

Title I's Migrant Education Program: The Challenges of Addressing Migrant Students' Educational Needs in the 21st Century

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I. INTRODUCTION

What social issue can be so controversial and significant enough to partially shut down the federal government for more than a month,¹ furlough over 800,000 federal employees,² and cost the U.S. economy eleven billion dollars?³ Immigration. The President and Congress reached an impasse at the end of 2018 and early 2019, with both political parties squabbling over a border wall aimed at decreasing immigration influxes. Policymakers and the media misguidedly focus their attention on the contentious border wall. In actuality, while there are thousands of immigrants already in the country, new immigrant flows are declining.⁴ Though some of the immigrants currently in the country are documented or have temporary protection, many do not. Regardless of their status, immigrants provide the country with an invaluable labor supply, such as migrant labors in the agricultural industry.⁵ Both immigrant and native-born migrant laborers have children who will become part of the country's citizenry. How policymakers prioritize the education of these children will have a long-term impact on their development and the country's future.

Through a little-known formula grant, titled the Migrant Education Program (MEP),⁶ the federal government has supported migrant agricultural workers'

1. See Mihir Zaveri, Guilbert Gates & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here's the History*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html> [<https://perma.cc/7T28-3275>].

2. See Laurel Wamsley, *How Is the Shutdown Affecting America?*, NPR (Jan. 9, 2019), <https://www.npr.org/2019/01/09/683642605/how-is-the-shutdown-affecting-america-let-us-count-the-ways> [<https://perma.cc/4S9E-H34U>].

3. See Ylan Mui, *The Government Shutdown Cost the Economy \$11 Billion*, CNBC (Jan. 28, 2019), <https://www.cnbc.com/2019/01/28/government-shutdown-cost-the-economy-11-billion-cbo.html> [<https://perma.cc/S969-XB96>]; see also Cong. Budget Off., *The Effects of the Partial Shutdown Ending in January 2019* (Jan. 2019), <https://www.cbo.gov/system/files?file=2019-01/54937-PartialShutdownEffects.pdf> [<https://perma.cc/T8CU-86VD>].

4. See, e.g., *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016 Research Report No. 13*, U.S. DEP'T. OF LABOR, i (2018) [hereinafter *NAWS*] ("On average, foreign-born farmworkers . . . first came to the United States 18 years before being interviewed. The vast majority of respondents had been in the United States at least 10 years (78%), with more than half arriving at least 15 years prior. . . ."). The newly arrived immigrants represent a smaller percentage of immigrants compared to those residing in the country for a number of consecutive years. See *id.* at 3. "Farmworkers who first arrived in the United States in the year predating their interview comprised 3 percent of workers interviewed in 2015-2016." *Id.*

5. See *id.* at 1, ("Nearly 7 in 10 hired farmworkers were born in Mexico.")

6. Also commonly referred to as the Education of Migratory Children.

children's education since 1966, as part of President Lyndon B. Johnson's Great Society initiative. Now part of Title I, Part C of the Every Student Succeeds Act (ESSA),⁷ the MEP has provided funds to state education agencies (SEAs) across the country to address migrant students' educational needs⁸ not met by other Title I programs.⁹ The MEP has helped change the trajectories of immigrant children and U.S.-born children of migrant workers for more than five decades. The migrant education narrative is inseparable from the federal government's history of educating low-income children. It is a story of race, equity, federalism, and public education policy for a subgroup of marginalized students.

Today, the MEP continues to award formula grants to SEAs. States use these funds to alleviate academic achievement gaps through programing and services that address migrant students' unique educational challenges.¹⁰ MEP services address these challenges with resources for additional "instruction . . . , health services, counseling and testing, career education, preschool services, and transportation [for] migrant students."¹¹ However, these funds serve only a fraction of the approximately 850,000 identified migrant students in the United States.¹² While smaller than other federal grant program amounts, the MEP continues to produce invaluable resources for migrant students—both native-born and foreign-born children. In this Note, *immigrants* will refer to foreign-born people living in the United States and *migrants* will refer to agricultural workers who move within the United States for agricultural work.¹³ As Pennsylvania's migrant education state director noted, "[b]eing migrant is

7. ESSA is the 2015 reauthorization of the Elementary and Secondary Education Act of 1965.

8. For example, data from the Department of Education shows that "migrant students are more likely than other children of school age to come from families with low levels of education, households with incomes below the poverty level, and to experience health problems, including nutritional diseases and respiratory infections." JEFFREY J. KUENZI, CONG. RESEARCH SERV., RL31325, THE FEDERAL MIGRANT EDUCATION PROGRAM AS AMENDED BY THE NO CHILD LEFT BEHIND ACT OF 2001, 2 (2006).

9. All MEP-eligible migrant students are also eligible for general Title I programs and grants, but MEP services target the challenges that remain unmet by other Title I grants aimed at addressing education for low-income children broadly.

10. Maria Estela Zarate et al., *Migrant Education: Equity in Context for Farmworkers and Their Children*, in FACILITATING EDUCATION SUCCESS FOR MIGRANT FARMWORKERS STUDENTS IN THE U.S. 1 (Patricia A. Perez & Maria Estela Zarate eds., Routledge 2017) ("[t]hese funds offer services in seven service areas with specific goals for each services area: School Readiness, English Language Arts, Math, Parental Involvement, Health Education, High School Completion, and Out-of-School Youth.").

11. KUENZI, *supra* note 8, at 1–2.

12. The 219,619 figure represents the total number of migrant youth *served* through the Migrant Education Program in 2016–17. See *Our Impact*, MIGRANT EDUCATION PROGRAM, [https://results.ed.gov/\[https://perma.cc/R6HZ-5N7B\]](https://results.ed.gov/[https://perma.cc/R6HZ-5N7B]). However, according to the Department of Education's Office of Migrant Education, "there are over 850,000 migrant students identified in the U.S." Maria Estela Zarate et al., *supra* note 10, at 1.

13. "Migrants" are also commonly referred to as "farm workers," "farm laborers," and "agricultural workers" in academia and society at large. "Immigrant" and "migrant" are mistakenly used interchangeably. A "migrant" is a person who travels for work. An "immigrant" is a person who moves from their homeland to live in another country. Many migrant workers are also immigrants, but not all immigrants are migrants. There are also U.S. citizens who live as migrant workers.

a way of living.”¹⁴ The MEP aims to address the side effects caused by that “way of living,” such as frequent absenteeism due to relocation, the need for additional academic instruction, English language instruction for non-native speakers, and general support for navigating multiple state school systems when families move between harvest seasons.

Migrant students deserve a quality education. As such, the MEP’s unique educational support forms one of the main reasons why the government should continue this program. Additionally, the federal government has historically played a role in migrant labor issues for agricultural workers and their children; the program is a model for comprehensive education policy for a subgroup of marginalized students; and these children are susceptible to being overlooked, as no one state may take responsibility for them due to their mobility.

Unfortunately, the MEP faces contemporary challenges in serving migrant students. First, two issues with the program’s eligibility standards make it difficult for the MEP to effectively serve students. The ESSA, which renewed the MEP in 2015, narrowed already strict requirements for migrant students. The 2015 eligibility standards made it more difficult for children to meet the definition of a “migrant student”¹⁵ and made it harder to show they made a “qualifying move”¹⁶ for the MEP’s purposes. The current standards also do not recognize new work industries into which some migrant agricultural families are transitioning, such as construction and landscaping.

The second set of major challenges impacting migrant education today are student records and the lack of student privacy protections. Generally, policymakers have rejected a federal student records database for any student group mainly due to privacy concerns.¹⁷ Notwithstanding the general concern for student privacy, migrant students’ records are maintained in state records systems that are then transferred to a central federal database. The lack of privacy protections from not only data breaches, but also inter-agency use is concerning, especially for a subgroup of migrant families who may have concerns over their immigration status. Updating the law to reshape the MEP eligibility qualifications to better reflect migrant patterns today and to ensure student privacy concerns is essential for the program’s future.

14. See *ESEA Reauthorization: Meeting the Needs of Special Populations: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. 12 (April 29, 2010) [hereinafter *Senate ESEA Reauthorization Hearing*] (testimony from Carmen Medina).

15. 20 U.S.C. § 6399(3). The statute specifically states, “The term ‘migratory child’ means a child or youth who made a qualifying move in the preceding 36 months— (A) as a migratory agricultural worker or a migratory fisher; or (B) with, or to join, a parent or spouse who is a migratory agricultural worker or a migratory fisher.” *Id.*

16. 20 U.S.C. § 6399(5)(b). The statute defines a qualifying move as a “move due to economic necessity . . . from one residence to another residence” and “from one school district to another school district.” *Id.*

17. The rejection of a federal student record system has mainly revolved around postsecondary education. See Nathaniel B. Custer, *Failed Justifications: Why Privacy and Federalism Do Not Support the Ban on Federal Unit-Record System*, 100 GEO. L.J. 2225, 2227 (2012) (“Researchers and other proponents of a federal unit-record system became optimistic early in the twenty-first century that congressional approval of a unit-record system was imminent. However, representatives in Congress and lobbying interests on the other side rallied to oppose the measure.”).

This Note endorses the MEP and its mission. It also argues for ways to continue and improve its goal to aid migrant children's education. It also advances the general justification for the program for three reasons. First, the program's services are still needed to help improve migrant students' academic disparities in the twenty-first century. Second, even though migrant students are properly characterized as national children,¹⁸ the program prevents these students from being overlooked by states unable to take full responsibility for their education due to their mobility. Third, the program is an indispensable model for how comprehensive education policy can serve a subgroup of low-income children with unique needs. Ultimately, this Note supports an eligibility standard that accomplishes three goals: first, one that reflects a more flexible definition for the required qualifying move; second, to expand eligibility to other low-wage and migrant-prone industries beyond agriculture, like construction and landscaping; and, third, a standard that calls for a reconsideration of a federal student records system in light of current policy debates.

Part I of this Note presents background information on the MEP program from its early history to its most recent update in ESSA. The program's history illustrates Congress's intent to address social inequality by enacting the MEP and its continued support for migrant students' education. Part II outlines the issues facing the MEP, beginning with two of the program's eligibility requirements and privacy concerns. Lastly, Part III proposes changes in the law to address these three issues.

II. FROM *HARVEST OF SHAME* TO THE MIGRANT EDUCATION PROGRAM: THE HISTORY OF MIGRANT EDUCATION AS A RESPONSE TO POVERTY AND INEQUALITY

The MEP's rich history and statutory evolution allows for a deeper understanding of its legal structure and the advocacy role it has played for a subgroup of low-income children. Since its inception, the MEP was designed to advocate for some of the nation's poorest students: migrant children—a group chiefly composed of minorities. The MEP also shares a parallel history with the changes in welfare reform constructed in the 1960s. Understanding migrant workers, the laws and policies that shaped the MEP, and the stakeholders in the MEP helps one to fully appreciate the program's purpose and impact.

A. *Migrant Population in the United States*

Migrant agricultural workers and their children are deeply rooted in the country's racial and education policy history. The migrant workforce was largely created at the country's transition from a slave economy to a sharecropper system.¹⁹ Through this transition, former slaves and their descendants became sharecroppers and agricultural

18. See *Leave No Child Behind*, *infra* note 117.

19. See *Timeline of Agricultural Labor*, NAT'L FARM WORKER MINISTRY, <http://nfwm.org/education-center/farm-worker-issues/timeline-of-agricultural-labor/> [<https://perma.cc/RE8K-CGBT>].

migrant workers.²⁰ One of the largest expansions of migrant workers occurred during World War II through the binational guest-worker initiative known as the *Bracero* program.²¹ This expansion initiated the conversion from the largely black agricultural workforce to a largely Mexican foreign workforce. This expansion opened the doors to cheap foreign labor, increasing the composition of migrant workers to include other Latin American and Asian immigrants in addition to the poor black and white native-born migrant workers. Immigrant groups, including immigrant children, rapidly began to represent a sizable percentage of the migrant workforce.

As one of the most chronically impoverished groups, migrant workers and their children were periodically a topic of presidential and congressional attention throughout different efforts to address socioeconomic inequalities in the 1900s. For example, in 1950, President Harry S. Truman enacted a blue-ribbon commission known as the Commission on Migratory Labor to study and advise him on the issues facing migratory labor.²² The report exposed a number of serious concerns migrant workers and their children encountered, including labor abuses, dire living conditions, and significant disparities in health and education.²³ Migrant agricultural workers received major national attention on Thanksgiving Day, 1960, when Edward R. Murrow, one of the most influential journalists of his time, shocked the country's conscience through his televised documentary *Harvest of Shame*. The documentary exposed the dire conditions migrant workers experienced while picking American families' food.²⁴ It further illuminated the clear connection between race and poverty. Some of the country's poorest people were those who picked the food consumed by Americans at every mealtime; the majority of these workers were black.²⁵ Martin Luther King, Jr. addressed the same issue in a speech where he underscored the evils of poverty saying:

20. *Id.* As the article notes,

Even though the [13th, 14th, and 15th] [A]mendments were passed, segregation was maintained under the Jim Crow laws, which systematized inferior treatment and accommodations for African Americans. Former slaves and their descendants continued to work in the fields, because they were in debt with the landowner or by sharecropping (working the fields in return for a share of the crop produced in the land. *Id.*

21. See DEBORAH COHEN, BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POSTWAR UNITED STATES AND MEXICO 1–2 (2011) (discussing the history of the *Bracero* program in the United States and the hiring of foreign nationals to meet labor demands in agricultural labor).

22. See *Statement by the President on Making Public the Report of the Commission on Migratory Labor*, AM. PRESIDENCY PROJECT (Apr. 7, 1951) (“I [have] today received the report of the Commission on Migratory Labor which I appointed in June 1950. I asked this Commission to investigate the whole range of problems associated with the use of migratory labor to meet agricultural labor needs.”), <https://www.presidency.ucsb.edu/documents/statement-the-president-making-public-the-report-the-commission-migratory-labor> [<https://perma.cc/2W6E-EA36>].

23. See PRESIDENT'S COMM'N ON MIGRATORY LAB., MIGRATORY LABOR IN AMERICAN AGRICULTURE: REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR 177–85 (1951) (discussing the Commission's recommendations to President Truman on low-skilled migrant labor).

24. See Idaho St. Dep't of Educ., *Migrant Education Program History*, YOUTUBE, <https://www.youtube.com/watch?v=DckPww8V-Ck> [<https://perma.cc/PX6S-UVCX>].

25. See generally *id.*

Some forty million of our brothers and sisters are poverty stricken, unable to gain the basic necessities of life. And so often we allow them to become invisible because our society's so affluent that we don't see the poor. Some of them are Mexican Americans. Some of them are Indians. Some are Puerto Ricans. Some are Appalachian whites. The vast majority are Negroes in proportion to their size in the population.²⁶

King could have accurately used the same words to summarize the makeup of migrant workers. After Murrow's exposé on race and poverty in agriculture, migrant workers became an obvious group in need of aid from President Johnson's 1960s War on Poverty initiative.²⁷

Despite the sporadic and brief waves of attention given to migrant workers, this population, including migrant students, remains understudied.²⁸ For instance, federal agencies lack a comprehensive and consistent measure of the number of migrant workers.²⁹ A number of factors may explain the federal government's inability to count all migrant agricultural workers, including agencies' inconsistent use of the term migrant, which "has varied across [f]ederal government agencies and programs that provide services to migrant and seasonal farmworkers."³⁰ Another inhibitor may be the logistical challenge of measuring a group of constantly mobile individuals. Relatedly, undocumented immigrant migrant workers and those who employ them intentionally avoid interacting with government officials, including surveyors.³¹ These factors may also contribute to the government's fractured migrant labor data from the agricultural statistics it gathers through various agencies.

The Department of Labor's data on agricultural workers from a random sample survey known as the National Agricultural Workers Survey (NAWS) represents one limited measure of migrant workers.³² The survey defines a migrant "as a person who reported jobs that were at least 75 miles apart or who reported moving more than 75 miles to obtain a farm job during a 12-month period."³³ The most recent data

26. Martin Luther King, Jr., *Martin Luther King Jr. Saw Three Evils in the World*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-hungry-club-forum/552533/> [<https://perma.cc/26R2-98XR>].

27. President Johnson's War on Poverty policies aimed to create opportunities for America's poorest, regardless of age, color, or creed, by providing new social welfare programs. See Elementary and Secondary Educ. Act, Pub. L. No. 89-10, 27.

28. See, e.g., PATRICIA A. PEREZ & MARIA ESTELA ZARATE, *Preface* to FACILITATING EDUCATION SUCCESS FOR MIGRANT FARMWORKER STUDENTS IN THE U.S., ix, xi (Patricia A. Perez & Maria Estela Zarate eds., Routledge 2017) ("[i]n carrying out the needs assessment [for a local migrant education program], we were struck by the lack of centralized and comprehensive body of research that would aid MEP staff and educators in supporting the academic success of migrant student along the PK-20 spectrum.").

29. See NAWS, *supra* note 4, at 5 ("The definition of 'migrant' has varied across [f]ederal government agencies and programs that provide services to migrant and seasonal farmworkers."); see also email from Theresa Varner, Nat'l Agric. Statistics Serv. Econ. Section, to José E. Madrid (Mar. 27, 2018, 10:34 ET) (on file with author) (discussing the inconsistency in federal agencies' reference to agricultural migrant workers).

30. See NAWS, *supra* note 4, at 5.

31. See Mejia, *infra* note 45.

32. See NAWS, *supra* note 4, at i.

33. *Id.* at 5.

reflects figures for 2015–2016 and the survey is not inclusive of all migrant workers because it only measures a sample of roughly 5,000 farmworkers (only nineteen percent of whom are actually migrant workers).³⁴ The NAWS classifies migrant workers as ‘domestic migrants’ (“those who traveled solely within the United States in the 12 months preceding their interview to do farm work”), and ‘international migrants’ (“those who crossed the U.S. border to do farm work”).³⁵ Similarly, the United States Department of Agriculture (USDA) uses the 2012 Census data to calculate the number of migrant workers at 436,570.³⁶ However, this figure, in addition to being outdated, may be under-inclusive for MEP purposes. This is because the migrant worker definition here does not include the same scope of migrant workers included in MEP, which includes fishermen and dairy workers.³⁷

The Office of Migrant Education (OME) at the Department of Education has helped track *some* statistics on migrant students through the states’ annual consolidated performance reports. From September 2015 through August 2016, the states collectively reported a total of 316,276 MEP-eligible students.³⁸ The states with the greatest concentration of migrant students include California, Texas, and Washington.³⁹ A large percentage of the students are in grades K-3 (81,245)⁴⁰ and 9-12 (73,100).⁴¹ The overall high school dropout rate for migrant students is estimated somewhere between thirty-seven and fifty percent.⁴² There is also a growing

34. *See id.* “These findings are based on data collected from face-to-face interviews with 5,342 crop farmworkers through the U.S. Department of Labor’s National Agricultural Workers Survey (NAWS) between October 1, 2014 and September 30, 2016.” *Id.* at i; *see also Foreign-Born Workers: Labor Force Characteristics—2016*, U.S. DEP’T OF LABOR 1, <https://www.bls.gov/news.release/pdf/forbrn.pdf> [<https://perma.cc/2CAL-NAZB>].

35. *NAWS*, *supra* note 33, at 5.

36. *Table 7. Hired Farm Labor—Workers and Payroll: 2012*, U.S. DEP’T OF AGRIC. 1, https://www.nass.usda.gov/Publications/AgCensus/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_007_007.pdf [<https://perma.cc/7YWD-B59C>].

37. *See Senator Sparkman Statement*, *infra* note 133.

38. *See Number of Eligible Migrant Students, 12 Months—Total: 2015-16*, U.S. DEP’T OF EDUC. (July 20, 2017), <https://eddataexpress.ed.gov/dataelementoverlay.cfm/deid/6714/states/XX/> [<https://perma.cc/J54F-H48J>].

39. *See id.* During the same time frame, 21,787 of the total migrant student population were also classified with a disability under Part B or Part C of Children with Disabilities (IDEA). *See id.* Disabilities include “mental retardation; hearing impairment, including deafness; speech or language impairment; visual impairment . . . ; serious emotional disturbance . . . ; orthopedic impairment; autism; . . . developmental delay; . . . specific learning disability” among others. *See id.*

40. The figure represents the “unduplicated statewide number of eligible migrant children in grades K to 3 who, within three years of making a qualifying move, resided in a State one or more days, between September 1 and August 31 of [the] reporting period.” *Number of Eligible Migrant Students, 12 Months—Grades K to 3: 2015-16*, U.S. DEP’T OF EDUC. (July 20, 2017), <https://eddataexpress.ed.gov/dataelementoverlay.cfm/states/XX/deid/6712/> [<https://perma.cc/7DSU-2EWY>].

41. “The unduplicated statewide number of eligible migrant children in grades 9 to 12 who, within three years of making a qualifying move, resided in a State one or more days, between September 1 and August 31 of a reporting period.” *Number of Eligible Migrant Students, 12 Months—Grades 9 to 12: 2015-16*, U.S. DEP’T OF EDUC. (July 20, 2017), <https://eddataexpress.ed.gov/dataelementoverlay.cfm/states/XX/deid/6711/> [<https://perma.cc/WJ9P-G9A9>].

42. *See Zarate et al.*, *supra* note 10, at 6 (“While the U.S. Department of Labor estimates dropout rates [for migrant students] as low as 37%, other scholars *optimistically* argue high school dropout rates for migrant students have hovered around 50%”).

subgroup of migrant students labeled as Out-of-School Youth.⁴³ They are typically older migrant youth, ages sixteen to twenty-one, not currently attending school or who have dropped out altogether in order to work.⁴⁴ An overwhelming majority of migrant students are racial minorities, and, while the largest percentage of migrant families are Latino, there is a diversity of groups represented—including black, Asian, white (a small percentage)—and a growing number refugee populations.⁴⁵ Measuring migrant student statistics presents the same general challenges as measuring the general migrant workforce population.

B. The Public Policy and Laws Behind The MEP

The MEP was formed as part of President Johnson's Great Society initiative, a federal equity program, and, as such, has continued to provide migrant students with resources to grant them better access to educational opportunities.⁴⁶ The congressional reauthorizations of the original Elementary and Secondary Education Act (ESEA) have retained the MEP as a supplemental program to the general Title I grants available to low-income students and, in doing so, have continued to recognize migrant students' unique academic needs.

1. The Elementary and Secondary Education Act's (ESEA) 1965 and 1966 Amendments

The 1960s presented a significant change for low-income children's education, including migrant children, through the enactment of the ESEA of 1965, a collection of federal aid programs that would eventually secure the funding for programs like MEP. President Johnson's War on Poverty policies aimed to create opportunities for America's poorest, regardless of age, color, or creed, by providing new social welfare programs.⁴⁷ ESEA directly dealt with addressing low-income children's lack of education opportunities by offering states grants for its low-income students.⁴⁸ While *low-income* status was the primary concern of the ESEA, certain subgroups were explicitly identified for federal aid.⁴⁹ Among these subcategories of low-income

43. *See id.*

44. *See id.* at 6–7.

45. *See, e.g.,* NEB. DEP'T OF EDUC., NEBRASKA MIGRANT EDUCATION PROGRAM 2, <https://cdn.education.ne.gov/wp-content/uploads/2018/04/2018Infographic.pdf> [<https://perma.cc/8W8R-LPYC>] (Nebraska's MEP served 5123 children in 2016–17 and from those served 3400 were Hispanic, 1058 were Asian, 398 were white, and 459 were African-American); *see also* Interview with Tomás Mejía, Migrant Educ. Program State Dir., Colo. Office of Migrant Educ., in D.C. (Mar. 3, 2018); Interview with Noemi Aguilar, Principal Consultant, Colo. Dep't. of Educ., in D.C. (Mar. 3, 2018). The program has and continues to serve migrant children regardless of immigration status since states are not allowed to deny free public education to students based on their immigration status. *See generally* Plyler v. Doe, 457 U.S. 202, 210–30 (1982) (striking down Texas statute that withheld educational funds for undocumented children).

46. *See* Elementary and Secondary Educ. Act, Pub. L. No. 89–10, 27.

47. *See id.* at 27–28.

48. *See* Angela Maria Branz-Spall et al., *Children of the Road: Migrant Students, Our Nation's Most Mobile Population*, 72 J. NEGRO EDUC. 55–62 (2003).

49. *See* Elementary and Secondary Educ. Amendments, Pub. L. No. 89–750, 1191–92.

students were agricultural migrant students.⁵⁰

A year after Congress enacted this monumental piece of legislation, President Johnson's Administration petitioned Congress to amend ESEA to include "special provision for migrant children."⁵¹ The images of impoverished, malnourished, and illiterate migrant children from Edward R. Murrow's *Harvest of Shame* that captured Americans' attention helped educate policymakers about migrant children's harsh lives.⁵² The Johnson Administration recognized that notwithstanding Title I's commitment to poor children, migrant children would likely not benefit from the appropriated funds because they either frequently missed school due to work or often relocated between states due to the harvest season.⁵³ The Administration expressly requested Congress for "[f]unds [that] would also be made available for the education of migratory children."⁵⁴ Johnson's advisors calculated that "approximately 150,000 migrant children accompan[ie]d their parents from community to community and from [s]tate to [s]tate" every year.⁵⁵ Dr. Arthur L. Harris, Associate Commissioner for Elementary and Secondary Education, testified before the House General Subcommittee on Education stressing that "[o]f all migrants over the age of 26, one-third [had] only a fourth-grade education or less" and that "[t]he median years of school completed by migrants over the age of 25 [was] 6.5."⁵⁶ The Administration knew that in order to ensure benefits to migrant students' education, special provisions were needed to address the migrant students' unique needs.

Johnson's request for special provisions to better accommodate migrant students were slightly challenged by other migrant children advocates, such as National Committee on the Education of Migrant Children (NCEMC), who worried about the unintended consequences such a provision could cause, like as segregated schooling for migrant children.⁵⁷ The NCEMC explicitly opposed "any education program [that would] result in the placement of migrant children into separate and segregated

50. See Margaret A. Gibson & Nicole D. Hidalgo, *Bridges to Success in High School for Migrant Youth*, 111 TEACHERS C. REC. 683, 684 (2009).

51. "Further we are requesting certain amendments which appear necessary based on our brief experience with the law. [ESEA]. In addition, we are requesting special provision for our and Indian children." *Elementary and Secondary Education Amendments of 1966: Hearing on H.R. 13160 and H.R. 13161 Before the Gen. Subcomm. on Educ. of the H. Comm. On Educ. and Labor*, 89th Cong. 107 (1966) [hereinafter *Amendments of 1966 Hearing*] (statement by Arthur L. Harris, Assoc. Comm'r for Elementary and Secondary Educ.). The Administration also estimated that after \$550 million Title I funds were distributed to schools nationwide after January 31, 1966, 3.5 million children had been served. See *id.*

52. *Every Student Succeeds Act (ESSA)*, U.S. DEP'T EDUC., <https://www.ed.gov/essa?src=ft> [<https://perma.cc/U9E8-Q6Z5>].

53. See *Amendments of 1966 Hearing*, *supra* note 51, at 111.

54. *Id.* at 111.

55. *Id.*

56. *Id.*

57. In statements submitted to the Senate Subcommittee on Education, Cassandra Stockburger, Director of the NCEMC, reported that migrant children's low education percentages were not due to mobility as much as they were due to "child labor, . . . racial or ethnic discrimination, lack of basic knowledge of how to participate in the school society and rejection in the school because of poor clothing, uncleanliness, and location of residence." *Elementary and Secondary Education Amendments of 1966: Hearing on S. 3046, S. 2778, S. 2928, and S. 3012 Before the S. Subcomm. on Labor and Pub. Welfare*, 89th Cong. 2124 (1966) (statement by Cassandra Stockburger, Director of the NCEMC).

programs except on a temporary basis for special remedial work.”⁵⁸ It also questioned the appropriateness of a special migrant education program and rather advocated for funds to help house migrant children in their home communities while their families migrated for agricultural work.⁵⁹

Ultimately, Congress amended the law to include explicit funding for multiple subgroups of low-income children, including agricultural migrant students who would not easily benefit from the ESEA's general funds due to their continuous mobility and general limited access to schools.⁶⁰ The amendment provision for migrant children was titled, “Payments To State Education Agencies for Assistance in Educating Migrant Children of Migratory Agricultural Workers.”⁶¹ The amendment granted the initiative nine million dollars⁶² to begin its operation for “programs and projects (including the acquisition of equipment and where necessary[,] the construction of school facilities) which are designed to meet the special educational needs of migratory children.”⁶³ The early MEP awarded grants to forty-four states, which served approximately 169,910 students in its first year and was later continued in subsequent reauthorizations of ESEA.⁶⁴ Those early reauthorizations helped expand the program to include the children of migrant fishermen as MEP recipients.⁶⁵

2. 1980s and 1990s: Reauthorization and Regulatory Changes

Congress continued to reauthorize the MEP throughout the 1980s and 1990s and included some major updates to the student eligibility criteria. The MEP faced uncertainty during a large part of the 1980s due to President Regan's overall dislike of federal aid programs.⁶⁶ Reagan had promised to end the Department of Education, federal education aid, and reduce entitlement programs across the board.⁶⁷ Despite lack of support from the White House, Congress modestly increased funding for the MEP, which drew criticism by the Administration and by those who argued that migrant students were not actually missing school days as a result of migrant labor.⁶⁸ This debate centered around the Reagan Administration's

58. *Id.*

59. *See id.*

60. *See* Elementary and Secondary Educ. Act, Pub. L. No. 89-750, 1191.

61. *Id.* at 1192.

62. *See Migrant Education Program History, supra* note 24.

63. Elementary and Secondary Educ. Amendments of 1966, Pub. L. No. 89-750, 1192.

64. *See* KUENZI, *supra* note 8, at 3.

65. *See id.* This expansion is further discussed in Part III.A.2.

66. Additionally, during his time as Governor of California, Reagan had undermined migrant workers' labor improvement efforts by publicly eating grapes during laborers' boycotts. *See* Colman McCarthy, *Harvesting the Grapes of Wrath*, WASH. POST (May 18, 1997), <https://www.washingtonpost.com/archive/entertainment/books/1997/05/18/harvesting-the-grapes-of-wrath/82fa30a5-1794-455f-bda5-98355c322bd7/> [<https://perma.cc/N7AJ-BPJH>].

67. *See* Fred M. Hechinger, *The Regan Effect: The Department That Would Not Die*, N.Y. TIMES (Nov. 14, 1982), <https://www.nytimes.com/1982/11/14/education/the-regan-effect-the-department-that-would-not-die.html> [<https://perma.cc/G6CH-8SEP>].

68. *See* Alex Heard, *Study Supports Migrant-Ed. Rule Change*, EDUC. WK. (June 18, 1983), <https://www.edweek.org/ew/articles/1983/06/08/03230026.h02.html> [<https://perma.cc/UL4N-N6TD>].

goal of narrowing the MEP's eligibility.⁶⁹ Yet, Congress continued the federal commitment to America's migrant children.

Through the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988,⁷⁰ Congress notably amended the MEP by expanding the qualifying age range for migrant children from five through seventeen years of age to three through twenty-one.⁷¹ It also extended eligibility to children of dairy workers in the same way that it had been extended to fishery migrant workers' children.⁷² Finally, the 1988 amendments also expanded the required interschool district move by students to include a move "from one administrative area to another within a state having a single school district (applicable to Hawaii and Puerto Rico)" and a move while "living in a school district of at least 15,000 square miles and migrating at least 20 miles to a temporary residence to engage in a fishing activity (applicable to Alaska)."⁷³ These changes revealed Congress's intent to reflect migrant workers' actual realities and not limit services to students based on rigid eligibility criteria.

Congress's expansion in the late 1980s was followed by a mix of restrictive and expansive amendments to the MEP's eligibility through the Improving America's Schools Act (IASA) of 1994. The Act's first update comprehensively expanded the definition of migrant students to "include unaccompanied minors who are themselves migrant workers or who are married to a migrant worker, as well as those under the legal guardianship of a migrant worker."⁷⁴ However, the same act restricted migrant students' eligibility years following their initial interschool district move. Migrant children were eligible for MEP funds up to six years after their most recent interschool district move due to migrant work, but IASA dropped the eligibility period to three years, where it remains today.⁷⁵ The change meant that a migrant child who had made a qualifying move from one school district to another would only continue receiving MEP funds up to thirty-six months, unless they made another qualifying move prior to the end of the original thirty-six month period.

Additionally, IASA established a priority of service for those students "who are failing, or most at risk of failing, to meet the State's challenging State academic content standards and challenging State student academic achievement standards, and whose education has been interrupted during the regular school year."⁷⁶ The 1994 amendments prioritized resources for the *most* mobile migrant students, who faced academic challenges and were less likely to attend school for long consecutive periods.

69. "The current debate over the program centers on a move by the Reagan Administration to change the eligibility requirements for the program." *Id.*

70. See KUENZI, *supra* note 8, at 3.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Reauthorized Migrant Education Program: Old Themes and New*, ERIC DIG., <https://www.ericdigests.org/1996-1/migrant.htm> [<https://perma.cc/28R7-C6QP>].

76. *Law & Guidance Part C—Education of Migratory Children*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/policy/elsec/leg/esea02/pg8.html> [<https://perma.cc/G3PJ-ACFY>].

3. 2000–2017: No Migrant Child Being Left Behind to Every Migrant Student Succeeding

In the twenty-first century, Congress has renewed the MEP under both a republican and democratic presidential educational policy. President George W. Bush's Administration received some pushback from Congress when the initial blueprint for No Child Left Behind (NCLB) lacked mention of migratory education.⁷⁷ The then-Secretary of Education Roderick R. Paige responded by assuring a House committee that the NCLB program intended to continue and expand the MEP.⁷⁸ The program was indeed renewed under NCLB with a new requirement by Congress for the Department of Education "to assist States in developing effective methods for the electronic transfer of student records" and "to ensure the linkage of migrant student record systems."⁷⁹

The MEP underwent regulatory changes after receiving controversial attention at the end of the Bush Administration due to states' inaccurate reporting of eligible migrant children.⁸⁰ A number of states and school districts, including Washington, D.C. and California, were investigated regarding the accuracy of their reported number of eligible migrant children.⁸¹ These investigations led to some states settling with the federal government to return MEP funds.⁸² A tightening of regulations and rules followed in the wake of these findings. Guidance focused on the determination of qualifying migrant children and the states' reported number of served migrant children. Little-to-no attention at the national level followed for the MEP as it continued to help educate the now majority Latino migrant students in all but a few states in the country.

ESSA, the most recent reauthorization of ESEA, renewed the federal government's commitment to migrant education in 2015.⁸³ Seen as a pendulum swing in the opposite direction of NCLB, ESSA has been described as a move towards states'

77. *Leave No Child Behind: Hearing Before the H. Comm. on Educ. and The Workforce*, 107th Cong. 28 (Mar. 7, 2001) [hereinafter *Leave No Child Behind Hearing*] (questioning by Representative Rubén Hinojosa). The article states:

Although severely under funded [sic], the Migrant Education Program provides a wide range of services that address the unique needs of these migrant children, such as health screening, family literacy, and summer programs . . . In President Bush's blueprint, "No Child Left Behind" does not address the Migrant Education Program. It only mentions migrant children in the section on reporting achievement data. *Id.*

78. "This [migrant education] program currently serves 750,000 children age 3 through 21. Our [NCLB] program continues to expand this program." *Id.* at 29 (statement by Sec. of Educ. Roderick R. Paige).

79. *Migrant Student Records Exchange Initiative*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/admins/lead/account/recordstransfer.html> [<https://perma.cc/5S5G-XH7S>] (last modified Aug. 26, 2014).

80. See Mary Ann Zehr, *Stiffer Rules Issued on Migrant Education Program*, EDUC. WEEK (July 30, 2008), https://www.edweek.org/ew/articles/2008/07/30/45migrant_web.h27.html?qs=%22Migrant+Education+Program%22 [<https://perma.cc/5JHB-28GY>].

81. See Mary Ann Zehr, *Migrant Education Program Draws Scrutiny*, EDUC. WK. (May 11, 2007), <https://www.edweek.org/ew/articles/2007/05/16/37migrant.h26.html> [<https://perma.cc/M33X-H634>].

82. See *id.*

83. See *Legislation, Regulations, and Guidance*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/programs/mep/legislation.html> [<https://perma.cc/XP2R-ZC4M>].

deference on educational issues and ways to address major educational reforms on a state-by-state basis.⁸⁴ The MEP's long-standing deference to SEAs prioritization of funds to serve and address migrant students' educational needs fit well within the larger policy approach adopted by ESSA. The program is still one of several Title I grant programs for low-income students, providing SEAs with about \$374,751,000⁸⁵ annual funds and benefiting approximately 228,000 migrant students.⁸⁶ The same amount was appropriated to the MEP for the three years prior to 2017 and is the same amount appropriated for the 2018–2019 fiscal year.⁸⁷ In 2017, all but three states and the District of Columbia were MEP grant recipients.⁸⁸

States may apply for MEP funds “using either a Title I Migrant-specific application, or a consolidated application through which States submit a single application for funds for a number of [f]ederal education formula grant programs.”⁸⁹ The Department of Education then allocates MEP funds to state education agencies (SEAs) by formula, “based on each state’s per pupil expenditure for education and counts of eligible migratory children, age 3 through 21, residing within the state.”⁹⁰ SEAs then distribute funds to subgrantees who serve migrant students, including local education agencies (LEAs), other educational state agencies, nonprofits, and institutions of higher education.⁹¹ SEAs have vast discretion allocating MEP funds and developing the different initiatives that prioritize migrant students’ needs, notwithstanding the priority provisions for those at most risk and with the highest mobility history as ordered by federal law.⁹²

Under ESSA, a MEP migrant student is required to (1) be between the ages of three and twenty-one (2) have a parent or guardian who is a migratory worker, or they themselves be migrant workers, or have a migrant worker spouse in the agricultural, dairy, or fishing industries and (3) have moved from one school district to

84. See Alyson Klein, *Under ESSA, States, Districts to Share More Power*, EDUC. WK. (Jan. 5, 2016), <http://www.edweek.org/ew/articles/2016/01/06/under-essa-states-districts-to-share-more.html> [https://perma.cc/R2R6-TFNG].

85. *Fiscal Years 2017–2019 State Tables for the U.S. Department of Education*, U.S. DEP’T OF EDUC. 2, <https://www2.ed.gov/about/overview/budget/statetables/19stbyprogram.pdf> [https://perma.cc/U9Z7-V29K].

86. The 219,619 figure represents the number of “[m]igrant youth participating in the Migrant Education Program in 2016–17.” See MIGRANT EDUC. PROGRAM, *supra* note 12.

87. U.S. DEP’T OF EDUC., FY 2018 CONGRESSIONAL ACTION, DEPARTMENT OF EDUCATION GRANTS TO LOCAL EDUCATIONAL AGENCIES 2 (Nov. 19, 2018), <https://www2.ed.gov/about/overview/budget/statetables/19stbyprogram.pdf> [https://perma.cc/ME4S-SBBX].

88. The states who did not participate in the Title I, Part C grant program were Connecticut, Rhode Island, and West Virginia. In addition, neither D.C. nor any other American commonwealth territories participated in the grant program. See *id.*

89. *Application Information*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/mep/applicant.html> [https://perma.cc/2P6E-HLT8]. The consolidated applications and plans “are authorized under Title IX of the Elementary and Secondary Education Act to promote coordination among programs and reduce paperwork.” *Id.*

90. *Purpose*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/mep/index.html> [https://perma.cc/89D2-6UHV].

91. See *Eligibility*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/mep/eligibility.html> [https://perma.cc/RN4G-D7HB].

92. See U.S. DEP’T OF EDUC., *Law & Guidance*, *supra* note 76.

another within thirty-six months.⁹³ Recruitment for MEP students and eligibility are overseen by migrant education recruiters at the state level. These recruiters conduct visits to migrants' homes, schools, and employment sites in industries known to employ migrant workers.⁹⁴ While eligibility requirements do not vary between states (unless states differently interpret the Department of Education's guidance), the MEP services for the seven service areas do vary widely.⁹⁵

State migrant education programs are as unique as their respective states. Some common initiatives in states' migratory programs include additional academic instructions in math, English and reading, before and after school programing, out-of-school youth initiatives, dropout re-engagement, college readiness programs, health education programs, and parent engagement and support programs.⁹⁶ MEP funds are the last funds to apply to migrant students, or as one state director of migrant education phrased it, they are the "cherry on top of the ice cream sundae" of Title I federal funds for poor children.⁹⁷ The states must first use all other Title I funds for which migrant students are eligible before they apply the MEP funds. This guarantees that MEP funds are supplementary and do not supplant state *or* other federal Title I funds.

State migrant education programs are shaped by and respond to their respective SEA's overall education programs and priorities. For example, in some states, funding for bilingual education is covered by the SEA's decision to implement schoolwide bilingual education programs with Title I funds. Other SEAs expand the number of comprehensive tutoring hours for students. The state migrant education program would thus not prioritize bilingual education or tutoring, but instead focus on addressing other issues migrant students face, which are not already covered by another state or Title I program. In some states with large Mexican migrant worker populations, like Texas, state migrant education programs include a bi-national education component, which incorporates a teacher exchange program with Mexico.⁹⁸ These bi-national programs aim to strengthen migrant students' literacy in their native language and allow for parents to understand the educational materials.⁹⁹

C. Key Stakeholders in Migrant Education

The key stakeholders in migrant education include the Department of Education (ED), state education agencies (SEAs), local education agencies (LEAs), and migrant

93. See *infra* note 120 and above-the-line text.

94. See *Overview of Migrant Education in California*, CALIFORNIA DEP'T. OF EDUC., <https://www.cde.ca.gov/sp/me/mt/overview.asp> [<https://perma.cc/7CUG-Q6KS>].

95. See Zarate et al., *supra* note 10, at 1 and accompanying text.

96. See, e.g., *Nebraska Migrant Education Program: State Profile 2017–2018 Profile*, NEB. DEP'T OF EDUC. 11, <https://cdn.education.ne.gov/wp-content/uploads/2017/07/StateProfile2017-18.pdf> [<https://perma.cc/2N3R-6F3K>].

97. Mejia, *supra* note 45.

98. See generally Adam Sawyer, *Professional Development Across Borders: The Promise of U.S.-Mexico Binational Teacher Education Programs*, 41 TCHR. EDUC. Q. 3 (2014).

99. The native language instruction is done parallel to English instruction both in school and through supplemental migrant education initiatives. See generally *id.*

education advocacy groups. The interplay and coordination between these stakeholders are essential to reach and serve the greatest number of migrant students.

Following the 1966 Amendment, ED formed the Office of Migratory Education (OME) to “administer grant programs that provide academic and supportive services to the children of families who migrate to find work in the agricultural and fishing industries.”¹⁰⁰ The OME remains headquartered in Washington, D.C. and oversees the Title I, Part C and other federal program for migrant education such as the College Assistance Migrant Program (CAMP).¹⁰¹ The office oversees the grant and funding processes to SEAs, provides technical support to states, gathers data, oversees programs such as the Migrant Student Information Exchange (MSIX), and provides guidance.¹⁰² The MEP group within OME is composed of five staff members who are assigned different state grantees by regions.¹⁰³ Non-regulatory guidance for MEP is typically coordinated between the Office of Elementary and Secondary Education and the OME.¹⁰⁴ In addition to non-regulatory guidance, the OME also provides technical support for SEAs, special trainings, and national conferences for directors and public officials serving migrant education.¹⁰⁵ Additionally, it collects and manages annual data from the SEAs receiving MEP funds through the Consolidated State Performance Report (CSPR), which includes “the number of eligible migrant children; student characteristics (e.g., mobility, English language proficiency, priority-for-services); student participation in MEP-funded services, staffing levels, and on the academic achievement of migrant students.”¹⁰⁶ This data is important for both accountability and transparency on states’ use of MEP funds and for best practices, since so many of the state programs differ in approach. The OME thus works closely and coordinates with another major group of stakeholders, SEAs, and the respective state migratory education departments or offices.

States and their respective SEAs and LEAs are vital components to the MEP as they plan, coordinate, and execute the states’ migratory education plans, goals, and programs. States vary in the type of migrant education program they enact, ranging

100. *Office of Migrant Education*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ose/ome/index.html> [<https://perma.cc/J33Z-9QNP>] (last modified Jan. 26, 2017).

101. The Department of Education describes CAMP as a program that:

assists students who are migratory or seasonal farmworkers (or children of such workers) enrolled in their first year of undergraduate studies at an [institution of higher education (IHE)]. The funding supports completion of the first year of studies. Competitive five-year grants for CAMP projects are made to IHEs or to nonprofit private agencies that cooperate with such institutions. The program serves approximately 2,000 CAMP participants annually.

Migrant Education—College Assistance Migrant Program Purpose, U.S. DEP’T EDUC., <https://www2.ed.gov/programs/camp/index.html> [<https://perma.cc/CL2N-T52V>].

102. *See About Our Office: Office of Migrant Education*, U.S. DEP’T EDUC., <https://www2.ed.gov/about/offices/list/ose/ome/index.html> [<https://perma.cc/5EYM-94HU>].

103. *See id.*

104. *See Guidance*, *infra* note 121, at ii.

105. One example of the annual meetings includes the Migrant Education Program (MEP) Annual Directors Meeting, which in 2018 took place from March 5th to 7th.

106. *Resources*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/mep/resources.html> [<https://perma.cc/C9KE-FFGH>].

from additional academic instruction programs to health training. SEAs also vary in the ways they structure their state migrant education programs. Some migrant education programs are coordinated by a state office solely overseeing migrant education and others are coordinated as part of larger public education office that oversees Title I funding. For example, the Colorado Department of Education has its own Office of Migrant Education, overseen by a state director and services are divided among five regional districts in the state,¹⁰⁷ while other states, like Minnesota, have their migrant education programs overseen by one central office coordinating all ESEA Title I programs.¹⁰⁸ A collection of variables shape states' migrant education programs, including, but not limited to, the respective state's agricultural labor force, the respective state's education goals and programs, and school district sizes.

Of course, states' education programs are not secluded from outside influences since migrant students cross-pollinate state migrant education programs during their seasonal moves. The state officials overseeing the migrant education programs tend to be previous educators themselves or are often longtime veterans of migrant education.¹⁰⁹ Migrant education professionals commonly emphasize the need for collaboration by MEP state directors at the local level and interstate level as well as coordination between other Title I programs for low-income students that migrant students are also eligible for based on the socioeconomic status. MEP's success is largely dependent upon the execution of programing by the SEAs and LEAs, which at times play both administrative roles and lobbying roles for the program.

Migrant student advocates are also key stakeholders in migrant education and have served as the essential ingredient for the federal government's commitment to support migrant students' education. The Interstate Migrant Education Council (IMEC) is one of the most active organizations, composed largely of state migrant education professionals. It has served as a lobbying arm to migrant education since its inception in 1983.¹¹⁰ IMEC advocates for the policies which have the greatest positive impact upon migrant students. It has advocated on behalf of migrant students' education at each reauthorization of ESEA since 1988 with large success as a majority of its recommendations to Congress have been included in law updates.¹¹¹ Its lobbying effort also extends to the Department of Education's regulation and non-regulatory guidance for MEP.

Placing the MEP in context of the broader history of social and education policy reform illustrates its innate characteristics of equity. The program's rich history and five-decade development demonstrates the MEP's importance and its promise to migrant children to alleviate the educational burdens they face due to their migratory

107. See *Migrant Education Contact Us*, COLO. DEP'T OF EDUC., <https://www.cde.state.co.us/migrant/contactus> [<https://perma.cc/R2NZ-2L9A>].

108. See *Elementary and Secondary Education Act (ESEA)/Federal Title Programs*, MINN. DEP'T OF EDUC., <https://education.mn.gov/MDE/dse/ESEA/index.htm> [<https://perma.cc/5PXP-DAEX>].

109. See Mejia, *supra* note 45.

110. *Id.*

111. See *History of IMEC*, INTERSTATE MIGRANT EDUC. COUNCIL, <http://imec-migrated.org/history.html> [<https://perma.cc/55Y2-7KTN>].

lifestyles. Understanding the complex history and dynamics aids in shaping the future of the program by learning from past challenges and best practices.

III. A DEFENSE FOR THE MIGRANT EDUCATION PROGRAM AND ITS CHALLENGES IN THE TWENTY-FIRST CENTURY

This section outlines issues facing the MEP today. The first is the qualifying move requirement, which eliminates eligibility for certain students who move, but may not ultimately find work in agriculture. The second eligibility issue addressed is the program's lack of inclusion of other work industries that are becoming inherently mobile or are industries that migrant agricultural families are moving towards. The third issue deals with the privacy concerns created by the federal student records database, which serves to facilitate migrant students' records from one school district to another.

Before considering the challenges facing the MEP program today, it is worth discussing the justifications for the MEP generally in the context of a pro-small federal government and deregulating Department of Education. The first and obvious reason to preserve the program is because migrant students lacking additional academic support continue to be one of the most economically disadvantaged groups with the lowest academic performance scores and the highest dropout rates.¹¹² The original reasons cited by Johnson's Administration to include special provision for migrant children in 1966 remain equally relevant to today's migrant students. Education scholars have reported that "how students are accommodated and integrated into schools and educational systems has important implications for the long-term outcomes of farmworkers' children. . . ."¹¹³ The MEP is an essential tool for securing migrant children's successful accommodation and integration into schools in order to guarantee them a greater opportunity at success in life.

Second, migrant students are accurately characterized as "national children," because "no single state or any local education agency can claim full responsibility for the education of these children" due to their mobility between school districts and state lines.¹¹⁴ The Republican-appointed U.S. Secretary of Education, Roderick R. Paige, agreed with the characterization and further highlighted that the MEP's "costs are not usually covered by state and local levels, since no single school district or even single state is responsible for the education of" migrant students.¹¹⁵ They often go overlooked by states in which they only spend part of the year. Additionally, even states that would like to help their migrant student population may face resource shortages that the MEP can help address. This characterization is further supported by the "long-standing policy that agriculture . . . work is a joint responsibility of the [f]ederal [g]overnment and the several states."¹¹⁶

112. See, e.g., Zarate et al., *supra* note 10.

113. PEREZ & ZARATE, *supra* note 28, at xi.

114. *Leave No Child Left Behind Hearing*, *supra* note 77, at 28 (citing to the statement made by Former Texas Congressman Rubén Hinojosa).

115. *Id.* at 29.

116. PRESIDENT'S COMM'N ON MIGRATORY LABOR, *supra* note 23, at 185. This "long-standing policy" was cited in 1951, prior to ESEA's passage.

Third, some may wonder why migrant students should get special provisions over non-migrant students who may have equally challenging obstacles to overcome. The answer should not be a forced binary of *these* students versus *those* students. The child of an unemployed parent, or a disabled student, or a white Appalachian student, are all equally deserving of comprehensive education programs that address their unmet and unique educational needs. The MEP is simply the program that works for *this* particular group of vulnerable students. But, it also serves as a model for how other comprehensive grant programs can address different subgroups' special needs. To be sure, other programs for subgroups of low-income children do exist, including, ESSA's "Title I, Part D, Prevention and Intervention Programs for Children and Youth Who Are Neglected, Delinquent, or At-Risk."¹¹⁷ Programs like the MEP stand for the idea that a "one-size-fits-all" approach does not work in education policy, but rather requires comprehensive policies that acknowledge and deal with unique groups' special circumstances.

All these justifications are in sync with the ethos expressed by the Department of Education's quote from the forty-fifth President in its Fiscal Year 2019 Budget Summary:

The foundation of the American Dream is a quality education. . . . All our Nation's children deserve the chance to be successful, to live fulfilling lives, and to give back to our communities. . . . [W]e recommit to ensuring that all children in America have a meaningful opportunity to harness their full potential.¹¹⁸

The federal government's recommitment to meaningful opportunities for all our nations' children requires a genuine commitment to grant programs, such as the MEP, to ensure unique, but addressable, obstacles do not hamper low-income children's educational potential.

Due to the need for MEP resources, it is essential to address the program's key contemporary challenges. First, the program's eligibility criteria are too rigid and create two problem areas: (1) in its requirement for a qualifying move and (2) in the limited eligible work industries allowed to receive MEP services. Second, the MEP's use of a federal student record system presents, absent any greater privacy protections, a discouraging effect for migrant families who may have immigrant status concerns.

A. MEP's Outdated Eligibility Requirements for Migrant Students

The MEP reacts to outdated eligibility requirements rather than proactively updating and implementing new ones to meet migrant students' changing realities. The current eligibility requirements are outdated because of their restriction of the type of migrant children served and for how long they are served. Also, the eligibility standards do not fully reflect new migrant labor patterns, such as the increase in

117. 20 U.S.C. § 6421 (2015).

118. U.S. DEP'T OF EDUC., FISCAL YEAR 2019 BUDGET SUMMARY AND BACKGROUND INFORMATION 1, <https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf> [https://perma.cc/HF9C-WBV3].

intra-school district moves. Relatedly, the law has failed to properly expand the eligible industries to include industries, such as construction and landscaping with similar characteristics as agriculture. Policymakers last expanded the regulations to include dairies in the 1980s.¹¹⁹ These shortsighted and restrictive eligibility standards restrict SEAs and LEAs from serving more migrant students who are currently disqualified from MEP eligibility.

ESSA's migrant student eligibility defined a migrant student and a qualifying move as:

(3) MIGRATORY CHILD.—The term ‘migratory child’ means a child or youth who made a *qualifying move* in the preceding 36 months—

- A. as a migratory agricultural worker or a migratory fisher; or
- B. with, or to join, a parent or spouse who is a migratory agricultural worker or a migratory fisher.

....

(5) QUALIFYING MOVE.—The term ‘qualifying move’ means a move due to economic necessity—

- A. from one residence to another residence; and
- B. from one school district to another school district, except—
 - i. in the case of a State that is comprised of a single school district, wherein a qualifying move is from one administrative area to another within such district; or
 - ii. in the case of a school district of more than 15,000 square miles, wherein a qualifying move is a distance of 20 miles or more to a temporary residence.¹²⁰

These inflexible and outdated definitions limit state MEPs from reaching students who would greatly benefit from MEP services. Qualifying move definitions currently delay or limit services for groups like migrant refugees. Similarly, MEP's inflexibility in eligibility for industries beyond agriculture overlooks the labor displacements created by technology, while not alleviating mobility and low-wage issues.

1. Narrow Definitions of a Qualifying Move

Who legally qualifies as a “migrant student” has narrowed and expanded by statute and regulation over the years with the intent to prioritize the most mobile students. ESSA's significant change to the MEP was an amendment to the migrant student eligibility. ED's new guidance changes only reflect the update to the eligibility change in the statute.¹²¹ The ESSA's eligibility update removed an intent provision in the

119. See KUENZI, *supra* note 8, at 3 (“The children of migratory fishers were added to the program in 1974, and children of agricultural dairy workers were added in 1988.”).

120. 20 U.S.C. § 6399 (2015) (emphasis added).

121. *Guidance: Education of Migratory Children under Title I, Part C of the Elementary and Secondary Education Act of 1965*, U.S. DEP'T OF EDUC. (Mar. 2017) <http://www.ed.gov/programs/mep/legislation.html> [<https://perma.cc/2SV8-33KZ>] [hereinafter *Guidance*] (“This introduction, along with Chapter II: Child Eligibility, were revised to reflect considerations of changes to the program enacted in the *Every Student Succeeds Act (ESSA)* of 2015, which reauthorized the *Elementary and Secondary Education Act of 1965 (ESEA)*.”)

definition for a qualifying labor move. This update to the law narrowed eligibility, which already lacked flexibility to allow services to a number of relevant migrant students.

NCLB had defined a migrant student as one:

who is, or whose parent or spouse is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who, in the preceding thirty-six months, *in order to obtain*, or accompany such parent or spouse, *in order to obtain*, temporary or seasonal employment in agricultural or fishing work—has moved from one school district to another.¹²²

Under the former definition, “in order to obtain” was also further defined as a move with the intent to engage in qualifying agricultural or fishery work whether or not they ultimately secured that qualifying work.¹²³ If they did not secure agricultural or fishery work soon after their move, the person could still “be considered to have moved in order to obtain qualifying work only if the worker state[d] that at least one purpose of the move was specifically to seek the qualifying work, and—(i) The worker is found to have a prior history of . . . qualifying work.”¹²⁴ ESSA removed the intent factor, which means that those who moved with the intent to engage in qualifying work, but who failed to secure work and lack a history of qualifying work are no longer eligible.

ESSA’s new criteria makes eligible only migrant students who moved or whose migrant parents or spouses moved *and* successfully engaged in agricultural work shortly after the move, regardless of their intent.¹²⁵ The ESSA update did leave one path of flexibility in the intent standard: a student may remain eligible for MEP funds even if a move for work did not result in actual employment in agricultural work, but there is a recent history of migrant work.¹²⁶

These changes were aimed at improving the recruitment of migrant students by eliminating intent as a factor that recruiters had to try and measure for migrants without prior history in agriculture. Notwithstanding these amendments, the reality is that this is likely to narrow the number of eligible students. The best illustration of this limitation is that of refugee migrant workers’ children. In Colorado, for example, Somali refugees are coming close to outnumbering Latinos in agriculture, dairy, and meat-packing jobs.¹²⁷ However, upon their initial arrival to the country, they may not find work in any industry and thus may move a number of times before finding

With the exception of replacing Chapter II, all other chapters remain unchanged from the non-regulatory guidance document that the Department published on October 23, 2003. Any future chapter revisions will be identified in the chapter title by the date of revision.”)

122. *Id.* at 10 (emphasis added).

123. *Id.* at 10–11.

124. 34 C.F.R. § 200.81(d)(2) (2018).

125. See Every Student Succeeds Act, S. 1177, 114th Cong. § 1309(h) (2015).

126. See *id.* at § 1309(h)(4) (“If an individual did not engage in such new employment soon after a qualifying move, such individual may be considered a migratory agricultural worker if the individual actively sought such new employment and has a recent history of moves for temporary or seasonal agricultural employment.”).

127. See Mejia, *supra* note 45.

work in agriculture or otherwise. Their initial move from their native or host country to the United States, even if they worked in agriculture in their prior country, does not make refugee children eligible for MEP. If and when refugee families make a qualifying move *after* having worked in agricultural labor, refugee children become eligible for MEP funds, assuming they meet all other requirements. Similarly, migrant children whose families move, but remain within the same school district (but not the same school), also fail to meet the eligibility requirement since they did not make an inter-school district move.

Yet, both these groups of students may be the ones who can most benefit from the type of programs and flexibility in response to unique needs in migrant education initiatives. Refugees in certain states are highly likely to work in various low-skilled jobs, including agriculture. However, it may require a number of moves before they end up in agriculture, all while their children's educational disparities remain unaddressed. Likewise, for those students whose families make moves within the same school district, a change from one school to another still poses challenges for migrant workers. For instance, in 2010 the average migrant family moved three to five times in a year,¹²⁸ and while these moves may be closer in radius now, they still cause educational disruptions such as delay in enrollment or low attendance periods. These type of eligibility rules fail to reflect the changes in agricultural workers and the realities in their migrating patterns.

These formalistically rigid eligibility requirements make the program reactive to issues rather than proactive in addressing new labor patterns. It is the equivalent of knowing a problem is going to occur but deciding not to act upon that knowledge until after the fact, at which point the problem has been aggravated. As Pennsylvania's migrant education director and IMEC member testified before Congress: "Mobility as a risk factor for academic achievement is combined with the fact that many migrant children are not native in the English language and need instruction in English as a second language."¹²⁹ MEP focuses to address mobility as just one of many factors affecting agricultural workers. Addressing and elevating the mobility factor early on before it occurs for a growing group of agricultural workers is not feasible under the current eligibility rules.

2. Lack of MEP Eligibility for Non-Agricultural, Low-Skilled Migratory Industries

Technological improvements continue to transform agricultural migratory labor by replacing the manual workforce with machines in crop fields.¹³⁰ This general

128. See *Senate ESEA Reauthorization Hearing*, *supra* note 14, at 12 (testimony by Carmen Medina).

129. *Id.*

130. See Alan Bjerga & Mario Parker, *Robot Crop Pickers Limit Loss of Farm Workers to Trump Wall*, BLOOMBERG (Jan. 19, 2017), <https://www.bloomberg.com/news/articles/2017-01-20/robot-crop-pickers-limit-loss-of-u-s-farm-workers-to-trump-wall> [<https://perma.cc/8VLX-AZ2R>] ("[r]obotic devices like lettuce thinners and grape-leaf pullers have replaced . . . human hands on U.S. farms in recent years . . ."); see also Tom Simonite, *Apple-Picking Robot Prepares to Compete for Farm Jobs*, MIT TECH. REV. (May 3, 2017), <https://www.technologyreview.com/s/604303/apple-picking-robot-prepares-to-compete-for-farm-jobs/> [<https://perma.cc/V9Z8-8FSQ>].

pattern threatens migrant students' families and their livelihoods as agricultural migrant workers. The move to mechanization in agriculture brought two major changes to migrant workers' lives. First, a percentage of migrant families are forced to find new forms of low-skilled, manual labor, because new technology continues to successfully adapt ways to pick even the most fragile crops, such as strawberries. Second, the general decline in agricultural jobs has also decreased the average migrant family's agricultural labor moves per year, while also pushing migrant workers into other low-wage industries or a mix thereof. The industries that are most likely to receive migrant agricultural workers are low-wage industries like construction and landscaping.¹³¹ These industries offer migrant workers low-skilled labor and do not require formal education or extensive job training. However, these industries, like agricultural labor, may also require workers to migrate to meet job demands throughout the United States.

It is now common for state migrant education field recruiters to visit construction and landscaping job sites, and look for former migrant agricultural workers and their children who may still qualify for MEP services.¹³² Former agricultural workers who move but transition to other industries may remain eligible for MEP services if they seek agricultural work shortly after their move, but did not find agricultural labor opportunities. The students only remain eligible up to thirty-six months after their initial move from agriculture. If the families do not secure work in agriculture past the thirty-six months and they continue to migrate for other low-skilled labor, MEP funds are no longer available to these former agricultural migrant students. Similarly, families without any agricultural work history who work in low-skilled industries and migrate for work are altogether ineligible for MEP services despite the common challenges shared with agricultural migrant students.

To be sure, Congress has updated the MEP on two occasions to expand eligibility beyond agricultural migrant labor. The first expansion occurred not too long after the program's founding to include children of migrant workers in the fishing industry in 1974.¹³³ Then, in 1988 Congress amended the MEP to include agricultural dairy migrant workers' children for services.¹³⁴ Currently, statute language clarifies that agriculture may include "dairy work or the initial processing of raw agricultural products."¹³⁵ Additionally, ED's administrative regulations define 'processing of raw agriculture products' to include "the production or initial processing of crops, dairy

131. See Mejia, *supra* note 45; see also Aguilar, *supra* note 45; Telephone Interview with Guillermo Barriga, Project Manager, Metro Migrant Educ. Program, Aurora Pub. Sch. Dep't. of Grants & Fed. Programs (Mar. 17, 2018).

132. See *id.*

133. 120 CONG. REC. S14,227, 14,327 (1974) (daily ed. May 13, 1974) (statement of Sen. Sparkman [hereafter *Senator Sparkman Statement*] ("[T]his amendment . . . simply provides that children of migratory fishermen may be taken care of in the same way as children of migratory agricultural workers. This means a great deal to my area, and I am sure to many other areas of the country where there is a sizable fishing industry.")).

134. KUENZI, *supra* note 8, at 3. This addition was added to the MEP under the Hawkins-Stafford Amendments of 1988, Pub. L. No. 100-297; see *id.*

135. 20 U.S.C. § 6399(2) (2015).

products, poultry, or livestock, as well as the cultivation or harvesting of trees.”¹³⁶ Eligible workers include crop pickers, dairy workers, slaughterhouse laborers, and workers in greenhouses and orchards.¹³⁷ The two statutory amendments and ED’s regulations have allowed for a more comprehensive inclusion of migrant workers *within* agriculture or raw food production.¹³⁸ However, none of these amendments have included non-agricultural or food industries that share some, if not all, of the same challenges as agricultural, fishery, and dairy labor. A significant percentage of migrant children are left without MEP services despite the growing number of families in low-skilled jobs that require them to relocate.

Labor organizations for low-skilled work, like the National Association of Home Builders report shortages in construction workers with over three-fourths of builders nationwide dealing with understaffed crews to meet demands.¹³⁹ Labor shortages in specific geographic areas will require new laborers and their families to migrate. Basic economic principles would indicate that a narrowing of jobs in agriculture and a growing demand for labor in other low-skilled industries creates a natural path of transition for migrant workers. These growing low-skilled and low-paying industries may not be agricultural in nature, but they may also generally require the workforce to migrate for work opportunities. However, as the current statutory language stands, no other low-wage industry worker without prior agricultural labor experience can be eligible.

B. Student Privacy Issues in The Federal Student Records System

The MEP has long faced a challenge in effectively transferring migrant students’ records between the various states students migrate to throughout the year. Migrant students’ multiple school transfers may present issues when schools are unable to confirm credits, immunization records, or basic academic information. ED describes the issues created from states’ lack of access to student records as follows: “Without timely access to the critical information contained in [student] records, school personnel may not be able to enroll migrant students, make appropriate grade and course placement decisions, and ensure the accrual of secondary school course credits.”¹⁴⁰

In response to this issue, Congress requires ED to manage a federal student records system,¹⁴¹ known as the Migrant Student Information Exchange (MSIX) program.

136. 34 C.F.R. § 200.81(a) (2019).

137. *See id.*

138. As of the writing of this Note, ED has placed a number of MEP related regulations on reserve, including Title 34 C.F.R. § 200.81(d) and (f)–(g). These subsections included ED’s definitions for migratory agricultural worker, migratory child, and migratory fisher. *See* 34 C.F.R § 200.81(d), (f)–(g) (2018). These regulatory reservations do not make a material difference to eligibility flexibility because Congress solidified the inflexible eligibility definitions into statute with the enactment of ESSA. *See* 20 U.S.C. § 6399(2)–(5) (2015).

139. *See* Jann Swanson, *NAHB Says Labor Shortages Worsening*, MORTGAGE NEWS DAILY (Apr. 14, 2017, 10:17 AM), http://www.mortgagenewsdaily.com/08142017_nahb_says_labor_shortages_wors.asp [<https://perma.cc/T5GT-GDV8>].

140. *See Migrant Student Record Initiative*, OFF. OF MIGRATORY EDUC., <https://msix.ed.gov/msix/trainingCorner/Brochure/MSIX%20Brochure%20-%20English%20v14%2002.pdf> [<https://perma.cc/3LZD-XWUD>] [hereinafter MSIX].

141. *See* 20 U.S.C. § 6398(b)(2)(A) (2015) (“[t]he Secretary, in consultation with the States, shall ensure the linkage of migrant student record systems for the purpose of electronically exchanging, among the States,

This records program “allows [s]tates to share educational and health information on migrant children who travel from [s]tate to [s]tate and who as a result, have student records in multiple [s]tates’ information systems.”¹⁴² The program functions by collecting every MEP-participating SEA’s state record system data to “ensure the appropriate enrollment, placement, and accrual of credits for migrant children nationwide.”¹⁴³ However, in the broader education policy context, a federal student record database has been a deeply divisive issue among lawmakers and some education policy advocates.¹⁴⁴

The debate has largely focused on a student records system for postsecondary education, but may be equally applicable to an elementary and secondary education records database.¹⁴⁵ On the one hand, proponents of a federal student record system argue that such a system would improve research on student performance and the overall state of postsecondary education.¹⁴⁶ On the other, lawmakers and organizations like the National Association of Independent Colleges argue against a centralized records system due to student privacy concerns.¹⁴⁷ The House Committee on Education and the Workforce, chaired by Representative Virginia Foxx (R-NC), has recently held hearings aiming to find the right balance between the “changing nature of data use and technology for educational purposes, the use of evidence and research in policymaking, and the public’s consistent call for privacy protections over student data[.]”¹⁴⁸ The Committee has heard from experts like Dr. Neal Finkelstein, a senior director at an education research service agency on the improvements and efficiencies reached by utilizing identifiable educational data in policy research.¹⁴⁹ Other experts included Jane Robbins, a senior fellow at the American Principles Project Foundation who recognized the value of data in research, but also made a normative

health and educational information regarding all migratory students eligible under this part.”); *see also* See 20 U.S.C. § 6398(e) (“[t]he Secretary shall direct the National Center for Education Statistics to collect data on migratory children.”).

142. *Migrant Student Records Exchange Initiative*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/admins/lead/account/recordstransfer.html> [<https://perma.cc/TT2K-HNKZ>].

143. *Id.*

144. *See generally* Custer, *supra* note 17 and accompanying text.

145. *See id.*

146. *See id.* at 2227; *see also* Adam Harris, *Here’s How a Student ‘Unit Record’ System Could Change Higher Ed*, CHRON. ON HIGHER EDUC. (May 25, 2017), <https://www.chronicle.com/article/Here-s-How-a-Student-Unit/240165> [<https://perma.cc/466R-4DGV>] (summarizing “students and families[’] need [for] more and better data to make informed decisions about college, including information about the employment outcomes of students” at the college level).

147. *See* Custer, *supra* note 17 at 2227; *see also* Emily Wilkings, *Student-Data Ban Faces Test*, CQ MAG. (Dec. 5, 2016), <https://fox.house.gov/news/documentsingle.aspx?DocumentID=398984> [<https://perma.cc/BV37-X4H2>] (“[T]he idea for a database of student information faces stiff resistance from some lawmakers and privacy advocates.”).

148. *Committee on Education and the Workforce Examines Evidence-Based Policymaking and Privacy for Students*, HOUSE COMM. ON EDUC. & WORKFORCE (Jan. 30, 2018), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=402433> [<https://perma.cc/V3PR-4CH5>] [hereinafter *Hearing on Evidence-Based Policymaking*].

149. *See id.*

claim against the governments' use of minors' identifiable data since minor students "are children who can't give informed consent."¹⁵⁰

The MEP may be one of the rare K-12 federal grant programs that requires a student records system. The current system, MSIX, was created as a solution to help facilitate the exchanges of migrant students' records between school districts and states as opposed to research purposes and the like. However, the MSIX's storage of identifiable student information presents the same student privacy concerns strongly debated in the postsecondary education context. There are two relevant federal statutes regarding student privacy: the Privacy Act and the Family Educational Rights and Privacy Act (FERPA).¹⁵¹ However, as many privacy advocates note, these statutes alone do not protect against breaches of personal information held by federal agencies.¹⁵² Additionally, even experts like Dr. Paul Ohm, who argue that "data analysis and privacy invasion are two sides of the same coin," also recognize that data student record storage mechanisms can, "in the wrong hands, lead to serious and harmful invasions of privacy."¹⁵³

For some migrant students, these harmful invasions of privacy can lead to serious consequences related to their immigration status. As previously noted, migrant families are made up of both native-born U.S. citizens and immigrants, or a combination of mixed immigration status among children and parents. ED's mission to educate all children may cause tension with other agencies' goals, such as those of the Department of Homeland Security. The department has proposed new regulations that would hold immigrants' use of public benefits, including some education programs for their citizen children against them when seeking to adjust their immigration status.¹⁵⁴ This generally restrictive tone towards immigration has and will continue to have a chilling effect on migrant families' willingness to provide personal information or benefit from public programs.¹⁵⁵ While the MEP does not explicitly require disclosing students' immigration status, students and their families are likely targets of U.S. immigration enforcement authorities. Without further privacy protections, more migrant families are resisting and will continue to resist providing personal information to both state and federal officials.

150. *Id.*

151. See Custer, *supra* note 17, at 2233.

152. See, e.g., Jon Marcus, *How Much Does the Government Really Need to Know About College Students in America?*, ATLANTIC (Oct. 24, 2017), <https://www.theatlantic.com/education/archive/2017/10/should-the-government-monitor-students-college-progress/543735/> [<https://perma.cc/TFA4-EBZQ>] ("Critics cite a 2015 [GAO] report showing that the number of breaches per year of personal information held by federal agencies more than doubled, to 27,624 from 2009 to 2014. They also draw attention to the 2015 hack of personnel records of 4 million federal employees and contractors. . .").

153. *Hearing on Evidence-Based Policymaking*, *supra* note 148.

154. See Dara Lind, *Exclusive: Trump's Draft Plan to Punish Legal Immigrants for Sending US-born Kids to Head Start*, VOX (Feb. 8, 2018, 7:37 PM), <https://www.vox.com/2018/2/8/16993172/trump-regulation-immigrants-benefits-public-charge> [<https://perma.cc/96U4-VZ4Y>].

155. See Mejia, *supra* note 45; Aguilar, *supra* note 45; Telephone Interview with Noemi Treviño, Migrant & Schoolwide Specialist, Minn. Dep't of Educ., (Mar. 7, 2018); Barriga, *supra* note 131; Telephone Interview with Dinh H. Nguyen, Ph.D., Dir. of Title I, Part C, Bureau of Fed. Educ. Programs, Fla. Dep't. of Educ. (Mar. 21, 2018).

IV. RESPONSES TO MIGRATORY EDUCATION CHALLENGES

The MEP's main challenges in supporting today's migrant populations are best addressed by statutory updates that reflect the changes in migratory labor and the need for greater privacy protection for student records. First, this Note advocates for flexibility in the definition of a qualifying move to allow eligibility for more students, such as those who may move with the intent to work in agriculture but fail to secure an agricultural job. The MEP's success in supporting migrant students is principally due to the flexibility and deference the program grants states and their SEAs. There remains, however, a significant lack of flexibility in certain essential parts of the program. These areas include the program's eligibility requirements for both students who qualify and the eligible migrant work industries. This Note advocates for eligibility expansion for more low-wage industries that require families to move and undergo some of the same hardships facing migrant agricultural workers. Lastly, the Note encourages Congress to remove the MEP's federal student records system, absent any further privacy protection for migrant students or, alternatively, allow opt-out options from the database for migrant families without losing eligibility to services.

A. Statutory Updates to Eligibility

The last major expansive MEP eligibility update occurred more than three decades ago. In the time since, many changes have reshaped migratory labor in the United States. More comprehensive updates to expand flexibility in qualifying moves and new migratory labor industries are essential for the next reauthorization.

1. Statutory Update with Flexibility in Qualifying Moves

Throughout the MEP's history, changes in eligibility criteria for migrant students have largely focused on prioritizing the most mobile. As previously stated, eligibility from a qualifying move only extends to thirty-six months after the move from one school district to another.¹⁵⁶ This priority has created a rigid eligibility standard that restricts migrant students who may not migrate as often and students who migrated as refugees, which does not count as a qualifying move. The eligibility requirements lack flexibility in SEAs' ability to respond to the new migrating patterns and demographics in migrant labor. For example, the current statutory regime may fail to recognize a refugee family's move to the United States as a qualifying move for MEP purposes, even if they had worked in agriculture in their home country. Yet, the educational restrictions and obstacles caused by mobility from one crop field to another will largely, if not identically, mirror the same obstacles caused by a refugee students' move from one country to another whose parents become low-wage workers. The current statutory restrictions would also fail to serve a child whose family moved in search of agricultural work but failed to secure work and have no prior history of agricultural work in the last thirty-six months. In both instances, moves have occurred,

156. See *Reauthorized Migrant Program*, *supra* note 75.

yet MEP funds are not allowed to serve these students due to minor technicalities. These types of students would benefit from MEP funds because researchers have found that the way “students are accommodated and integrated into schools and educational systems has important implications for the[ir] long-term outcomes.”¹⁵⁷

Additionally, while mobility is one major contributing factor to migrant students’ educational difficulties, it is not the only one. Other obstacles are present despite an absence of physical moves, such as the need for additional language instruction, cultural differences, a general lack of understanding about educational institutions and the requirements for postsecondary education, and student record discrepancies. The MEP should continue to prioritize the most mobile students, but not by denying services to those with less frequent moves. As education scholars have pointed out, MEP “services now have a shorter time span to effectively impact students’ academic trajectory if the student and their families remain in one location longer than three years.”¹⁵⁸ It is unrealistic to believe that all the vestiges of a migrant lifestyle upon students will be resolved within thirty-six months from their last move.

The ESSA eligibility change to remove the *intent* provision only became effective in 2017, and state migrant education directors and service providers are cautious to make any premature judgements about the way the statute change will impact the number of children they serve.¹⁵⁹ Again, the problem is not solely the new change to eligibility, but the overall lack of flexibility in eligibility for workers in agriculture who may not be moving as often or who are likely to move, but whose children will not be served by MEP until such a move does occur. This prevents the LEAs from serving and intervening early in the process before significant issues materialize due to a move. If states were allowed to serve workers who have yet to migrate for work before the move, they could potentially alleviate common mobility issues such as delay in enrollment, credit and student transfers between school districts, or prevent the move of the student altogether.

A number of state migrant education programs provide parent trainings to educate families about the educational impacts to children caused by school moves and promote finding ways to prevent students from moving themselves whenever possible.¹⁶⁰ These trainings and education have resulted in less families migrating as a whole; rather, the head of household temporarily migrates from their home state while their children remain in school.¹⁶¹ Reducing the number of student moves from district to district ought to be measured as a positive impact allowed by SEAs’ intervention using MEP funds for agricultural workers who have not yet moved for work. While the MEP was not designed to create proactive moves to prevent migration, it would be feasible for an agency interpretation to include preventative migration efforts as a way of reaching the program’s stated purposes.

157. PEREZ & ZARATE, *supra* note 28, at xi.

158. Zarate et al., *supra* note 10, at 8.

159. See Mejia, *supra* note 45; see also Aguilar, *supra* note 45; Treviño, *supra* 155; Barriga, *supra* note 131; Nguyen, *supra* note 155.

160. See *id.*

161. See *id.*

Thus, Congress should update the qualifying move requirement to include two additional types of migrant labor moves. First, a qualifying move should include a move by a family with a history of any currently qualifying migrant work or a move from *any* country into any qualifying migrant industry. Relatedly, Congress needs to enact a new commission, similar to the National Commission on Migrant Education created in 1988, to further study the new migratory labor patterns and determine if thirty-six months continue to reflect an appropriate eligibility period in light of the decline in migrants' average moves per year. If the commission were to find a smaller average number of moves per year by migrant families, then Congress should respond by extending the eligibility period for migrant students after a qualifying move beyond thirty-six months. This update will better reflect actual labor realities and still prioritize the new most mobile of students. It will also allow MEP service providers a more realistic timeframe to help improve migrant students' academic disparities.

2. Statutory Update to Include Additional Low-Paying and Migratory Industries

In addition to creating flexibility in the qualifying labor move and the eligibility period following such a move, the law should also comprehensively reflect the new migrant industries that share the same qualities as agricultural migrant labor. The shriveling demand for manual labor in agriculture due to a shift to mechanization by new technologies threatens agricultural workers' livelihood. At the same time, other low-skilled labor industries, including construction and landscaping, are providing migrant agricultural workers with new occupation options. However, these expanding industries do not necessarily alleviate workers' need to migrate. Workers are not guaranteed to settle down in areas after they have found nonagricultural low-wage employment in other industries. In particular, construction work is increasingly responsive to emergency demands due to unforeseen factors, such as natural disasters. This is most evident following a major natural disaster where new infrastructure and homes need to be rebuilt. Hurricane Katrina in Louisiana¹⁶² and Hurricane Irma in Florida¹⁶³ are two examples of this trend. Based on the limited data from service providers in states like Colorado, migrant families are altogether transitioning to these industries or working in them to supplement their agricultural labor. The mobility issues in these industries create the same type of educational obstacles for the workers' children.

While Title I, Part C was originally formed to respond to the needs of migrant *agricultural* workers, there is very little reason to not extend that support to other

162. See generally Andy Grimm, *Hispanic Immigration Post-Katrina Finding Permanent Roots in Metro New Orleans*, TIMES-PICAYUNE (Aug. 27, 2015), http://www.nola.com/katrina/index.ssf/2015/08/katrina_latino_immigrant_new_o.html [<https://perma.cc/HQW4-K5N4>]; see generally Blake Sisk & Carl L. Bankston, III, *Hurricane Katrina, a Construction Boom, and a New Labor Force: Latino Immigrants and the New Orleans Construction Industry, 2000 and 2006–2010*, 33 C.L. POPULATION RES. POL'Y REV. 309 (2014), <https://doi.org/10.1007/s11113-013-9311-8> [<https://perma.cc/6TBQ-7W9D>].

163. See generally Danielle Paquette, *Companies Can't Find Workers to Rebuild After Harvey and Irma*, WASH. POST (Oct. 4, 2017), <https://www.washingtonpost.com/news/work/wp/2017/10/04/companies-cant-find-workers-to-rebuild-after-harvey-and-irma/> [<https://perma.cc/MTK2-U3XU>].

groups of mobile, low-income families. When Senator Sparkman from Alabama submitted the amendment to include fishery sector workers' children, he provided the following justification: "There are many fishermen in the country who move from place to place just as agricultural workers move from place to place [This] amendment is to put them in the same place as migratory agricultural workers—nothing more and nothing less."¹⁶⁴ The Senator indirectly implied that the low-wage status of both industries in conjunction with their mobility were the justifying combination for MEP funds.¹⁶⁵ This shows Congress's intent to address mobility for migrant workers not just in agriculture, but those similar low-wage industries as well. What made Congress explicitly highlight agriculture in the MEP was that it represented one of the harshest low-wage industries with significant chronic poverty rates. Later, Congress recognized mobility and low-wage characteristics in both fishery and dairy labor to justify extending the same educational aid provided to migrant agricultural laborers. Extending MEP eligibility to additional industries characterized by high mobility and low-wages, like construction and landscaping, honors the language and spirit of the model set by Congress's previous amendments in the 1970s and 1980s.

Whether mobility is caused by moves in agriculture or by moves in any other low-skilled or low-paying industry, the MEP's main concern should be to address and reduce education obstacles created by such moves. "Migrant" has become synonymous with agriculture, but migrant labor now encompasses industries that may not have been migratory in nature in previous decades. The law should not obsess over the industry, but rather on the common factors linking these industries: mobility and low-wages, which together exacerbate migrant students' educational challenges. A commission on migrant education could help identify the most relevant industries characterized by required mobility and low-pay. The threshold number can be decided by Congress, like the federal poverty standard, to mark low-pay. Following such findings Congress must update the statute to offer eligibility to families in those industries.

B. Rethinking Student Records Database

Student advocates at large have rallied against the idea of a student records system due to privacy concerns. This same level of concern and discussion of the MSIX and previous federal student record programs for minors has been strikingly absent from the debate. In order to respond to migrant students' continuous moves between schools, Congress required the creation of a student record system as a solution to eliminate the issues—such as enrollment delays—due to a lack of student information.¹⁶⁶ While the student data collection and database requirements were well-intended, lawmakers accepted them too quickly as the best solutions even though they have rejected such a student data collection practice and database for all other

164. *Senator Sparkman Statement*, *supra* note 133, at 14,327.

165. *See id.*

166. *See supra* notes 141, 142, and their accompanying text.

students. Whether or not there are legal rights arguments for using a federal database to maintain migrant student data is beyond the scope of this paper. However, at minimum, as current policy debates have demonstrated, there is a strong normative argument to consider regarding student privacy concerns. A legally viable practice is not synonymous with good public policy.

As Congress considers the balance between data collection for research and student privacy concerns, it must fully consider the implications of federally-held data for subgroups of populations, like migrant students with a percentage of immigrant families who worry about their legal status. This argument does not challenge that MSIX may present an effective solution for migrant students' issues when they transfer between schools. This Note aims to insert the MSIX program into the broader educational and privacy debate so that more protections may be granted to migrant children.

Additional privacy protections are required for migrant students beyond the "federal requirements to safeguard the privacy and security of education data, including requirements set forth in the Privacy Act of 1974, the Family Educational Rights and Privacy Act (FERPA), and the Federal Information Security Management Act (FISMA)."¹⁶⁷ The current Administration's policies and attitudes toward immigration frightens immigrant migrant families and dissuades them from sharing identifiable information, thus making them less likely to participate in migrant education programming. Families require a greater guarantee that federal agencies or departments, such as the Department of Homeland Security, will not access and abuse the information collected through MEP's student records database or any state database.

The current federal protections are inadequate because they fail to protect a nationwide student record system. Additional protections beyond FERPA that contain protections from interagency abuse must be extended and made explicit in order for agencies and courts to easily administer. Congress's intent must be clear: to protect migrant students and their families from even indirect use of their information by federal agencies for non-educational purposes. At the very minimum, MSIX has to be part of the national debate on student privacy to help benefit from whatever balance Congress decides to strike between data use and student privacy.

In the meantime, Congress ought to give migrant students and their families the option to opt out of the MSIX program without forfeiting their eligibility for MEP funds.¹⁶⁸ Policymakers should not force the "take-the-bitter-with-the-sweet"

167. See MSIX, *supra* note 140.

168. As of March 18, 2019, ED placed a notice and comment request regarding the MSIX on the Federal Register. The notice requests public comments on the following:

- (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

The public comments were due May 17, 2019. See Agency Information Collection Activities; Comment Request; Migrant Student Information Exchange (MSIX), 84 Fed. Reg. 52, 9768 (March 18, 2019). Even if ED places some restrictions on MSIX, the subjects for comments lack any discussion on privacy. See *id.*

approach upon vulnerable migrant children in order for them to benefit from federal grants. The federal government makes special accommodations and opt-out options for a number of other programs that promote parent choice and student autonomy. Migrant students' autonomy to choose to share information, absent the government's further guarantee not to use such data for other agency needs—such as deportation efforts—ought to be among those accommodations.

V. CONCLUSION

ESSA's Title I, Part C Migrant Education Program has aided migrant students' public education through federal aid for more than half a century. The program's story is one of race, class, and education policy in America, for migrant students have represented some of the poorest minority children in the country. Throughout its history, the limited statutory and regulatory changes have prioritized serving the most mobile students through eligibility requirements. However, the MEP's eligibility requirements lack crucial updates, and therefore do not accurately represent today's migrant labor realities. In order to correct these incongruities, first, the definition of qualifying moves should be expanded to include *any* history of eligible migrant work for a longer period of time. Second, the program's reach must reflect the changes to migrant labor which now includes industries beyond agriculture that require families and students to move in pursuit of other low-skilled work opportunities. Finally, a federal student records database must be reinforced with further protection beyond the current federal privacy laws, which are inadequate for a nationwide federal records system for all students. If such security measures are not feasible, then migrant students and their families need to be guaranteed the choice to opt-out of the federal database without having their MEP services terminated. All three of these recommendations require a study from a congressional committee to refine the recommendations to policy makers on the state of migrant labor today in order to update the MEP to reflect those new realities.

The proposed improvements are neither revolutionary nor drastic deviations from the MEP's original goal of alleviating the burdens inhibiting some of the poorest children in the country from receiving a quality education. ESEA's creation of federal aid for migrant children in the 1960s, and its further amendments like the ESSA, aimed to assist the poorest of the poor and those most likely to move for low-wage work. Today, those migrant children still require that same support, but their realities are different from those of migrant children in the past. The law should therefore reflect those changes. In order to ensure that migrant workers' children have equal access to education as a means to better their lives, Congress must allow for flexibility in qualifying moves, expand the number of qualifying industries for MEP funds, and strengthen protections for students' privacy.