



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

April 2, 2019

Nancy Berryhill
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted via 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 the Social Security Task Force of the Consortium for Citizens with Disabilities (CCD). CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 57 million children and adults with disabilities and their families living in the United States. CCD's Social Security Task Force ("CCD Task Force") focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

Introduction and Background

The Social Security Administration (SSA) uses a strict standard to determine if an individual qualifies for disability benefits. Claimants must have severe impairments that last at least 12 months or are expected to result in death; additionally, they must either meet or equal a "listing" for an impairment or be determined to be unable to return to past relevant work and unable to make an adjustment to other work. The Social Security Act requires SSA to consider the claimant's age, education, and work experience to decide if he or she can adjust to other work.

SSA cannot consider the vocational factors of age, education, and work experience in isolation, but must address the interplay among them. Further, SSA must consider how these factors combine with a claimant's physical and mental abilities, known as their residual functional capacity or "RFC." While a claimant experiencing adversity in one of those areas might be able to adjust to other work, the more severe the adversity and the more vocational factors in which a claimant experiences adversity, the more limited he will be in his ability to adjust to other work. One issue currently considered as part of the educational factor is a claimant's ability to communicate in English.

Inability to communicate in English is never the sole reason for an award of disability benefits. Indeed, many disability claimants who are unable to communicate in English are denied. For

ability to communicate in English to be considered in SSA's "grid" rules, claimants must already be found to have severe impairments that either last 12 months or will result in death and must already be determined to be unable to return to past relevant work. Then, there are only two places in the "grids" where inability to communicate in English changes whether the adjudicator is directed to a finding of disability:

- People age 45-49 whose RFC limits them to sedentary work and who have either unskilled or no past relevant work experience.
- People age 50-54 whose RFC limits them to light work and who have either unskilled or no past relevant work experience.

In Fiscal Year 2016, there were 2,548,732 initial disability decisions, of which 33% were favorable. Of these, the supporting materials in the NPRM indicate 2,487—or 0.29%—were awarded based on these grid rules.

Even if the grids direct a finding of non-disability, a claimant can be found disabled if his or her RFC includes exertional and non-exertional limitations that preclude adjustment to other work. The grids do not consider limitations in memory or concentration; the need to avoid dust, noxious fumes, or extremes of heat or cold; frequent breaks (for example, to test and adjust blood sugar); difficulty with handling or fingering; or other factors that could reduce the ability to adjust to other work. SSA will need to go beyond the grids and rely on vocational expert testimony in more cases if the proposed rule is finalized. This is not efficient and will have serious consequences to affected claimants.

SSA's justification for the rule change is inaccurate and inconclusive

SSA's longstanding policy is correct. "Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language." SSA should continue to consider ability to communicate in English as a vocational factor.

Claimants who are unable to communicate in English have fewer vocational opportunities than claimants with the same level of education who can communicate in English.

The NPRM says "claimants who cannot read, write, or speak English often have a formal education that may provide them with a vocational advantage." However, the portion of 20 C.F.R. §§404.1564 and 416.964 that would remain unchanged by the proposed rule distinguishes different educational categories based on "ability in reasoning, arithmetic, and language skills." Each of these abilities is diminished for a person unable to communicate in English, regardless of their formal education.

Consider Mario, who received a high school degree in Italy and cannot communicate in English, and Lara, who is similarly unable to communicate in English but only completed the eighth grade in Brazil. Any additional ability in reasoning, arithmetic, and Italian language that Mario may possess is minimal compared to the detriment his and Lara's inability to communicate in English poses to their ability to adjust to new work.

Mario and Lara would both be unable to convey their abilities to an English-speaking potential employer on a job application or in an interview. Neither would be able to perform job duties expected of someone with her respective level of education: Mario would not display the reasoning abilities expected of a high school graduate in workplace situations where he cannot understand or discuss what is going on; Lara would be unable to perform arithmetic tasks involving a language in which she cannot communicate (for example, making change when a customer asks for her change as “a five and five singles”). The fact that Mario may have the Italian-language abilities expected of an Italian high school graduate does not make him better able to communicate with English speakers than Lara, even though she may have less proficiency in Portuguese.

As SSA states in Social Security Ruling (SSR) 85-15, the basic mental demands of competitive, remunerative, unskilled work include the ability (on a sustained basis) to understand, carry out, and remember simple instructions; the ability to respond appropriately to supervision, coworkers, and usual work situations; and the ability to deal with changes in a routine work setting. That SSR was correct when it stated that a “substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base. This, in turn, would justify a finding of disability because even favorable age, education, or work experience will not offset such a severely limited occupational base.” Mario and Lara, and other people who are unable to communicate in English, have an occupational base that is equally or perhaps even more limited: Understanding and carrying out even simple instructions is harder or impossible when the instructions are conveyed in a language one does not speak. People who are unable to communicate in English literally cannot respond to English-speaking supervisors or coworkers. And such individuals may be unaware of or more easily confused by changes in the work setting: they could not read a sign saying “out of order” on a machine, could not understand a supervisor explaining a new work process, and would have more difficulty reporting problems or unusual circumstances. These severe limitations in the occupational base require consideration.

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 the current job market.

Demographic changes in the U.S. workforce do not justify a change to the medical-vocational guidelines

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.” Although there has been a decrease in the percentage of Americans who only speak English, this does not necessarily mean that speakers of other languages have greater work opportunities. If Mario and Lara could only communicate in Ixil (a Mayan dialect from Central America) or Tigrinya (spoken in Ethiopia and Eritrea), the fact that an increasing number of Americans know more-common foreign languages would not increase their work opportunities.

The NPRM also groups together people who speak English “well,” “not well,” and “not at all” under the banner of “limited English proficiency.” But it should be obvious that those who can speak English “well” have different vocational options than those who speak it not at all. Similarly, the ORES data provided in the NPRM docket groups all individuals with less than a high school diploma together; it does not consider the additional factors of age (at least 45), work history (unskilled or none), and medical conditions (severe, lasting at least 12 months or expected to result in death, limiting an individual to sedentary or light work) that exist for all claimants for whom inability to communicate in English currently dictates a finding of disability. The NPRM has not shown that the labor market has improved for such individuals.

The mere presence of more low-skilled jobs in the national economy is similarly irrelevant. Some unskilled jobs are part-time, temporary, or otherwise not at the SGA level. Also, 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. Some unskilled jobs require public contact and English skills: supermarket cashiers must talk with their customers and need to know the names of different types of fruits and vegetables so they can look up and key in produce codes. Other jobs, like gravediggers, require less public contact but more demanding physical duties. And some unskilled jobs, like in childcare, require both English abilities and physically demanding work such as carrying children and preparing meals. Even if there were more cashiers and gravediggers and child care providers than there used to be, people whose RFCs limit them to light or sedentary work and who cannot communicate in English are still unable to perform 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” before applying for disability benefits does not mean they can perform these jobs now. Any claimant whose age, education, work experience, and RFC are being assessed to see if there are other jobs they can perform have already been found unable to return to their past relevant work at an earlier stage of SSA’s sequential evaluation process. All claimants considered under the grid rules that direct a finding of disability for claimants unable to communicate in English are limited to sedentary or light work, which the jobs listed above are not. And if someone who worked as a laborer or janitor in the past applies for disability benefits and is found to have an RFC that limits him to sedentary work, then his work history is likely unskilled, meaning that he lacks skills that transfer to other occupations.

Contradiction with proposed “public charge” rule

The arguments in this NPRM are also directly contradicted by proposed rulemakings in 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. While CCD does not support the DHS public charge proposal and believes that many people with limited English proficiency—and/or with disabilities—can be self-supporting, disability claimants who have 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 for whom educational factors are considered during 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 can direct a finding of disability, the barriers to employment are even greater.

Claimants and beneficiaries 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. The vast majority of claimants who are unable to communicate in English live in places where English predominates, and some claimants who are unable to communicate in English are also unable to communicate in the predominant language where they live (for example, five Vietnamese refugees have been resettled in Puerto Rico; their English and Spanish-language abilities are unknown).

The current policy also 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, 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 are unable to communicate in English or were awarded benefits under the relevant two grid rules: it is possible that none of them were.

Similarly, the NPRM describes in detail the number of claimants in Puerto Rico who reported an inability to communicate in English and describes the fact that many reported a high school education or more. Yet it obscures the fact that of the 11,564 Puerto Rican claimants reporting an inability to communicate in English in FY 2016, just 777 were awarded benefits at the initial level based on the relevant grid rules. It does not explain whether any of the 777 had high school degrees. Fiscal Year 2016 may also have been an outlier year, given that the OIG report cited in the NPRM found only 244 claimants in calendar years 2011-2013 who were granted benefits by Puerto Rico’s DDS (at either the initial or reconsideration level) based on these grid rules.

Adjudicators should be allowed to consider the language of instruction and participation in English language learner programs

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 would, makes little sense. Disability claimants who were physically present

in programs designed to teach them to communicate in English but who still cannot do so, clearly did not experience the same educational attainment as a person who attended such programs and learned what they were taught. In addition to not learning to communicate in English, claimants who are still unable to communicate in English likely missed out on the gains in reasoning, arithmetic, and communications abilities that SSA expects each additional year of education to convey.

Inability to adjust to a new language can indicate challenges adjusting to new work

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. All claimants whose ability to communicate in English is considered would all have to adjust to different work, because they were all found unable to return to their past relevant work—if they could return to past relevant work, they would have been denied. 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. As the Task Force wrote in a response to a 2015 SSA ANPRM, 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. 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 and the worker cannot communicate with supervisors or coworkers.

The proposed rule will decrease efficiency

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

More, and more costly, appeals will be necessary

The proposed rule change will reduce efficiency for claimants who would currently be awarded benefits based on the grids. If the proposed rule is finalized and they are denied benefits, many will file appeals to obtain vocational expert testimony. This is costly for SSA and will contribute to the agency’s backlog. Some claimants will become homeless, hospitalized, or deceased while they await adjudication. Claimants who are dissuaded from appealing or applying will require more costly government services like homeless shelters and emergency rooms than they otherwise might have needed.

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. The NPRM does not explain how adjudicators will be taught and monitored as they compare education provided in different countries, in different languages, often many decades ago. Also, 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. Many vocational experts lack the expertise to do so, and it is likely that different VEs will provide wildly inconsistent testimony on this topic.

SSA’s implementation plan is flawed

While this NPRM should not be finalized at all, SSA’s plans to use it on claims pending on the effective date of the final rule will make it worse. Cases where decision-writing is pending or decisions have already been written may need to be re-done, including scheduling supplemental hearings. There will likely be additional appeals and remands from the Appeals Council and federal courts. If SSA does finalize rules altering the disability determination process, it should make the rules effective on claims filed on or after a given date.

Conclusion

There is no justification for this proposed rule. 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. Furthermore, SSA’s plan to implement these changes is flawed, will harm people with disabilities, and will lead to inefficiency in disability claims adjudication. SSA should rescind this NPRM and maintain its current regulations.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

Autistic Self Advocacy Network
Center for Public Representation
Justice in Aging
National Alliance on Mental Illness
National Association of Disability Representatives
National Committee to Preserve Social Security and Medicare
National Organization of Social Security Claimants’ Representatives
Paralyzed Veterans of America
The Arc of the United States