

# BARRIERS TO EDUCATION FOR CHILDREN OF MIGRANT FARM WORKERS

## INTRODUCTION

The bleak circumstances of the undereducated migrant worker has been depicted in literature and film for years. John Steinbeck's *Grapes of Wrath*<sup>1</sup> and Edward Marrow's 1960 documentary, *A Harvest of Shame Children*, brought the migrant worker's plight to light.<sup>2</sup> The poverty of migrant workers is a cycle repeated for generations.<sup>3</sup> Illiteracy and lack of education for migrant children are key contributors to the continuation of life in the fields and ensuing poverty. Children of migrant farmworkers are chronically "undereducated."<sup>4</sup> Frequent moves to new schools, language and cultural barriers, and child labor contribute to the undereducation of children of migrant farm workers.<sup>5</sup> This law review comment details the educational barriers peculiar to the child of the migrant farm worker and, discusses present and future programs designed to help the migrant student.

## I. BACKGROUND

Migrant farmworker children have the highest dropout rate of any group the country, ranging from forty-five to sixty percent.<sup>6</sup> High school graduation rate for migrant children is even lower, at only ten percent completing the twelfth grade.<sup>7</sup> On average, the migrant farm

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<sup>1</sup> TOBY F. SONNEMAN, *FRUIT FIELDS IN MY BLOOD: OKIE MIGRANTS IN THE WEST* 5 (Univ. of Idaho Press) (1992).

<sup>2</sup> ISABEL VALLE, *FIELDS OF TOIL: A MIGRANT FAMILY'S JOURNEY* 213 (Washington State Univ. Press) (1974).

<sup>3</sup> See Sonneman, *supra* note 1, at 18.

<sup>4</sup> Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 1974 U.S.C.C.A.N. 6441.

<sup>5</sup> Velma Menchaca & Jose Ruiz-Escalante, *Instructional Strategies for Migrant Students* (July 17, 2001), at <http://aelliot.ael.org/~eric/digests/edorc9510.html>.

<sup>6</sup> Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. J. 99, 117 (1994).

<sup>7</sup> Shelley Davis, *Child Labor in Agriculture* (Sept. 11, 2001) at <http://ael.org/eric/di>

worker has only five and a half years of formal schooling and many are not even literate in their native language.<sup>8</sup>

Frequent moves in search of agricultural work causes children to be uprooted from school.<sup>9</sup> This results in low student performance, with forty-one percent low achievement versus twenty-six percent of students who have never moved.<sup>10</sup> This also causes poor peer relationships and isolation.<sup>11</sup>

A small number of migrant youth, typically from small villages in Mexico, Central America, or South Asia, have never been enrolled in any school. The population of these villages is often smaller than a United States public school.<sup>12</sup> Middle and high school age students with little formal schooling are likely to remain illiterate, even in their own language.<sup>13</sup> Some of these children live in remote regions where the nearest school is too far for the student to travel.<sup>14</sup> These students face obstacles that extend beyond a language barrier. Not only are they unfamiliar with classroom procedures, they are forced to adjust to varying bell schedules.<sup>15</sup>

## II. PROGRAMS AVAILABLE

### A. Migrant Education Program

Migrant Education Program (MEP) is authorized by Title I Part C of the Elementary and Secondary Education Act (ESEA).<sup>16</sup> Congress has long understood that all individuals are to be given fair and equal education.<sup>17</sup> In 1965, congress adopted ESEA to provide “a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are of moral imperative, and improve the life of every individual, because the quality of our in-

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gests/rdor9610.htm.

<sup>8</sup> Katherine Milton & Jack E. Watson, *Distance Education for Mexican-American Migrant Farmworkers* (July 17, 2001), at [http://seamonkey.ed.asu.edu/~mcisaac/emc598geold97/Sprin\\_g97/10/migrant.html](http://seamonkey.ed.asu.edu/~mcisaac/emc598geold97/Sprin_g97/10/migrant.html).

<sup>9</sup> See Susan C. Morse, *Unschooling Migrant Youth: Characteristics and Strategies to Serve Them* (Aug. 3, 2001), at <http://aelliot.ael.org/~eric/digests/edorc972.html>.

<sup>10</sup> Len Biernat & Christine Jax, *Limiting Mobility and Improving Student Achievement*, 23 *HAMLIN L. REV.* 1, 4 (1999).

<sup>11</sup> *Id.* at 9.

<sup>12</sup> Morse, *supra* note 9.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Improving America's Schools Act, Pub. L. No. 103-382, 108 Stat. 3519.

<sup>17</sup> See *id.*

dividual lives ultimately depends on the quality of the lives of others.”<sup>18</sup> MEP focuses on five major themes: standards and assessment, teaching and learning, professional development, funding and governance, and partnerships with schools, parents, families, and communities.<sup>19</sup>

The purpose of MEP is to “support high-quality and comprehensive educational programs for migratory children to help reduce educational disruptions and other problems that result from repeated moves.”<sup>20</sup> Specifically, MEP gives grants from the state’s Education Department for the purpose of helping migrant children overcome cultural barriers, language difficulties, and educational disruptions.<sup>21</sup> These funds are distributed with priority given to grantees providing services to migratory students who are failing, or in danger of failing.<sup>22</sup> A child meets the requirements for MEP when he or she moves within a thirty-six month period, with a parent or guardian seeking seasonal or temporary agricultural or fishing work. MEP will apply whether the child moves within the state or from a different state.<sup>23</sup> Although MEP is federally funded, the framework for delivering services is set out by each state it serves.<sup>24</sup>

California’s Migrant Education services are provided through the local school districts to help the migrant child overcome interruptions in schooling, health problems, and any other educational difficulties.<sup>25</sup> Because each state’s requirements and standards in curriculum and testing differ, migrant students suffer when they move to different states. Having to adapt to a new curriculum with each move, puts even the brightest migrant students in danger of failing.<sup>26</sup> MEP programs offered to migrant students include an individual assessment of the migrant child’s needs, bilingual and bicultural education, academic instruction, remedial instruction, vocational counseling, and career edu-

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<sup>18</sup> *See id.* § 101.

<sup>19</sup> *See generally* CAL. ED. CODE § 54444.1 (West 1982).

<sup>20</sup> 20 U.S.C. § 6391 (1994).

<sup>21</sup> 20 U.S.C. § 6391 (1994).

<sup>22</sup> *See* CALIFORNIA DEPARTMENT OF EDUCATION, MIGRANT EDUCATION/INTERNATIONAL OFFICE [hereinafter CALIFORNIA DEPARTMENT OF EDUCATION]; Al Wright, *Reauthorized Migrant Education Program: Old Themes and New* (July 17, 2001) at <http://aelliott.ael.org/~eric/digests/edorc951.html>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

cation services.<sup>27</sup>

### B. Parent Advisory Council

There is a close relationship between the level of parental involvement in a child's education and the student's academic performance.<sup>28</sup> Because of this, California Education Code section 54444.2 establishes a parent advisory council to give the parents' of migrant students a voice in their children's education. The responsibilities of the parent advisory council are to collaborate with MEP coordinators on selecting and reassigning MEP program staff, establishing education program goals, and being actively involved in program planning.<sup>29</sup> Migrant farm working parents need to be involved in the schooling of their children, and help prevent the high rate drop out rate among migrant children. In order to help prevent the cycle of illiteracy and lack of formal education,<sup>30</sup> the parents should have a voice in the migrant programs that service their families.<sup>31</sup>

Hispanic parents traditionally exhibit limited involvement in their children's education. However, studies show that migrant farmworking parents want to be involved, which is often misinterpreted as lack of interest.<sup>32</sup> Language barriers, culture, and negative past experiences with the educational system, contribute to the low level of educational involvement of migrant farm-working parents.<sup>33</sup> The parent advisory council tries to remedy this problem by giving farm-working parents a voice in educational programs available to their children, and letting them know that their input is valuable and desired.<sup>34</sup>

### C. Migrant Student Record Transfer System

The Migrant Student Record Transfer System (MSRTS), a program administered through MEP, was established to help with the difficulties that arise from frequent moves to new school districts by migrant

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<sup>27</sup> 1981 Cal. Stat. 843-1186 at 3595-3596.

<sup>28</sup> Nancy Feyl Chavkin & Dora Lara Gonzalez, *Forging Partnerships Between American Parents and the Schools* (August 3, 2001) at <http://aelliot.ael.org/~eric/digests/edorc958.html> (discussing approaches that will mostly likely be able to involve the parents of migrant students to become involved in the education of their children).

<sup>29</sup> CAL. ED CODE § 54444.4 (West 1982).

<sup>30</sup> See Milton & Watson, *supra* note 8.

<sup>31</sup> *Martinez v. Matthews*, 544 F. Supp. 1233, 1238 (5th Cir. 1976) (discussing Congressional concern that migrant farmworkers take an active role in the governance of health centers serving migrant farm working families).

<sup>32</sup> Chavkin & Gonzalez, *supra* note 28.

<sup>33</sup> *Id.*

<sup>34</sup> See generally CAL. ED CODE § 54444.1 (West 1982)

students.<sup>35</sup> The MSRTS was implemented as a central reservoir for students' school and health records. When a student moves from one school to another, MSRTS stores his or her records and the new school simply has to retrieve the records from the national database.<sup>36</sup> This gives immediate access to the student's records and allows for a speedier transition into the new school.<sup>37</sup>

However, the MSRTS was abandoned in 1995 after the Secretary of Education deemed the MSRTS system inefficient and not cost-effective.<sup>38</sup> A problem with MSRTS was that many of the students migrated to states with lower concentrations of migrant workers or Mexico, where they did not have MSRTS systems. This problem also occurred when the children moved to Mexico. As a result, the student's most recent school and health records were not available.<sup>39</sup>

A class action lawsuit for injunctive relief seeking to reinstitute the MSRTS system was filed on behalf of the migrant students that were serviced.<sup>40</sup> The U.S. District Court for the District of Columbia found that although Title 20, United States Code section 2783(a)(2)(A) states that ". . . the Secretary is also authorized to enter into contracts with State educational agencies to operate a system for the transfer . . . of migrant student records," the Secretary of Education is not mandated to do so.<sup>41</sup> The court held that discontinuing the MSRTS did not meet the burden of "irreparable injury" necessary to grant injunctive relief because the migrant parents can simply hand carry the student's records, as do other parents who move.<sup>42</sup>

Although the intent of Congress was to establish and maintain a system for transferring student records, none has been reestablished in the wake of the 1995 closure of the MSRTS.<sup>43</sup> In 2001, a bill, entitled the Better Education for Students and Teachers Act, was proposed. This Act would establish a new electronic record transfer system.<sup>44</sup> This proposed system would mandate the Secretary of Education to assist each state in developing a system to transfer student health and

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<sup>35</sup> *Herrera v. Riley*, 886 F. Supp. 45, 47 (D.C. 1995); see also Al Wright, *supra* note 22.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Davis, *supra* note 7.

<sup>40</sup> *Herrera*, 886 F. Supp. at 46.

<sup>41</sup> *Id.* at 49.

<sup>42</sup> See *id.* at 51.

<sup>43</sup> 20 U.S.C. § 2783 (1965).

<sup>44</sup> Better Education for Students and Teachers Act, S.1, 107th Cong. (2001).

school records and determine the number of migrant students residing within the state.<sup>45</sup> The bill states, “the secretary shall assist States in developing effective methods for the transfer of student records and in determining the number of students . . . .”<sup>46</sup>

However, the bill was revised and is now entitled, *To Close the Achievement Gap with Accountability, Flexibility, and Choice, So That No Child is Left Behind*.<sup>47</sup> The requirement for an electronic records transfer system is deleted in the new bill. This bill states, “The State will provide for educational continuity through the timely transfer of pertinent school records, including information on health, when the children move from one school to another . . . .”<sup>48</sup> The new bill does not create a central data warehouse for school records, nor does it specify how a timely transfer of school records will be made.<sup>49</sup> On January 8, 2002, the bill was signed by President Bush and became law.<sup>50</sup>

*D. High School Equivalency Program and College Assistance Migrant Program*

A large percentage of migrant students drop out of school and never attain a high school diploma. To combat this, Congress started a program in 1967 called the High School Equivalency Program (HEP).<sup>51</sup> HEP helps students attain their high school equivalency certificates. Along with study preparation for taking the General Education Diploma (G.E.D.), HEP also offers vocational job training programs and college preparation. HEP is available to migrant students who are at least sixteen-years-old and not currently enrolled in high school.<sup>52</sup> Since its inception in 1967, HEP has assisted over thirty thousand migrant students.<sup>53</sup>

A smaller program related to HEP is the College Assistance Migrant Program (CAMP).<sup>54</sup> CAMP is funded by a combination of the U.S.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *To Close the Achievement Gap with Accountability, Flexibility, and Choice, So That No Child is Left Behind*, H.R. 1, 107th Cong. (2001).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> H.R. 1, 107th Cong. (2001), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR00001:@@X>.

<sup>51</sup> Milton & Watson, *supra* note 8.

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *Id.*

Department of Education, state grants, and participating universities. The program offers all, or a great portion, of the first year's tuition, a monthly stipend, and other financial counseling such as available student loans and scholarships.<sup>55</sup> During the next three years of college, the migrant student is offered student loans, work-study programs, and available grants and scholarships. Academic tutoring, career counseling, and health care are also a part of CAMP.<sup>56</sup> College-bound migrant students "are urged to get out of the fields and into the classrooms" by CAMP recruiters.<sup>57</sup>

### E. Mobile Schools

One solution to the drop out rate associated with frequent moves by the migrant family is to create a mobile school.<sup>58</sup> In 1993, a program consisting of five staff members followed students as they moved from Ohio to Florida each year during harvest times. There were thirty-six students, in the program, ranging from kindergarten to first grade.<sup>59</sup> Research on the students, collected from 1994 to 1996, reported significant academic and emotional improvement.<sup>60</sup> Organizers of the program realize the program is not feasible for all migrant students due to cost restraints and mobility patterns.<sup>61</sup> The experimental program ended in 2000.<sup>62</sup>

## III. BILINGUAL EDUCATION

The vast population of migrant farmworkers speak Spanish as their native language. Over ninety percent of migrant farmworkers are Hispanic, eighty percent of whom are born in Mexico.<sup>63</sup> For many children of farmworkers, English is not spoken in the home at all. School may be the first place the migrant child is put in an English-speaking setting.<sup>64</sup> Parents of migrant children want their children to become

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<sup>55</sup> Valle, *supra* note 2, at 126-127.

<sup>56</sup> *Id.* at 127.

<sup>57</sup> *Id.*

<sup>58</sup> Nanette Woitas, *School Follows Harvest: An Experimental School That Moves Between Ohio and Plant City as Crops are Picked is Helping Migrant Farmworkers' Children Succeed*, TAMPA TRIBUNE, March 21, 1998, at Plant City 1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See id.*

<sup>62</sup> Telephone interview with Joann Parlino, Director of Religious Education, St. Clement Church (Apr. 4, 2002).

<sup>63</sup> Milton & Watson, *supra* note 8.

<sup>64</sup> *See* Joan Strouse et al., *An Urban Migrant-Education Model*, EDUCATION, Spring,

proficient in English in order to fully realize the American Dream of social and economic prosperity.<sup>65</sup> However, language is a barrier to education. As such, these students have difficulty keeping up and often end up dropping out.<sup>66</sup>

Another difficulty faced by migrant students is that their parents are often illiterate in both English and Spanish. These parents cannot read information from the school that pertains to their child. A phone call to set up a face-to-face interview is the best way to ensure that parental involvement stays at its highest level.<sup>67</sup> A migrant Head Start program in Illinois called *Prestame una Comadre* (the English translation is *Loan me a Godmother*) sends social workers for home visits up to three times a week. During the home visit, the social worker involves the parents in the child's studies.<sup>68</sup> The program also holds small group meetings focusing on self-reliance, child development, child education, and improving family functioning.<sup>69</sup> To facilitate the best educational outcome for the migrant child all family members need to participate in a partnership with school. Each member of the family should share responsibility for education of the children.<sup>70</sup>

Bilingual education has been a controversial subject for several years.<sup>71</sup> In 1974, the United States Supreme Court decided *Lau v. Nichols*.<sup>72</sup> In this case, a group of eighteen hundred non-English speaking Chinese-American students sued to have a bilingual education system established in San Francisco.<sup>73</sup> The court held that students' access to a meaningful education was being withheld.<sup>74</sup> The court made the distinction that only schools with a substantial number of non-English speaking students would be mandated to provide bilingual education.<sup>75</sup>

In recent years, a debate has raged over the best method of helping

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1993, at 480; Stephen Krashen, *Why Bilingual Education?* (September 11, 2001) at <http://www.ael.org/eric/digests/edorc968.htm>.

<sup>65</sup> Valeria G. v. Wilson, 12 F. Supp.2d 1007, 1017 (N.D. CA. 1998) (citing California Proposition 227 § 300(d)).

<sup>66</sup> Strouse et al., *supra* note 64, at 480.

<sup>67</sup> Chavkin & Gonzalez, *Supra* note 28.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See Krashen, *supra* note 64.

<sup>72</sup> *Lau v. Nichols*, 414 U.S. 563, 564 (1974).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 569.

<sup>75</sup> *Id.* at 571-572.

non-English speaking students become fluent English speakers.<sup>76</sup> The Bilingual Education Act of 1974 created federal funding to help local schools establish and maintain bilingual education programs.<sup>77</sup> However, the Act does not mandate that all limited English proficient (LEP) students receive a bilingual education, nor does it specify what type of program the local school should utilize to help students attain English proficiency.<sup>78</sup>

A controversy exists whether teaching students in their native language keeps them from learning English more quickly. Opponents of bilingual education feel that having students separated from their English-speaking peers wastes educational resources.<sup>79</sup> In Bilingual Education classes, students are taught substantive subjects, such as math, social studies, and history, in their native language.<sup>80</sup> Proponents of Bilingual Education feel this will allow students to compete academically with their English-speaking peers.<sup>81</sup> On the other hand, opponents of Bilingual Education classes claim that separating Spanish-speaking children and teaching them in Spanish is a “well-meaning, but ill advised strategy leading inevitably to marginalization from the social and economic mainstream.”<sup>82</sup>

Immersion programs are offered as a resolution. These programs allow a student to have some subjects taught in their primary language and other subjects held in English-only classrooms.<sup>83</sup> A smaller number of immersion programs mainstream LEP students into all-English classrooms from the start.<sup>84</sup> Proponents of immersion programs contend that it has proven itself effective and is the predominant method of teaching immigrant children the native languages of Western European countries, Canada, and Israel.<sup>85</sup>

In 1988, California voters overwhelmingly passed Proposition 227 entitled “English Language in Public Schools.”<sup>86</sup> The goal of Proposition 227 is to limit LEP students to only one year of immersion.<sup>87</sup>

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<sup>76</sup> See Krashen, *supra* note 64.

<sup>77</sup> *Valeria G. v. Wilson*, 12 F. Supp.2d 1007, 1018 (N.D. CA. 1998)

<sup>78</sup> *Id.*

<sup>79</sup> See generally Krashen, *supra* note 64.

<sup>80</sup> *Valeria*, 12 F. Supp. at 1018.

<sup>81</sup> See *id.*

<sup>82</sup> *Id.* (quoting language from California Proposition 227).

<sup>83</sup> Krashen, *supra* note 64.

<sup>84</sup> *Id.*

<sup>85</sup> *Valeria*, 12 F. Supp. at 1018.

<sup>86</sup> *Id.* at 1011.

<sup>87</sup> *Id.* at 1013.

Currently, the LEP students are not mainstreamed into all-English classes until they are proficient in English.<sup>88</sup> In *Valeria v. Wilson*, Proposition 227 was upheld on the basis that it did not deny a "meaningful opportunity to participate in the educational program" as defined in *Lau*.<sup>89</sup> The court also found that because the program was designed to encourage LEP students to become English speakers, and since the program has not yet shown any results to the contrary, there are no Civil Rights violations.<sup>90</sup>

LEP migrant students feel estranged from their English-speaking peers. They are often regarded with disdain and considered ignorant because of their inability to communicate in English.<sup>91</sup> Weak peer relationships are shown to create a disinterest in school and a downward spiraling effect on academics.<sup>92</sup> Until the migrant student becomes proficient in English, the student will not be able to have any meaningful relationships with the school's English-speaking majority. Spanish-speaking students speak Spanish to each other, creating an isolated subclass. Such subclass is often viewed as inferior by their English-speaking classmates.<sup>93</sup> Whether an immersion program is utilized to teach English or the traditional bilingual educational model is used, the goal of such programs is getting these children to speak fluent English.<sup>94</sup> The reasoning is that once a child is fluent in English, he or she can excel academically and move from the poverty stricken migrant community to the professional market.

#### IV. ILLEGAL ALIEN STATUS

With eighty to ninety percent the migrant workers arriving from foreign countries to work in the fields, it is not surprising that many of the children who arrive with their parents are not in the United States legally.<sup>95</sup> Approximately twenty-five percent of all farmworking families do not have lawful resident status.<sup>96</sup> The percentages are even higher for migrant workers. A large portion of American citizens feel contempt about spending tax dollars to support a public education for

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1022.

<sup>90</sup> *Id.* at 1024.

<sup>91</sup> Valle, *supra* note 2, at 196.

<sup>92</sup> See Biernat & Jax, *supra* note 10, at 10.

<sup>93</sup> See Valle, *supra* note 2, at 195-196.

<sup>94</sup> *Valeria*, 12 F. Supp. at 1014.

<sup>95</sup> Milton & Watson, *supra* note 8.

<sup>96</sup> Davis, *supra* note 7.

illegal alien students. Yet, without education, these children have little hope of escaping poverty and becoming productive citizens.<sup>97</sup> Contrary to common stereotypes, alien migrant workers are not shiftless and lazy, but work long hours under hazardous conditions to support their families and give their children a chance at a better life.<sup>98</sup>

In 1975, Texas became frustrated with supporting education for illegal aliens who came across its border to live and work. Texas changed its existing education laws to deny public education to children who were not legally in the United States.<sup>99</sup> A class action lawsuit was brought on behalf of the Texas children who were denied access to public education.<sup>100</sup> The suit alleged violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court struck down the Texas law and the Court of Appeals for the Fifth Circuit affirmed.<sup>101</sup> The United State Supreme Court granted certiorari and affirmed the case in 1982.<sup>102</sup>

The Supreme Court in *Plyler v. Doe* stated that although public education is not a Constitutional right, it is not merely a governmental benefit of social welfare.<sup>103</sup> Without education, a child is deprived of the fundamental tool to having a productive life.<sup>104</sup> Because a great many of these children will continue to live in the United States, whether legally or illegally, the long-range cost of providing a free public education may well be more cost efficient than keeping them uneducated, illiterate, and with few employable skills.<sup>105</sup> Education provides preparation for vocational training, gives children the ability to adjust to their new culture, and gives children the possibility to succeed in the future.<sup>106</sup>

Illegal alien children do not voluntarily violate immigration laws, but enter the United States at the insistence of parents who are search-

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<sup>97</sup> See *Plyler v. Doe*, 457 U.S. 202, 207 (discussing the need for education of all children despite residence status, even if denying education to illegal aliens would save money and that illegal alien children are doomed to remain in poverty without education).

<sup>98</sup> See Migrant and Seasonal Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2583, 1982.

<sup>99</sup> *Plyler*, 247 U.S. at 207.

<sup>100</sup> *Id.* at 206.

<sup>101</sup> *Id.* at 208.

<sup>102</sup> *Id.* at 230.

<sup>103</sup> *Id.* at 221.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 207-208.

<sup>106</sup> See *id.* at 223.

ing for labor.<sup>107</sup> The goal of the Equal Protection Clause is the “abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”<sup>108</sup> Children, regardless of citizenship or legal permanent status, should be given equal access to a public education. Without education, illegal alien children are likely to suffer a lifetime of hardship.<sup>109</sup> The Supreme Court held, “We are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State’s authority to deprive these children of an education.”<sup>110</sup>

More recently, in 1994, California voters passed Proposition 187, requiring public educators to verify each student’s citizenship status and deny education to those students who were in the United States illegally.<sup>111</sup> However, the Personal Responsibility and Work Opportunity Act (PRA), which regulates the alien eligibility for governmental benefits, specifically states the PRA does not deny basic public education based on alien status.<sup>112</sup> In 1997, *LULAC v. Wilson* struck down Proposition 187, relying upon the Supreme Court’s holding in *Plylor v. Doe*.<sup>113</sup>

## V. MIGRANT CHILD LABOR

### A. Educational Alternatives

According to the National Agricultural Workers’ Survey (NAWS), approximately eleven percent of U.S. farmworkers are between the ages of fourteen and seventeen.<sup>114</sup> The total number of these teens is approximately 126,000.<sup>115</sup> Children farm laborers under the age of fourteen were not included in the NAWS, so little is known about their level of participation in agriculture.<sup>116</sup> Like the male dominated adult agricultural workforce, eighty-four percent of minor farmworkers are boys.<sup>117</sup>

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<sup>107</sup> *Id.* at 220.

<sup>108</sup> *Id.* at 222.

<sup>109</sup> *Id.* at 223.

<sup>110</sup> *Id.* at 224-225.

<sup>111</sup> *LULAC v. Wilson*, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997).

<sup>112</sup> *Id.* at 1255.

<sup>113</sup> *Id.*

<sup>114</sup> U.S. DEP’T. OF LABOR, REPORT ON THE YOUTH LABOR FORCE 53 (2000).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 52.

<sup>117</sup> *Id.* at 53.

Children who work as agricultural laborers have more difficulty in school than children who do not work. Thirty-eight percent of students who work in the fields are not learning at grade level, compared to only twenty-two percent of farmworker children who do not have to work.<sup>118</sup> Further, minors working in farm labor often do not attend school at all. Sixteen percent of farm-workers, fourteen to seventeen-years-old, have not attended school in the past twelve months.<sup>119</sup>

Migrant children often drop out of school as soon as they are old enough to work in the fields in order to earn money to help support the family.<sup>120</sup> Seventy-three percent of migrant farmworker children live in poverty, making the chance to earn money for the family appealing.<sup>121</sup> The average annual income for two full-time farmworkers is only \$14,000, well below the 1999's poverty line of \$16,700.<sup>122</sup> Such economic conditions place pressure on children to help support the family in lieu of pursuing educational opportunities.<sup>123</sup>

There is an apparent need to accommodate working students so that they can earn money for their family, without sacrificing their educational needs.<sup>124</sup> Many students simply dropout altogether once they are old enough to work in the fields full-time.<sup>125</sup> One alternative is to create schools with flexible hours. Some school districts actually change school hours during harvest seasons when most of the children will be absent from school anyway.<sup>126</sup> Maine has along history of child labor during the potato harvest, and some of its school districts close during this time.<sup>127</sup>

Offering direct mentoring, or case management, is another way to offer assistance individually tailored to farmworking students.<sup>128</sup> A direct mentor will be flexible to an individual student's work schedule.<sup>129</sup> Drawing upon a student's life experience as farmworker, the mentor can incorporate it into lessons, helping the student better understand

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<sup>118</sup> *Id.* at 56.

<sup>119</sup> *Id.*

<sup>120</sup> Milton & Watson, *supra* note 8.

<sup>121</sup> Davis, *supra* note 7.

<sup>122</sup> HUMAN RIGHTS WATCH. FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS 12 (2000).

<sup>123</sup> *Id.*; Davis, *supra* note 7.

<sup>124</sup> See Milton & Watson, *supra* note 8.

<sup>125</sup> Davis, *supra* note 7.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Milton & Watson, *supra* note 8.

<sup>129</sup> *Id.*

ideas and concepts.<sup>130</sup>

### B. Fair Labor Standards Act

The Fair Labor Standards Act of 1938 (FLSA) sets age limits on child labor,<sup>131</sup> but places less restrictive requirements for children working in agriculture.<sup>132</sup> In non-agricultural industries, children must be at least sixteen-years-old to work unlimited hours.<sup>133</sup> However, in agriculture, children as young as fourteen may work in agriculture for an unlimited time outside of school hours.<sup>134</sup> The FLSA limits the employment of a fourteen-year-old in non-agricultural work to only three hours on a school day,<sup>135</sup> but makes a special exception for children working in agriculture.<sup>136</sup> There is no limit on the number of hours a twelve or thirteen-year-old can work in agriculture when given the consent of the parent or caregiver. Even without the parents' consent, a twelve or thirteen-year-old child can work unlimited hours if on the same farm as where the parents work.<sup>137</sup> The FLSA places no restrictions on the number of hours (outside of when school is in session) a child under fourteen can be employed in harvesting crops on a piece rate basis with a parent's consent.<sup>138</sup> Yet, children under fourteen years are deemed too young for most work in other areas. In non-agricultural jobs, they can only perform tasks not covered by a formal employment contract, such as occasional babysitting.<sup>139</sup>

The FLSA continues to govern the ages and length of working hours for minors.<sup>140</sup> The FLSA has been criticized for being outdated. When the FLSA was drafted in 1938, children worked on their own family farms which they would one day inherit.<sup>141</sup> In those days, few farm children were expected to receive more than the most basic education.<sup>142</sup> Today, however, the face of agriculture has changed dramati-

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<sup>130</sup> Menchaca & Ruiz-Escalante, *supra* note 5.

<sup>131</sup> 29 U.S.C. § 203-1 (2001).

<sup>132</sup> 29 U.S.C. § 213(a)(6) (2001).

<sup>133</sup> 29 C.F.R. § 570.2(a) (2001).

<sup>134</sup> 29 C.F.R. § 570.2(2)(b) (2001).

<sup>135</sup> 29 C.F.R. § 570.35(a)(5) (2001).

<sup>136</sup> 29 C.F.R. § 570(2)(b) (2001).

<sup>137</sup> *Id.* § 570(2)(b).

<sup>138</sup> *Id.* § 570(2)(b).

<sup>139</sup> U.S. DEP'T. OF LABOR, *supra* note 114, at 2.

<sup>140</sup> HUMAN RIGHTS WATCH, *supra* note 122, at 56.

<sup>141</sup> HUMAN RIGHTS WATCH, UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS at <http://www.hrw.org/campaigns/crp/farmchild/failure.htm> (Aug. 30, 2001) [hereinafter UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS].

<sup>142</sup> HUMAN RIGHTS WATCH, *supra* note 122, at 57.

cally. Child farm workers are no longer the sons and daughters of the farm owners; rather, they are children of poor migrant farm workers who harvest crops for commercial farms.<sup>143</sup>

Legislation has been proposed that would amend the FLSA to set the same hour restrictions on agricultural child labor that are already in place in other sectors of child labor.<sup>144</sup> Iowa Senator Tom Harkin introduced a senate bill entitled the Children's Act for Responsible Employment (CARE). CARE would apply the same age requirements of other types of employment to agriculture and increase the civil penalties for child labor violations.<sup>145</sup> Legislation introduced by California Congressman Tom Lantos would amend the FLSA to specifically state that child farmworkers employed under the age of thirteen is "oppressive child labor."<sup>146</sup> This proposed legislation, entitled Young Americans Bill of Rights, would also establish tougher civil and criminal penalties for child labor violators.<sup>147</sup>

Moreover, many farm owners simply ignore the restrictions placed by the FLSA because the fines are slight in comparison to the economic advantages a successful harvest will bring.<sup>148</sup> The maximum civil penalty given by the Wage and Hour Division of the Department of Labor is \$10,000. However, this penalty is only imposed when violations result in death or serious injury of a child. In 1998, the average penalty imposed was only \$971.<sup>149</sup>

Further, many farm workers simply violate child labor laws because the probability of getting caught is low<sup>150</sup> due to the low number of investigators.<sup>151</sup> Of the nine hundred and forty Wage and Hour Division investigators, only twenty-three are designated as farm-labor specialists. None are dedicated solely to child labor.<sup>152</sup> In 2000, one hundred thousand minors were estimated to be working illegally. However, the Wage and Hour investigators had cited only one farm owner for every thousand children working illegally.<sup>153</sup>

One purpose of the FLSA is to ensure that a child's employment

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<sup>143</sup> HUMAN RIGHTS WATCH, *supra* note 141.

<sup>144</sup> HUMAN RIGHTS WATCH, *supra* note 122, at 60.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 59.

<sup>147</sup> *Id.* at 59-60.

<sup>148</sup> See Davis, *supra* at note 7.

<sup>149</sup> HUMAN RIGHTS WATCH, *supra* note 122, at 63.

<sup>150</sup> UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS, *supra* note 141.

<sup>151</sup> HUMAN RIGHTS WATCH, *supra* note 122, at 60.

<sup>152</sup> *Id.* at 61.

<sup>153</sup> *Id.* at 60-61.

will not interfere with educational pursuits.<sup>154</sup> However, even in the early years following the passage of the FLSA, America has struggled with the exploitation of child labor.<sup>155</sup> In 1957, *Mitchell v. Hornbuckle* set the tone for present day child labor laws. In *Mitchell*, an agricultural packing plant employed children until as late as 2 or 3 a.m. The children often missed school the next day or were tired and sluggish during class.<sup>156</sup> It argued that the law had not been violated because the packing occurred late at night rather than during school hours.<sup>157</sup> The Court held that although the letter of the law had not been violated, the purpose for imposing school hour restrictions had indeed been violated. The Court issued a permanent injunction enjoining Hornbuckle Farms from employing any child under the age of sixteen during school hours.<sup>158</sup>

Today, we see similar exploitation of children in agriculture. FLSA prohibits "Oppressive" child labor.<sup>159</sup> The FLSA does not consider children under twelve employed in agriculture, outside of school hours, to be oppressive.<sup>160</sup> Although children are not allowed to work during school hours, these children are often tired, fatigued, and unable to concentrate on schoolwork.<sup>161</sup> Like *Mitchell*, the letter of the law is not being violated, but we see that the purpose for imposing the school hour restrictions has been violated.

## VI. CONCLUSION

Education is necessary to end the cycle of poverty that is so pervasive among the migrant farm worker. To end this poverty cycle, students need an education to achieve more just than low paying jobs, including farm work itself. Fortunately, schools and social service agencies have become aware of the special problems faced by the children of migrant farmworkers and direct the student to the appropriate program. Programs such as MEP and CAMP are paving the way for migrant students to reach their full potential. In order to escape pov-

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<sup>154</sup> *Thirsty's v. United States Department of Labor*, 57 F. Supp. 2d. 431, 434 (S.D. Tex. 1999) (discussing that although the FLSA allows a child under sixteen to work outside of school hours, its purpose is to "ensure that the children's employment will not harm them or interfere with their schooling").

<sup>155</sup> Davis, *supra* note 7.

<sup>156</sup> *Mitchell v. Hornbuckle*, 155 F. Supp. 205, 212 (M.D. Ga. 1957).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> 29 U.S.C. § 212(c) (2001).

<sup>160</sup> HUMAN RIGHTS WATCH, *supra* note 122, at 56; Davis, *supra*, note 7.

<sup>161</sup> Davis, *supra* note 7.

erty, legislators must demand that education take priority over child labor.

## VII. RECOMMENDATIONS

As discussed, language is a barrier to migrant children's education. Getting Spanish-speaking children to become fluent in English is imperative for their success. Children must be taught to speak English in order to fully realize their potential. English immersion for LEP students is an acceptable alternative to traditional bilingual education, so long as the students are mainstreamed when they have enough English skills to function in an all-English class.

Because computer technology has improved dramatically since 1995 when the MSRTS was abandoned, a new migrant student record system should be instituted. In the present day, the computer glitches of the past will be easy to correct. An improved record transfer system will help facilitate the education of thousands of students who must move frequently.

In the same respect, the long hours that these children work is also a barrier to their education. The FLSA needs to be amended to place the same restrictions on child labor in agriculture as it does in other sectors. Hour restrictions need to be placed on children under sixteen to give them time to study, and to prevent them from coming to school in a state of exhaustion. Further, increases in both civil and criminal penalties to necessary to keep farmowners from disregarding child labor laws. In order to give these penalties any meaning, the Wage and Hour Division needs to hire investigators specializing in child labor violations in agriculture.

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