Appendix I: Legal Issues

The Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA), is the principal source of law that MEP recruiters and administrators need to know. However, as recruiters do their work and get to know migratory families, the family situations they will learn about may raise questions about whether migratory children or their families have rights or benefits available to them under other laws. The purpose of this appendix is to help recruiters and administrators gain familiarity with some of the other laws that may be relevant and provide them resources where they may learn more.

Reporting Responsibilities

On occasion, home visitors, recruiters, and other MEP staff discover situations that are troubling, may violate state or local law, or may even endanger the lives of migratory children. For example, the recruiter may encounter cases (or suspected cases) of child abuse or neglect, or suspicion of criminal activity that may, depending on the state and the situation, require the recruiter to report information to law enforcement authorities and/or social service agencies.

Child Abuse and Neglect. The Federal Child Abuse Prevention and Treatment Act (CAPTA) as amended by the CAPTA Reauthorization Act of 2010 defines child abuse and neglect as, at a minimum

* any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or
* an act or failure to act which presents an imminent risk of serious harm. (42 U.S.C. § 5101)

This definition of child abuse and neglect refers specifically to parents and other caregivers. A "child" under this definition generally means a person who is younger than age 18 or who is not an emancipated minor. Federal legislation sets minimum standards for states that accept CAPTA funding, but each state provides its own definitions of maltreatment within civil and criminal statutes. Most states have laws requiring school personnel and others to report suspected cases of child abuse or neglect. States designate individuals, typically by professional group, who are mandated by law to report child maltreatment.

While any person may report incidents of abuse or neglect, individuals typically designated as mandatory reporters have frequent contact with children and include

* health care workers,
* school personnel,
* child care providers,
* social workers,
* law enforcement officers, and
* mental health professionals.

Some states also mandate that animal control officers, veterinarians, commercial film or photograph processors, substance abuse counselors, and firefighters report abuse or neglect. For a state-by-state comparison of reporting requirements or other state-specific information (reporting telephone numbers, services) contact Childhelp®,at 1-800-4-A-CHILD (800-422-4453, toll-free) or visit the Child Welfare Information Gateway’s website (<https://www.childwelfare.gov/state-resources/>). (It is possible that individual localities may have their own additional reporting requirements.

Typically, when someone has reasons to suspect that a child has been abused or neglected, he or she must report this to the proper authorities. The recruiter and other MEP staff need to ensure that their supervisors provide them with the requirements for reporting suspected child abuse or neglect in their state and localities. While the recruiter, home visitors, and others may feel that reporting certain situations may hinder their effectiveness and affect their duties, they should remember that if they are required by law to report suspected child abuse or neglect, they must do so.

Truancy. A school-age student who is absent from school without permission is a “truant.” Although the precise definition may vary from state to state, in most states, except for situations such as excused absences, home schooling, etc., it is against the law for anyone between certain ages not to attend school (typically between the ages of 6 and 16).

Federal law does not address issues of truancy. State or local law may, and many schools and districts have “truancy officers” who have the authority and responsibility to “ticket” students who are not in school and report them and their parents to the authorities and in some cases to child welfare agencies. Recruiters in some states may feel pressured to cooperate with truancy officers by reporting migratory school-age students who miss school; however, state and local MEPs should provide guidance regarding how to handle cases of truancy and what legal responsibilities, if any, recruiters and other staff working with migratory children and their families have in this area.

Student Records

Parental Consent. At times, school personnel may want or need to exchange information about specific migratory children with other service providers. For example, they may wish to provide relevant records to other school districts that enroll these students, provide a full-range of services to migratory children, or otherwise work with other agencies to help make program decisions. Federal law, specifically the Family Educational Rights Privacy Act of 1974 (FERPA), governs how and when a school district may provide these records to others. (Individual states may also have their own requirements.)

FERPA is a federal law that applies to educational agencies and institutions that receive funding under a program administered by the U. S. Department of Education. (Parochial and private schools at the elementary school level do not generally receive such funding and, therefore, are not subject to FERPA.) Under FERPA, schools must generally afford parents: access to their children's education records, an opportunity to seek to have the records amended, and some control over the disclosure of information from the records.

Parents may access, seek to amend, or consent to disclosures of their children's education records, unless there is a court order or other legal document specifically stating otherwise. When a student turns 18 years of age or attends a postsecondary institution, the student, and not the parent, may access, seek to amend, and consent to disclosures of his or her education records.

Access to Education Records. Schools are required by FERPA to

* provide a parent with an opportunity to inspect and review his or her child's education records within 45 days of the receipt of a request;
* provide a parent with copies of education records or otherwise make the records available to the parent if the parent, for instance, lives outside of commuting distance of the school; and
* redact the names and other personally identifiable information about other students that may be included in the child's education records.

Schools are not required by FERPA to

* create or maintain education records;
* provide parents with calendars, notices, or other information which does not
generally contain information directly related to the student; or
* respond to questions about the student.

Amendment of Education Records. Under FERPA, a school must

* consider a request from a parent to amend inaccurate or misleading information in the child's education records;
* offer the parent a hearing on the matter if it decides not to amend the records in accordance with the request; and
* offer the parent a right to place a statement to be kept and disclosed with the record if, as a result of the hearing, the school still decides not to amend the record.

A school is not required to consider requests for amendment under FERPA that seek to change
(1) a grade or disciplinary decision, (2) the opinions or reflections of a school official or other person reflected in an education record, or (3) a determination with respect to a child's status under special education programs.

Disclosure of Education Records. A school must generally have a parent's consent prior to the disclosure of education records and ensure that the consent is signed and dated and states the purpose of the disclosure. However, FERPA permits a school or other educational agency to disclose education records without consent in certain circumstances, such as when

* the disclosure is to school officials, including teachers, of the LEA in which the student is currently enrolled who have been determined to have legitimate educational interests as set forth in the school district's annual notification of rights to parents (see below); and
* the disclosure is to another LEA or institution of higher education in which a student seeks or intends to enroll or is already enrolled, and consistent with specific provisions in FERPA governing these actions, either (1) the disclosure is consistent with the school district's annual notification of its intent to provide records to such an educational agency or institution and rights of parents to inspect these records and upon request a right to a hearing, or (2) the district tried to first notify the parent of the proposed transfer.

The school also may disclose these records without parental consent if (1) the disclosure is to state or local educational authorities auditing or evaluating federal or state supported education programs or enforcing federal laws which relate to those programs, (2) the disclosure is pursuant to a lawfully issued court order or subpoena, or (3) the information disclosed has been appropriately designated by the school as “directory information.” Directory information includes a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information about them.

Thus, regardless of the assistance that other agencies may be able to provide to migratory children and their families, FERPA requires a school or district to obtain parental consent before it provides a child’s educational records (including a child’s COE) to social service and community agencies or to institutions of higher education that might be interested in recruiting or serving migratory children but at which the student has not enrolled or is not seeking to enroll.

Annual Notification. A school must annually notify parents of students in attendance that they must allow parents to

* inspect and review their children's education records;
* seek amendment of inaccurate or misleading information in their children's education records; and
* consent to most disclosures of personally identifiable information from education records.

The annual notice must also include

* information for a parent to file a complaint of an alleged violation with ED’s Family Policy Compliance Office;
* a description of who is considered to be a school official and what is considered to be a legitimate educational interest so that information may be shared with that person; and
* information about who to contact to seek access or amendment of education records.

Schools may provide this notification through a local or student newspaper, calendar, student programs guide, rules handbook, or other means reasonable likely to inform parents. The notification does not have to be made individually to parents.

Complaints of alleged violations of FERPA may be submitted by phone (1-800-USA-LEARN or 1-800-872-5327) or addressed to:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-5901

More information regarding FERPA may be obtained from the Family Policy Compliance Office (<https://www2.ed.gov/policy/gen/guid/fpco/index.html>).

Access to Services

There are many legal rights and safeguards that promote a student’s rights to access educational services. These include the following:

School Attendance Regardless of Civil Status (Plyler vs. Doe). The U.S. Supreme Court ruled 5-4 in the case of Plyler vs. Doe, 457 U.S. 202 (1982) that the State of Texas could not deny to undocumented immigrant students a free public education that other students enjoy (i.e., the
Court ruled that these undocumented children have the same right to a free, public education as U.S. citizens and permanent residents). Faced with minor children who had entered the United States from Mexico illegally with their parents, the Supreme Court concluded that while Congress had the authority to act on issues involving the nation’s immigration laws, it had not done so with regard to the eligibility of undocumented students to attend school. In the absence of any clear Congressional policy to the contrary, the Court therefore found that the Constitutional protections of due process and equal protection demanded that these children not be penalized because of the actions of their parents. As a result of this decision, public schools and school personnel are prohibited from adopting policies or taking actions that would deny such minor students access to education based on their immigration status. (The decision does not affect the right of school district officials to require adequate evidence that any student–including immigrant students– resides within the area that the school district serves.)

A Note on Social Security Numbers. The Social Security Administration is responsible for administering and performing the duties regarding Social Security Numbers (SSN). Most of the guidance regarding a school district’s release of a student’s SSN concerns FERPA.

Generally, state laws or state constitutions require school districts to provide a free public education to all children who reside in the area the districts serve. Hence, possession of a social security number should not be a factor that affects any child’s right to a free public education.

Meaningful Opportunity for English Learner (EL) Students to Participate in School Programs (Civil Rights Act of 1964). In *Lau vs. Nichols* (1973), the U.S. Supreme Court ruled unanimously that the San Francisco school system violated Title VI of the Civil Rights Act of 1964 (20 USC § 2000d) by denying non-English speaking students of Chinese ancestry a meaningful opportunity to participate in their public educational program. Title VI prohibits discrimination based on race, color, or national origin. The Court affirmed a memorandum of the former U.S. Office of Education that, on the basis of Title VI, had directed school districts to take steps to help limited-English proficient students overcome language barriers and to ensure that they can participate meaningfully in the district's educational programs.

The Court found that simply providing students the same desks, books, teachers, and curriculum as other students did not ensure that these students received an equal educational opportunity since students who do not understand English are effectively foreclosed from any meaningful education. Where English is the principal language of instruction, the decision also means that the district must provide these students with a meaningful opportunity to learn English as part of their school program. Moreover, because this right stems from the Civil Rights Act of 1964, school districts
must use state or local funds, rather than MEP or other federal program funds, to meet their responsibilities for providing such meaningful opportunity to participate in school programs.

The U.S. Department’s Office of Civil Rights (OCR) (<https://www2.ed.gov/about/offices/list/ocr/index.html>)has interpreted the Civil Rights Act of 1964 to apply to “national origin minority students” who are learning English as a second language, or whose ability to learn English has been substantially diminished through lack of exposure to the language. OCR conducts investigations of the educational services provided for language minority students either as a result of a complaint allegation or through a compliance review. OCR provides information on how to file a complaint (<https://www2.ed.gov/about/offices/list/ocr/docs/howto.html>).

 (NOTE: The Equal Educational Opportunity Act of 1974 (20 U.S.C. 1703) similarly prohibits states from denying equal educational opportunity to an individual on account of his or her race, color,
sex, national origin, or by the failure of an educational agency to take appropriate action to
overcome language barriers that impede equal participation by its students in its instructional programs. However, violations of this statute are enforced through the U.S. Department of Justice (<https://www.justice.gov/crt/educational-opportunities-section-overview>).)

Section 504 of the Rehabilitation Act of 1973. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination (including employment discrimination) based on disability in programs or activities receiving federal financial assistance, including the funding that ED provides to schools, school districts, and other LEAs. Examples of the types of discrimination prohibited include access to educational programs and facilities, denial of a free appropriate public education for elementary and secondary students, and academic adjustments in higher education.

ED’s regulations governing Section 504 are in Part 104 of the Code of Federal Regulations (CFR). Among other things, section 104.35 of these regulations provides that a recipient that operates a public elementary or secondary education program shall conduct an evaluation of any person who, because of a disability, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program. The Department’s Office for Civil Rights (OCR) (<https://www2.ed.gov/about/offices/list/ocr/index.html>) investigates claims that Section 504 is being violated and in appropriate circumstances, brings actions for enforcement.

School Lunch and Breakfast Programs. The National School Lunch Program (NSLP) (<https://www.fns.usda.gov/nslp/national-school-lunch-program-nslp>) is a federally assisted meal program, operated through Department of Agriculture’s (USDA’s) Food and Nutrition Service in public and non-profit private schools and residential childcare institutions. It provides nutritionally balanced, low-cost, or free lunches to millions of children each school day. Similarly, the School Breakfast Program (SBP) provides assistance to states to operate non-profit breakfast programs in schools and residential childcare institutions.

While eligibility for free or subsidized lunches and breakfasts depends on family income, Congress in 2004 made migratory children automatically eligible for free school lunches and breakfasts once the LEA (where the school food programs are to be provided) has received documentation of their status as migratory children (as defined in section 1309 of the ESEA). On August 16, 2004, the USDA issued a memorandum (<https://www.fns.usda.gov/sites/default/files/2004-08-16.pdf>) on the eligibility of migratory children for free lunches and breakfasts.

McKinney-Vento Program. The McKinney-Vento Homeless Assistance Act (McKinney-Vento Act) ensures the removal of educational barriers for children and youth experiencing homelessness. SEAs and LEAs must have policies and procedures to ensure that homeless students are immediately enrolled, are allowed to remain in their school of origin if they move and if this is in their best interest, and receive services to enable them to be successful in school. The definition of homeless in the Act includes any child or youth who lacks living situation that is fixed, regular, and adequate. The law specifically mentions migratory children and youth who meet the definition of homeless. Every LEA has a local homeless liaison who determines if a child or youth is eligible for services under the McKinney-Vento Act. For more information on the McKinney-Vento program and coordination between MEP and McKinney-Vento programs, review a brief entitled “Migrant Students Experiencing Homelessness: Rights and Services Under the McKinney-Vento Act” (<https://nche.ed.gov/downloads/briefs/migrant.pdf>) published by the National Center for Homeless Education.

Communication with U.S. Citizenship & Immigration Services (USCIS formerly INS) Through the Student and Exchange Visitor Information System. The USCIS operates the web-based Student and Exchange Visitor Information System (SEVIS) (<http://j1visa.state.gov/sponsors/current/sevis/>) that, among other things, explains visa requirements and provides other information related to foreign or exchange students who come to attend U.S. schools. SEVIS implements a 1996 federal law that requires the Department of Homeland Security (DHS) to collect current information, on an ongoing basis, from DHS-certified schools and Department of State (DoS)-designated exchange visitor program sponsors relating to nonimmigrant foreign students (F-visas and M- visas) and exchange visitors (J-visas) during the course of their stay in the United States.

While SEVIS focuses primarily on the requirements governing enrollment in postsecondary institutions, it also provides information on K-12 student-exchange programs and, of particular interest to the MEP, basic information on the F-, M-, and J- visas. SEVIS provides information only with respect to students, including migratory students, who enter the nation legally, i.e., under one of the available visa categories. However, most migratory students will not be in the SEVIS system.
J-1 visa status is for high school students who are participating in DoS-designated exchange visitor programs. F-1 visa status is available only for foreign high school students as part of a USCIS-administered student exchange program, is available for no more than 12 months, and requires reimbursement to the district of the full-unsubsidized cost of education for the period of study.
M-1 visa status is for students who attend vocational or other nonacademic programs other than language training and so, at the K-12 level, typically will be available only to foreign students wishing to attend a vocational high school. Presently, no foreign exchange students may legally enter the U.S. without having first been entered into the SEVIS system by either their sponsoring student foreign exchange program (J-1 visa holders) or their hosting high school (F-1 visa holders). Moreover, because students with these visas must have made prior arrangements with the school district that will enroll them, no student with one of these visas should be showing up unannounced at a school or school district door.

For information on students who do not have one of these visas, see the discussion above on School Attendance Regardless of Civil Status (Plyler vs. Doe).

Welfare Reform Law. In 1996, the Welfare Reform Law was enacted, creating new requirements affecting access by aliens to federally funded programs. The legislation (the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193), imposed major restrictions on benefits for noncitizens (Haskins, 2009). Certain of the law’s provisions may sometimes create tension for school staff, other providers, and the MEP community. For example, section 434 of the law states:

Notwithstanding any other provision of federal, state, or local law, no state or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service[[1]](#footnote-2) information regarding the immigration status, lawful or unlawful, of an alien in the United States. (Welfare Reform Act, 110 Statute 2275: Sec. 434. Communication Between State and Local Government Agencies and the Immigration and Naturalization Service)

The 1996 law substantially changed the circumstances under which non-citizens may receive most federal benefits. For example, although the rules are complex, the most pertinent provision provided that non-citizens who arrived in the United States after 1996 are subject to a five-year ban on most welfare benefits. One exception was that non-citizens may receive emergency services. At the end of five years, non-citizens can receive Temporary Assistance for Needy Families (TANF), Medicaid, and a few other benefits at the discretion of the state in which they reside. Although TANF became effective July 1, 1997, it was reauthorized in February 2006 under the Deficit Reduction Act of 2005. This ban continues on Supplemental Nutrition Assistance Program (SNAP), historically and commonly known as the Food Stamp Program (if over 19 years and not pregnant, see next section below) and the Supplemental Security Income (SSI) program until the immigrant works for 10 years or becomes an American citizen. Some immigrants who entered the U.S. before 1996 continue to be eligible for Supplemental Security Income and SNAP. Review information on SNAP eligibility (<https://www.fns.usda.gov/snap/eligibility>).

Children's Health Insurance Program Reauthorization Act of 2009. When Congress reauthorized the State Children's Health Insurance Program or SCHIP (<https://www.medicaid.gov/chip/chip-program-information.html>), states became eligible to provide Medicaid and CHIP coverage to children and pregnant women (up to age 19 for CHIP or up to age 21 for Medicaid) who are lawfully residing in the United States, including those within their first five years of having certain legal status. This bill was the repeal of the previous federal law, the Welfare Reform Law of 1996, which required the five-year waiting period before many legal immigrants could enroll in Medicaid and CHIP.

Eligibility of migratory students and families for welfare programs depends upon whether a state has elected to provide these benefits to “qualified aliens.” This is affected by whether the applicant meets the definition of “qualified alien” and in some cases whether the individual entered the country prior to August 22, 1996, or has been in “qualified alien” status for five years. If a state provides TANF, Medicaid, or SCHIP benefits to “qualified aliens,” then an otherwise eligible individual who meets the definition of “qualified alien” and who entered before August 22, 1996, or who has been in a “qualified alien” status for five years should be eligible. It should be noted that while certain immigrants are not eligible for federally funded benefits, such as TANF, SNAP, Medicaid, or SCHIP because of their immigration status, in some cases states may elect to provide state-funded benefits including income maintenance, nutrition assistance, or health care. Review guidance on the most recent policies effecting immigrant children and families (<https://www.acf.hhs.gov/sites/default/files/fysb/doj_hhs_hud_letter.pdf>).

Social Security Numbers (SSNs) are required of all TANF and Medicaid applicants and recipients. However, SSNs are required only for the persons for whom Medicaid benefits are actually sought (e.g., a mother can apply for Medicaid benefits for her children without seeking benefits for herself, in which case she is not required to provide her SSN, but she is required to provide SSNs for her children). If a non-citizen, who is not eligible for regular Medicaid, qualifies for emergency Medicaid coverage, the applicant cannot be required to provide a SSN. SSNs are not required for the stand-alone, separate SCHIP; however, they are required for the Medicaid expansion SCHIP. The TANF rules regarding who is an “applicant” may vary from state to state, but generally families are required to apply for benefits as a unit. Review information on benefits related to citizenship or immigration status (<https://www.fns.usda.gov/sites/default/files/a-QsAsonCitizenship_0.pdf>).

1. In 2003, the functions of the U.S. Immigration and Naturalization Service were transferred to the new Department of Homeland Security. [↑](#footnote-ref-2)