UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL
1999 BRYAN STREET, HARWOOD CENTER, SUITE 1440
DALLAS, TEXAS 75201-6817
PHONE: (214) 661-9530
AUDIT FAX: (214) 661-9531 INVESTIGATION FAX: (214) 661-9589

August 22, 2006

Control Number
ED-OIG/A06F0016

T. Kenneth James, Commissioner
Arkansas Department of Education
4 Capitol Mall
Little Rock, AR 72201

Dear Commissioner James:

This **Final Audit Report**, entitled *Arkansas Department of Education's (Arkansas) Migrant Education Program (MEP)*, presents the results of our audit. The purpose of the audit was to determine if Arkansas implemented systems that accurately count the children eligible to participate in the program. Our review covered the period September 1, 2003, through August 31, 2004. We found that 114 of the 119 migrant children in our sample were ineligible. Based on the sample results, we project that Arkansas had 3,127 ineligible migrant children in the districts we reviewed, and we estimate that Arkansas inappropriately spent about $877,000 in MEP grant funds for those children.

We provided a draft report to Arkansas on February 3, 2006. Arkansas provided both preliminary and supplemental responses to that report on March 9, 2006 and April 5, 2006. We have summarized those responses at the end of the finding in this final report, and have included them as Attachment 4 to this report. Arkansas's preliminary response also included its migrant handbook as a large attachment. Because of the voluminous number of pages in that attachment, we have not included it with this report. Copies of that attachment are available upon request.

BACKGROUND

The MEP is authorized under Title I, Part C of the Elementary and Secondary Education Act of 1965, as amended. Federal regulations define a MEP eligible migratory child as a child who is, or whose parent, spouse, or guardian is, a migratory agricultural worker, including a migratory dairy worker, or a migratory fisher, and who, in the preceding 36 months, has moved from one school district to another, to obtain temporary or seasonal employment in agricultural or fishing work. The goal of the MEP is to ensure that all migrant students reach challenging academic standards and graduate with a high school diploma or its equivalent, a General Education Development (GED) certificate that prepares them for responsible citizenship, further learning,

and productive employment. Federal funds are allocated by formula to state education agencies, based on each state's per pupil expenditure for education and counts of eligible migratory children, aged 3 through 21, residing within the state. Arkansas's MEP authorized funding for Award Year 2003-2004 was $5,183,388. A total of 18,479 migrant children were counted in the MEP during the award year.

On July 6, 2004, the U. S. Department of Education's Office of Migrant Education (OME) requested that each State complete a re-interview of the migrant child count for the year 2003-2004. This was voluntary but highly recommended. Arkansas elected to perform the re-interview process, and attempted to contact about 800 families. Many of the families could not be interviewed because they were no longer at their given addresses.

AUDIT RESULTS

Arkansas did not implement systems that accurately counted the migrant children eligible to participate in the migrant education program. In its comments to the draft report, Arkansas did not concur with the finding or recommendations. Arkansas's comments are summarized at the end of the finding, along with the OIG's response. Details of Arkansas' preliminary and supplemental comments and our detailed responses are presented in Attachment 3. The full text of Arkansas's comments is presented in Attachment 4.

FINDING NO. 1 – Arkansas Department of Education Included Ineligible Migrant Children in Its 2003-2004 Count

Arkansas did not implement systems that accurately counted children eligible to participate in the MEP. Specifically, 114 of 119 children (96%) we reviewed in three districts (Searcy, Rogers, and Springdale) were ineligible to participate in the MEP. We selected an unbiased random sample for each of the three districts—19 in Searcy, 50 in Rogers, and 50 in Springdale. We reviewed the Certificates of Eligibility (COEs)[1] for the 119 migrant children, and conducted interviews with family members. Based on those reviews and interviews, we determined that 114 of the sampled children were ineligible and an additional 206 siblings were also ineligible. We determined that five migrant children in our sample and eight siblings were eligible because the migrant activity was seasonal work. Based on the combined results of our sampling in the three districts, we project that 3,127 children, out of a universe of 3,191 migrant children, were ineligible. At a calculated rate of $280.50 per child, we estimate that Arkansas spent about $877,000 on ineligible children.[2]

---

[1] A COE is a form to document migrant eligibility.

[2] We questioned costs at the rate of $280.50 per child. We calculated that per-child amount by dividing the State's 2003-2004 funding amount ($5,183,388) by the reported 2003-2004 child count (18,479). We then calculated the questioned costs by multiplying the per-child funding amount ($280.50) by the estimated number of ineligible children (3,127).

Migrant Eligibility

Pursuant to 34 C.F.R. § 200.81(d)(1), "Migratory child means a child who is, or whose parent, spouse, or guardian is, a migratory agricultural worker . . . and who, in the preceding 36 months, in order to obtain, or accompany such parent, spouse, guardian in order to obtain, temporary or seasonal employment in agricultural or fishing work – has moved from one school district to another."

To determine whether Arkansas had adequate systems in place to correctly identify and count eligible migrant children, we selected an unbiased random sample at the three districts audited—Searcy, Rogers, and Springdale. We reviewed the COEs for 119 children identified as migrant children in those three school districts. Based on the COE reviews and re-interviewing families that we could locate, we determined that 114 children were ineligible migrant children because the families did not meet the basic requirements set forth in 34 C.F.R. § 200.81(d). We interviewed families for 67 of the 119 children, and noted from the COE that one other child was ineligible because of being too young for the MEP. We actually conducted 63 interviews; some of the families had more than one migrant child in our sample. We relied on COE reviews only for the families that we were not able to interview. For 68 of the 114 children, the families either did not move with the intention of obtaining qualifying employment in temporary or seasonal agricultural jobs (59), did not make a qualifying move (5), or were ineligible due to the age of the child (4). During our work in one district, a parent told us that the qualifying worker had always lived in that district. The COEs for the 68 children that we reviewed also listed the names of 121 siblings that we determined to be ineligible. As a result, Arkansas inappropriately spent $53,015 in migrant funds for 189 ineligible migrant children. Attachments 1 and 2 present a breakdown of our finding for each school district.

Temporary versus Permanent Work

In addition to the 68 children identified as not meeting migrant eligibility requirements for the reasons stated above, we also identified 46 ineligible migrant children whose families worked in positions that were not temporary or seasonal as required by 34 C.F.R. § 200.81(c)&(d). The positions were permanent and available year-around at processing plants or in livestock farming.

Based on the type of work activity indicated on the COEs, we identified 46 ineligible migrant children in our sample, and an additional 85 siblings who also were ineligible migrant children. We also determined that 31 children whose parents work at processing plants have been enrolled in the districts for at least four years. Other than the move dates on the COE, we found no other evidence indicating a qualifying move during the enrollment periods. Although continuous enrollment may not be determinative by itself, in the absence of contrary evidence, we concluded that the families had not made a qualifying move in the last 36 months. Some of the children were ineligible for more than one reason. In Attachment 1 to this report, the 31 children are included in these categories: Ineligible Intent (20) and Ineligible–Permanent Jobs (11). Although the Department's guidance allows a State to complete an industrial survey to establish permanent positions as temporary positions, Arkansas did not complete an industrial survey that the Department determined would be sufficient evidence of temporary employment, nor did Arkansas have any adequate alternative documentation to show how permanent jobs were

considered to be temporary for MEP purposes. The industrial survey data provided to us was inadequate because it was from 1996 and no recent industrial survey had been completed. Arkansas did not provide any other documentation that would serve the same purpose as an industrial survey.

Additionally, the jobs at the processing plants and livestock farms do not meet the definition of temporary. According to 34 C.F.R. § 200.81(c) a "Migratory agricultural worker means a person who . . . has moved in order to obtain **temporary** or seasonal employment in agricultural activities (including dairy work) as a principal means of livelihood." Although the regulation does not define temporary, Black's Law Dictionary defines temporary as "that which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration; opposite of permanent." Arkansas's own handbook defines temporary as lasting "for a short time frame, usually no longer than 12 months." The enrollment records that we reviewed for the migrant children in our sample showed that many of the children were enrolled in the districts for three or four years. Therefore, employment at the processing plants and livestock farming are not for a limited time.

On October 23, 2003, OME issued Draft Non-Regulatory Guidance, Section L, which allows States to classify permanent positions as temporary positions if an industrial survey is conducted. The guidance states: "An industrial survey is an alternate way to establish that work that is available year-round is 'temporary' for purposes of the MEP because of a high degree of turn over, frequent layoffs without pay, or few or no opportunities for permanent full-time employment. An industrial survey may only be used for specific job categories in which workers are engaged in qualifying work. Furthermore, SEAs may only rely on an industrial survey if the survey meets all of the requirements in this section."

Some of the significant requirements of the Industrial Survey are as follows:

- Analyze the data to determine if the turnover rate is sufficiently high for the job to be considered temporary.
- Prepare a summary report that documents the process of the industrial survey and the findings regarding each job category.
- Description of how turnover information was obtained.
- The date the survey was conducted, the survey's expiration date, and pertinent explanatory comments.
- The Draft Guidance also provides the formula of how to calculate the turnover rate.

The processing plant positions held by the children's parents were permanent because they were available on a year-round basis. One migrant official told us that work in chicken plants was not seasonal. The results of our audit support that statement. Because the jobs held by the children's parents were not temporary jobs, and because Arkansas did not complete an industrial survey or provide adequate alternative documentation, we determined that 46 students and 85 siblings were ineligible for MEP services. As a result, Arkansas inappropriately expended about $36,746 in migrant funds for 131 ineligible migrant children. This occurred because the Arkansas Department of Education did not implement adequate controls to ensure that all children counted as eligible migrants met the regulatory requirements.

Based on the results of the random sample, we project that 3,127 of 3,191 migrant children in the three districts were ineligible. As a result of the high error rates in each of the three districts reviewed, we estimate that Arkansas inappropriately expended about $877,000[3] in migrant education funding on ineligible children in the three audited districts. Additionally, because the migrant count in those districts was overstated, the Department has no assurance that other Arkansas districts accurately counted migratory children for 2003-2004 or subsequent years. Based on our review, we concluded that Arkansas did not have sufficient internal controls in place to ensure an accurate migrant child count.

Recommendations

We recommend that the Assistant Secretary for the Office of Elementary and Secondary Education require the Arkansas Department of Education to—

1.1 Conduct a State-wide migrant child count for the $5,183,388 of MEP funds allocated to Arkansas in Fiscal Year 2003-2004, as well as for subsequent years, and return to the Department any funds expended for ineligible children. For the three districts we audited, we estimate that $877,000 should be returned for the period covered by the audit.

1.2 Establish adequate internal controls to ensure Federal requirements are followed by migrant officials when identifying and recruiting children into the program and future migrant child counts are accurate.

Arkansas's Comments

Arkansas's General Counsel provided comments on the draft report dated March 6, 2006. In those comments, Arkansas also requested additional information related to the documentation we reviewed and the interviews we conducted, and asked for the opportunity to submit additional comments after its review of the requested information. We provided Arkansas with the requested information and Arkansas's General Counsel submitted additional comments dated April 5, 2006. Arkansas strongly disagreed with our audit approach and our finding that a substantial proportion of other children were otherwise ineligible and requested that we withdraw that finding.

OIG's Response

After reviewing Arkansas's comments, we have not changed our basic finding or recommendations. For the purpose of clarification, we have eliminated the separate non-qualifying job category, and have reported these students in the category of not moving with the intention of obtaining qualified employment. Three of these students were ineligible for more than one reason and are now reported in the no qualifying move or ineligible due to the age of the child categories. We were not persuaded by Arkansas' arguments, and Arkansas did not submit evidence to contradict the results of our review, which showed that families did not move with the intention of obtaining qualifying employment or were ineligible for other reasons. We

---

[3] The estimated questioned cost is calculated at a rate of $280.50 for 3,127 ineligible migrant children. $280.50 * 3,127 = $877,123.50.

summarized and responded to Arkansas's comments in detail in Attachment 3. With the exception of a voluminous handbook included with the March 6, 2006 comments, copies of the full text of Arkansas's comments are included in Attachment 4.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of our audit was to determine whether Arkansas implemented systems that accurately counted the children eligible to participate in the migrant education program. To accomplish the audit objectives, we interviewed Arkansas MEP officials and MEP directors and recruiters in the audited districts that had migrant programs. In addition, we interviewed parents of MEP participants to verify information included in the COEs. We performed our fieldwork at the Arkansas Department of Education's offices in Little Rock, Arkansas from June 6 to June 10, 2005, and we held an exit conference with Arkansas on November 4, 2005.

To verify the information included on the COEs, we interviewed parents of 67 MEP participants at their homes within the school districts of Searcy, Rogers, and Springdale. The interviews were conducted in Searcy from July 11 to July 14, 2005; in Rogers from August 22 to September 1, 2005; and in Springdale from September 19 to September 23, 2005. For the remaining 52 migrant children in our sample, we made the determination based on the COE.

From data provided by Arkansas, covering the audit period September 1, 2003, through August 30, 2004, we selected an unbiased random sample of MEP participants from the two largest migrant school districts and from the largest school district without a migrant program. The child count included children from across the State, whether or not they lived in school districts that had migrant programs. At Searcy, we randomly selected 19 migrant children out of a universe of 158. At Rogers, we randomly selected 50 migrant children out of a universe of 1,541. At Springdale, we randomly selected 50 migrant children out of a universe of 1,492.

We relied on computer-processed data provided by Arkansas. To test the reliability and completeness of the data, we verified that each student had the required COE and that migrant students were enrolled in the school districts in 2003-2004. We also attempted to interview parents of the children in our sample. We concluded that the data provided by Arkansas was sufficiently reliable to use in meeting the audit's objective. However, our testing disclosed instances of non-compliance with Federal regulations that led us to conclude that internal control weaknesses existed in each of the three districts audited.

Our audit was performed in accordance with generally accepted government auditing standards appropriate to the scope of the review described above.

ADMINISTRATIVE MATTERS

Statements that managerial practices need improvements, as well as other conclusions and recommendations in this report, represent the opinions of the Office of Inspector General. Determinations of corrective action to be taken will be made by the appropriate Department of Education officials.

If you have any additional comments or information that you believe may have a bearing on the resolution of this audit, you should send them directly to the following Education Department official, who will consider them before taking final Departmental action on this audit:

Henry Johnson
Assistant Secretary
Office of Elementary and Secondary Education
400 Maryland Avenue SW
FOB – 6, Room Number 3W314
Washington D.C. 20202

It is the policy of the U. S. Department of Education to expedite the resolution of audits by initiating timely action on the findings and recommendations contained therein. Therefore, receipt of your comments within 30 days would be appreciated.

In accordance with the Freedom of Information Act (5 U.S.C. § 552), reports issued by the Office of Inspector General are available to members of the press and general public to the extent information contained therein is not subject to exemptions in the Act.

Sincerely,

/s/
Sherri L. Demmel
Regional Inspector General
for Audit

Attachments (4)

Attachment 1
Ineligible Migrant Students Per District

A summary of our results at the three audited districts is as follows:

Arkansas	**Searcy**	**Rogers**	**Springdale**	**Total**
Sample Size	19	50	50	119
200.81(d) Basic Eligibility Requirements				
No Qualifying Move	2	3	0	5
Ineligible Intent	9	29	21	59
Age Ineligible	0	3	1	4
Ineligible – Permanent Jobs	4	14	28	46
Total Ineligible	15	49	50	114
Siblings				
Sample Size	31	105	79	215
200.81(d) Basic Eligibility Requirements				
No Qualifying Move	2	4	2	8
Ineligible Intent	15	65	25	105
Age Ineligible	1	3	4	8
Ineligible – Permanent Jobs	6	31	48	85
Total Ineligible	24	103	79	206
Total Children Reviewed	50	155	129	334
Total Ineligible	39	152	129	320
Error Rate (Total Ineligible/Sample Size)	79%	98%	100%	96%

Attachment 2
Questioned Costs Per District

We questioned costs at the rate of $280.50 per ineligible migrant child. We calculated that per-child amount by dividing the State's 2003-2004 funding amount ($5,183,388) by the reported 2003-2004 child count (18,479). We then calculated the questioned costs by multiplying the per-child funding amount ($280.50) by the estimated number of ineligible children in each district.

Searcy:

Based on our review of the 2003-2004 migrant child count for the Searcy School District, we determined that 39 children were ineligible. Arkansas received $10,940 in ineligible migrant funds for those students. Based on the audited results of our unbiased random sample, we project that out of a universe of 158 migrant children we can consider 125 migrant children ineligible based on the 79% error rate. At a calculated rate of $280.50 per child, we estimate that Arkansas expended $35,062.50 in ineligible migrant funds.

Rogers:

Based on our review of the 2003-2004 migrant child count for the Rogers School District, we determined that 152 children were ineligible. Arkansas received $42,636.00 in ineligible migrant funds for those students. Based on the audited results of our unbiased random sample, we project that out of a universe of 1541 migrant children, we can consider 1,510 children to be ineligible based on the 98% error rate. At a calculated rate of $280.50 per child, we estimate that Arkansas expended $423,555 in ineligible migrant funds.

Springdale:

Based on our review of the 2003-004 migrant child count for the Springdale School District, we determined that 129 children were ineligible. Arkansas received $36,184.50 in ineligible migrant funds for those students. Based on the audited results of our unbiased random sample, we project that out of a universe of 1,492 migrant students we can consider all 1,492 migrant ineligible based on the 100% error rate. At a calculated rate of $280.50 per child, we estimate that Arkansas expended $418,506 in ineligible migrant funds.

Attachment 3
Auditee Comments and OIG Response

Arkansas's Comments on OIG Use of Re-interviews

Arkansas objected to use of re-interviews to question determinations it had made regarding the eligibility of students and their families. Arkansas stated that it was entitled to rely on the reasonable good faith judgment of its recruiters applying subjective criteria, and that it was inappropriate for OIG to make an independent judgment based on re-interviews several years after the original interviews by Arkansas recruiters. Arkansas maintained that draft guidance from the Department established that "there is room to make a judgment as to the purpose of a move and whether the job is temporary or seasonal." Arkansas also questioned the reliability of the OIG re-interviews due to the passage of time, change in family circumstances or recollections, the fact that OIG interviewers were outsiders to the community, and that some interviews were conducted by OIG translators and not OIG auditors. Arkansas also stated that the OIG re-interviews were not probative of what the families originally told its recruiters and formed the basis of their reasonable good faith judgments. Arkansas also stated that OIG could not rely on re-interviews unless it also interviewed the recruiters. Arkansas stated that the test of compliance was whether it had a reasonable system for making the required judgments in good faith at the time they must be made; repayment can be sought only where there is an abuse of discretion.

Arkansas also stated that it is unclear whether OIG interviewers asked appropriate follow-up questions, as its recruiters are trained to do, particularly if a parent indicated that the family moved because another relative or friend lived in the area. Arkansas stated that it was inappropriate to rely on a statement that a family moved to an area to join family and friends, without probing further to determine if the family had another purpose in moving, such as seeking migrant employment. Arkansas stated that reasons given were not necessarily inconsistent with seeking temporary or seasonal agricultural employment. Arkansas stated that OIG improperly relied on a "sub-conclusion" in interviews and did not pursue whether there were other qualifying reasons for a family's move.

OIG's Response

In our judgment, as well as that of OME, re-interviews are an appropriate method to test the validity of eligibility determinations made by agencies participating in MEP. We disagree with Arkansas assertion that "there is room for judgment" to make a child or family eligible for MEP. That phrase does not appear in the Department's guidance. A participant must have a reasonable basis to determine eligibility; there is no "room" or discretion to make a child eligible if statutory criteria are not met. While some difference in interview results can be expected due to the passage of time, change in recollection, or difference in interviewers, widespread differences would not be expected if an agency had a reliable and reasonable system in place. Our results show that Arkansas's system was not reliable, at least with respect to the districts we reviewed.

Our interviewers used open-ended questions to ask why and when a family moved to an area. Open-ended questions, as opposed to leading questions, are a more reliable method of testing the validity of interview results reported by Arkansas. We agree that seeking qualifying employment need not be the exclusive motivation for a move, but, as required by law, that motivation must be the primary purpose. If a family did not voluntarily state that it moved to seek qualifying employment, we did not seek to elicit that response with further questions.[4] We reject Arkansas's suggestion that migrant parents are not capable of or willing to answer these basic questions. The probative nature of our questioning was sufficient to meet our audit objectives. We acknowledge that our interviewers were outsiders to the community; Arkansas's recruiters were also strangers to the people being recruited. We saw no indication that the parents we interviewed were less than forthcoming or not truthful in their answers. Contrary to Arkansas's suggestion, we did interview recruiters in the audited districts that had migrant programs. Those interviews confirmed our audit conclusions.

Generally accepted government auditing standards fully anticipate and authorize the use of specialists, such as translators, as part of the audit team. We utilized the services of a qualified, bilingual Department staff member to translate and interview parents. The staff member worked under the personal supervision of the auditor-in-charge who evaluated the staff member's work and found it to be reliable. Arkansas presented no contrary evidence to suggest that interviews by a non-auditor are not reliable.

Arkansas's Comments on Incorrect Standard

Arkansas stated that we improperly concluded that children were ineligible if the parent assumed non-qualifying employment or was unemployed after a move. Arkansas stated that such children would be eligible if a parent moved with the intention of obtaining qualifying employment.

OIG's Response

We agree that intent at the time of the move determines MEP eligibility. For the category of students in the draft report where we reported a parent working in a non-qualifying occupation, we found no evidence either on the COE, prepared by Arkansas recruiters, or in the answers provided during our interviews that the family moved with the intention of securing qualifying employment. For the final report we have eliminated the separate non-qualifying job category, and have reported these students in the category of not moving with the intention of obtaining qualified employment.

Arkansas's Comments on Poultry Processing Plants

Arkansas disagreed with our conclusions concerning parents who either sought employment or were employed in poultry processing plants. Arkansas stated that it was entitled to rely on the Department's draft guidance, which stated that employment that is available year-round could be considered temporary if working conditions or periods of slack demand make it unlikely that a

[4] Arkansas comments concerning sub-conclusions are misdirected. What Arkansas refers to as auditor "sub-conclusions" are actually the reasons given by parents for a move as recorded on the form we used to record the interview results.

worker will remain at the job permanently. Arkansas asserted that we imposed post hoc standards with respect to use of an industrial survey to establish the temporary nature of the position or time limits on how long a position could be considered temporary. Arkansas stated that an industrial survey it conducted in 1996, while not meeting all the elements of the survey prescribed by the Department as acceptable evidence of temporary employment, did show that processing jobs involved adverse working conditions, and very high turnover rates, typically in excess of 50 percent over a 12-month period, and in some cases over 100 percent. Arkansas stated that the conclusions of its recruiters as to the temporary nature of these positions were reasonable given their direct knowledge of the jobs, informal communications with the companies, and constant newspaper advertisements for the jobs.

OIG's Response

Contrary to Arkansas's comment, we are not imposing "post hoc standards." We recognize that the Department has provided guidance that employment available year-round could nevertheless be considered temporary for purposes of MEP. However, Arkansas did not complete an industrial survey that the Department determined would be sufficient evidence of temporary employment, nor did Arkansas have any adequate alternative documentation to show how permanent jobs were considered to be temporary for MEP purposes. The 1996 industrial survey data provided to us was inadequate because of its age; no recent industrial survey had been completed. In the absence of a current survey, we could not conclude that jobs in 2003-2004 that on their face were not seasonal or limited in duration should nevertheless be considered temporary. Since Arkansas did not provide evidence to support the other statements made in its comments on the temporary nature of the processing jobs, we could not evaluate whether Arkansas has alternative, adequate documentation that would demonstrate the temporary nature of the positions. During the course of our audit we gave Arkansas several opportunities to provide records to support its position. Arkansas can provide any evidence it has to the Department for consideration during resolution of this audit.

Arkansas's Comments on Specific Students

Arkansas provided specific comments with respect to 12 students and stated that it was unclear why we reached our conclusions. Arkansas also stated that our questionnaires for the Searcy School District were ambiguous.

OIG's Response

We found all 12 students discussed by Arkansas to be ineligible, primarily because the intent of the move was to work in poultry processing plants. One was ineligible because the child was underage when the COE was signed; one was ineligible because the intent of the move was to get away from high rent in other places; another was ineligible because the intent of the move was to be near family. We reviewed the results of our Searcy interviews, and the results support our findings.

Arkansas's Comments on its Re-interview Effort

Arkansas asserted that we ignored the results of Arkansas's own extensive re-interview effort.

Attachment 3

OIG's Response

We did not ignore Arkansas's re-interview effort. We reviewed Arkansas's effort and found that we could not rely on Arkansas's results in our audit. We concluded that the sampling process used was not statistically valid and Arkansas's results could not be statistically projected. Arkansas's re-interview samples were drawn on a biased non-random basis, and the exact size or student-specific composition of the universe was undefined.

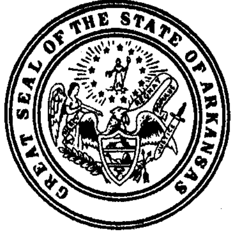
Arkansas's Comments on OIG's Audit Approach

In a footnote to its March 6, 2006 comments, Arkansas questioned the "validity and objectivity" of the OIG's audit approach based on comments allegedly made by OIG auditors at an exit conference. According to Arkansas, OIG auditors expressed the view that the standards were vague, the Department's guidance might not be in harmony with the law, that OIG findings reflected OIG's interpretation, and that they had been instructed by their superior to give the worst-case scenario for these audits.

OIG's Response

Regarding alleged auditor statements about standards for the MEP, in preparing our audit findings and this report, we have used as criteria the requirements of the MEP statute and regulations. We have referred to the guidance issued by the Department for appropriate application of those MEP requirements, and have not developed a separate OIG interpretation. We have not questioned an Arkansas practice or individual determination that was consistent with the Department's guidance.

Arkansas misconstrued comments made about a "worst-case scenario." OIG auditors simply received instruction to convey clearly the full extent of potential liability at the exit briefing so that Arkansas would not be surprised by the numbers that would appear in the draft report, in particular the numbers that would be derived from statistical projections. This instruction did not affect the objectivity or validity of our audit approach, and served to insure that Arkansas was fully informed about the potential scope of our findings.



Arkansas

Attachment 4

DEPARTMENT OF EDUCATION

4 STATE CAPITOL MALL • LITLE ROCK, ARKANSAS 72201-1071 • (501) 682-4475 • http://arkedu.state.ar.us

Dr. Kenneth James, Commissioner of Education

OFFICE OF GENERAL COUNSEL

March 6, 2006

Ms. Sherri L. Demmel
Regional Inspector General for Audit
United States Department of Education
1999 Bryan Street, Harwood Center, Suite 1440
Dallas, Texas 75201-6817

Dear Ms. Demmel:

This letter responds to your draft audit report, entitled, "Arkansas Department of Education's (Arkansas) Migrant Education Program (MEP)," transmitted to Commissioner James in a letter of February 3, 2006. Because the central proposed conclusions of your audit involve a determination that a significant percentage of migrant education students in three Arkansas school districts were ineligible under the Migrant Education Program (MEP) for award year 2003-04, based on a review of individual student documentation and re-interviews with individual families, we need complete information on specific children and families that form the basis for your conclusions in order to respond to the draft audit report. Please send that information to us – whether in the form of audit work papers or otherwise – so that we can respond fully to your draft report. We respectfully request a reasonable period of time after receiving that information to analyze it and respond to your draft conclusions.

Pending receipt of the additional information, we are providing this letter as an interim, preliminary response to the basic approach taken in the draft audit report. We reserve the right to supplement this response with additional information and analysis. In summary, we strongly disagree with the approach taken, and in particular with the conclusions that almost all children in the three Arkansas school districts reviewed – Searcy, Rogers, and Springdale – were ineligible and that Arkansas needs to repay $877,000 to the U.S. Department of Education (USDE).

Although the issue of student eligibility under the MEP involves particular objective elements – related to the move of a student or the student's parent within the prior 36 months to obtain agricultural or fishing employment – virtually all of the proposed findings of ineligibility in the draft audit relate to subjective elements of the eligibility definition. First, under the statute and regulations, eligibility is determined not according to whether students or their parents in fact held temporary or seasonal jobs in agriculture or fishing, but rather whether they moved for the

STATE BOARD OF EDUCATION: Chair - Dr. Jeanna Westmoreland, Arkadelphia, Vice Chair - Diane Tatum, Pine Bluff
Members: *Sherry Burrow, Jonesboro *Shelby Hillman, Carlisle * Dr. Calvin King, Marianna *Randy Lawson, Bentonville
*MaryJane Rebick, Little Rock *Dr. Naccaman Williams, Springdale

An Equal Opportunity Employer

purpose of obtaining such jobs. 20 U.S.C. § 6399; 34 C.F.R. § 200.81(c)-(e); *Title I, Part C Education of Migratory Children Draft Non-Regulatory Guidance* at D1-D4, p. 14 (October 23, 2003). Second, USDE non-regulatory guidance – which is binding on USDE and may be relied upon by the State of Arkansas as a permissible way to meet the law, but is not binding on the State of Arkansas[1] -- recognizes that the application of this standard involves a reasonable judgment by state interviewers or recruiters, based on an interview with the family at the time that judgment is made, and that there is room to make a judgment as to the purpose of the move and whether the job is temporary or seasonal based on a number of factors, even if the job itself is not ordinarily defined as limited in duration.[2]

Given the subjective nature of the eligibility determination and the absence of statutory or regulatory standards for making that judgment, the test of compliance must be whether a state has a reasonable system for making these judgments in good faith at the time they must be made. We believe Arkansas clearly meets that standard, both for the state as a whole and for the particular districts in which this audit was conducted. That is especially the case when taking into account the communication challenges of eliciting reliable information from families that may have limited English proficiency and that, based on poverty and in many cases concerns over immigration status, may be distrustful of interviewers.

We believe strongly that it is inappropriate for USDE auditors, years after these determinations were made, to re-interview families and seek to make an independent judgment of what the intent of the student or parent worker may have been several years earlier when they were interviewed by the state recruiter. The family's circumstances and intent may have changed during this period, and their recollection of what their circumstance may have been at a previous time is in any case irrelevant to the appropriateness of the state's determinations based on interviews in 2003-04 or preceding years. Indeed, such re-interviews and the questions that Office of Inspector General (OIG) auditors asked (as provided to the Arkansas Department of Education) do not elicit information that answers the question of whether state recruiters had made good faith, reasonable eligibility determinations We also have serious concerns that many of the re-interviews with Spanish-speaking families were conducted not by auditors but by translators and that auditors were not even present for many of these re-interviews. We question the validity and accuracy of information obtained in this way, especially by interviewers who

---

[1] "Compliance with the guidance in this document will be deemed by departmental officials, including the Inspector General, as compliance with the applicable Federal statutes and regulations. This guidance does not impose requirements beyond those in the ESEA and other Federal statutes and regulations that apply to the MEP. While States may wish to consider the guidance, they are free to develop their own approaches that are consistent with applicable Federal statutes and regulations. The guidance in this document is not intended to be prescriptive or exhaustive." *Title I, Part C Non-regulatory Guidance, supra* at 7.

[2] "A recruiter must use sound and reasonable judgment to determine whether the particular facts and circumstances support a determination that the worker moved with . . ." the "intent to seek or obtain qualifying work." *Id.* at D1, p. 14; *see also* answer to question K3, "May work that is available year-round be considered temporary?": "Yes. Employment that is available on a year-round basis may be considered temporary if working conditions or periods of demand make it unlikely that the worker will remain at the job permanently." *Id* at 26. OIG auditors at the November 4, 2005 exit interview stressed that the audit raised no issue of fraud in the making of the subject eligibility determinations.

were strangers to these families and communities and could not be expected to establish the rapport and trust needed in these kinds of interviews.[3]

It appears that a significant percentage of the migrant students who were found in the draft audit to be ineligible were temporary workers or the children of temporary workers in poultry processing plants. Many of these jobs are not seasonal, and the OIG draft audit in effect treats them as non-temporary jobs. However, the draft audit report would impose post hoc standards as a basis for a substantial repayment claim against the State where no such standards exist in applicable law or regulations:

- First, the draft report makes much of the fact that the State failed to perform an industrial survey, but neither the statute nor the regulations require or even mention an industrial survey. USDE non-regulatory guidance provides for the option of conducting an industrial survey, but emphasizes that this is, as a matter of "administrative convenience" to the State,[4] a non-required "alternate way to establish that work that is available year-round is 'temporary' for purposes of the MEP because of a high degree of turn-over, frequent lay-offs without pay, or few or no opportunities for permanent full-time employment,"[5] It is only one of several options for the state to use in determining whether migrant workers were seeking temporary work, and whether work that is available year-round is "temporary work," including judgments made by recruiters in interviewing workers. And, as noted above, the guidance itself is not legally binding, but merely guidance that states may choose to follow or not, at their option.
- Second, the draft report resorts to a dictionary definition of the word "temporary," ignoring the fact that USDE's non-regulatory guidance itself defines the term loosely without imposing a hard and fast definition. In fact, Arkansas violated neither the cited dictionary definition, "lasting for a limited time," which provides no enforceable standard, nor the non-binding definition in the non-regulatory guidance: "Temporary employment is employment in agriculture or fishing that lasts for a short time frame, usually no longer than12 months." (emphasis supplied)

The key point is that there is no standard and no limit for what constitutes temporary employment in either the statute or regulations. Of perhaps equal significance, the draft audit report misses the point that even if there were a specific, enforceable time limit for what constitutes temporary employment, it simply does not follow from the fact that a job is technically available beyond that time limit – or from the fact that a worker may wind up staying in a job beyond that time limit – that the worker could not be found to have been seeking qualifying, temporary work. As USDE's non-regulatory guidance indicates, work that is

---

[3] We have additional concerns about the validity and objectivity of the approach taken in this audit, based on comments by the OIG auditors at the November 4, 2005 exit interview. The auditors expressed the view that USDE's non-regulatory guidance might not be in harmony with the law, and that their proposed findings reflected their interpretation of the law. That view is wrong on two counts. First, the non-regulatory guidance is not inconsistent with the law. Second, as noted in footnote 1, *supra*, as a matter of law, Arkansas and other states may rely on the non-regulatory guidance and may not be subject to adverse action by USED for following the guidance. The auditors also acknowledged vagueness in the standards, but indicated that they had been instructed by their superior to give the worst-case scenario for these audits.

[4] *Id.* at L2, p. 27.

[5] *Id.* at L1, p. 27.

available year-round may be considered temporary if working conditions make it unlikely that a worker will remain at the job permanently.[6] That is precisely the determination that was made by recruiters for many of the migrant workers in question. Recruiters also determined that many of these workers had a history of moves that made it likely that the work would be temporary. Both the MEP regulations and USDE's guidance specifically refer to poultry processing jobs as qualifying work under the MEP,[7] and the non-regulatory guidance includes factors for determining whether a job is in fact temporary that necessarily involve the exercise of reasonable judgment by the recruiter.[8]

The judgments that were made as to the temporary nature of these jobs were reasonable and consistent with the law and USDE's non-regulatory guidance. Arkansas recruiters, unlike the OIG staff who performed this audit, have direct personal knowledge of the food processing jobs for which migrant students or their parents moved. The working conditions for these jobs are extremely poor and result in constant job turn-over. As acknowledged by the poultry companies in an industrial survey conducted by the Arkansas Department of Education in 1996, the working conditions of these processing jobs involve a cold, wet working environment with strong odors; fast, repetitive work; frequently long and unpredictable hours; heavy dust; and uninterrupted standing on concrete floors to perform work. The survey documents very high turn-over rates in these positions, typically well in excess of 50% in a 12 month period, and in some cases over 100% for that period.[9] That industrial survey may not meet all of the specific elements for the non-required industrial survey described in the subsequently-issued USDE non-regulatory guidance, but it clearly supports the reasonableness of the judgments made by recruiters that the processing jobs in these poultry factories were qualifying, temporary work under the MEP. Based on informal communications with the companies, other indicia such as constant newspaper employment advertisements for these jobs, and the direct knowledge of local recruiters, it is clear that this situation has not changed.[10]

We also note that while States are not required to prepare certificates of eligibility by any statute or regulation, Arkansas complied fully with USDE's non-regulatory guidance both as to the form and completion of its certificates of eligibility in order to document its eligibility determinations.[11] We believe that all or substantially all of the certificates reviewed in the audit cited the specific basis for the recruiter's judgment. Arkansas' certificates of eligibility for the year in question closely adhered to the model certificate provided in USDE's non-regulatory guidance, and they have subsequently been amended to require more detail than required in the USDE model.[12] In sum, completed certificates of eligibility documenting the interview and citing

---

[6] *Id* at K3, p. 26.

[7] *See* 34 C.F.R. § 200.81(a); *Title I, Part C Non-Regulatory Guidance, supra,* at H1, I1, I7 at 20-21.

[8] *See Id.* at K1-K-3, p. 26.

[9] *See Id,* at L8, p. 29: "As a rule of thumb, a 50 percent turnover rate in a 12-month period is a sufficiently high turn-over rate to consider work temporary."

[10] The Arkansas Department of Education has not conducted a more recent industrial survey because of the difficulty of obtaining the cooperation of food processing plants, which are not generally forthcoming in volunteering information about their workforce.

[11] USED guidance suggests that states use certificates of eligibility as one acceptable way to document the basis for the judgment that a student or his/her parent moved for the purpose of finding a temporary job. *Id.* at M1-M11, pp. 34-38.

[12] *Id.* at 38.

a proper basis for the determination that the student or parent moved for the purpose of obtaining a seasonal or temporary job fully meet the State's legal obligations to maintain records that show the basis for its eligibility determinations.

Let us be clear: Arkansas is prepared to reimburse the Department for MEP allocations received based on any students if they or their parents did not make a move to seek employment within 36 months before being found eligible; if the jobs for which the moves were made were outside the fields of agriculture or fishing; or if the certificates of eligibility include information that contradicts any basis for a reasonable judgment that the move was made to seek temporary or seasonal employment. But there is no proper basis for a repayment claim here for the good faith judgments made by recruiters in 2003-04 or prior years concerning both the intent of students and their families who moved within the 36 month period to obtain agricultural or fishing work and the temporary nature of that work. Those judgments were consistent with the law, program regulations, and the Department's own non-regulatory guidance. We cannot stress enough our conviction, from both a legal and policy standpoint, that those judgments resulted in funding vital services for children who clearly represent the very needy, migratory children that Congress meant to serve in enacting the Migrant Education Program.

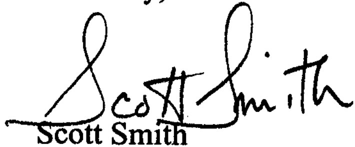
Consistent with the recommendation in the draft audit report, Arkansas is prepared to work with USDE's Office of Migrant Education in considering strengthening controls in identifying eligible children. We are always looking for ways to improve our administration of federal and state programs, and are prepared to implement further controls that would be reasonable and cost effective. We should note, however, that we have already taken steps to strengthen administration of the program. Although not required to do so, Arkansas was one of the first three states to re-interview migrant education students for 2003-04.[13] Our re-interview process showed an error rate of 5.6%. We have adopted a migrant education program manual which closely tracks and elaborates on USDE's own guidance; provide training for recruiters; and have a quality control system to review the determinations of recruiters. *See Tab A.* As noted above, we have also revised our certificates of eligibility to require additional information, including specific check-off boxes for the reasons that work is judged temporary. *See Tab B.* The recommendation that we conduct a statewide migrant child count for 2003-04 and more recent years would be redundant of the re-interview process and other improvements noted above, and a waste of limited state resources. However, we are prepared to discuss with USDE's Office of Migrant Education further steps to ensure the accuracy of our counts – especially as part of any program-wide accountability initiatives that Office may undertake.

Thank you for considering these comments. We look forward to receiving the additional information requested above so that we may provide a full response to your draft audit.

---

[13] The draft audit's dismissive reference to our re-interview process for failing to interview many families that were no longer at their given addresses is, frankly, perverse. The fact that many families had moved would only seem to confirm their migratory status.

Sincerely,

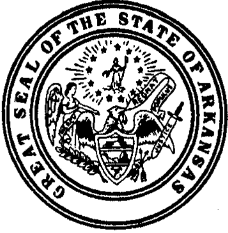


Scott Smith
General Counsel

SS:law

cc: T. Kenneth James, Ed.D., Commissioner of Education
Thomas A. Carter, Deputy Inspector General, Office of the Inspector General

Attachments



Arkansas

Attachment 4

DEPARTMENT OF EDUCATION

4 STATE CAPITOL MALL • LITTLE ROCK, ARKANSAS 72201-1071 • (501) 682-4475 • http://arkedu.state.ar.us

Dr. Kenneth James, Commissioner of Education

April 5, 2006

Ms. Sherri L. Demmel
Regional Inspector General for Audit
United States Department of Education
199 Bryan Street, Harwood Center, Suite 1440
Dallas, Texas 75201-6817

Dear Ms. Demmel:

This letter supplements my response of March 6, 2006, to your draft audit report, entitled, "Arkansas Department of Education's (Arkansas) Migrant Education Program (MEP)," transmitted to Commissioner Dr. T. Kenneth James in a letter of February 3, 2006. This supplemental response is based on a review of documents provided by your office to Arkansas' Migrant Education Unit Leader William Cosme on February 2, 2006, and transmitted to me on March 9, 2006, as well as additional documents that we had requested and that were provided to me on March 30, 2006. All of these documents were provided in response to my request for complete information on specific children and families that form the basis for your conclusions in order to be able to respond fully to the draft report. The documents that you provided consist of blank questionnaires used in the audit; draft summary charts for the Searcy, Rogers, and Springdale school districts purporting to cite the reason or reasons for ineligibility determinations for each student in the audit sample found to be ineligible; and completed questionnaires prepared by U.S. Department of Education (USDE) Office of Inspector General (OIG) representatives in conducting the audit in these school districts.[1]

We reaffirm and incorporate each of the points made in our March 6, 2006, letter and add the following supplemental responses. The documents that you provided reinforce our concern that the approach taken in this audit is flawed and does not generally provide a proper basis for seeking a repayment of funds from the State of Arkansas. We believe that an interview with a migrant family conducted by an auditor (or a translator on behalf of an auditor) two or more years after-the-fact may not be very probative of what that family's intent was when it in fact

[1] Although the draft audit report indicates that the parents of 67 MEP participants were interviewed, you sent us only 63 completed questionnaires. Should we assume that the other interviewed families were determined to be eligible? Please let us know if that is not the case. Of the 63 questionnaires sent to us, 21 did not indicate an eligibility conclusion or the reason for that conclusion. It is unclear to us if we should assume that all of these questionnaires reflect determinations of ineligibility, although the aggregate determinations in your draft report suggest that is probably the case.

STATE BOARD OF EDUCATION: Chair - Dr. Jeanna Westmoreland, Arkadelphia, Vice Chair - Diane Tatum, Pine Bluff
Members: *Sherry Burrow, Jonesboro *Shelby Hillman, Carlisle * Dr. Calvin King, Marianna *Randy Lawson, Bentonville
*MaryJane Rebick, Little Rock *Dr. Naccaman Williams, Springdale

An Equal Opportunity Employer

moved.[2] More importantly, it is not at all probative of what was said by the family to the responsible Arkansas recruiter or of whether that recruiter had made a reasonable good faith judgment as to the intent of the family and the nature of the qualifying work in applying subjective statutory eligibility criteria at the time the eligibility determination was made. As our March 6, 2006, letter explains and as the USDE's *Title I, Part C Non-regulatory Guidance* makes clear, both statutory eligibility elements on which your audit focuses – the intent of the family in moving and whether a qualifying job was involved, even in poultry plant jobs that were technically available on a year-round basis – required subjective judgments by the state recruiters.[3] The legal issue of whether these children were eligible under the MEP turns primarily on whether Arkansas recruiters applied the correct statutory standard and whether they made a good faith subjective judgment in doing so.[4] We believe USDE should assert a financial claim for repayment against the State of Arkansas in this circumstance only if it concludes that Arkansas recruiters abused their discretion in making these statutory eligibility judgments based on the information that was before them at the time.[5] To have an OIG interviewer render a different judgment based on a separate interview with a family years after-the-fact does not address this issue, and without interviewing the Arkansas recruiters, the audit could not do so.[6]

We have the following additional responses based on the audit questionnaires that you sent to us. To the extent OIG used analyses consistent with that reflected in these questionnaires in determining ineligibility for families that were not interviewed, our concerns apply with equal force to those determinations.

---

[2] As noted in our March 6 letter, the insufficient probative value of information obtained in this way is aggravated by the fact that these interviews were conducted by strangers to these families and communities who could not be expected to establish the rapport and trust needed to elicit accurate information in these kinds of interviews. Arkansas' own re-interview process confirmed the challenges of obtaining reliable information from migrant families, particularly through a subsequent re-interview process. *See Report on the OME Re-InterviewInitiative,* Arkansas Migrant Education Program (2005).

[3] *Title I, Part C Education of Migratory Children, Draft Non-Regulatory Guidance,* October 23, 2003, U.S. Department of Education, at II-D1, II-D7.

[4] As our March 6 letter acknowledged, certain of the statutory eligibility requirements, such as whether the children had made a move within the prior 36 months, turn on objective facts. We conceded that failure to meet these conditions triggers a repayment obligation.

[5] As noted in our March 6, 2006, letter, Arkansas complied fully with USDE's non-regulatory guidance as to the form and completion of certificates of eligibility in order to document its eligibility determinations, and we believe that all or substantially all of the certificates reviewed in the audit cited the specific basis for the recruiter's judgment. The bases cited conformed to the law and the non-regulatory guidance and properly implemented Arkansas' obligation to maintain records documenting its eligibility determinations. *See,* footnotes 11 and 12 and accompanying text of our March 6 letter.

[6]Nor does the draft audit report fully analyze the substantial Arkansas re-interview process for 2003-04, which Arkansas undertook voluntarily at considerable cost and effort. The draft casually dismisses that process on the basis that many families had moved and could not be located. Although many families had moved, the re-inteview process reached many families and generated important findings that logically would be central to any OIG audit, but were essentially ignored in the OIG audit report. *See Report on the OME Re-Interview Initiative, supra.*

1. The questionnaires that you sent us state a conclusion that a child is eligible or ineligible based on stated sub-conclusions on elements of eligibility such as the intent of the move and the occupation of parents when they moved to the school district. However, it is unclear to us whether OIG representatives asked any more specific or follow-up questions beyond the very general conclusory categories in the questionnaire.[7] Also, both the questionnaires and the draft report err in assuming that a determination on eligibility flows from the stated sub-conclusions. For example, many of the questionnaires indicate, in the "intent of move" box, that the child and one or both parents moved to the school district because the other parent, other relatives, or friends lived there. Based on this sub-conclusion, the OIG questionnaires conclude that the intent of the move was ineligible under the MEP. That conclusion is unwarranted. **Neither the statute nor regulations require that a child, parent, or spouse who moves for the purpose of seeking temporary or seasonal agricultural or fishing work have no other intent in mind.** As the *Title I, Part C Non-regulatory guidance*, at II-D5, indicates, the recruiter needs to make a judgment as to whether the primary purpose of a move was to seek such work, but the prospective worker may also have other purposes in mind.

   Migrant workers typically learn of opportunities for migrant work by word-of-mouth from family members and friends. It is not surprising that migrant workers commonly seek temporary or seasonal work in places where their family and friends are located. When Arkansas recruiters interview a family, an indication by a family member that he or she moved to the school district to join his or her family is not the end of the inquiry, but appropriately the beginning of a series of questions to elicit information on whether the opportunity to seek temporary or seasonal work was in fact a primary intent of the move. Consistent with guidance and training provided over time by USDE's Office of Migrant Education, questions are asked, for example, as to whether family or friends had discussed such opportunities and whether the individual would have moved to the school district in the absence of such opportunities. All of our recruiters are expected to ask these questions. See the enclosed "Basic Interview Pattern" that has been used to train all of our recruiters since 2003. Family relationships and friendships are inextricably tied to a significant proportion of migrant employment moves. An audit conclusion that a child's, parent's, or spouse's intent to be with family or friends disqualifies an otherwise eligible child under the MEP would represent a serious misunderstanding of the law and the realities of migrant employment. This problem appears to apply to at least 19 of the questionnaires.

2. Similarly, many of the OIG-completed questionnaires cite other non-work-related reasons as the intent of the move and conclude from these sub-conclusions that the moves did not make the children eligible under the MEP. For example, some questionnaires indicate that the child, parent, or spouse moved because he/she preferred to live in a small town; because of the cost of living or the availability of a doctor; to buy a home; to get closer to town, school, or employment; or to get a better education. Some questionnaires indicate

[7] In response to the question that our representatives asked at the audit's exit interview concerning what questions were asked in the interviews with migrant families, OIG simply gave us a copy of the questionnaire.

that the worker came to visit relatives and decided to stay.[8] As noted above, the problem with using these sub-conclusions to draw a conclusion of ineligibility is that neither the statute nor the regulations require the move to have been made for the sole or exclusive reason of obtaining temporary or seasonal agricultural employment. The *Title I, Part C Non-regulatory guidance*, at II-D5, acknowledges this point and indicates that obtaining temporary or seasonal agricultural or fishing work should be the primary reason, not necessarily the exclusive reason, for the move. Generally, the reasons cited in these questionnaires are not inconsistent with a primary goal of seeking temporary or seasonal agricultural employment. (Contrary to the OIG-stated conclusion on the questionnaires, these reasons do not necessarily suggest an intent to make a permanent move.)[9] Again, given answers such as these, Arkansas recruiters would be expected to ask additional questions to determine whether a primary intent of the move was to obtain temporary or seasonal employment. *See* enclosed "Basic Interview Pattern." Consistent with guidance and training provided over time by USDE's Office of Migrant Education, Arkansas interviews of possible migrant workers probe the intent of their move at considerable depth. This approach appears to be lacking in the subject audit. It appears that problems involving unwarranted conclusions regarding the intent of the move, as described in this paragraph, apply to at least 29 of the questionnaires.

3. Many of the questionnaires conclude that children were ineligible under the MEP on the basis that one or both parents assumed non-qualifying positions at the time of the move or did not in fact have a job. However, as indicated in the *Title I, Part C Non-regulatory guidance,* at II-D1 to D4, and as explained in our March 6, 2006, letter, assumption of a non-qualifying job by the child, parent, or spouse – or the failure to obtain a qualifying job – does not per se mean that the child is ineligible. The question is whether the child, parent, or spouse moved with the intent to take a qualifying agricultural (or fishing) job, a question that requires the exercise of judgment by a state recruiter and is best answered at

---

[8] A worker who merely visits or is on vacation in a given location has not made a qualifying move. *See* II-D13 of *Title I, Part C Non-regulatory guidance*. Indeed, a visit or vacation is not a move at all. It is in fact not uncommon for migratory workers to visit relatives or friends to see if work is available in the area. If a worker on a trip or vacation decides to make this more than a trip or visit and to remain in the location to seek a temporary agricultural job in the location, it is at that point that a move is made, and it would be a qualifying move. For example, a family that came to the Rogers school district on a one month visit, but decides to make this more than a brief visit and to stay in Rogers in order to seek temporary or seasonal agricultural work at that point has made a qualifying move with the requisite intent. Nothing in the statute, regulations, or non-regulatory guidance requires the intent of the move to be fully formed before the worker sets foot in the school district to which the move is made.

[9] Even if they did indicate such an intent, nothing in the statute or regulations renders a child ineligible on this basis if the child, parent, or spouse moved with the intent of obtaining temporary or seasonal agricultural work within the prescribed, preceding 36-month period. The *Title I, Part C Non-regulatory guidance*, at II-D6, states: "If the recruiter finds that the primary purpose for the move was to permanently relocate to a new area, the move does not qualify, even if the worker is engaged in qualifying work." On the other hand, II-C12 of the *Non-regulatory guidance* provides that an SEA may recruit a child after he or she "settles out," meaning that a child who became eligible during the preceding 36 month period would retain eligibility even if the child's family had settled permanently in their current place of residence. Apart from the fact that this distinction is not legally binding (and was not included in prior iterations of the *Non-regulatory guidance*), it is a nuanced distinction that is difficult to apply and that may lead to different conclusions depending on the questions asked by the recruiter, the recruiter's ability to elicit information from the family, and the timing of the interview. Again, this issue reinforces our concern that OIG cannot reliably make these determinations based on separate interviews with families years after-the-fact and without interviewing the responsible recruiter.

the time the eligibility determination is made. We believe that Certificates of Eligibility for every one of these prospective employees, and for employees in families that were not interviewed, indicated specifically that the employee either had a specific temporary agricultural job or was seeking such a job with particular agricultural employers or particular types of agricultural employers based on the original recruiter interviews. That satisfies the statutory and regulatory standard. We note also that it is not uncommon that migratory workers move to obtain temporary or seasonal agricultural work, but do not obtain that work for temporary or even significant periods of time. For example, many prospective workers face immigration issues, including a lack of required immigration papers that may impede their employment, may be daunted by employment-related drug tests, or may not promptly find available agricultural employment. Audit determinations based on the sub-conclusions in the completed audit questionnaires would be based on incomplete information and fail to apply the correct statutory and regulatory standard of eligibility. This problem appears to apply to at least 27 of the questionnaires.

4. In some cases, it is not at all clear why the OIG interviewer concluded that the worker did not have the requisite intent or there was no qualifying job. For example:
   - The questionnaire for [redacted] of the Rogers School District includes the sub-conclusion in the "intent of move" box, "work ended in Denver," concluding from this that the move was ineligible. The basis for this conclusion eludes us.
   - The interview questionnaire for [redacted] concluded that [redacted] children were ineligible based on the intent of the move. The "intent of move" box on the form included the sub-conclusion: "Work ended in Ks. [redacted] had lived in Rogers on and off since 1990 & located to Kansas in 1993. Moved to Rogers in 04 since he knew the area." The form indicates that [redacted] took a job at Tyson (poultry plant) when he moved to Rogers. Knowing an area where he moved to assume a qualifying temporary agricultural job does not suggest an intent other than finding qualified employment, nor does it disqualify [redacted] children under the MEP.
   - The questionnaire for [redacted] concludes there was no qualifying job (as well as that there was no eligible intent to move, on a basis addressed in paragraph 1 above), but states that the father's principal occupation when he moved to the Rogers school district was, "Divorced."
   - The questionnaire for [redacted] indicates that he has been in Arkansas and has been working at Tyson since 1993. If that work was uninterrupted since 1993 (and eligibility is not based on [redacted] intent to obtain qualifying work, and the form simply says N/A for [redacted] which is ambiguous), [redacted] children would not be eligible. However, it is not clear in the questionnaire if the work at Tyson was uninterrupted or whether [redacted] lived in the Rogers school district without interruption since 1993, or whether these questions were asked by the OIG interviewers.
   - The questionnaire for [redacted] indicates that she moved, "for more work here" and that she was a temporary hire. The form indicates that she has never worked at Tyson, but does not indicate the nature of her temporary work.

- The questionnaire for [redacted] indicates that the father held various jobs when the family moved to Rogers and concludes, without indicating what those jobs were, that there was no qualifying job.
- The questionnaire for [redacted] (Rogers school district) concluded that the child was ineligible based both on the intent of the move (for reasons addressed in paragraph 2, above) and "the non-qualifying job for person who signed COE." However, nothing in the statute, regulations, or non-regulatory guidance requires the qualifying job to be that of the person who signs the certificate of eligibility,[10] and the questionnaire for [redacted] indicates that the father had a temporary job at Tyson when he moved to Rogers.
- The questionnaire for [redacted] (Rogers school district) makes a determination of ineligibility based on both a non-qualifying job (for reasons addressed in paragraph 3, above) and ineligible intent to move. However, the intent of move box on the form simply says, "Jobs." That statement does not resolve the issue of whether there was an eligible intent.
- The questionnaire for [redacted] (Springdale school district) concludes there was no qualifying job (and that there was no eligible intent to move, on a basis discussed in paragraph 1 above), but gives no information under the box for "principal occupation of parents when you moved to Springdale," and indicates that the mother's current occupation is "poultry."
- The questionnaire for [redacted] indicates that he moved from Mexico to the Springdale school district in 2001, works at Tyson, and "they go back to Mexico for 6 months or so for vacation and then come back to work." As any Arkansas recruiter can tell you, Tyson Foods, Inc. does not give 6 months of vacation to its workers. [redacted] clearly was a temporary worker who left his job at Tyson to return to Mexico and then came back to find another temporary job at Tyson, consistent with the eligibility provisions of the Migrant Education Program. Also, even if these had been vacations, the work appears to have occurred within the 36 month period following the first qualifying move.
- The questionnaire for [redacted] (Springdale school district) concludes that the child is ineligible because the "qualifying person was already here." However, the form provides inconsistent information on which spouse worked for which employer. Also, both employers cited – Tyson and Pinnacle Foods – provide qualified, temporary or seasonal agricultural employment.
- The questionnaire for [redacted] concludes that he is ineligible because the intent of the move was not temporary and the job was non-qualifying. However, the "intent of move" box provides no information or sub-conclusion, and the "principal occupation" box indicates maintenance at Tyson (poultry plant). Depending on its specific functions, a maintenance job may or may not have been a qualifying job, but Tyson commonly shuffles workers between maintenance and food processing jobs, and the fact that [redacted] took this position at Tyson is likely supportive of his intent to seek temporary agricultural work.
- The questionnaires for the Searcy school district are generally ambiguous and do not include express conclusions.

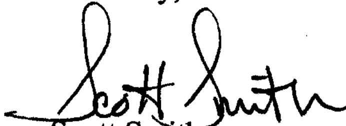
[10] Indeed, nothing in the statute, regulations, or non-regulatory guidance even requires that there be a certificate of eligibility or, if there is one, that it be signed by a parent.

These and many of the other OIG-generated questionnaires do not provide a basis for second-guessing the judgments of Arkansas recruiters. Certainly, if the recruiter had no factual basis to conclude that obtaining seasonal or temporary agricultural work was the primary reason for the move, a move would not support the eligibility of the child in question. However, the audit does not address the recruiters' bases for making these determinations.

For these reasons, and for the reasons stated in our letter of March 6, 2006, we strongly recommend that OIG withdraw from the audit report its draft findings that a substantial proportion of children in the audited school districts were ineligible and its draft recommendations for substantial repayments based on these findings. We would concur in audit recommendations to repay appropriate amounts reflecting the very small proportion of children who are found not to have made a move related to agricultural employment within the prior 36 month period, as required by the law. Also, as noted in our March 6 letter, we are prepared to work with the USDE's Office of Migrant Education in making any appropriate changes to further strengthen our process for determining and documenting eligibility.

Thank you for the opportunity to comment on the draft audit and to review and comment on the supplementary information that you sent. We would be pleased to elaborate on or answer any questions you have regarding our March 6, 2006, response and this supplemental response.

Sincerely,



Scott Smith
General Counsel

Enclosure

SS:law

cc: T. Kenneth James, Ed.D., Commissioner of Education
Thomas A. Carter, Deputy Inspector General, Office of Inspector General

BASIC INTERVIEW PATTERN

Determining Eligibility for The Migrant Education Program

There are 2 questions that are essential to the eligibility of a migrant Family/Youth that must be answered before one can continue the interview process. These crucial questions are as follows:

1. **Is there anyone in the household under the age of 22?**

2. **Have you moved here in the last 3 years or has anyone moved in or out of the household in the last 3 years?**

If the answer to either of these questions is **"NO"**, there is no need to continue the interview other than the **FINAL QUESTION***.
If the answer is **"YES"** the interviewer must continue to verify eligibility.

3. **Why was the move made? (Intent) If the one of the principal reasons for the move was to seek qualifying work the interview should continue.**

INTENT

The Intent of the Move can be for multiple reasons but one of the principal reasons should be for qualifying work.

Many times when directly asked why a move was made the response will be because the worker had family or friends at the new location. A well-trained interviewer must also determine if the Qualifying Work was also one of the principal reasons for the move.

Questions that could assist in determining that the work was a principal reason for the move:
Did you hear of the qualifying work before you made the move?
Would you have moved if the work were not available?
Have you worked in qualifying work in the past? Were you aware that this work would be available if you moved here?
Did your family or friends tell you about the work?
What type of work does your friends or family have here? Did they tell you that this work was available before you made plans to move?

Comments that could clarify the Intent of Move:
The worker has family members who are working at the plant that informed him of work.
The worker heard of the work before he arrived.
The worker came to apply for work at the plant.
The family has worked in the same plant before and returned to seek work again in the plant.
The worker indicated he made the move for the qualifying work.

If the move was made for reasons that did not include seeking qualifying work the interview is over except for the FINAL QUESTION.

4. If the qualifying work is temporary you must document what indicates that the work is temporary?

As the Non-Regulatory guidelines point out in section K2, #5 the agricultural or fishing work may be permanent but if the interviewer has reason to believe that the worker does not intent to perform the job indefinitely the work could be considered temporary.

Questions that could assist in determining if the work is Temporary:

Do you have plans for seeking other work?
What work do you intend to do after this?
Do you own a home (have a residence) elsewhere? When do you plan to return there?
Are you looking for a better (paying) job?
How long will you stay in this job?
Do you intend to look for other work soon?
Will you look for a better paying job after this?
How long do you think you will do this work?
Have you done this type of work here or at other plants in the past?
Will you return to your home in (wherever) soon?
Do you plan on moving again? When?
Have you lived here in the past? When? What type of work did you do at that time?

5. When and from Where was the move made?

6. Who made the move?

7. Is the move permanent? Does the Family/Youth intend to stay permanently or will they move again in the future?

This is a determination that should be made through questioning the interviewee on his or her likelihood to remain. Many times the worker will not know for sure if they will stay. The interviewer must make a determination through careful questioning.

Questions that could be used as indicators in your determining permanency, along with the family/youth's history are as follows:
Do you intend to stay here permanently?
How many times have you moved in the past 3 years?
Where will you move after this job is finished?
Have you ever made a move here to do this type of work?

Do you have/own a home elsewhere?
Will you return to you home base?
Are you looking for a better place to live and work?
Would you move if you found better paying work elsewhere?
Will you remain in this town forever?

Comments that could clarify the determination that the move was not permanent:
Family's history of migrant moves indicate that this is not a permanent relocation.
Family has a residence in Michoacan, Mexico and will return there.
Family has a history of migrant moves.
Family has moved 3 times in the past 2 years

8. Is the Qualifying Work an important part of the household income? (PMOL)

Questions that could assist in determining if the qualifying work is a primary means of livelihood:
Is this the only income for the family?
Is this income necessary to support the family?
Could you pay the bills without this income?
Would you be able to get by without this income?

Comments that could clarify the determination:
Even though the family/youth has other income this job brings in income that is necessary to pay the bills.
A family of this size needs this extra income from this 2nd job.
Mr. Smith works in construction but Mrs. Smith state that her income is needed to make ends meet.
Mr. Rodriguez also works in the Tyson Plant but the family needs the extra income to get by.
A family of this size needs this extra income.
Worker indicated that this work is necessary for family to get by.

If the responses up to this point indicate that the Family/Youth is "Migrant" the Interviewer should begin the process of verifying in detail and documenting with the COE the final determination of Eligibility. Upon completion of the COE the Interviewer should always ask the **FINAL QUESTION.**

***FINAL QUESTION: Do you know anyone else who might qualify for the MEP; anyone who has moved here in the last 3 years, is under 22 years of age and/or has children under the age of 22 years of age living with them?**