

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

April 2, 2019

Nancy Berryhill  
Acting Commissioner  
Social Security Administration  
6401 Security Boulevard  
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Submitted via [www.regulations.gov](http://www.regulations.gov)

Re: Notice of Proposed Rulemaking on Removing “Inability To Communicate in English” as an Education Category, 84 Fed. Reg. 1006 (February 1, 2019), Docket No. SSA-2017-0046

Dear Acting Commissioner Berryhill:

These comments are submitted on behalf of Justice in Aging. Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources.

We have decades of experience with Social Security and Supplemental Security Income (SSI) benefits, with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency (LEP). Justice in Aging conducts training and advocacy regarding Social Security and SSI benefits, provides technical assistance to attorneys and others from across the country on how to address problems that arise under these programs, and advocates for strong protections to ensure that beneficiaries receive the benefits to which they are entitled promptly and without arbitrary denial or disruption.

## Introduction

SSA should withdraw this proposed rule and continue to consider “inability to communicate in English” as a factor in the disability determination process.

In 1967, the Social Security Act was amended to specifically require consideration of vocational factors – age, education, and work experience – if the individual claimant was not disabled

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based solely on their medical impairments, and was not able to return to past relevant work.<sup>1</sup> The Social Security Administration (SSA) issued final regulations in 1978, codifying these “Medical-Vocational Guidelines” at step 5 of the disability determination process, as well as other policies involved in the disability determination process.<sup>2</sup>

The 1978 regulations provided consistency and uniformity in the treatment of individuals applying for Social Security Disability Insurance (SSDI) and SSI disability benefits. The current framework takes into account the medical and vocational factors required by the Social Security Act and calibrates those factors to ensure that individuals with the most adverse vocational factors get those factors fully considered.

The Medical-Vocational Guidelines, also known as “the grids,” acknowledge the interplay between the various vocational factors used – age, education, work experience, and residual functional capacity (RFC). The rules must, by statute, be weighed in favor of those with more adverse vocational characteristics.

While a claimant experiencing adversity in one area might be able to adjust to other work, the more severe the adversity and the more vocational factors in which an individual experiences adversity, the more limited they will be in their ability to adjust to other work. One issue currently considered as part of the educational factor is an individual’s ability to communicate in English.

Inability to communicate in English is never the sole reason why an individual is awarded disability benefits, and many applying for disability benefits who are unable to communicate in English are denied. There are only two places in the current grids where inability to communicate in English is an educational category that changes whether the adjudicator is directed to a finding of disability or not.

In Table 1, for individuals whose RFC is limited to sedentary work<sup>3</sup> as a result of their severe medical impairments, Rule 201.17 for people age 45-49 who have either unskilled or no past relevant work experience, and are “illiterate or unable to communicate in English,” indicates a finding of “disabled.” Rule 201.18 for people with the same vocational profile but who are literate and able to communicate in English, directs a finding of “non-disabled.”

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<sup>1</sup> 42 U.S.C § 423(d)(2)(A).

<sup>2</sup> 43 Fed. Reg. 55349 (Nov. 28, 1978).

<sup>3</sup> Sedentary work involves lifting no more than 10 pounds at a time with occasional lifting or carrying, and mainly involves sitting, although standing and walking may be occasionally required. 20 C.F.R. § 404.1567(a). Social Security Ruling 96-9p states that: “[u]nder the Regulations, ‘sedentary work’ represents a significantly restricted range of work. Individuals who are limited to no more than sedentary work by their medical impairments have very serious functional limitations.”

In Table 2, for individuals whose RFC is limited to light work,<sup>4</sup> Rule 202.09 for people age 50-54 who have either unskilled or no past relevant work experience, and are “illiterate or unable to communicate in English,” points to a finding of “disabled.” Rule 202.10 for people with the same vocational profile but who are literate and able to communicate in English, indicates a finding of “non-disabled.”

In both tables, limited English proficiency, lack of education, and low skills are considered for older, severely impaired applicants who can’t realistically change careers — but not for younger applicants. We are deeply concerned by this proposal to remove “inability to communicate in English” from these two rules in the grids. This change would result in older LEP individuals with disabilities being wrongfully denied access to SSDI and SSI benefits. We submit the following comments to oppose the proposed rule, and ask that SSA withdraw it.

#### SSA presents insufficient evidence for the need to change its rules

- The NPRM says “claimants who cannot read, write, or speak English often have a formal education that may provide them with a vocational advantage.”

Over forty years of research has shown that immigrants actually have great difficulty transferring their education from their native country, foreign credentials, and overseas job experience to the U.S. job market. “When immigrants arrive in a country they may find that the human capital skills they brought with them are not relevant to their adopted labor market. This may be obvious in the case of language skills, where many foreign languages, either for monolingual foreign language speakers or destination language bilinguals, have little value in the destination country. . . . But it also appears to be the case that there is less-than-perfect international transferability of skills acquired on the job or through formal schooling in the country of origin.”<sup>5</sup>

In 1978, Barry Chiswick, a leading researcher in this field, showed that the partial effect of a year of schooling for a foreign-born man in analyses of 1970 US Census data was 5.7 percent, whereas the partial effect of schooling among the native born was 7.2 percent. Similarly, at 10 years of experience, the percent increase in earnings for an additional year of experience in the country of birth was only 1.4 percent among the foreign born, but 2.1 percent for experience among the native born.<sup>6</sup>

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<sup>4</sup> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of up to 10 pounds, and requiring a good deal of walking or standing, or sitting with some pushing or pulling of arm or leg controls. Those who can do light work are also considered to be able to do sedentary work, unless they have additional limiting factors like loss of dexterity or inability to sit for long periods of time. 20 C.F.R. § 404.1567(b).

<sup>5</sup> Barry R. Chiswick and Paul W. Miller, *The international transferability of immigrants' human capital skills*, IZA Discussion Papers, No. 2670, Institute for the Study of Labor (IZA), Bonn, 2007, <http://ftp.iza.org/dp2670.pdf>.

<sup>6</sup> Barry R. Chiswick, “The Effect of Americanization on the Earnings of Foreign-born Men”, *Journal of Political Economy*, Vol. 86, No. 5, pp. 897-921 (1978).

Similar patterns have been found for data from later Censuses. Data from the 2014 American Community Survey show that nearly two-thirds of foreign-born immigrants have been educated abroad, reflecting the fact that most immigrants arrive in the U.S. as adults, not as school-age children or younger. A large portion of these immigrants who were educated outside of the U.S. are LEP – 34.6 percent, compared with only 8.2 percent of those educated in the U.S.<sup>7</sup> Furthermore, this study documents that a significant number of immigrants are working in jobs for which they are educationally overqualified – 42 percent have an education level that exceeds the need of their job, demonstrating that they are not able to make full use of their educational background in the U.S. job market.

When combined with age and work experience, the vocational impact of education in general—and ability to communicate in English in particular—are even more pronounced. The grid rules where a finding of disability can be directed for people who are unable to communicate in English all involve individuals with unskilled or no work experience, who are age 45 or older. They are likely to be decades away from their most recent education, and therefore to have less memory of their education and to have learned things that are less relevant to current work environments.

- The NPRM says “since we adopted these rules, the U.S. workforce has become more linguistically diverse and work opportunities have expanded for individuals who lack English proficiency.”

However, no evidence is presented to show that work opportunities in sedentary and light unskilled jobs have expanded for older adults who have limited proficiency in English. The NPRM groups together people who speak English “well,” “not well,” and “not at all” when it describes the work opportunities available for people with limited English proficiency, without providing any evidence that work opportunities have expanded for those who are unable to communicate in English. The Department of Labor’s O\*NET does not list any jobs for which knowledge of the English language is unnecessary or unimportant.<sup>8</sup>

Labor force participation rates among people who are LEP, even if broken down by educational levels, are insufficient justification for the proposed rule change. The data from SSA’s Office of Research, Evaluation, and Statistics provided in the NPRM docket groups all individuals with less than a high school diploma together, and does not consider the additional vocational factors of age (45 years old and older), work history (unskilled or none), and medical conditions (limiting an individual to sedentary or light work) that exist for all those for whom “inability to communicate in English” currently directs a finding of disability under these rules. The NPRM

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<sup>7</sup> Rob Paral, *Ready to Work: Understanding Immigrant Skills in the United States to Build a Competitive Labor Force*, Chicago Council on Global Affairs, January 2018, <https://www.thechicagocouncil.org/publication/ready-work-understanding-immigrant-skills-united-states-build-competitive-labor-force>.

<sup>8</sup> <https://www.onetonline.org/find/descriptor/result/2.C.7.a?s=1&a=1>

provides no research to show that the labor market has improved for such individuals. Studies of immigrant workers show that limited English proficiency is more common among those with lower-skilled jobs (60 percent) compared with those in middle-skilled jobs (52 percent) or in high-skilled jobs (19 percent).<sup>9</sup>

While the NPRM notes that “English language proficiency has the least significance for unskilled work because most unskilled jobs involve working with things rather than with data or people,” these jobs still do require some level of training, generally with verbal and/or written instruction. People with limited vocational skills — including education, experience, and language and literacy skills — find it harder to make occupational adjustments at advanced ages, which is why Congress incorporated vocational factors into the statute and why the current rule considers inability to communicate in English. It is harder to be retrained if you do not understand the language in which the training is presented. It is harder to transfer skills if you do not speak the language of potential employers.

Additionally, many unskilled jobs do require public contact and the ability to communicate in English. For example “fast food worker” (DOT 311.472-010) has a Specific Vocational Preparation (SVP) level of 2, meaning one month or less of training is necessary, but includes duties such as taking customer orders and communicating them to the kitchen. Other jobs entail physical duties that exceed the RFC of a claimant limited to light or sedentary work: a “landscape laborer” (DOT 408.687-014) also has an SVP of 2 but is heavy work, involving tasks like digging holes and hauling topsoil. And there are many unskilled jobs that require both English skills and physical abilities beyond the capabilities of anyone considered under the two grid rules threatened by this NPRM. For example, the job of “child care attendant” (DOT 355.674-010) also has an SVP of 2; it is considered medium work that can involve lifting, bathing, and dressing children and helping them to walk, and requires workers to be able to communicate with coworkers, the children, and their families. While there are probably more fast food workers, landscape laborers, and child care attendants in the United States than there were in 1978, that does not mean that people whose RFCs are limited to sedentary or light work and whose inability to communicate in English results in them are able to perform many of the duties required by these jobs.

Many disability claimants who are unable to communicate in English participated in the labor force before their impairments started or worsened. However, the fact that large percentages of claimants worked, as the NPRM states, “in occupations requiring lower level skills such as laborer, machine operator, janitor, cook, maintenance, and housekeeping” does not mean that the people whose disability claims are assessed at step 5 can do them. If these claimants could perform their past relevant work, they would have been denied at step 4 of the disability determination process. If they are being considered under these grid rules that direct a finding

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<sup>9</sup> Hamutal Bernstein and Carolyn Vilter, *Upskilling the Immigrant Workforce to Meet Employer Demand for Skilled Workers*, Urban Institute, July 2018, [https://www.urban.org/research/publication/upskilling-immigrant-workforce-meet-employer-demand-skilled-workers/view/full\\_report](https://www.urban.org/research/publication/upskilling-immigrant-workforce-meet-employer-demand-skilled-workers/view/full_report).

of disability for claimants unable to communicate in English, they are limited to sedentary or light work, which precludes such jobs. And if they did perform such jobs in the past, then their work history is likely unskilled, meaning that they lack skills to transfer to other occupations.

The NPRM's list of top ten past jobs held by disability beneficiaries whose inability to communicate in English factored into their disability decisions fails to show that these applicants could adjust to other work. To the contrary, it underscores the difficulty of job applicants who are severely impaired, older, unable to do their past work, unable to do physically demanding work, and unable to communicate in English — all factors that must be present for ability to communicate in English to be considered.

All but one of the top ten jobs listed in the NPRM are physically demanding, as defined in the Dictionary of Occupational Titles. Every applicant who reaches step 5 of the sequential determination process by definition cannot perform his or her past work (step 4). In addition, any applicant for whom the English-language rules applies by definition cannot perform medium or heavy work, which characterizes nine of the ten occupations listed. Even the one occupation on this list that is characterized as “light” — housekeeping — would not be an option for those who can perform only sedentary work. Rather than bolstering SSA's claim, these statistics directly undermine the notion that there are plentiful job opportunities available for the extremely narrow group of applicants for whom this rule applies.

- The arguments in this NPRM are directly contradicted by proposed rulemakings from other federal agencies.

In an October 10, 2018 NPRM, the Department of Homeland Security (DHS) stated that “an inability to speak and understand English may adversely affect whether an [immigrant] can obtain employment,” using that as a reason such an immigrant is more likely to become a public charge.<sup>10</sup> While Justice in Aging submitted comments opposing the DHS public charge proposal and believes that many people with limited English proficiency can be self-supporting, we assert that SSA must continue to consider the interaction between a claimant's medical and vocational limitations. People with severe medically determinable impairments lasting one year or more or expected to be fatal, and who cannot return to their past relevant work—the only people who are assessed at step 5 of the sequential evaluation process—are a group more likely to have obstacles to employment than the typical individual who is unable to communicate in English. When these limitations are combined with being over age 45 and having either a history of unskilled work or no past relevant work experience, as in the two current grid rules where inability to communicate in English direct a finding of disability, the barriers to employment are even greater.

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<sup>10</sup> 83 Fed. Reg. 51114.

- Claimants and beneficiaries living in Puerto Rico and outside the United States are not a reason to change the rules.

The NPRM says “our current rules treat English language proficiency as a relevant vocational factor even when claimants live in countries outside the U.S. or in U.S. territories where English is not a dominant language, leading to disparate results based on the location of the claimants.” But the issues in Puerto Rico and countries with totalization agreements are not a reason to change the program for everyone, especially given that the vast majority of claimants who are unable to communicate in English live in areas where English is the predominant language.

In most parts of the United States, the inability to communicate in English poses a significant barrier to work for the older, unskilled, impaired individuals who would be affected by this proposed rule. A very small number of SSDI beneficiaries are found disabled based on the current rule and live in communities where a language other than English predominates. The NPRM does not note that SSI benefits are not available to those living outside the United States, including those living in Puerto Rico.

The current policy provides uniformity, because people who are unable to communicate in English are treated equally regardless of where they live. Given that the U.S. citizens living in Puerto Rico and other territories can and often do move to the United States permanently or temporarily, and many workers receiving disability benefits while living abroad hold U.S. citizenship or otherwise have the right to live in the United States, it is appropriate to make rules based on the dominant language of the national economy, which remains English.

The number of people receiving disabled-worker benefits under totalization agreements is very small: just 2,021 worldwide in 2017,<sup>11</sup> with approximately one-third living in countries where English is the dominant language. The NPRM does not provide any information about how many disabled workers receiving benefits under totalization agreements were awarded benefits under the relevant two grid rules: it is possible that none of them were.

The NPRM shows that about one-third of 1 percent of all SSDI claimants live in Puerto Rico and cite inability to communicate in English.<sup>12</sup> It would be arbitrary to change the rules for *all* claimants based on this very small group. The agency should not make nationwide rules based on exceptional cases. The grid rules are intended to create a uniform standard to be applied in every case, ensuring that disability examiners and administrative law judges all use the same criteria in making decisions. Given the size and scope of Social Security, the rules should set forth a standard that is appropriate across the broadest set of circumstances. Most applicants — including applicants unable to communicate in English — live in communities where English is the dominant language.

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<sup>11</sup> <https://www.ssa.gov/policy/docs/statcomps/supplement/2018/5m.html>

<sup>12</sup> Office of the Inspector General, *Qualifying for Disability Benefits in Puerto Rico Based on an Inability to Speak English*, April 2015, [https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13062\\_0.pdf](https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13062_0.pdf).

Inability to communicate in English can indicate difficulties with making vocational adjustments and thus should continue be considered a vocational factor in the disability determination process.

Prohibiting adjudicators from considering “an individual's educational attainment to be at a lower education category than his or her highest numeric grade” because “the individual participated in an English language learner program, such as an English as a second language class”, as the NPRM proposes, makes little sense. Disability claimants who participated in programs designed to teach them to communicate in English, yet who remain unable to do so, clearly did not experience the educational attainment such programs are intended to provide. Though claimants who are unable to communicate in English may have been physically present, their educational attainment should not be considered equivalent to that of someone who both attended school and learned from it. In addition to not learning to communicate in English, such an individual likely missed out on the gains in reasoning, arithmetic, and communications abilities that SSA expects each additional year of education to convey.

A person who cannot adjust to communicating in a new language, even after attending English classes or living in a place where English is the dominant language, is also likely to have difficulty adjusting to the demands of a new job. In the October 10, 2018 NPRM,<sup>13</sup> the Department of Homeland Security (DHS) stated, “numerous studies have shown that immigrants’ English language proficiency or ability to acquire English proficiency directly correlate to a newcomer’s economic assimilation into the United States.” And yet people whose claims are adjudicated at step 5 of the sequential evaluation process would all have to adjust to different work, because at step 4 they were found unable to return to their past relevant work. Difficulty in learning to communicate in English is a valuable proxy for difficulty learning the duties of a different job, and therefore SSA should continue to consider it.

This difficulty is likely amplified for older claimants whose prior work gave them no transferrable skills. Age is properly considered a vocational factor in the disability determination process: mortality rates double from age 40 to 50 and again from age 50 to 60; conditions such as osteoarthritis, low back pain, and rheumatoid arthritis become much more prevalent as individuals leave the 30-44 age group and enter the 45-59 age group; cognitive decline in every category except vocabulary begins as early as age 45 and accelerates with age, as does hearing loss; people in their 40s and older often begin to experience vision changes that lead to difficulties reading and performing other close work, decreased color perception, and difficulty handling glare; there is a rapid decline in “perceptuomotor” skills between age 50 and 60; and older adults, on average, take longer to complete training, show lower levels of mastery when learning new skills, experience slower rates of learning, and spend more time off task.<sup>14</sup>

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<sup>13</sup> 83 Fed. Reg. 51114.

<sup>14</sup> Consortium for Citizens with Disabilities Social Security Task Force comments on “Advance Notice of Proposed Rulemaking on Vocational Factors of Age, Education, and Work Experience in the Adult Disability Determination Process,” 80 Fed. Reg. 55050 (Sept. 14, 2015) <http://c-c-d.org/fichiers/CCD-SSTF-Comments-ANPRM-on-vocational-factors-final-12-14.pdf>, pp.4-6.

A history of unskilled work experience, or no work experience at all, also creates a vocational disadvantage. When these adverse age and work experience profiles, plus an RFC limiting the claimant to sedentary or light work, are combined with the adverse factor of inability to communicate in English, the barriers to work are immense. Vocational adjustment is unlikely when all of these factors are present.

### The proposed rule will decrease efficiency and consistency

The grids were designed to increase efficiency and consistency in disability determinations. The proposed rule would reduce SSA's ability to reach either goal.

The proposed rule change will reduce efficiency for claimants who would be awarded benefits based grid rules 201.17 and 202.09. If they are denied benefits, many will file appeals, which are costly for SSA to adjudicate. Some will experience financial or medical peril, or even die, before receiving a final decision. Others will not pursue their claims (or may never apply for benefits in the first place), leaving them dependent on more costly government services like homeless shelters and emergency rooms than they otherwise might have needed. Many claimants will ultimately be awarded benefits as adjudicators move past the grids and to an individualized vocational analysis, but this requires them to wait longer for much-needed benefits and may require the testimony of a VE, which is not provided at the initial or reconsideration stages of the application process.

Adjudicators will be faced with assessing whether schooling completed in another language and/or another country provides "evidence that [the claimant's] educational abilities are higher or lower than the numerical grade level completed in school." While the proposed rule would not allow adjudicators to make this adjustment solely because the education was in another language, it is possible for education provided in another language to support a finding of educational abilities above or below the numerical grade completed in school. These determinations will be necessary for all claims adjudicated at step 5 of the sequential evaluation process, not just those who previously would have been determined disabled under grid rules 201.17 and 202.09. The determinations will be especially complicated when they occur with older individuals whose education occurred many decades in the past.

Under the proposed rule, VEs might need to testify not just about which jobs an individual with the claimant's vocational factors and residual functional capacity could perform, but also about how many of those jobs require the ability to communicate in English, so an adjudicator can determine if there are a significant number of jobs available. It is unclear what sources VEs would rely on for this information, and how SSA can provide consistent decisions if VE testimony on this issue varies substantially.

Consistency under the grids is a major advancement over the pre-grids, *ad hoc* approach to disability determinations. In addition to promoting consistency, the grids promote efficiency by eliminating the need for time-consuming, costly, and inconsistent testimony from vocational experts in certain circumstances.

The NPRM proposes using these rules for “new applications, pending claims, and continuing disability reviews (CDR), as appropriate, as of the effective date of the final rules.” While this NPRM should not be finalized at all, using it for claims pending on the effective date of the final rule is especially inefficient. At any given time, SSA has tens of thousands of claims in which hearings have been held and decisions are in the process of being written; some decisions are not issued for many months after the hearing. ALJs who hold hearings before the effective date of the final rule will not have adduced the appropriate evidence to determine whether claims should be granted under the final rule. They might not even know what the final rule will say. This problem will lead to supplemental hearings, the need to change decisions and decision-writing instructions, and additional Appeals Council and federal court appeals. Cases pending at the initial and reconsideration levels may see similar challenges. If SSA does finalize rules altering the disability determination process, it is more appropriate for them to become effective only with claims filed on or after the effective date.

### Conclusion

The NPRM provides no evidence that job opportunities for the narrow set of workers affected by this rule exist in “significant numbers in the national economy,” as the statute requires. Whether a disability claimant’s education was in English or another language, and whether the claimant can communicate in English, have significant effects on the work he or she is able to perform. SSA’s longstanding policy reflects these facts, and SSA has not provided sufficient justification for any change. The NPRM fails to provide a cost-benefit analysis and account for the significant and foreseeable costs to society that would result. It also fails to state any benefits that the proposed change would bring about. Furthermore, SSA’s plan to implement these changes is flawed and will lead to inefficiency in disability claims adjudication, which would further exacerbate SSA’s funding and staffing shortages. SSA should rescind this NPRM and maintain its current regulations.

Thank you for the opportunity to comment on these proposed regulations. If there are questions concerning this submission, please contact Tracey Gronniger, at [tgronniger@justiceinaging.org](mailto:tgronniger@justiceinaging.org).

Respectfully submitted,

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