adjudication, one or more public benefits as defined in the rule, for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months)."[11]

4. *Fee Waivers and Categories Excluded from Public Charge.*

"DHS has revised the rule to state that a fee waiver request or receipt would not be considered for purposes of determining public charge inadmissibility if the fee waiver was applied for, or granted, as part of an application for which a public charge inadmissibility determination was not required."[12]

5. *College Tuition and On-Campus Healthcare*

"DHS appreciates the comments regarding the effect of the rule on colleges and universities, including student health centers, as it relates to international student enrollment. However, this rule does not regulate international student enrollment in colleges and universities nor the amount of financial aid awards

[10] 84 Fed. Reg. 41390, emphasis added.
[11] 84 Fed. Reg. 41331, emphasis added.

[12] 84 Fed. Reg. 41299, emphasis added.

or the rate of tuition that colleges and universities charge. The final rule also does not regulate student health centers located at colleges and universities. Rather, the rule directly regulates aliens who, at the time of application for admission or adjustment of status, are deemed likely at any time in the future to become a public charge, as well as aliens seeking extension of stay or change of status.[829] DHS is prescribing how it will determine whether an alien is inadmissible because he or she is likely at any time in the future to become a public charge and identify the types of public benefits that will be considered in the public charge determinations. An alien applying for admission or adjustment of status generally must establish that he or she is not likely at any time in the future to become a public charge."[13]

6. Public Benefits Received by Family Members

"Because DHS will not consider the receipt of public benefits by U.S. citizens and aliens not subject to public charge inadmissibility, the receipt of public benefits by these individuals will not be counted against or made attributable to immigrant family members who are subject to this rule."[14]

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[13] 84 Fed. Reg. 41477, emphasis added.

[14] 84 Fed. Reg. 41313.