

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA-2017-0046]

RIN: 0960-AH86

Removing Inability to Communicate in English as an Education Category.

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to eliminate the education category “inability to communicate in English” when we evaluate disability claims for adults under titles II and XVI of the Social Security Act (Act). Changes in the national workforce since we added this category to our rules in 1978 demonstrate that this education category is no longer a reliable indicator of an individual’s educational attainment or the vocational impact of an individual’s education. The proposed revisions reflect research and data related to English language proficiency, work, and education; expansion of the international reach of our disability programs; and audit findings by our Office of the Inspector General (OIG). The proposed revisions would help us better assess the vocational impact of education in the disability determination process.

DATES: To ensure that your comments are considered, we must receive them by no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method.

Regardless of which method you choose, please state that your comments refer to Docket

No. SSA-2017-0046 so that we may associate your comments with the correct regulation.

CAUTION: You should be careful to include in your comments only information you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. Internet: We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at <http://www.regulations.gov>. Use the webpage's "Search" function to find docket number SSA-2017-0046 and then submit your comment. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. Fax: Fax comments to (410) 966-2830.

3. Mail: Address your comments to Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235-6401.

Comments and background documents are available for public viewing on the Federal eRulemaking portal at <http://www.regulations.gov> or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Dan O'Brien, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235-6401, (410) 597-1632. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213, or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION:

Background

Current disability rules for adults

Title II of the Act provides for the payment of disability insurance benefits to fully insured individuals under the Act. Title II also provides for the payment of child's insurance benefits for individuals who become disabled before attaining age 22, and for the payment of widow's and widower's insurance benefits for disabled widows, widowers, and surviving divorced spouses of insured individuals.¹ In addition, title XVI of the Act provides for Supplemental Security Income (SSI) payments to eligible individuals who are aged, blind, or disabled and have limited income and resources.²

For adults (including individuals claiming child's insurance benefits based on disability under title II), the Act defines "disability" under both titles II and XVI as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.³

In many cases, the Act requires us to consider an adult claimant's education when we determine whether or not he or she is disabled. The Act states that an adult shall be determined to be under a disability only if his physical or mental impairment(s) are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful

¹ See sections 202(d)(1)(B)(ii), (e)(1)(B)(ii), (f)(1)(B)(ii), 223(a) of the Act, 42 U.S.C. 402(d)(1)(B)(ii), (e)(1)(B)(ii), (f)(1)(B)(ii), 423(a).

² Section 1611(a) of the Act, 42 U.S.C. 1382(a).

³ See sections 223(d)(1)(A), 1614(a)(3)(A) of the Act, 42 U.S.C. 423(d)(1)(A), 1382c(a)(3)(A).

work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.⁴

We use a five-step sequential evaluation process to determine whether an adult is disabled based on this statutory definition.⁵ If we are unable to find an individual disabled or not disabled at a given step, we proceed to the next step.⁶ If we proceed to the fifth and final step, we consider the individual's residual functional capacity (RFC), which is the most the individual can still do despite his or her limitations,⁷ together with the individual's vocational factors of age, education, and work experience,⁸ to determine if the individual can make an adjustment to perform other work previously not performed.⁹ We find individuals to be disabled if they cannot make an adjustment to perform other work.¹⁰ We find individuals not disabled if they can make an adjustment to perform other work.¹¹ Other work that individuals can adjust to must exist in significant numbers in the

⁴ See sections 223(d)(2)(A), 1614(a)(3)(B) of the Act, 42 U.S.C. 423(d)(2)(A), 1382c(a)(3)(B).

⁵ 20 CFR 404.1520(a)(4) and 416.920(a)(4).

⁶ Id. At the first step, we consider the individual's work activity, if any. If the individual is doing substantial gainful activity, we will find the individual not disabled. At the second step, we consider the medical severity of the individual's impairment(s). If the individual does not have a severe medically determinable physical or mental impairment that meets the duration requirement, or a combination of impairments that is severe and meets the duration requirement, we will find the individual not disabled. At the third step, we also consider the medical severity of the impairment(s). If the individual has an impairment(s) that meets or equals one of our listings in 20 CFR Part 404, Subpart P Appendix 1 and meets the duration requirement, we will find the individual is disabled. If the individual is found not disabled at the third step, we consider our assessment of the individual's residual functional capacity and his or her past relevant work at the fourth step. If the individual can still do his or her past relevant work, we will find that the individual is not disabled. At the fifth and last step, we consider our assessment of the individual's residual functional capacity and his or her age, education, and work experience to see if the individual can make an adjustment to other work. If so, we will find that the individual is not disabled. If the individual cannot make an adjustment to other work, we will find the individual disabled. See 20 CFR 404.1520(a)(4) and 416.920(a)(4).

⁷ See 20 CFR 404.1545 and 416.945.

⁸ See 20 CFR 404.1520(g) and 416.920(g).

⁹ 20 CFR 404.1520(a)(4)(v) and 416.920(a)(4)(v).

¹⁰ Id.

¹¹ Id.

national economy.¹² At the final step of our sequential evaluation process, we use the Medical-Vocational Guidelines (grid rules) to administer the Act’s definition of disability and direct or guide determinations and decisions about whether individuals are disabled.¹³ The education category “inability to communicate in English” is administered through the grid rules.

Current policy for education as a vocational factor

In this NPRM, we propose to eliminate the education category of “inability to communicate in English” from step five of the disability sequential evaluation process. Instead, we would consider an individual’s education using the other current education categories of high school education and above, marginal education, limited education, and illiteracy.

Our current rules explain how we evaluate the vocational factor of education.¹⁴ Education is primarily used to mean formal schooling or other training that contributes to an individual’s ability to meet the vocational requirements of work, such as reasoning ability, communication skills, and arithmetic ability.¹⁵ However, a lack of formal schooling does not necessarily mean that an individual is uneducated or does not have reasoning, communication, and arithmetic abilities. Past work experience and the kind of responsibilities an individual had when they were working, daily activities, hobbies, or

¹² 20 CFR 404.1560(c) and 416.960(c).

¹³ 20 CFR 404, Subpart P, Appendix 2.

¹⁴ See 20 CFR 404.1564 and 416.964.

¹⁵ See 20 CFR 404.1564(a) and 416.964(a).

results of testing may show that the individual has significant intellectual ability that can be used to work.¹⁶

Generally, we will use individuals' highest completed numerical grade level to determine the education category.¹⁷ However, we may adjust an individual's education category if there is evidence that his or her educational abilities are higher or lower than the numerical grade level completed in school.¹⁸ We discuss the categories that examine such evidence below.

We currently use five categories of education: high school education and above, marginal education, limited education, illiteracy, and inability to communicate in English.¹⁹ These categories of education are organized into four levels in the grid rules: high school graduate or more; limited or less; marginal or none; and illiterate or unable to communicate in English.

High school education and above means abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above.²⁰ We generally consider that someone with these educational abilities can do semi-skilled through skilled work. For individuals in this category, we also consider whether there is recently completed education that provides for direct entry into skilled work. If they recently completed education allowing for direct entry into skilled work and are able to perform the work for which they received the education, we do not consider them to be

¹⁶ Id.

¹⁷ See 20 CFR 404.1564(b) and 416.964(b).

¹⁸ Id.

¹⁹ See 20 CFR 404.1564(b)(1)-(5) and 416.964(b)(1)-(5).

²⁰ See 20 CFR 404.1564(b)(4) and 416.964(b)(4).

disabled.²¹

Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs.²² We generally consider an individual with a 7th grade through the 11th grade level of formal education to have a limited education.

Marginal education means ability in reasoning, arithmetic, and language skills needed to do simple, unskilled jobs.²³ We generally consider an individual with formal schooling at a 6th grade level or less to have a marginal education.

Illiteracy means the inability to read or write.²⁴ We consider an individual illiterate if he or she cannot read or write a simple message, such as instructions or inventory lists, even though the individual can sign his or her name. Generally, we expect an illiterate individual to have little or no formal schooling.

Our rules explain that we consider inability to communicate in English an education category because the ability to speak, read, and understand English is generally learned or increased in school.²⁵ Our current rules further explain that because English is the dominant language of this country, it may be difficult for someone who does not speak and understand English to do a job, regardless of the amount of education he or she may have in another language.²⁶ Therefore, under our current rules, we consider an

²¹ See 20 CFR 404, Subpart P Appendix 2, rules 201.00(d) and (g), and Tables No. 1, 2, and 3.

²² See 20 CFR 404.1564(b)(3) and 416.964(b)(3).

²³ See 20 CFR 404.1564(b)(2) and 416.964(b)(2).

²⁴ See 20 CFR 404.1564(b)(1) and 416.964(b)(1).

²⁵ See 20 CFR 404.1564(b)(5) and 416.964(b)(5).

²⁶ This policy dates to 1978. See 43 FR 55349 (1978) (codified at 20 CFR 404.1507, 416.907 (1979)). Prior to that time, our rules did not specifically address the inability to communicate in English as a vocational factor. See 20 CFR 404.1502(e) and 416.902(e) (1978). Rather, since 1960, 25 FR 8100, 8101 (1960)

individual's ability to communicate in English when we evaluate what work, if any, he or she can do. We do not consider fluency in other languages.²⁷

Based on the organization of education categories in the current grid rules, an individual who is unable to communicate in English may be considered under the grid rules specifying education level of "illiterate or unable to communicate in English" or under the broader category of "limited or less" or "marginal or none," depending on the individual's age and RFC.²⁸

Under the grid rules, age 45 is the earliest point at which English language proficiency can make a difference in disability determination.²⁹ In other words, the "inability to communicate in English" education category makes no difference as to the outcome of disability determination for individuals under 45 years of age. The grid rules are premised on the idea that for individuals under age 45, the inability to communicate in English does not pose a significant vocational limitation because being younger gives them an advantage in adjusting to other work.³⁰ Our current rules are also based on the premise 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.³¹

(codified at 20 CFR 404.1502(e) (1961)), the rules provided that education and training are factors in determining an individual's employment capacity, that a lack of formal schooling was not necessarily proof that an individual is uneducated, and that the kinds of responsibilities an individual had while working may indicate an ability to do more than unskilled work, even though an individual's formal education has been limited.

²⁷ See 20 CFR 404.1564(b)(5) and 416.964(b)(5).

²⁸ See 20 CFR 404.1564(b)(5) and 416.964(b)(5).

²⁹ See 20 CFR 404, Subpart P Appendix 2, Table No. 1.

³⁰ See 20 CFR 404, Subpart P Appendix, rule 201.00(h)(2).

³¹ See 20 CFR 404, Subpart P Appendix 2, rules 201(h)(4)(i) and 202(g).

Why we are proposing to revise our rules

In 1978, we promulgated the five-step sequential evaluation process and adopted the grid rules, under which we consider the interaction of the individual's residual functional capacity, age, education, and work experience to determine whether or not an individual is disabled under our rules. We propose to revise the rules for how we consider an individual's education in relation to the inability to communicate in English for several reasons. Central to our proposed revisions is that our current rules do not take into account that claimants who cannot read, write, or speak English often have a formal education that may provide them with a vocational advantage. If a claimant meets the current criterion of "inability to communicate in English," we generally disregard the amount of formal schooling the individual may have and evaluate the claim in the same manner as we do for a claim filed by an illiterate individual. Moreover, 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. Further, 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. Claimants who are unable to read, write, or speak English often have formal education that could provide a vocational advantage

Claimants who report an inability to read, write, or speak English often report having a high school education or more. In fiscal year 2016, approximately 49% of title II claimants and 39% of title XVI claimants who reported an inability to read, write, or

speak English,³² also reported having completed a high school education or more.³³

Further, the claimants who reported an inability to read, write, or speak English and who had at least a high school education had past work experience at higher skill levels, when compared to the claimants with less education.³⁴ Our claims data indicate that higher levels of education may provide a vocational advantage, even for individuals who are unable to communicate in English.³⁵

The U.S. workforce has become more linguistically diverse

Since we adopted our current rules in 1978, linguistic diversity in the national economy has increased, which has changed the way the inability to communicate in English affects an individual's ability to work. For purposes of the data analysis in this NPRM, we refer to individuals who self-identified in the U.S. Census Bureau's (Census) American Community Survey as speaking a language other than English at home and speaking English "well," "not well," or "not at all" collectively as LEP.³⁶ We selected

³² Under our current rule, these claimants may fall under the "illiterate" or "inability to communicate in English" category. See 20 CFR 404.1564(b)(1) and (5), and 416.964(b)(1) and (5).

³³ This conclusion is based on our analysis of the initial determination data for all fiscal year 2016 claims in the U.S. Table 1: Self-reported education level of claimants reporting an inability to read, write or speak English, Adult Initial Determinations, FY 2016 (Table 1), available at regulations.gov as a supporting and related material for docket SSA-2017-0046. We note that in the fiscal year 2016, we adjudicated over 1.5 million and 1.2 million claims, respectively, under titles II and XVI at the initial level, and approximately 7.7% (118,815) title II claimants and 10.1% (128,084) of the title XVI claimants reported an inability to read, write, or speak English.

³⁴ This conclusion is based on our analysis of the title II claims allowed under the grid rules 201.17 and 202.09 at the initial level within the U.S. in fiscal year 2017. See Graph 1: Self-reported education and Specific Vocational Preparation (SVP) level of past relevant work by Title II claimants reporting an inability to read, write, or speak English allowed under 201.17 or 202.09, Initial Determinations within U.S. and U.S. territories, FY 2017, available at regulations.gov as a supporting and related material for docket SSA-2017-0046.

³⁵ Id.

³⁶ Our analysis is based on the data published by the Census, which is the primary source of data on languages spoken in the U.S. To obtain data on an individual's ability to speak English, Census has been asking three questions since 1980. The first of the three part-question asks if the respondent speaks a language other than English at home and gives the option to choose "No, only speaks English" or "Yes." If the respondent selects "Yes," the second part of the question asks the respondent to identify the language spoken at home. Finally, the third part of the question asks the respondent to rate his or her ability to speak

this definition consistent with how the Census defines LEP.³⁷

In absolute numbers, the working age population (ages 25-64) with LEP increased from approximately 5.4 to 17.8 million between 1980 and 2016, while more than doubling, from 5.1% to 10.5%, as a percentage of the population.³⁸ Within this group, the number of individuals who spoke no English more than quadrupled from approximately 682,000 to 2.8 million (representing growth from 0.6% to 1.7%, as a percentage of the working age population).³⁹

Between 1980 and 2016, the number of non-English speaking workers in the 25-64 age range grew from approximately 373,000 to 1.7 million.⁴⁰ During the same period, the labor force participation rate for working age individuals who speak no English increased from approximately 54.7% to 61.5%.⁴¹ Notably, considering the working age population with “less than high school diploma,” the 2016 labor force participation rate for those speaking no English (60.5%) surpassed the labor force participation rate of

English as “very well,” “well,” “not well,” and “not at all.” See Measuring America: The Decennial Censuses From 1790 to 2000, pp. 85, 92, and 101 available at <https://www.census.gov/prod/2002pubs/pol02-ma.pdf>. In this NPRM, we refer to individuals speaking only English at home as individuals speaking “only English.” We refer to individuals speaking another language at home and speaking no English as individuals speaking English “not at all” or as individuals speaking no English.

³⁷ The U.S. Census Bureau defines LEP as individuals who speak English less than “very well.” U.S. Census Bureau American Community Survey (ACS), What State and Local Governments Need to Know, p. 12, n. 8, February 2009, <https://www.census.gov/content/dam/Census/library/publications/2009/acs/ACSstateLocal.pdf>.

³⁸ See SSA Office of Research, Evaluation, and Statistics (ORES) analysis of 1980 Census and 2016 American Community Survey: English Proficiency, Table 1: Estimated working-age (25-64) population, by English proficiency and educational attainment, 1980 and 2016 (ORES Table 1). Available at [regulations.gov](https://www.regulations.gov) as a supporting and related material for docket SSA-2017-0046.

³⁹ *Id.* We note that ORES Tables refer to an individual speaking no English as an individual who “does not speak English.”

⁴⁰ See ORES analysis of 1980 Census and 2016 American Community Survey: English Proficiency, Table 2: Estimated labor force participation of working-age population (25-64), by English proficiency and educational attainment, 1980 and 2016 (ORES Table 2). Available at [regulations.gov](https://www.regulations.gov) as a supporting and related material for docket SSA-2017-0046.

⁴¹ *Id.*

those speaking “only English” (48.9%).⁴² In 1980, the reverse was true; working age individuals with less than a high school diploma speaking only English had a 60.7% labor force participation rate that exceeded the 54.5% rate for those speaking no English.⁴³

The increase in labor force participation by individuals who lack English proficiency may be in part due to the increase in low-skilled work in the national economy. In 2014, our Office of Research, Evaluation, and Statistics (ORES) prepared an Evidence Synthesis consolidating information from research we commissioned and other available research for the purposes of modernizing our vocational regulations.⁴⁴ ORES’ literature review on the vocational factor of education indicates that with the introduction of new technology replacing moderately skilled workers, there are fewer moderately skilled jobs and higher numbers of low and high skilled jobs.⁴⁵ Indeed, our claims data show that many claimants who may fall within the “inability to communicate in English” category have a history of working in occupations requiring lower level skills such as laborer, machine operator, janitor, cook, maintenance, and housekeeping.⁴⁶ Consistent with our claims data and ORES’ literature review, a Brookings Institution’s (Brookings)

⁴² Id.

⁴³ Id.

⁴⁴ See the Extraction of SSA’s Office of Research, Evaluation, and Statistics, “Evidence Synthesis: The Use of Vocational Factors in the Disability Determination Process” (Sept. 2014) (Extraction of Evidence Synthesis), available at regulations.gov as a supporting and related material for docket SSA-2017-0046. The Evidence Synthesis in its entirety is available at <https://www.regulations.gov/docket?D=SSA-2014-0081>.

⁴⁵ See the Extraction of Evidence Synthesis. See also Acemoglu, Daren, and Autor, David. 2011. “Chapter 12 – Skills, Tasks and Technologies: Implications for Employment and Earnings,” in Ashenfelter, O, and Card, D, eds. Handbook of Labor Economics, 4(B): 1043-1171 (available at regulations.gov as a supporting and related material for docket SSA-2017-0046).

⁴⁶ This is based on our analysis of over 2200 title II and XVI claims allowed under grid rules 201.17 and 202.09 in the fiscal year 2017 only within the U.S. States and the District of Columbia. See Table 2: Top 10 past relevant work held by Title II and Title XVI claimants found disabled under the grid rules 201.17 or 202.09, Adult Initial Determinations within U.S., FY 2016 (Table 2). Available at regulations.gov as a supporting and related material for docket SSA-2017-0046.

study of LEP workers in the U.S. found that a lack of English proficiency does not generally prevent low-skilled workers from obtaining employment.⁴⁷ Brookings' analysis shows that over 1 million individuals with LEP, including those who speak English "not at all," are represented in each of the following occupations: building and grounds cleaning and maintenance; production; construction and extraction; food preparation and serving; transportation and material moving; sales and related occupations; and office and administrative support.⁴⁸ In the first four of the listed occupations, the workers with LEP make up more than 10% of total workers.⁴⁹ In sum, both our claims data and external data indicate that work opportunities have expanded and labor force participation has increased for individuals who may fall within the "inability to communicate in English" education category.⁵⁰

The international reach of our title II disability program has steadily expanded since 1978

Since we adopted our current education categories in 1978, we have established a network of bilateral Social Security agreements that coordinate the U.S. Social Security

⁴⁷ Jill H. Wilson, Investing in English Skills: The Limited English Proficient Workforce in U.S. Metropolitan Areas, Metropolitan Policy Program, at Brookings Institution (September 2014), p. 10, available at https://www.brookings.edu/wp-content/uploads/2014/09/Srvy_EnglishSkills_Sep22.pdf.

⁴⁸ See Table 2. Occupations with at Least 1 Million LEP Workers, 2012. Id. at 13.

⁴⁹ Id.

⁵⁰ We acknowledge that the definition of LEP we used for purposes of the data analysis in this NPRM is not an exact match for the claimants who may fall within the "inability to communicate in English" education category. We also note that the "inability to communicate in English" education category is broader than what the ordinary meaning of the phrase "inability to communicate" may otherwise suggest and can apply to individuals who have no ability or some ability to communicate in English. Under our current rules, individuals who have some or even high capacity to read and write English may be found unable to communicate in English if they are unable to speak English. Alternatively, individuals who can speak some English but are unable to read English may be found unable to communicate in English. In POMS DI 25015.010 C.1.b we expressly state that an individual is unable to communicate in English when the individual cannot speak, understand, read "or" write a simple message in English. This means that even when an individual has some ability to do three out of four, the individual will still be categorized as unable to communicate in English if he or she cannot do all four. (<https://secure.ssa.gov/apps10/poms.NSF/lnx/0425015010>). The population described as LEP for the purposes of the data analysis in this NPRM is comparable to the claimant population who may fall under the "inability to communicate in English" education category.

program with the comparable programs of other countries.⁵¹ These international Social Security agreements, often called "totalization agreements," have two main purposes. First, they eliminate dual Social Security taxation, the situation that occurs when a worker from one country works in another country and is required to pay Social Security taxes to both countries on the same earnings. Second, the agreements help fill gaps in benefit protection for workers who have divided their careers between the U.S. and another country.

The international reach of our title II disability program has steadily expanded over the years. In 1978, we had a totalization agreement with only one country.⁵² We now have totalization agreements with 28 countries.⁵³ English is the predominant language in only four of those countries (Canada, United Kingdom, Ireland, and Australia). When an individual files a disability claim based in part on eligibility under a totalization agreement, we use the same five-step sequential evaluation process to determine whether he or she qualifies for disability benefits. Under our current rules, even if individuals applying for disability live in a country with a totalization agreement where English is not a dominant language, we must still classify them in the "inability to communicate in English" education category if they cannot speak, read, or write English. In light of the significant expansion of the totalization program since 1978, we believe our proposal to consider individuals' education level would strengthen our international disability program abroad.

⁵¹ Additional information is available at https://www.ssa.gov/international/agreements_overview.html.

⁵² Id.

⁵³ Id. These countries are Italy, Germany, Switzerland, Belgium, Norway, Canada, the United Kingdom, Sweden, Spain, France, Portugal, Netherlands, Austria, Finland, Ireland, Luxembourg, Greece, South Korea, Chile, Australia, Japan, Denmark, the Czech Republic, Poland, the Slovak Republic, Hungary, Uruguay, and Brazil.

OIG audit recommendation

Eligibility for the title II disability program benefits extends to U.S. nationals in the U.S. territories, which include Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Marianas Islands, and American Samoa. As we do for individuals in countries with totalization agreements, we currently consider the inability to communicate in English to be a vocationally relevant factor when adjudicating disability claims in all U.S. territories, regardless of whether English is the dominant language.⁵⁴ In 2015, OIG examined the trends associated with the application of existing grid rules involving the inability to communicate in English in Puerto Rico.⁵⁵ OIG's audit of claims in Puerto Rico indicated that the grid rules involving the inability to communicate in English merit a closer examination.

Following the audit, OIG recommended that we evaluate the appropriateness of the grid rules related to the inability to communicate in English when determining

⁵⁴ Among the U.S. territories, English is dominant language only in the U.S. Virgin Islands. In the U.S. Virgin Islands, 71.6% speak English only, 17.2% speak Spanish or Spanish Creole, 8.6% speak French or French Creole, and 2.5% speak other languages. Available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DPVI_VIDP2&prodType=table. As for the other territories, in American Samoa, 88.6% speak Samoan, 3.9% speak English only, 2.7% speak Tongan, 3% speak other Pacific Island languages, and 1.4% speak Asian languages. Available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DPAS_AS DP2&prodType=table. In Guam, 43.6% speak English only, 21.2% speak Philippine languages, 17.8% speak Chamorro, 10% speak other Pacific island languages, and 6.3% Asian languages. Available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DPGU_GUDP2&prodType=table. In Puerto Rico, 94.3% speak Spanish and 5.5% speak English only. Available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_DP02PR&prodType=table. In U.S. Northern Mariana Islands, 32.8% speak Philippine languages, 24.1% speak Chamorro, 17% speak English only, 14.1% speak Asian languages, and 5.1% speak other Pacific Island languages. Available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DPMP_MPD P2&prodType=table.

⁵⁵ Qualifying for Disability Benefits in Puerto Rico Based on an Inability to Speak English, available at https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13062_0.pdf.

eligibility for disability for individuals similar to those evaluated in the audit. In response to the audit, we analyzed the fiscal year 2016 national data for claims adjudicated under the two main grid rules dealing with the inability to communicate in English (i.e., grid rules 201.17 and 202.09). In FY 2016, our analysis revealed that claims from Puerto Rico (31.2%), California (19.2%), New York (11.22%), and Florida (5.8%) accounted for 67.42% (1,677) of all initial title II allowances (2,487) made under these two grid rules.⁵⁶ While claims allowed under the two grid rules in Puerto Rico accounted for nearly a third of all initial title II allowances under the two grid rules nationally, claims from Puerto Rico represented 1% of all of the 472,468 of initial title II disability allowances.⁵⁷

Our current policy on the inability to communicate in English explains the seemingly disproportionate number of allowances made under grid rules 201.17 and 202.09 in Puerto Rico. According to U.S. census data, 94.3% of the residents in Puerto Rico speak Spanish.⁵⁸ Consistent with this data, in fiscal year 2016, 11,564 (86.8%) claimants in Puerto Rico reported an inability to read, write, or speak English.⁵⁹ Among the claimants who reported an inability to read, write, or speak English, 9,167 (79.3%) had an education at high school or more.⁶⁰

A subsequent analysis of our data from the fiscal year 2017 similarly showed that 80.4% of the claimants who reported an inability to read, write, or speak English and

⁵⁶ See Table 3: Title II Allowances under grid rules 201.17 or 202.09, Adult Initial Determinations within U.S. and U.S. territories, FY 2016 (Table 3). Available at [regulations.gov](https://www.regulations.gov) as a supporting and related material for docket SSA-2017-0046.

⁵⁷ Id.

⁵⁸ Available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_16_5YR_DP02PR&prodType=table.

⁵⁹ See Chart 1: Claimants reporting an inability to read, write, or speak English Adult Initial Determinations, Puerto Rico, FY 2016 (Chart 1). Available at [regulations.gov](https://www.regulations.gov) as a supporting and related material for docket SSA-2017-0046.

⁶⁰ See Chart 1.

were approved for disability under the grid rules 201.17 and 202.09 had high school education or more.⁶¹ Their work histories varied and included many professions requiring high levels of education and skills.⁶² These data indicate that an ability to communicate in English is not the most appropriate proxy for determining educational categorization.

ANPRM

On September 14, 2015, we published an Advance Notice of Proposed Rule Making (ANPRM) in the Federal Register entitled “Vocational Factors of Age, Education, and Work Experience in the Adult Disability Determination Process.”⁶³ In this ANPRM, we documented our longitudinal vocational factors research efforts from 1998 to 2014, and we solicited public comments and supporting data about how each of these vocational factors affects an individual’s ability to adjust to other work.⁶⁴ We said that we would consider all relevant public comments we received, but that we would not respond directly to them.⁶⁵

Although we did not specifically ask for comments on the “inability to communicate in English” education category, 10 of the 137 public comments submitted in response to the ANPRM, including those submitted after we extended the comment period, addressed that issue.⁶⁶ Commenters expressed diverging opinions; these

⁶¹ See Chart 2: Self-reported education level of claimants reporting an inability to read, write or speak English allowed under 201.17 or 202.09, Adult Initial Determinations, Puerto Rico, FY 2017. Available at [regulations.gov](https://www.regulations.gov) as a supporting and related material for docket SSA-2017-0046.

⁶² For example, our fiscal year 2017 data on Puerto Rico showed that work history of the claimants allowed under grid rules 201.17 or 202.09 included jobs in nursing, education, management, community work, financial, and legal fields. See Table 4: Past relevant work of Title II claimants with 1 or more years of college education.

Allowances under 201.17 or 202.09, Adult Initial Allowances, Puerto Rico, FY 2017, available [regulations.gov](https://www.regulations.gov) as a supporting and related material for docket SSA-2017-0046.

⁶³ 80 FR 55050, available at <https://www.regulations.gov/docket?D=SSA-2014-0081>.

⁶⁴ Available at <https://www.regulations.gov/docket?D=SSA-2014-0081>.

⁶⁵ 80 FR at 55051.

⁶⁶ 80 FR 66843, available at <https://www.regulations.gov/docket?D=SSA-2014-0081>.

commenters did not present supportive data. For example, one commenter said that in today's economy, literacy in English has much less effect on an individual's ability to work because, in the opinion of the commenter, many non-English speakers are currently working throughout the U.S. economy. Another commenter noted that the inability to communicate in English would further erode an individual's ability to work and that it should be given more weight.

Proposed revisions

For the reasons stated above, we propose to revise the rules we use to evaluate education as a vocational factor for individuals who communicate in a language other than English when we evaluate disability claims for adults under titles II and XVI of the Act. Specifically, we propose to change how we evaluate education for individuals who communicate in a language other than English by removing the education category "inability to communicate in English."

Under the proposed regulations, we would not consider an individual's educational attainment to be at a lower education category than his or her highest numeric grade level solely because the education occurred in a language other than English, the individual participated in an English language learner program, such as an English as a second language class, or the individual is deemed to have LEP under current Federal standards.⁶⁷ These proposed rules retain our longstanding and well-supported recognition

⁶⁷ Individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English can be limited English proficient, or LEP, available at <https://www.lep.gov/faqs/faqs.html#OneQ1>. We note that the definition of LEP provided by LEP.gov differs from the definition of LEP we used to present data as explained earlier.

that more formal education, work experience, and training improve an individual's ability to adjust to other work.

Instead, we would apply our current rules for determining an individual's education category for all claimants regardless of which language they use to communicate. We will use an individual's numerical grade level to determine the education category of the individual, and we may adjust an individual's education category if there is evidence that his or her attained educational abilities are higher or lower than the highest numerical grade level completed in school.

We propose to make these and other minor conforming revisions in 20 CFR 404.1564 and 416.964. We also propose to make other revisions to these sections to remove references to the English language.

We also propose to revise the grid rules. First, we propose to revise all grid rules referencing an inability to communicate in English. Specifically, we would revise "Illiterate or unable to communicate in English" to "Illiterate" (201.17, 201.23, 202.09, 202.16) and "Limited or less—at least literate and able to communicate in English" to "Limited or Marginal, but not Illiterate" (201.18, 201.24, 202.10, 202.17). For clarity and ease of use, we propose to revise "Marginal or none" to "Marginal or Illiterate" (203.01). Second, we propose to make other conforming changes throughout the grid rules consistent with the revisions discussed above.

How we would implement these proposed revisions

If we adopt these proposed rules as final rules, we would begin to apply them to new applications, pending claims, and continuing disability reviews (CDR), as appropriate, as of the effective date of the final rules.⁶⁸

Effect on current regulatory and subregulatory guidance

If we adopt these proposed rules as final rules, we would rescind Acquiescence Ruling (AR) 86-3(5), which applies to claims in the Fifth Circuit, because AR 86-3(5) would be inconsistent with the final rules.⁶⁹ We may also rescind or replace other current Social Security Rulings to conform to the final rules. Where necessary, we would also issue updated subregulatory guidance.

Rulemaking Analyses and Notices

We will consider all comments we receive on or before the close of business on the comment closing date indicated above. The comments will be available for examination in the rulemaking docket for these rules at the above address. We will file comments received after the comment closing date in the docket and will consider those comments to the extent practicable. However, we will not respond specifically to

⁶⁸ We would use the final rules beginning on their effective date. We would apply the final rules to new applications filed on or after the effective date, and to claims that are pending on and after the effective date. This means that we would use the final rules on and after their effective date in any case in which we make a determination or decision, including CDRs, as appropriate. See 20 CFR 404.902 and 416.1402.

⁶⁹ AR 86-3(5): *Martinez v. Heckler*, 735 F.2d 795 (5th Cir. 1984) Disability Program -- Individuals Who Are Illiterate and Unable To Communicate in English -- Titles II and XVI of the Social Security Act addresses whether the Social Security disability grid rules applicable to individuals who are illiterate or unable to communicate in English are applicable to individuals who are illiterate and unable to communicate in English.

untimely comments. We may publish a final rule at any time after close of the comment period.

Clarity of This Rule

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this notice of proposed rulemaking, we invite your comments on how to make the rule easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rule clearly stated?
- Have we organized the material to suit your needs?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand, e.g. grouping and order of sections, use of headings, paragraphing?

REGULATORY PROCEDURES

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this notice of proposed rulemaking meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB reviewed it.

We also determined that this final rule meets the plain language requirement of Executive Order 12866.

Executive Order 13132 (Federalism)

We analyzed this proposed rule in accordance with the principles and criteria established by Executive Order 13132, and determined that the proposed rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. We also determined that this proposed rule will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

Executive Order 13771

Based upon the criteria established in Executive Order 13771, we have identified the anticipated program cost and administrative costs as the following.

Anticipated Costs to Our Programs:

Our Office of the Chief Actuary estimates, based on the best available data, that this proposed rule, assuming it is finalized and implemented for all disability decisions completed after June 2, 2019, would result in a reduction of about 6,500 OASDI beneficiary awards per year and 4,000 SSI recipient awards per year on average over the period FY 2019-28, with a corresponding reduction of \$4.6 billion in OASDI benefit payments and \$0.8 billion in Federal SSI payments over the same period.

Anticipated Administrative Costs to the Social Security Administration:

The Office of Budget, Finance, and Management estimated administrative costs of \$97 million for SSA and \$24 million for DDS, totaling \$121 million, for the 10-year period from FY 2019 through FY 2028.

Regulatory Flexibility Act

We certify that this proposed rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

These proposed rules contain public reporting requirements in the regulation sections listed below, or will require changes in the forms listed below, which we did not previously clear through an existing Information Collection Request.

| OMB No. Form No. Regulation Section | Description of Public Reporting Requirement | Number of Respondents (annually) | Frequency of Response | Average Burden Per Response (minutes) | Estimated Annual Burden |
|--|--|---|----------------------------------|--|--|
| 0960-0072 SSA-454 | Continuing Disability Review Report | 541,000 | 1 | 60 | 541,000 |
| 0960-0579 SSA-3368 | Disability Report – Adult | 2,258,510 | 1 | 95 | 3,575,974 |
| 0960-0681 SSA-3373 | Function Report – Adult | 1,734,635 | 1 | 61 | 1,763,546 |
| 0960-0635 SSA-3380 20 CFR | Function Report – Adult Third Party | 709,700 | 1 | 61 | 721,528 |

| | | | | | |
|-----------------------|-----------------------------|------------------|---|----|------------------|
| 404.1564 | | | | | |
| 20 CFR 416.964 | | | | | |
| 0960-0144 SSA-3441 | Disability Report-Appeal | 637,431 | 1 | 50 | 531,193 |
| Total | | 5,881,276 | | | 7,133,241 |

SSA submitted an Information Collection Request for clearance to OMB. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated techniques or other forms of information technology. If you would like to submit comments, please send them to the following locations:

Office of Management and Budget

Attn: Desk Officer for SSA

Fax Number: 202-395-6974

E-mail address: OIRA_Submission@omb.eop.gov

Social Security Administration, OLCA

Attn: Reports Clearance Director

3100 West High Rise

6401 Security Blvd.

Baltimore, MD 21235

Fax: 410-966-2830

Email address: OR.Reports.Clearance@ssa.gov

You can submit comments until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], which is 60 days after the publication of this notice. To receive a copy of the OMB clearance package, contact the SSA Reports Clearance Officer using any of the above contact methods. We prefer to receive comments by email or fax.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income.)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: January 2, 2019

Nancy Berryhill,
Acting Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend 20 CFR part 404 subpart P and part 416 subpart I as set forth below:

Part 404--FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE
(1950--)

Subpart P—Determining Disability and Blindness

1. The authority citation for subpart P of part 404 continues to read as follows:

Authority: Secs. 202, 205(a)-(b) and (d)-(h), 216(i), 221(a) and (h)-(j), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a)-(b) and (d)-(h), 416(i), 421(a) and (h)-(j), 422(c), 423, 425, and 902(a)(5)); sec. 211(b), Pub. L. 104-193, 110 Stat. 2105, 2189; sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

2. Amend § 404.1564 by:

- a. Removing the sixth sentence of paragraph (b) introductory text and paragraph (b)(5);
- b. Redesignating paragraph (b)(6) as paragraph (c), and
- c. Revising the first sentence of newly redesignated paragraph (c).

The revision to read as follows:

§404.1564 Your education as a vocational factor.

* * * * *

(c) Information about your education. We will ask you how long you attended school, and whether you are able to understand, read, and write, and do at least simple arithmetic calculations. * * *

3. Amend Appendix 2 to Subpart P of Part 404 by:

- a. Revising 201.00(h)(1)(iv);
- b. Revising the second sentence of 201.00(h)(2);
- c. Revising In 201.00(h)(4)(i);
- d. In 201.00 Table No. 1, revise rules 201.17, 201.18, 201.23, and 201.24;
- e. Revising 202.00(d) and (g)
- f. In 202.00 Table No 2, revising rules 202.09, 202.10, 202.16, and 202.17;

and

- g. In 203.00 Table No. 3, revising rule 203.01.

The revisions to read as follows:

Appendix 2 to Subpart P of Part 404—

* * * * *

201.00 * * *

(h)(1) * * *

(iv) Are illiterate.

(2) * * * It is usually not a significant factor in limiting such individual's ability to make an adjustment to other work, including an adjustment to unskilled sedentary work, even when the individuals are illiterate.

* * *

(4) * * *

(i) While illiteracy may significantly limit an individual's vocational scope, the primary work functions in most unskilled occupations involve working with things (rather than with data or people). In these work functions, education has the least significance. Similarly the lack of relevant work experience would have little significance since the

bulk of unskilled jobs require no qualifying work experience. Thus, the functional capacity for a full range of sedentary work represents sufficient numbers of jobs to indicate substantial vocational scope for those individuals age 18-44, even if they are illiterate.

TABLE NO. 1--RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO SEDENTARY WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

| Rule | Age | Education | Previous Work Experience | Decision |
|--------|------------------------------------|---|--------------------------|------------------|
| ***** | | | | |
| 201.17 | Younger individual age 45-49 | Illiterate | Unskilled or none | Disabled |
| 201.18 |do | Limited or Marginal, but not Illiterate |do | Not disabled* |
| ***** | | | | |
| 201.23 | Younger individual age 18-44 | Illiterate | Unskilled or none | Do. ⁴ |
| 201.24 |do | Limited or Marginal, but not Illiterate |do | Do. ⁴ |
| ***** | | | | |

* * * * *

202.00 * * * * *

(d) A finding of disabled is warranted where the same factors in paragraph (c) of this section regarding education and previous work experience are present, but where age, though not advanced, is a factor which significantly limits vocational adaptability (i.e., closely approaching advanced age, 50-54) and an individual's vocational scope is further significantly limited by illiteracy.

* * * * *

(g) While illiteracy may significantly limit an individual's vocational scope, the primary work functions in most unskilled occupations relate to working with things (rather than data or people). In these work functions, education has the least significance. Similarly, the lack of relevant work experience would have little significance since the bulk of unskilled jobs require no qualifying work experience. The capability for light work, which includes the ability to do sedentary work, represents the capability for substantial numbers of such jobs. This, in turn, represents substantial vocational scope for younger individuals (age 18-49), even if they are illiterate.

TABLE NO. 2--RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO LIGHT WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

| Rule | Age | Education | Previous Work Experience | Decision |
|-----------|-----|-----------|--------------------------|----------|
| * * * * * | | | | |

| | | | | |
|--------|----------------------------------|---|-------------------|---------------|
| 202.09 | Closely approaching advanced age | Illiterate | Unskilled or none | Disabled. |
| 202.10 |do | Limited or Marginal, but not Illiterate |do | Not disabled. |
| ***** | | | | |
| 202.16 | Younger individual | Illiterate | Unskilled or none | Do. |
| 202.17 |do | Limited or Marginal, but not Illiterate |do | Do. |
| ***** | | | | |

203.00 *****

TABLE NO. 3--RESIDUAL FUNCTIONAL CAPACITY: MAXIMUM SUSTAINED WORK CAPABILITY LIMITED TO MEDIUM WORK AS A RESULT OF SEVERE MEDICALLY DETERMINABLE IMPAIRMENT(S)

| Rule | Age | Education | Previous Work Experience | Decision |
|--------|-----|------------------------|--------------------------|----------|
| 203.01 | * | Marginal or Illiterate | * | * |
| ***** | | | | |

Part 416--SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND
DISABLED

Subpart I—Determining Disability and Blindness

8. The authority citation for subpart I of part 416 continues to read as follows:

Authority: Secs. 221(m), 702(a)(5), 1611, 1614, 1619, 1631(a), (c), (d)(1), and (p), and 1633 of the Social Security Act (42 U.S.C. 421(m), 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), (d)(1), and (p), and 1383b); secs. 4(c) and 5, 6(c)-(e), 14(a), and 15, Pub. L. 98-460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, and 1382h note).

9. Amend § 416.964 by

- a. Removing the sixth sentence of paragraph (b) introductory text and paragraph (b)(5);
- b. Redesignating paragraph (b)(6) as paragraph (c); and
- c. Revising the first sentence of newly redesignated paragraph (c)

The revision to read as follows:

§416.964 Your education as a vocational factor.

* * *

(c) Information about your education. We will ask you how long you attended school, and whether you are able to understand, read, and write, and do at least simple arithmetic calculations. * * *

[FR Doc. 2019-00250 Filed: 1/31/2019 8:45 am; Publication Date: 2/1/2019]