



**Seattle**  
Office of Immigrant and  
Refugee Affairs  
**Cuc Vu, Director**

April 2, 2019

Office of Regulations and Reports Clearance  
Social Security Administration  
3100 West High Rise Building  
6401 Security Boulevard  
Baltimore, Maryland 21235-6401  
Submitted via [www.regulations.gov](http://www.regulations.gov)

**Re: Removing Inability to Communicate in English as an Education Category, Docket No. SSA-2017-0046**

Dear Director O'Brien:

I am writing on behalf of the City of Seattle Office of Immigrant and Refugee Affairs (OIRA). The City submits this comment in response to the proposed rule published by the Social Security Administration in their Notice of Proposed Rulemaking (NPRM) posted on February 1, 2019. This NPRM proposes to eliminate the education category "inability to communicate in English" when considering applications for Social Security Disability Insurance (SSDI).

**The City of Seattle strongly opposes the proposed rule to remove "inability to communicate in English" as an education category.**

Seattle created the Office of Immigrant and Refugee Affairs (OIRA) in 2012 to improve the lives of Seattle's immigrant and refugee families. In line with the City of Seattle values of social justice and equity, OIRA works to strengthen immigrant and refugee communities by engaging them in decisions about the City of Seattle's future and improving the City's programs and services to meet the needs of all constituents. We believe supporting immigrants to integrate into American society creates a stronger future for our nation. Just as previous immigrants did before, today's immigrants are tomorrow's U.S. citizens who will be fully engaged in the cultural and civic life of our society both locally and nationally.

To that end, our office funds and facilitates numerous programs that support the integration of immigrants into Seattle's civic society and workforce. Our programs assist immigrants of all ages and educational backgrounds. Many of our programs serve clients who lack formal education, including many elders who are English Language Learners (ELL) or Limited English Proficient (LEP).

Approximately 29 percent of immigrants in Seattle-King County report that they speak English "less than very well."<sup>1</sup> The inability to speak English proficiently may pose an obstacle in obtaining stable,

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<sup>1</sup> American Community Survey, 2009-2013.

living-wage employment. Studies show that individuals with the lowest level of English-speaking ability are less likely to be employed, and if employed, less likely to be employed full-time. Those who work full-time earn less on average than their counterparts who speak only English.<sup>2</sup> This proposed rule, if implemented, will yield a disproportionate impact on low-income, ELL/LEP immigrants who rely on these benefits for their health and well-being.

**The rationale for including “inability to communicate in English” as an education category remains valid, and there is nothing to justify a change to the rule.**

In considering the individual’s ability to speak and understand English, current SSA regulations state, “We consider a person’s ability to communicate in English when we evaluate what work, if any, he or she can do.”<sup>3</sup> Since 1967, the SSA has considered age, education and work experience in its determination of whether an applicant qualifies for SSDI. These considerations were codified in 1978, and a grid was created to weigh numerous factors, including age, education, work experience, and “residual functional capacity” (how well an individual can perform work tasks despite their disability). The education factor considers, among other things, the applicant’s (in)ability to communicate in English.<sup>4</sup> Under the current rule, an individual’s inability to communicate in English would only contribute to a possible disability determination if the applicant is over 45 years old, as those younger are considered more able to shift to other vocations where English skills are not as necessary. The disability determination process is currently five sequential steps, and the proposed rule aims to eliminate the “inability to communicate in English” component of the final step.

The SSA’s rationale for this proposed rule change is based on a flawed notion of how the U.S. economy has changed in the last 40 years. The NPRM states, “[t]he U.S. workforce has become more linguistically diverse and work opportunities have expanded for individuals who lack English proficiency.” Among claimants who report an inability to read, write or speak English, the NPRM reports that increasingly, those individuals have a high school education, and are more likely, when compared to less educated claimants, to have past work experience at higher skill levels.

The SSA suggests that this trend of claimants having more education and work experience at higher skill levels means that it has become easier for those individuals to get a job because of that education and work experience, even if they cannot communicate in English. The SSA bases this conclusion on their claims data, and a Brookings Institution study on low-skill workers. While these trends may reflect demographic changes in the LEP/ELL population, they do not necessarily lead to the conclusion that the

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<sup>2</sup> Jennifer Cheeseman and Hyon B. Shin, Population Division, U.S. Census Bureau, *How Does Ability to Speak English Affect Earnings?* [https://www.census.gov/hhes/socdemo/language/data/acs/PAA\\_2005\\_AbilityandEarnings.pdf](https://www.census.gov/hhes/socdemo/language/data/acs/PAA_2005_AbilityandEarnings.pdf)  
<sup>3</sup> 20 CFR section 404.1564(b)(5).

<sup>4</sup> 20 CFR section 404.1564(b), stating, “The term *education* also includes how well you are able to communicate in English since this ability is often acquired or improved by education...Since the ability to speak, read and understand English is generally learned 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 has put forth in the NPRM. Even if more claimants report having a high school education, and that having a high school education makes it more likely that they have had past work experience at a higher skill level, this claim does not differentiate between higher skill level work performed in the U.S. versus work performed in a location where the claimant had the ability to communicate and was likely a native speaker of a local language or dialect.

As an example, a claimant who is a 60-year-old former nurse from China has both advanced education and past employment at a higher skill level. But if the claimant spoke only Mandarin in school and the workplace, and could not communicate in English, the individual's education, much less their skills and experience as a nurse, would probably not translate into better options in the U.S. job market where there are relatively few professional-level jobs in the medical field available to LEP workers. If the claimant has significant physical or mental impairments, their options would be even more limited. To not consider this individual's inability to communicate in English as a relevant factor in a comprehensive disability determination seems ill-informed to the severe limitations that this person would face as an LEP individual looking for work.

**The increased linguistic diversity of the U.S. workforce has not resulted in jobs appropriate for all types of workers.**

The NPRM states that "work opportunities have expanded and labor force participation has increased" for individuals who, in the disability determination context, might be classified as unable to communicate in English. This is partially the result of technological advances facilitating the replacement of moderate-skill jobs with low-skill jobs which are generally more attainable for LEP workers. The NPRM emphasizes that lack of English proficiency does not typically prevent low-skill workers from getting low-skill jobs (as the NPRM provides the examples of laborer, machine operator, janitor, cook, maintenance, and housekeeping), and that many LEP workers have past work experience in these vocations. While it is true that many LEP individuals are persistent in finding a job and have valuable experience in their vocations, the NPRM does not address the fact that these lower-skill jobs may not be appropriate for certain claimants, including elderly individuals or those with physical limitations.

The mere fact that the U.S. workforce has become more linguistically diverse (defined as a greater number of workers who do not speak English) does not mean that the inability to speak English is not directly relevant to one's job prospects, especially if one's training, experience and abilities do not align with the vocations typically accessible to LEP workers. Changing workforce trends do not dictate what is fair for an individual claimant whose ability to gain lawful employment—in conjunction with a diagnosed disability—are directly affected by his or her inability to communicate in English.

**This proposed rule unfairly targets LEP immigrants who rely on SSDI for their basic needs.**

As stated previously, the consideration of the claimant's inability to communicate in English is but one factor in a five-step process. The individuals who ultimately qualify for SSDI are deemed eligible based on a combination of other factors. In our current political climate, it is revealing, but not necessarily

surprising, that the SSA is seeking to alter a single factor that applies predominantly to individuals born outside the U.S.

While some individuals born in the U.S. lack the ability to communicate in English, this proposed rule will clearly have a disproportionate impact on those who were born outside of the U.S. The NPRM justifies the proposed rule by arguing that the current rule leads to illogical results for claimants who live outside the U.S. or in U.S. territories where English is not the dominant language, in that it's unfair for one's inability to communicate in English to be considered a detriment. The circumstances of claimants from Puerto Rico, where Spanish is spoken more commonly than English, should *not* be used as a justification to dismiss the vastly different circumstances of a claimant residing in an English-dominant location. However, as claims from Puerto Rico represent just 1 percent of disability allowances, the logical solution is not to change the rules for the remaining 99 percent. If the SSA seeks a solution to address this particular issue, the rule change should be drawn more narrowly, rather than applying to individuals living in English-dominant areas who face a significant disadvantage for their inability to communicate in English.

**SSA employees believe the proposed rule will cause inefficiencies and lead to unfair resolutions.**

Past and current SSA employees spoke to their concerns about this proposed rule, highlighting the frustration it would cause for front-line employees and the unfair results it would cause.

Steve Kofahl, a retired SSA employee who worked at field offices in New York, Oregon, and Washington during his 42 years with the agency, expressed deep reservations about the proposed rule change, as it would serve to exclude individuals who would currently qualify for the benefit. He cited the issue in Puerto Rico as a possible rationale for the proposed rule change, but emphasized that the change would negatively impact a far greater number of people residing in English-dominant areas. Mr. Kofahl stated that the rule change would cause inefficiencies because claimants who would otherwise have been approved after the initial application or a single appeal will likely appeal their cases to the Administrative Law Judge (ALJ).

We also spoke to a judicial assistant with the Office of Hearing Operations (OHO), who works closely with the ALJs and who asked to remain anonymous. She expressed concern over the specificity of the proposed rule change. By the time a claimant gets to step 5 of the process, where an ALJ is examining their educational background, including their ability to communicate in English, many other factors are at play. The claimant's inability to communicate in English is given only a proportionate amount of weight in the final determination.

But as the "inability to communicate in English" factor only plays a small role in the overall determination process, and affects a relatively small percentage of claimants, the OHO assistant wonders why the change is being proposed at all, when the change will have a disproportionate effect on the LEP worker population, most of whom are immigrants. She believes that the implementation of the proposed rule will result in meritorious claims being denied, as this factor was intentionally included in the original grid to acknowledge the unique difficulties that LEP workers encounter in the U.S. workforce.

**The current regulations are sufficiently restrictive, and the proposed rule will only cause unnecessary obstacles for those who truly need the benefit.**

The current regulations impose a narrow framework in which a claimant's "inability to communicate in English" is considered alongside many other factors. Removing this one particular factor via the proposed rule will disproportionately disqualify individuals born outside of the U.S. from receiving the benefits they need to survive. While there may be improvements needed within the disability determination process, it is short-sighted and unjust for such changes to fall exclusively on the shoulders of LEP workers. While the U.S. economy, along with workforce demographics, have changed in the last 40 years, these changes have not eliminated the need for a claimant's English ability to be considered as a relevant factor in the disability determination process.

Thank you for taking the time to review and respond to this comment. The City of Seattle is strongly opposed to this proposed rule and requests that the SSA withdraw it or amend it significantly such that it would not produce the unjust, negative impacts described herein.

Sincerely,



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