The Case for Congressional Action on Public Charge

Health Equity

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“Give me your tired, your poor, your huddled masses yearning to breathe free.”

These famous lines etched on the Statue of Liberty are familiar to many Americans who are taught in schools, proudly, that America is a land of immigrants. In practice, however, immigrants to the United States have long faced hostility and discrimination. In recent years, the infamous 2019 public charge rule (which PolicyLab opposed) threatened to penalize some immigrants for using many public benefits to which they were legally entitled. The resulting fear and disenrollment from essential public safety net programs caused devastating consequences to families and to public health, particularly in the context of the COVID-19 pandemic.

The current administration effectively reversed the 2019 rule earlier this year, and recently the Department of Homeland Security (DHS) invited public comment to determine how to better define public charge and reduce fear among immigrant families. PolicyLab strongly welcomes these efforts, and through a collaboration of researchers in our Health Equity Portfolio, we submitted comments emphasizing the importance of public benefits and health insurance coverage to children and families.

However, while we welcome these recent efforts at a more just interpretation, we found it challenging to provide guidance to DHS when, in many ways, their hands are tied by requirements from underlying law. In addition, our portfolio members have been concerned about whether a future administration could simply reinstate a similar rule. So, I decided to take a deeper look at the history and role of “public charge” in immigration law.

I learned that while the 2019 rule was a significant departure from previous interpretations, the statute that underlies public charge is itself unclear, discriminatory and has caused harm throughout its long history. Without legislative reform, immigrant families will remain vulnerable to ongoing discrimination, and a future administration could again reinstitute a harmful rule. We need congressional action to reform the statute or (preferably) abolish public charge altogether.

What is public charge?

The roots of "public charge" in the U.S. stretch back to the exclusionary "poor laws" of the colonial period. Generally, a person is considered a public charge if they are dependent on the government. Immigrants who are deemed "likely to become a public charge" can face various restrictions, including denial of a green card. The 2019 rule dramatically expanded the scope of public charge to include many vital public benefits for the first time, which led to widespread disenrollment from safety net programs and endangered public health for citizens and noncitizens alike.

However, these problems—while extreme—were not new. Public charge has been damaging, unclear and discriminatory throughout its entire history. For instance, the Immigration Act of 1882 (which introduced public charge into federal law) explicitly discriminated against those with mental illness and intellectual disabilities, using loaded language such as "idiot" and "lunatic." In the late 19th and early 20th centuries, public charge was leveraged to deny admission to immigrants of color, largely based on racial stereotypes, and to Jewish people trying to flee Nazi Germany. Public charge was also used to exclude gay and lesbian immigrants all the way until 1990.

While we are grateful that the current administration abandoned the 2019 rule, public charge is still very much with us, embedded into statute (i.e., codified law from acts previously passed by Congress). Without deeper statutory reform, immigrants will remain vulnerable.

The statute is the problem

Despite its long history in federal law, "public charge" has never been officially defined by Congress. The draconian 2019 rule showed how dangerous this can be, as in practice it gives the Executive Branch enormous power over how to interpret public charge. The Judicial Branch is unlikely to offer relief: even though the 2019 rule was repeatedly challenged in federal courts, the lawsuits were not enough to counter the chilling effect.

This risk of executive overreach is just one consequence of the statute's vagueness. DHS officers have enormous discretion over individual cases. This increases the risk of inconsistent rulings and discrimination, particularly given that immigration officers often operate under conditions that are likely to contribute to implicit bias. Without a clear definition of public charge, immigrants are also left uncertain how they can avoid being considered "likely to become a public charge." However, creating a more specific definition would pose its own risks. Currently, in determining whether someone is likely to become a public charge, a DHS officer will consider the "totality of the circumstances." This approach is at least flexible, as officers can consider the nuances of each individual case.

The statute has other problems. While it does not provide a clear definition of public charge, it lists some specific factors (the "statutory" factors) that DHS officers must consider in their review, including age; health; family status; assets, resources, and financial status; and education and skills. This leaves DHS and its officers in an ethical quandary. For example, what does it mean for DHS to consider health? In our recent comments, we strongly discouraged DHS from considering chronic health conditions, warning that in practice, this would discriminate against marginalized communities who often have poorer health outcomes because of systemic racism and other barriers. But what then is DHS to examine if they are required to consider health? The statutory factors themselves encourage discrimination. Indeed, they were explicitly and repeatedly used as justification for many provisions in the 2019 rule.

Finally, legal scholars have raised concerns about how public charge interferes with states' and other agencies' efforts to protect public health. For instance, the vague definition of public charge allowed DHS to reach well beyond the agency's scope and heavily influence health policy, undermining federal public benefit programs.

The need for congressional action

It is hard to define public charge in a way that would balance clarity with flexibility. However, the statute could still be amended to provide some guardrails. The statute could explicitly state that designated public benefits are exempt from public charge determinations. Congress has already placed significant restrictions on immigrants' eligibility for benefits, so adding such clarifying language would not reflect a major change to immigration policy.

The statute could also be amended to remove the statutory factors, or at least make them optional as opposed to mandatory. This would help address the inherent discrimination that these factors encourage.

However, a better approach would be to revisit our immigration policies and remove the public charge statute entirely. Public charge undermines the health of children and families, and it inherently conflicts with both our nation's commitments to provide for those in need, and with our proud heritage as a land of immigrants. Rather than penalizing immigrants, we should support them, so that they can continue their enormous contributions to the rich tapestry that is the U.S. Immigrants and native-born Americans alike should be able to look at our most famous national landmark with pride, knowing that its welcoming lines hold true.

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