LIMITED ENGLISH PROFICIENT
CLAIMANTS & INTERPRETERS

Federal Court	Regulations, Rulings	HALLEX, POMS, OTHER
Martinez v. Astrue, No. 3:07cv699, 2009 WL 840661, at *2 n. 2 (D.Conn. Mar. 30, 2009) ("[T]raditional notions of due process would suggest that without an interpreter a claimant unable to communicate in English would hardly receive a full hearing in accordance with the beneficent purposes of the Act.") As a policy, the Social Security Administration provides interpreters free of charge for claimants with limited English proficiency. *See Hearing Procedures—Foreign Language Interpreter,* HALLEX I–2–6–10 (update Sept. 2, 2005) ("If a claimant has difficulty understanding or communicating in English, the ALJ will ensure that an interpreter, fluent in both English and a language in which the claimant is proficient, is present throughout the hearing."). Claims manuals, including HALLEX, are not regulations and therefore are not binding on the Social Security Administration. *Schweiker v. Hansen,* 450 U.S. 785, 789, 101 S. Ct. 1468, 67 L.Ed.2d 685 (1981).	Clinton' s 2000 **Executive Order No. 13,166.65** **-** "to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are **limited** in English proficiency (see 65 Fed. Reg. 50,121 (Aug. 11, 2000). -[E]ach Federal agency shall examine the services it provides and develop and implement a system by which **LEP** persons can meaningfully access those services consistent with, and without unduly *1118 burdening, the fundamental mission of the agency. -Each Federal agency shall also work to ensure that recipients of Federal financial assistance ... provide meaningful access to their **LEP** applicants and beneficiaries. **SSA's LEP policy**. -SSA 's LEP policy can be found at: http://www.ssa.gov/multilanguage/LEPPlan2.htm. SSA's LEP policy provides as follows: 1. Qualified Interpreters provided *free* when requested. 2. **OR,** when necessary to ensure not *disadvantaged*. 3. **Definition of Limited English Proficient (LEP) is:** Individuals who do not speak English as their p*rimary* language and whose ability to read,	**HALLEX I-2-6-10 LU: 10/6/15:** - "If before or during the hearing, the claimant or appointed representative ***requests*** an interpreter…the ALJ will ensure a *qualified* interpreter is present at the hearing"…If claimant…objects to the interpretation, …ALJ must determine whether…claimant…received a full & fair hearing". ALJ must note the objection on the record and in decision. -"If ….during the hearing, …claimant demonstrates the need for an interpreter, the ALJ will ensure a qualified interpreter is present…." The clear meaning of these words shows that an ALJ may take some testimony in English to determine, during a hearing, that an interpreter is ***needed.*** At that point, the hearing will stop to allow the ALJ to obtain an interpreter. -ALJs can use the Telephone interpreter Service (TIS) w/o certifying them. TIS interpreters are available "immediately…within a few minutes" (**HALLEX I-2-1-70 C2**). **Witnesses** also must have interpreters. If an ALJ determines a witness has difficulty understanding the interpretation, or the witness objects to the interpretation, the ALJ must determine if the claimant is receiving a full and fair hearing. **HALLEX I-2-6-10(D).** "The criteria in I-2-1-70, & I-2-6-10 is ***distinct*** from the vocational factors assessed during a hearing. Using an interpreter…does not mean …ALJ must find a claimant has an "inability to communicate in English" under 404.1564(b)(5) and 416.964(b)(5). A claimant is entitled to request an interpreter if he is more comfortable speaking Spanish (see ***Montoya v. Colvin*, 2013 WL 1091085,**

Echevarria v. Secretary of Health and Human Services, 685 F.2d 751, 755 (2d Cir.1982). ***Aviles v. Astrue,*** 2010 WL 3155150 (U.S.D.C., C.D. CA. August 6, 2010) The ALJ primarily discounted plaintiff's credibility for three reasons: (1) plaintiff claimed difficulties with English; (2) plaintiff failed to pursue vocational rehabilitation; and (3) plaintiff's appearance and demeanor at the two hearings before the ALJ. (*See* AR 36-37.) The court did not find these reasons for discounting credibility convincing. *First, the Court was not aware of any authority that states that Plaintiff does not have the right to have an interpreter assist her at a hearing before an ALJ.* Cf. Social Security Program Operations Manual ("POMS") GN 00203.001 (claimant may provide a qualified interpreter, or SSA will provide interpreter). *See also* Richard C. Ruskell, *Social Security Disability Claims*	write, speak or understand English is not **fluent. (**DOJ/HHS Guidance definition) 4. If not provided an interpreter, claimants can file "Unfair Treatment Complaint" within 180 days of date they were aware of the conduct by writing to ODAR, Div. Quality Services, 5107 Leesburg Pike, Suites 1702/1703, Falls Church, VA 22041-3255. http://www.ssa.gov/pubs/10071.html LEP/DOJ/HHS Data from US Census; 8% of population speak English less than "very well" (i.e. To help Fed. Agencies identify the need for services for LEP individuals, the U.S. Census. American Community Survey, collects LEP data in response to a question "How well does this person speak English?". The answers require use of the following categories: "very well, well, not well, or not at all". http://www.census.gov/topics/population/language-use/about.html 4.1% of claimants i.e., 2,921,131, out of 71,282,198 claimants, in FY 2010 prefer interviews in a language other than English (SSA LEP policy, https://www.ssa.gov/ultilanguage/LEPPlan2.htm)	**(U.S.D.C., E.D. CA., 1/17/14.)** **HALLEX I-2-6-10**. Ensures an Interpreter is present throughout the hearing if claimant ***requests*** an interpreter. If not requested by claimant, and it appears the claimant needs an interpreter, the ALJ will obtain a qualified interpreter if the claimant has difficulty understanding OR communicating in English. **HALLEX I-2-1-70** LU 11/14/14. *Foreign Language Interpreters*. An interpreter is merely an extension of the claimant, or voice of the claimant. An interpreter is not "another person" or witness that the "ALJ considers necessary and proper" as described in 20 CFR §§ 404.944, 416.1444. The ALJ has no discretion to refuse to provide an interpreter if it is "***requested".*** A **request** for an interpreter can be found in the record, among a variety of documents. (1) It is noted on the Request for hearing; (2) the field office indicates it is needed; (3) the eView or Case Processing and Management System may have such a request; (4) the Disability Report-Adult (SSA-3368) may show the ability to speak/understand English is limited; (5) a report of contact or any other statement that suggests an interpreter should be requested. **POMS or HALLEX BINDING?**: If you need to rely on POMS (or HALLEX) (See *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm*., 454 U.S. 27, 31-32, 70 L.Ed.2d 23, 102 S.Ct. 48 (1981) citing *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 275, 94 S.Ct. 1757, 1762, 40 L.Ed.2d 134 (1974); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792,

Handbook, § 3.15 Interpreters (May 2010) (same). The record also reflected that some of plaintiff's medical records were apparently in Spanish-particularly records from El Salvador, records for which the ALJ declined to hold the record open to allow those records to be translated into English. (*See* AR 579.) Plaintiff claimed at the hearing that to read and write in English was different for her than to talk. (AR 495.) Plaintiff testified that she used an interpreter at all of her workers' compensation appointments. (AR 506.). (AR 487.) *The Court also did not find convincing the ALJ's assertion that, because Plaintiff apparently took a driver's test and a citizenship test in English, Plaintiff's request to have a Spanish interpreter at her hearing impugns her credibility.* ***Montoya v. Colvin,*** 2013 WL 1091085 (U.S.D.C., C.D., CA, March 13, 2013) Where request for interpreter at hearing was inconsistent with earlier representations claimant made on application forms about English fluency, and on the disability report form that he could speak and understand English, at hearing he testified after being in country 25 years, that he spoke and read a	**SSR 03-3p** (Effective 11/10/03): LEP Individuals. "If the individual requests or needs one, …" we are responsible for obtaining…a qualified interpreter……This includes…at a CE…" 20 CFR §§404.911(a)(4), 416.1411(a)(4) **Good cause for missing the deadline to request review**. A good cause reason includes: "linguistic limitations (including **any** lack of facility with the English language) which prevented…filing a timely request OR from understanding…the need to file…" This allows tolling of the statute of limitations. (See also POMS GN 03101.010.B.1.d). 20 CFR §§404.1563(c), 416.963(c)…**Age**…Vocational Factor….in some circumstances, we consider…persons age 45-40 …more limited in ability to adjust to other work than… 20 CFR §§404.1564(b)(1) & (5), 416.964(b)(1) & (5) …**Education**… Vocational Factor. (1) Illiteracy…inability to read or write a simple message… (5) Inability to communicate in English…since 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. 20 CFR Pt.404, APP. 2 to Subpart P, 201.00. "A finding of disabled is warranted for individuals...age 45-49 who ….are restricted to sedentary work, …are unskilled or have not transferable skills, have no past relevant work or can no longer perform PRW, and are unable to communicate in English, or are able to speak	801, 13 L.Ed.2d 616 (1965): holding (T)he interpretation put on the statute by the agency charged with administering it is entitled to deference… if it's construction is 'sufficiently reasonable'". In applying that to *Davis v. Sec.* HHS, 867 F.2d 336 t (6 Cir.1989), Court looked to SSA's POMS, described as a policy and procedure manual utilized by employees in evaluation of claims – "The importance of this inspection of intent" was highlighted – the Agency's definition of "intent" was controlling. As we stated in *Whiteside*, when reviewing an agency's interpretation of its own regulations, "[t]he question for this court ... is not whose interpretation of the statute we prefer," but whether we are persuaded that the Secretary's interpretation is reasonable and consistent with the regulation's language. See *Whiteside v. Sec.* HHS, 834 F.2d 1289, 1292 (6th Cir. 1987) ruling an interpretation of a statute by agency is entitled to deference since the agency is charged with its execution, unless there are compelling indications that it is wrong... **POMS Section DI 23040.001.** Eff. 9/27/12 https://secure.ssa.gov/apps10/poms.nsf/lnx/0423040001. -POMS directs that when a claimant is "requesting language assistance….(DDS)*will* provide an interpreter free of charge…"**OR** "when…evident…(that) assistance is necessary to ensure that the individual is **not disadvantaged**". -Determining when an interpreter is needed by reviewing the claim file (e.g. , forms SSA 3368, Transmittal Sheet, Contact reports) . This means: if requested, language assistance must be provided. -If not requested, l a n g u a g e assistance will be provided if it "is evident…assistance is necessary to ensure that (claimant) is not disadvantaged". -Section E states a claimant may prefer

"little English". That testimony and the request for an interpreter was not inconsistent with representations regarding fluency on his forms. *While plaintiff may possess conversational English fluency, he nonetheless is entitled to request an interpreter if he is more comfortable speaking Spanish, particularly in a legal setting*. The record showed claimant frequently used interpreters during medical appointments. Thus, ALJ's finding that statements were inconsistent was not supported by the record. ***Ortiz Torres v. Colvin***, 939 F.Supp.2d 172, (U.S.D.C., N.D. NY, April 10, 2013). With regard to the adequacy of the interpreter, the issue is whether a claimant was provided a full and fair hearing, where there were technical difficulties hearing the testimony. ***Lluberes v. Colvin,*** 2014 WL 2795256 (U.S.D.C., S.D. N.Y. 6/20/14). While courts have acknowledged that the failure to provide an applicant with an interpreter at the ALJ hearing may require remand, *see, e.g., Tankisi v. Comm'r of Soc. Sec.,* 521 F. App'x 29, 31 (2d Cir.2013) ("A violation of the interpreter policy can result in the denial of a full and fair hearing."),… "the failure to use an	and understand English but are unable to read or write in English. (See Grid Rule 201.17). If limited to "light" work, previous work is "unskilled or none", i s "closely approaching advanced age, 50-54, and the vocational scope is further **significantly** limited by illiteracy or inability to communicate in English, a finding of disabled is warranted. (see Grid Rule 202.09).	her own interpreter, but SSA can provide their interpreter in addition. -Generally a violation of interpreter policy is viewed as a failure to provide a full and fair hearing. An Interpreter is defined as an ***"intermediary***" b e t w e e n the claimant and the agency. POMS §DI 23040.001. Eff. 9/27/12. The American Bar Association's Standards for Language Access in Courts, defines a "***Proceedings Interpreter***" as a person who interprets for a LEP litigant in order to make the litigant "**present"** and able **to participate effectively** during a proceeding". ABA commentary states that courts (which includes State and Federal administrative tribunals) should allow a LEP to "**self-identify"** as needing services when requesting an interpreter, and an adjudicator should "presume the need is bona fide", because assessing language proficiency is a difficult and intensive task and requires training in language acquisition and proficiency assessment, not usually possessed by a judge. The ABA cited this example: "a judge might decline an interpreter …after observing him conversing with an attorney w/o aid of an interpreter, or after observing him follow simple instructions such as "sit down". Such a denial could be erroneous as it incorrectly assumes the ability to use English for simple communications and rote statements (often memorized). http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf

interpreter for consulting examinations" is treated differently, and instead "go[es] to the weight of that evidence rather than the fairness of the hearing." *Alvarez v. Comm'r of Soc. Sec.,* 2011 WL 2600712, at *3 n. 4 (D.N.J. June 28, 2011). Plaintiff used a friend who was an interpreter and alleged it was not adequate, but failed to identify an instance where she was unable to understand or otherwise be disadvantaged by it. ***Ramos v. Commissioner of Social Security, 2015*** WL 708546, *(U.S. D.C., S.D. N.Y. 2/4/15) holding* "use of professional interpreters is the best practice, but the Act does not mandate their use on a penalty of remand". POMS §DI 23040.001 directs that SSA "will provide an interpreter free of charge to any individual requesting language assistance, or when necessary to ensure (they) are not disadvantaged". Held: POMS has no legal force, does not bind SSA, it is a claims manual and not a regulation. Case involved a doctor who used his staff as interpreter. This along with other errors, were determined "harmless".		See Interagency Language Roundtable scale (ILR scale) with designations of 0-5 https://en.wikipedia.org/wiki/ILR_scale; The ACTFL Proficiency Scale http://www.languagetesting.com/actfl-proficiency-scale; **Multilanguage Gateway.** Provides translated SSA forms in most languages. https://www.ssa.gov/multilanguage **Advocacy**: N-LAAN is a national listserv for language access advocates; www.probono.net/nlaan/

SSA v. Larry Butler, MSPB, Doc.CB-7521-14-T-l CURRENTLY ON REMAND PENDING HEARING This was a suspended ALJ case. Butler argued he did not have to follow the Hallex. Butler also believed the Hallex did not allow him to take any testimony in English once an interpreter was provided, and it would impede his ability to determine whether a claimant meets the definition of illiterate or unable to communicate in English. However this HALLEX actually states that if an ALJ decides after hearing some testimony that an interpreter is needed, the AU may stop the hearing and obtain an Interpreter. AMICI CURIAE briefs were filed on 2/29/16 by Asian Americans Advancing Justice (AAJC); The Asian & Pacific Islander American Health Forum; The National Asian Pacific American Bar Association; and the National Council of Asian Pacific Americans Respondent's **Response** was filed 3/28/16. **SSA v. Butler, CB-7521-14-0014-T-1, 8/25/2016-** MSPB remanded the case finding: 1) SSA proved there was good cause to suspend without pay because AU Butler failed to follow instructions and agency policy; and 2) The Board found that the respondent proved by		

preponderance of the evidence that is disclosures were a contributing factor in SSA's decision to file a complaint against him under 5 U.S.C. §7521. MSPB's Order states that (1) failure to follow instructions is sufficient "good cause" for removal of an AU. SSA v. Anyel, 58 M.S.P.B. 261, 269 n.13 (finding that AUs are required to follow agency policies); (2) decisional independence does not prohibit appropriate administrative supervision required in general office management when it is unrelated to decisional independence. Brennan v. Dept. HHS, 787 F.2d 1559, 1562 (Fed. Cir. 1986); (3) SSA's directives to obtain interpreters and move and decide cases are unrelated to decisional independence; (4) the proper framework for evaluating guidance documents when SSA is seeking discipline of its own employee for failing to comply with directives and policy is to rely on decisions of the U.S. Court of Appeals for the Federal Circuit and the MSPB where similar allegations were made. Abrams v. SSA, 703 F.3d 538, 543 (Fed. Cir. 2012); (5) there was no support in the record that HALLEX 1-2-6-10 interfered with Butler's ability to determine if a claimant could communicate in English; (6) we do not understand how an interpreter could be considered anything but necessary and proper for a claimant with possible limited English proficiency in an SSA hearing.		

Cruz v. Sullivan, 912 F.2d 8, 11 (2d Cir.1990)(holding traditional notions of due process and fairness suggest that, without an interpreter, a claimant unable to communicate in English would hardly receive a "full hearing ... "; (6) the record did not support Butler's assertions that an interpreter prevented him from determining at step 5 claimant's ability to communicate in English because AUs testified they could grant interpreter requests and determine ability to communicate in English based on the record as. The Board found remand was a1212ro12riate to reassess Butler's claim of reprisal for whistle-blowing activity. The ALJ made protected disclosures to Congress and agency management starting in March 2012,[1] and the Board found remand was appropriate to analyze whether SSA provided by clear and convincing evidence that it would have taken the same action in the absence of the protected disclosures. The Board required upon remand that the AU follow the three part test in Carr V. SSA, 185 F3d 1318, 1323 (Fed. Cir.1999), i.e., and consider the following factors: (1) the strength of the agency's evidence in support of its action, noting that the Board found SSA met all the requirements for a		

suspension of 60 days; (2) the existence and strength of any motive to retaliate on the part of the agency officials involved in the decision; (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but are similarly situations. Finally, the Board required that upon remand the ALJ apply the definition of clear and convincing evidence as set forth in *Whitmore v. DOL*, 680 F.3rd 1353, 1368 (Fed.Cir.2012) that "evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion".		

[1] ALJ Butler had complained to Congress and the agency, as well as the Office of Inspector General, of the government incurring unnecessary costs, decisions made without a complete record, failing to ensure evidence was reliable or valid, allegations of concealing information and evidence from reps, and OIG's inaction in response to his complaints was gross mismanagement and abuse of authority;