

April 2, 2019

Submitted via www.regulations.gov

Office of Regulations and Reports Clearance
Social Security Administration
3100 West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235-6401

RE: Proposed Rule: Dependents RIN: 0960-AH86

Dear Office of Regulations and Reports Clearance:

Thank you for the opportunity to comment on the Social Security Administration (SSA)'s proposed rule, "Removing Inability to Communicate in English as an Education Category." The New York City Mayor's Office of Immigrant Affairs (MOIA) and the New York City Mayor's Office for People with Disabilities (MOPD) write to oppose the proposed rule.

Under current law, the SSA may consider English proficiency when making a disability determination for claimants who do not meet a "medical impairment" listing.¹ Limited English proficiency cannot alone establish disability; indeed it is only considered at the fifth step of a five-step sequential process, when the SSA considers it in combination with other factors, such as the residual functional capacity of a claimant and their age, education, and work experience. Claimants' cases reach the fifth step of the evaluation process if the prior four steps have resulted in determinations that the claimant 1) is not working at a self-supporting wage, 2) has a "medically determinable impairment," which 3) does not meet the listing criteria of a Social

¹ The SSA uses a five-step sequential evaluation process to determine whether an adult is disabled, the second of which is considering "the medical severity of the individual's impairment(s)." Removing Inability to Communicate in English as an Education Category, 84 Fed. Reg. 1006-07 (proposed Feb. 1, 2019). For the second step of the evaluation process, the SSA refers to a "Listing of Impairments" to determine if sufficient evidence has been presented to establish that an individual has a disability. However, the absence of a listing-level impairment does not mean the individual does not have a disability. Rather, it merely requires the adjudicator to move on to the next step of the process and apply other rules in order to resolve the issue of disability. As the NPRM states, "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 [the SSA] 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)." *Id.*

Security “medical impairment listing,” and 4) the claimant’s “residual functional capacity” precludes her from performing any of her past relevant work. Only then does an SSA adjudicator engage in step five of the process, determining whether a claimant can perform any other kind of work, considering her residual functional capacity, education, age, and work history. An “inability to communicate in English” is considered among the education factors at this step of the process, and generally means that the SSA adjudicator disregards any formal education that the claimant may have.² The proposed change would result in individuals with disabilities who have limited English proficiency (LEP) being wrongfully denied access to Supplemental Security Income (SSI) and Social Security Disability (SSDI) benefits.

Drawing on their deep experience serving and facilitating access on behalf of New Yorkers who have LEP, MOIA and MOPD oppose this proposed rule change because it reflects a fundamental misunderstanding of our LEP population’s participation in the workforce, and as a result, would inflict undue harm on New Yorkers with disabilities who have LEP. New York is home to what is arguably the most diverse immigrant population of any major city in the world.³ At almost 40 percent of New York City’s population and nearly half its total workforce (44 percent), immigrants are undeniably integral to the city’s economy.⁴ Immigrant New Yorkers are employed at roughly the same rate as native-born New Yorkers.⁵ Immigrants’ diverse skills and multilingual fluency are assets to the local workforce.

Although New Yorkers with LEP contribute to New York City’s vibrant economy, a significant medical or physical impairment in combination with LEP status can effectively prohibit an individual from accessing the workforce. As a result, depriving the SSA of the ability to consider LEP among other factors will yield inaccurate decisions as to SSI and SSDI eligibility, which will in turn frustrate the aims of these vital supports.

The Proposed Rule Would Discriminate Against New Yorkers with LEP and Disabilities.

Over 1.8 million New Yorkers (over 23 percent of the city population) are considered to have LEP—individuals who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English.⁶ These comprise both foreign-born New Yorkers and U.S. born citizens. For most New Yorkers with LEP, their level of English language proficiency is not an absolute impediment to joining the workforce. Indeed, as of 2016, 23

² Removing Inability to Communicate in English as an Education Category, 84 Fed. Reg. 1006, 1008 (proposed Feb. 1, 2019).

³ NYC Department of City Planning (2013), *The Newest New Yorkers: Characteristics of the City’s Foreign-born Population*, p. 2 http://www.nyc.gov/html/dcp/pdf/census/nyy2013/nyy_2013.pdf.

⁴ NYC Mayor’s Office of Immigrant Affairs, *State of Our Immigrant City* (2019), p. 9, *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

⁵ NYC Mayor’s Office of Immigrant Affairs, *State of Our Immigrant City* (2019), p. 21, *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf.

⁶ Of all New Yorkers over the age of 5, both immigrants and U.S.-born, in 2017. NYC Mayor’s Office of Immigrant Affairs, *State of Our Immigrant City* (2019), p. 13, *available at* https://www1.nyc.gov/assets/immigrants/downloads/pdf/moia_annual_report%202019_final.pdf. New York City uses the Census Bureau’s definition of LEP which is those who speak English less than “very well.”

percent of all NYC workers had LEP.⁷ However, this is not to say that all New Yorkers with LEP have access to the workforce.

Almost 1 million New Yorkers, or roughly 11.2 percent of the city’s population, have disclosed living with a disability.⁸ About 31 percent of all New Yorkers aged 18 and over with a disability—an estimated 281,000 people—have LEP.⁹ Of these, nearly 70 percent, or 195,000 people, speak English “not well” or “not at all.”¹⁰ This third of NYC’s adult population that has both disabilities and LEP, the nearly 300,000 people, would be potentially targeted by this proposed rule.¹¹ And in the New York City economy, a person with a disability who has LEP is at significantly more risk of not being able to participate in the workforce. This is because the work that individuals with LEP are able to perform is frequently limited to occupations that require moderate-to-heavy physical exertion. Indeed, New Yorkers with LEP are concentrated in such fields, like food service, construction, and manufacturing.¹² This is consistent with nationwide trends in employment among individuals with LEP.¹³ Thus, for a New Yorker who has LEP and has a disability that makes it impossible for them to do their past work, their LEP status may make it very difficult if not impossible to find alternative work.

Taken together, these data points mean that the proposed rule will unjustly discriminate against a doubly vulnerable population of New Yorkers. SSA adjudicators should not be prohibited from considering LEP status.

⁷ Center for an Urban Future & The Center for Popular Democracy, “A City of Immigrant Workers: Building a Workforce Strategy to Support all New Yorkers,” April 2016, p. 8, available at <https://nycfuture.org/pdf/A-City-of-Immigrants.pdf>.

⁸ NYC Mayor’s Office for People with Disabilities, *AccessibleNYC: An Annual Report on the State of People with Disabilities Living in New York City* (2018), p. 13, available at <https://www1.nyc.gov/assets/mopd/downloads/pdf/accessiblenyc-2018.pdf>.

⁹ 2013-2017 American Community Survey Public Use Microdata Sample. “LEP” defined here as “Speaks English less than ‘very well.’” This is the definition used by the Census Bureau and for other federal governmental purposes.

¹⁰ 2013-2017 American Community Survey Public Use Microdata Sample.

¹¹ We say “potentially” here because some portion of New Yorkers with disabilities with LEP will be able to establish “disability” for SSA purposes at prior steps in the five-step sequential process.

¹² Center for an Urban Future & The Center for Popular Democracy, “A City of Immigrant Workers: Building a Workforce Strategy to Support all New Yorkers,” April 2016, p. 8, available at <https://nycfuture.org/pdf/A-City-of-Immigrants.pdf>.

¹³ See, e.g., Jie Zong & Jeanne Batalova, “The Limited English Proficient Population in the United States,” *Migration Policy Institute*, July 2015, Fig. 5, <https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states#Education%20and%20Employment>. (Showing that men and women with LEP are disproportionately represented, relative to their English-proficient counterparts, in service occupations; natural resources, construction, and maintenance occupations; and production, transportation, and material moving occupations. Individuals with LEP are conversely under-represented, relative to their English-proficient counterparts, in management, business, science, and arts occupations; and sales and office occupations.).

Conclusion

LEP ought to remain a consideration used by the SSA when making a disability determination for claimants who do not meet a “medical impairment listing,” as under present policy. The proposed rule would visit discriminatory harm upon a doubly vulnerable population in New York City, and the country. As a result, MOIA and MOPD request that the proposed rule be rescinded.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bitta Mostofi', with a stylized, cursive script.

Bitta Mostofi
Commissioner, Mayor’s Office of Immigrant Affairs

A handwritten signature in blue ink, appearing to read 'Victor Calise', with a cursive script.

Victor Calise
Commissioner, Mayor’s Office for People with Disabilities