



Disability Rights Education & Defense Fund

October 31, 2019

Hon. Lindsey Graham  
Chairman  
Senate Judiciary Committee  
224 Dirksen Senate Office Bldg.  
Washington, DC 20510

Hon. Dianne Feinstein  
Ranking Member  
Senate Judiciary Committee  
152 Dirksen Senate Office Bldg.  
Washington, DC 20510

Dear Chairman Graham and Ranking Member Feinstein,

The undersigned national disability rights groups write to express our opposition to the nomination of Steven Menashi for the U.S. Court of Appeals for the Second Circuit. We urge the Senate Judiciary Committee to vote against advancing his nomination.

Mr. Menashi has worked to erode the rights of people with disabilities while serving as a legal advisor at the Department of Education and as Associate White House Counsel. Mr. Menashi has indicated that he worked on a broad range of immigration issues, including broadening the “public charge” rule,<sup>1</sup> which effectively excludes countless people with disabilities and their families from legal immigration to the United States.<sup>2</sup> As legal advisor at the Department of Education, Menashi was instrumental in providing advice on the Department’s decision to impose a two-year delay on enforcement of the “Equity in IDEA” regulations implementing the Individuals with Disabilities Education Act’s requirement to address significant disproportionality in the treatment of students of color with disabilities.<sup>3</sup>

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<sup>1</sup> <https://www.politico.com/newsletters/politico-pulse/2019/08/02/inside-stephen-millers-push-to-change-public-charge-rule-704429>

<sup>2</sup> See Autistic Self Advocacy Network, ASAN Condemns Proposed ‘Public Charge’ Immigration Regulations, Sept. 25, 2018, <https://autisticadvocacy.org/2018/09/asan-condemns-proposed-public-charge-immigration-regulations/>.

<sup>3</sup> Autistic Self Advocacy Network, ASAN Comments on Proposed Delay of Significant Disproportionality Rule, May 15, 2018, <https://autisticadvocacy.org/2018/05/asan-comments-on-proposed-delay-of-significant-disproportionality-rule/>; Letter from the NAACP Legal Defense and Educational Fund to Senator Mitch Mc.CConnell and Senator Chuck Schumer (Sept. 27, 2019) (on file with the NAACP Legal Defense and Educational Fund); Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 83 Fed. Reg. 8396, 8396-97 (proposed Feb. 27, 2018) (to be codified at 34 C.F.R. § 300) (proposed delay of implementation of regulations); Nomination of Steven Menashi to the U.S. Court of Appeals for the 2nd Circuit: Hearing

Mr. Menashi’s admitted involvement in crafting the discriminatory public charge rule is damning. Under § 212(a)(4) of the Immigration and Nationality Act, if an immigrant who is applying for entry into the United States, applying for a green card, or applying for an adjustment of status (with some exceptions) is deemed “likely to become a public charge,” they may be excluded from the country.<sup>4</sup> Before Menashi’s tenure as White House Counsel, only an immigrant’s cash benefits and institutionalization paid for by the government were considered relevant to the public charge determination.<sup>5</sup> The new public charge rule, which has been preliminarily enjoined by a number of courts,<sup>6</sup> if adopted, would vastly expand the number and types of public benefits that would impact the determination. Receipt of Medicaid, Section 8 housing assistance, Medicare Part D, and even SNAP benefits would be counted against immigrants.<sup>7</sup> The public charge rule would also stigmatize immigrants with disabilities by weighing *any* medical condition “significant enough to interfere with the person’s ability to care for him- or herself or to attend school or work” against the immigrant — a definition which would include nearly *all* disabilities, including people with intellectual and developmental disabilities (I/DD).<sup>8</sup> The view of disability reflected in this radical and unjustified departure from the previously established definition of “public charge” raises serious concerns about Mr. Menashi’s capacity to adjudicate claims involving people with disabilities in a fair and neutral manner.

Menashi’s role in delaying enforcement of the significant disproportionality regulations is also troubling. The 2016 regulations are vital in order to identify and remedy racial and other disparities in identification, placement, and discipline of students with disabilities. Nevertheless, during Menashi’s tenure at the Department of Education, the Department nevertheless chose to delay enforcement until July 2020 at the earliest, and 2022 for students aged three through five. The sole justification the Department offered was a suggestion that the disproportionality regulations “may not appropriately address the problem of significant disproportionality,”<sup>9</sup> effectively negating a final regulation without an adequate notice or comment process. As a result, a district court ruled that the decision to delay enforcement was arbitrary and capricious,

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before the Senate Judiciary Comm., 116th Cong. (2019) (Statements of Steven Menashi on Questions for the Record).

<sup>4</sup> U.S. Citizenship and Immigration Services, Public Charge Fact Sheet, <https://www.uscis.gov/news/fact-sheets/public-charge-fact-sheet> (last updated April 29, 2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41295-296 (Aug. 14, 2019) (describing the proposed rule’s rationale for the benefits it proposes to include in public charge inadmissibility determinations).

<sup>8</sup> 84 Fed. Reg at 41502.

<sup>9</sup> 83 Fed. Reg. at 8397.

and therefore violated the Administrative Procedures Act.<sup>10</sup> In the meantime, the uncertain status of enforcement has likely resulted in major ground-level delays in gathering adequate data to comply with the rule, thus causing significant harm to students with disabilities and communities of color.

Mr. Menashi's role in advising the White House and the Department of Education on courses of action that not only are harmful to the disability community, but also have been found by courts to be illegal, should be disqualifying. Moreover, while legal challenges to these policies are ongoing, Mr. Menashi could one day sit on a powerful federal appeals court, presiding over a number of these measures on which he may have directly provided guidance.

People with disabilities rely on fair and impartial federal courts to enforce our rights to be free from discrimination, to access the community, and to participate equally in federal programs. Mr. Menashi's disturbing and long track record demonstrates a willingness to put ideology ahead of the law. Based on that record, we have little confidence that people with disabilities who appear before him can expect a fair day in court. His testimony to Congress provided little assurance that he would be able to rule on these or other issues in a neutral manner. We therefore urge you to reject his nomination.

Sincerely,

Autistic Self Advocacy Network

Bazelon Center for Mental Health Law

Disability Rights Education and Defense Fund

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<sup>10</sup> Council of Parent Attorneys and Advocates Inc. v. Elizabeth (Betsy) DeVos & Johnny W. Collett, No. 18-cv-1636 (D.D.C. Mar. 7, 2019) (order denying defendants' motion to dismiss, granting plaintiff's motion for summary judgment, denying defendants' cross-motion for summary judgment, and vacating the "Delay Regulation).