

THE MULTIETHNIC PLACEMENT ACT (MEPA) Fact Sheet

What is MEPA?

► MEPA is the Multi-Ethnic Placement Act, signed into law by President Clinton in October, 1994. MEPA is designed to:

- Prevent discrimination in the placement of children on the basis of race, color, or national origin.
- Facilitate the diligent recruitment of foster and adoptive parents.
- Increase the number of children who are adopted.

► MEPA prohibits states or public and private foster care and adoption agencies that receive Federal funds from delaying or denying the placement of any child solely on the basis of race, color or national origin.

► MEPA permits an agency to consider both a child's cultural, racial, and ethnic background and the capacity of the foster or adoptive parents to meet the needs of a child of a specific background, as one of a number of factors used in determining whether a placement is in the child's best interests. This factor must, however, be applied on an individualized basis, not by general rules.

► MEPA requires agencies to provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive homes are needed.

Who are the children MEPA is designed to help?

► MEPA is intended to help children in foster care who are awaiting adoption. In 1990, approximately 69,000 children in foster care had a goal of adoption. Of those children, parental rights had been terminated for 20,000, so they were legally free to be adopted and awaiting placement in an adoptive home.

► In particular, MEPA is designed to help children who are harder to place, including minority children. Of the children awaiting adoption at the end of 1990, approximately 46% had already waited two years. It takes substantially longer to find homes for minority children.

► The great majority of the children awaiting adoptive placement have been abused or neglected and are in foster care. A determination has been made that it is unsafe for them to return to their parents.

► Most of the children are school age; few are infants. In 1990, approximately 4% were under one year old, 36% were ages 1-5, 43% were ages 6-12, and 17% were 12 years and older.

- ▶ Two out of three children legally free and awaiting adoption have special needs: medical, developmental, behavioral or psychological.

Why does it take so long for children to be adopted?

- ▶ Finding adoptive homes for older children and those with emotional or physical problems is difficult, yet most of the children waiting for adoption fall into these categories. While there are many families seeking to adopt, many of these families want young, healthy children.
- ▶ Lengthy processes to terminate parental rights, lack of financial resources for adoption, excessive caseloads and difficulty in recruiting foster and adoptive families contribute to the slow adoption of many of these children.
- ▶ Some states and agencies have policies that discourage transracial placements or that allow lengthy searches for same race families before authorizing transracial placements. Some families are informally discouraged from ever applying to adopt children of a different race or ethnicity. These policies can result in delaying or preventing adoption of children by reducing the number of available families.

How will MEPA help?

- ▶ By preventing discrimination that can cause delays in or denial of adoptive placements, and by increasing recruitment efforts, MEPA should increase the number of children who are adopted.

What are the next steps for states?

- ▶ MEPA allows states one year from enactment, or until October 21, 1995, to bring their policies into compliance with MEPA's non-discrimination provisions (extensions can be granted if additional time is needed to change state statutes). In 1996, states' Title IV-B Child Welfare Services state plans must demonstrate how they will meet the recruitment requirements of MEPA.
- ▶ On April 24, 1995 DHHS issued guidance to assist agencies that receive federal funds for adoption or foster care placements and help ensure compliance with Title VI of the Civil Rights Act of 1964 and MEPA.
- ▶ The Administration for Children and Families (ACF) and the Office for Civil Rights (OCR) of the DHHS will help states and agencies meet the requirements of MEPA and ensure that neither race, color or national origin is used to delay or deny placement of children.

Is MEPA an "unfunded mandate"?

- ▶ No. Under Title IV-E of the Social Security Act, the federal government will match 75% of any state funds used to train staff or foster and adoptive parents; the federal government will match 50% of state administrative funds used for recruitment and child placement activities.

ADOPTION Fact Sheet

How does the adoption system work?

- ▶ Under state and federal laws, before exploring adoption possibilities, state child welfare agencies are required to try to reunite children with their parents when a child's safety can be assured. States are required to make a determination regarding reunification or adoption within one year.
- ▶ Between 50 and 70% of all children initially placed in foster care eventually are returned to their parents.
- ▶ When reunification is not possible, state and federal laws require efforts to find a permanent home for a child, preferably through adoption. All state laws require that, before an adoption can take place, the legal rights of the biological parents be severed through a state court proceeding.

Who are the children who need adoptive homes?

- ▶ One group consists of children, primarily infants, whose parents voluntarily relinquish them for adoption; little is known about these children or the nature of their adoptive placements because their parents generally deal with private adoption agencies or make private placements with adoptive families.
- ▶ A second group of children are those who have been placed in foster care based on court determination that they were abused or neglected, and for whom reunification efforts have been unsuccessful.
- ▶ In December 1990, there were approximately 69,000 foster children in the country for whom state agencies had determined that adoption was the appropriate goal. Approximately 20,000 of these children were legally free to be adopted (their parents' legal rights to ever regain custody had been terminated) and were waiting to be adopted.
- ▶ Forty-four percent of the children awaiting adoption were white, 43% African American, 7% Hispanic. Only four percent of these children were under age 1; 36% were between the ages of 1 and 5; 43% were 6-12 years of age; and 17% were over the age of 12. The median age was 7.4 years.
- ▶ Two out of three waiting children have special needs: medical, developmental, behavioral or psychological.

How long do children wait for adoption?

- ▶ Of the children awaiting adoption at the end of 1990, approximately 46% had already waited two years.
- ▶ It takes substantially longer to find homes for minority children. Older children and sibling groups irrespective of race also have longer waits.

- ▶ Many children are never adopted, even though their biological parents' parental rights have been terminated.

Why does it take so long and why do so many children go unadopted?

- ▶ Finding adoptive homes for older children and those with emotional or physical problems requires aggressive action by agencies, and most of the children waiting for adoption fall into these categories.
- ▶ In 1990, 43% of the children waiting for adoption were 6 to 12 years old; only 4% were infants. Two out of three children -- a doubling since 1982 -- had some special need: they were disabled, older, had siblings, or were minority.
- ▶ Lengthy processes to terminate parental rights, lack of financial resources for adoption, excessive caseloads and difficulty in recruiting foster and adoptive families contribute to the slow adoption of many of these children.
- ▶ There is some evidence that the adoption of minority children is being slowed because some foster care and adoption agencies are unwilling or reluctant to place these children with non-minority families. Some state agencies have followed explicit or implicit policies that make race or ethnicity the primary consideration in placement thus reducing the pool of available families.

What is the Clinton Administration doing to increase adoptions?

- ▶ The Administration is ensuring that states make full and effective use of the Adoption Assistance program, which provides critical economic support to families who adopt special needs children, since they may have large medical and other expenses. Under the Clinton Administration, the number of children for whom adoption subsidies are provided has increased by about 30%.
- ▶ Grants have been provided to public and private agencies to develop successful models for recruiting families, provision of post-legal adoption services, support for parent groups, and the development of training curricula.
- ▶ The Administration has conducted national and regional leadership conferences to build the capacity of public and private agencies to facilitate the adoption of minority and special needs children.
- ▶ The Administration provides support for the National Adoption Exchange, the Adoption Clearinghouse, the National Resource Center for Special Needs Adoption, and the Interstate Compact on Adoption and Medical Assistance.
- ▶ The Administration is committed to fully enforcing the Multiethnic Placement Act, whose non-discrimination and recruitment provisions should increase the number of children who are adopted.
- ▶ The Clinton Administration has expressed strong concerns about "welfare reform" proposals that would jeopardize these programs and eliminate the guarantee of federal funds to help support adoptions.

CURRENT STATE POLICIES AND PRACTICES IN MULTIETHNIC ADOPTION Fact Sheet

Who sets policy and makes decisions about adoptive placements for children?

- ▶ Policies with respect to placement of children for adoption are established by each state.
- ▶ In most states, both public and private adoption agencies -- either run directly by the state or under contract with the state -- have authority to make decisions with respect to placing children in specific homes.
- ▶ Ultimately, these decisions must be approved by a court as part of the adoption process.

What do state laws provide?

- ▶ In most states, the state adoption statute states that children should be placed in homes that promote their best interests. Few state statutes define the term "best interests."
- ▶ Most states have adopted regulations or agency policies that identify some factors to be considered in choosing placements. These include: the relationship of the family to child; where siblings are placed; the physical and emotional needs of the child; the capacities of the prospective parents; the age, sex, racial, ethnic, and cultural identity of the child; and continuity and stability of the child's foster care placement, and the child's psychological attachment to the foster family.

How do some states currently consider race, culture or ethnicity in their adoption policies?

- ▶ The racial, ethnic, and cultural background of the child are now among the factors that many state statutes, regulations, or policy manuals specify as being relevant to placement decisions. A number of state policy manuals specify that placement with a family of the same background as the child is generally in a child's best interests.
- ▶ Some states specify a rank order of preferences for placements, which make placement in a family of the same race or ethnicity as the child a highly preferred category.

- ▶ Some states prescribe set periods of time in which agencies must try to place a child with a family of the same race or ethnicity before the child can be placed with a family of a different race or ethnicity.
- ▶ Some states have a general preference for same race or ethnicity placements, although they do not specify a placement order or a search period.
- ▶ Some states indicate that children should be placed with families of the same race or ethnicity provided that this is consistent with the best interests of the child.
- ▶ In some states, available families, especially foster families, have been denied the right to adopt children of a different race or ethnicity.
- ▶ In some states, agency policies may also discourage some families from ever applying to adopt children of a different race or ethnicity.
- ▶ Some states prohibit discrimination in placements.

How will The Multiethnic Placement Act (MEPA) affect state laws and policies?

- ▶ MEPA prohibits states or foster care and adoption agencies that receive Federal funds from delaying or denying the placement of any child solely on the basis of race, color or national origin. HHS' Guidance identifies a number of policies that would be inconsistent with these requirements of MEPA, such as exclusively searching for families of a specific race or ethnicity.
- ▶ MEPA allows race or ethnicity to be considered only as it can be shown to relate to the specific needs of the individual child. For example, under MEPA an agency may look to see whether a prospective family has thought about the needs of the particular child, and is equipped to cope with these needs. Children who are older, disabled, or of a different race or ethnicity from the family may need special attention and therefore MEPA allows a placement agency to assess the capacity of the family to meet this child's needs.
- ▶ While an agency may assess any advantages that would be derived by the child from placement in a family of similar background, this would need to be considered along with the other advantages each prospective family might bring to the child. They may not use or rely on race-based generalizations in making their assessments.
- ▶ Neither MEPA nor the Guidance seek to regulate any state policies with respect to placement decisions that are not based on race or ethnicity. Agencies may not, however, use other factors as a proxy for race or ethnicity.

**THE MULTIETHNIC PLACEMENT ACT (MEPA)
CIVIL RIGHTS ENFORCEMENT PROCESS
Fact Sheet**

What is the general enforcement process of Title VI of the Civil Rights Act of 1964?

- ▶ Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits discrimination on the basis of race, color, or national origin in programs receiving federal financial assistance.
- ▶ If the Department determines that a recipient of federal financial assistance has unlawfully discriminated on the basis of race, color, or national origin, it must notify the recipient of its finding and seek voluntary compliance. 42 U.S.C. § 2000d-1; 45 C.F.R. § 80.7(d).
- ▶ If attempts to obtain voluntary compliance are unsuccessful, the Department may enforce Title VI by initiating administrative proceedings to terminate federal financial assistance, or it may pursue other means, including referring the matter to the Department of Justice with a recommendation to pursue judicial proceedings. 42 U.S.C. § 2000d-1; 45 C.F.R. § 80.8(a).

How does a state or agency know whether it is impacted by MEPA?

- ▶ If a state or agency receives federal financial assistance, either directly from HHS or indirectly through a state administered HHS program, such as community services block grant funding, it is required to be in compliance with the Multiethnic Placement Act.

How does a state or agency know whether it is in compliance with MEPA?

- ▶ HHS officials are in the process of reviewing state statutes and published agency policies regarding adoption and foster care placement.
- ▶ In the event that the Department determines that a statute or policy authorizes practices inconsistent with MEPA or Title IV, it will notify the state or agency no later than a month after issuance of the guidance.
- ▶ States and agencies should also review their statutes, policies and practices to ensure that they are in compliance.

► In the meantime, representatives from the Office for Civil Rights and the Administration for Children and Families are available to provide technical assistance to states and agencies to help them come into compliance with the Multiethnic Placement Act.

What if a state or agency is notified that certain practices, statutes or policies are out of compliance?

► If a state or entity is notified that certain practices, statutes or policies might be out of compliance with the Multiethnic Placement Act, it will need to make necessary changes as soon as feasible. With some limited exceptions, MEPA requires that states and agencies be in compliance no later than October 21, 1995.

► HHS will work with states and agencies to assist in making the changes necessary for compliance.

► HHS is committed to assisting all covered agencies or entities to come into voluntary compliance with the Act.

► If an agency or state voluntarily complies, no enforcement action will be taken.



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

LETTER TO ADDRESSEES:

SUBJECT: Guidance on the Multiethnic Placement Act of 1994

The Administration for Children and Families (ACF) and the Office for Civil Rights (OCR) of the Department of Health and Human Services (DHHS) are writing to transmit new policy guidance on the use of race, color, or national origin as considerations in adoption or foster care placements.

The guidance is designed to assist public and private agencies, that are involved in adoption or foster care placements and that receive Federal funds, in complying with Title VI of the Civil Rights Act of 1964 (Title VI) and the Multiethnic Placement Act of 1994 (MEPA).

The Multiethnic Placement Act, signed into law by President Clinton on October 20, 1994, is designed to: prevent discrimination in the placement of children in foster care and adoption on the basis of race, color, or national origin; decrease the length of time that children wait to be adopted; and facilitate the identification and recruitment of foster and adoptive parents that can meet children's needs. The Act prohibits states or agencies that receive Federal funds from delaying or denying the placement of any child solely on the basis of race, color or national origin.

HHS is committed to assisting all covered agencies or entities to come into voluntary compliance with MEPA. Toward this end, within the next month, we will complete a review of the applicable state statutes, regulations and published policies in this area. We will contact you again if we believe your state is not in compliance with MEPA, and we will provide technical assistance on compliance at your request. In the meantime, we encourage states and agencies to begin their own review of statutes, regulations and policies.

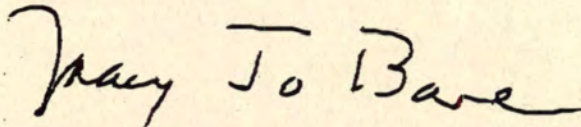
Compliance with the non-discrimination provisions of MEPA is required no later than one year after the date of its enactment, or October 21, 1995. Agencies desiring technical assistance regarding compliance with the nondiscrimination provisions should contact Ron Copeland of OCR at (202) 619-0553, TDD 1-800-537-7697.

Page 2 - Addressees

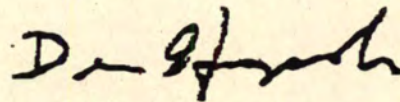
Compliance with the recruitment provisions of MEPA is required for Federal approval of FY 1996 title IV-B state plans. State recruitment plans must be submitted by October 31, 1995. Those states which are submitting consolidated state plans, including title IV-B, subparts 1 and 2, may include their recruitment plans in the consolidated state plan and submit them by the expected due date of June 30, 1995. For those states submitting separate title IV-B, subpart 1 plans, the recruitment plans must be submitted by October 31, 1995 even though the rest of the state plan may not be submitted until later. Technical assistance on recruitment efforts may be obtained by contacting Ellen Carey of ACF at (202) 205-8652 (adoption) and Gerri Robinson (202) 205-8575 (foster care), TDD (202) 401-4675.

The Department is committed to vigorous enforcement of MEPA to ensure that temporary foster care placements and permanent adoptive homes are readily available for children who need them, that children are not subject to discrimination in their placements, and that all children have the benefit of a loving, permanent home. Please be assured that in the coming months, we will assist covered agencies or entities in taking the actions necessary to fulfill these important statutory objectives.

Sincerely,



Mary Jo Bane
Assistant Secretary
for Children and Families



Dennis Hayashi
Director
Office for Civil Rights

Attachments

Addressees:

State agencies administering or supervising the administration of Titles IV-B and IV-E of the Social Security Act

Adoption Opportunities grantees

State agencies enforcing civil rights

**FACSIMILE TRANSMISSION**

**ADMINISTRATION FOR CHILDREN AND FAMILIES
OFFICE OF THE ASSISTANT SECRETARY
370 L'ENFANT PROMENADE, S.W.
WASHINGTON, D.C. 20447**

June 19, 1995

TO:*Sabrina***Telephone:****Fax:****Number of Pages (excluding cover):***456-5709**//*

FROM:

**Wendy Jacobson
Special Assistant to the
Deputy Assistant Secretary**

Telephone:**Fax:****(202) 260-1853****(202) 401-4678**

MESSAGE:

As requested:

- Fact Sheets on the Multi-Ethnic Placement Act (MEPA); Adoption*
- letter sent to states & other grantees about Administration practice on MEPA.*

72ND STORY of Level 1 printed in FULL format.

Copyright 1994 Sun-Sentinel Company
Sun-Sentinel (Fort Lauderdale)

August 15, 1994, MONDAY, ALL EDITIONS

SECTION: EDITORIAL, Pg. 9A, JOAN BECK

LENGTH: 860 words

HEADLINE: CHANGE IN SOCIAL CLIMATE NEEDED TO GIVE ADOPTION WARM RECEPTION IT MERITS

BODY:

Adoption is a loving option," reads the want ad. "We can answer each others' prayers. We can offer love, security, stability, a full-time mom and devoted dad to the precious life you are carrying. And you can give us a family we couldn't have otherwise. We have a beautiful suburban home and will provide an excellent education and financial security. Medical, legal, counseling and court-approved living expenses paid. Please call our attorney."

Ads like this are now a standard category in the classified sections of daily newspapers. They are packed with emotion, empathy, legal precautions and practical considerations: "A secure home filled with laughter." "A big back yard." "Housing and maternity clothes if needed."

What's happening here is a desperate effort by individuals to maintain and use an honorable and useful solution to unwanted pregnancy that both government and social agencies have largely been ignoring in recent years.

Fewer than 53,000 non-relative adoptions now occur annually in the United States, down from 90,000 in 1970. Yet the number of births to young, unmarried mothers has soared. So has the toll of abortions. About 470,000 children are in foster care, a startling increase from 276,000 in 1986.

Adoption can offer a win-win-win answer for a birth mother who doesn't want a baby, for a couple who does and for the child. So the sharp decline in its acceptance and use is a social tragedy, but one that could easily be reversed.

Several trends have impacted unhappily on adoption in the last two decades.

Abortion has become common and legal, widely touted as the final solution to an unwanted pregnancy. It takes the lives of about 1.5 million babies every year, some of whom might have survived to be adopted in a different social climate. Adoption, by contrast, is often portrayed as morally wrong and the cause of lifelong guilt and remorse for the birth mother.

Unmarried mothers no longer face the social stigma they did, and having a baby out of wedlock is not only acceptable but can be fashionable. Babies who might have been placed for adoption a generation ago are now raised by single mothers - many on welfare, some with good jobs like TV's Murphy Brown.

Meanwhile, misconceptions about adoption have grown - most of them anecdotal and some deliberately fanned by a few abortion supporters, by opponents of interracial adoption and by those concerned but uninformed about the effects of adoption on children.

Sun-Sentinel (Fort Lauderdale), August 15, 1994

The myth-perception is that adopted children turn out to be problem kids, that they never cease to feel rootless and estranged without their biological parents and that no amount of love and effort by adoptive parents can erase the trauma.

These concerns should be dispelled by a new, federally funded, four-year study by the Search Institute in Minneapolis. It's called the largest ever done of adolescent adoptees and their families.

The study concludes that most adopted teens are "thriving," with no signs adoption has had "a negative effect on their identity development, mental health or well-being."

In comparison with other students in a large public school sampling, the Search Institute found adoptees have slightly less problem behavior, with a lower incidence of binge drinking, sexual activity, vandalism, trouble with police, absenteeism and drunk driving and considerably less depression. They are not turning out to be maladjusted, problem kids.

Adoption is too valuable to be left to the want ads. Social agencies should reassess and update the adoption services they can provide. Family planning groups should not automatically recommend abortion in cases of problem pregnancy, but should also offer the benefits of adoption and fully support a woman who chooses it.

State legislators should rewrite laws that keep too many children in long-term foster care. They should insist on laws that protect the privacy of adoption records unless both adoptee and birth parent agree to make information available. Caseworkers should be quicker to recommend adoption when parents are abusing, neglectful or uninterested. Judges should be more willing to free a child legally for adoption when it is in the child's best interest.

Congress can also help by passing the Multiethnic Placement Act proposed by Sen. Howard Metzenbaum, D-Ohio. It would counter the pernicious and racist bias of black social workers against transracial adoption by providing that if a same-race adoptive family cannot be found, a child can be adopted across racial lines rather than be stuck in long-term foster care. The measure is an amendment to two human services bills now in House-Senate conference committee. Rep. Chris Smith, R-N.J., has introduced an Omnibus Adoption Act that would encourage adoption, offer tax incentives and provide legal help for birth mothers. The bill is stuck in several House committees and no action is likely soon.

It's not often a win-win-win solution, like adoption, is available for a social problem. We should cherish and encourage this one.

Joan Beck is a columnist for the Chicago Tribune, 435 N. Michigan Ave., Chicago, Ill. 60611.

TYPE: Chicago Tribune

LOAD-DATE: August 16, 1994

1ST STORY of Level 1 printed in FULL format.

Copyright 1995 The Times Mirror Company
Los Angeles Times

May 7, 1995, Sunday, Home Edition

SECTION: Opinion; Part M; Page 4; Op-Ed Desk

LENGTH: 610 words

HEADLINE: FOSTER KIDS NEED GOOD PARENTS, PERIOD;
DON'T MAKE RACE SOLE OR DISQUALIFYING ISSUE IN ADOPTIONS

BODY:

Should an adoption be denied because a child is not of the same race or ethnicity as that of the family that wants the child? In principle, no. Practically, however, such decisions are made, and they indeed should be -- carefully and on a case-by-case basis. Although it's naive to assume that decisions about adoption can ever be colorblind, race or ethnicity should not be the sole reason for denying placement of a child in a loving home. That would be racist.

Most states give priority to matching the race or ethnicity of adoptive families and children. In 1993, Texas became the first state to require that race or ethnicity be given no more weight than any other factor. California, which has 94,000 children in foster care, is now considering a similar measure in order to comply with the federal Multiethnic Placement Act of 1994 (MEPA).

That bill was intended to prevent public and private foster care and adoption agencies that receive federal funds from denying or delaying placements solely on the basis of race, ethnicity or national origin. The law does permit -- but does not require -- these factors to be considered in determining the child's best interests. And that's good.

LOOPHOLE-RIDDLED: Last month the federal Department of Health and Human Services issued policy guidelines on the law. The agency said a number of current practices of some states violate MEPA, including time limits for race or ethnic matching and special agency requirements to justify trans-racial placements. But these long-awaited guidelines apparently do not placate MEPA critics, including former Sen. Howard M. Metzenbaum (D-Ohio), who sponsored the MEPA bill.

Metzenbaum is unhappy because the law's final language is full of loopholes that, he maintains, subvert its original intent. He says the guidelines are not specific enough and that they may not really facilitate the placement of African American children. Meanwhile, a measure recently passed by the House, sponsored by Rep. Jim Bunning (R-Ky.), would go further than Metzenbaum's bill by eliminating race altogether as a factor in placing children. However, Bunning's legislation is perhaps unrealistic and unfair to the children and families involved.

BLACK OPPOSITION: Two weeks ago the California Assembly's Human Services Committee unanimously cleared a bill to amend state adoption law. The measure, sponsored by Assemblyman Jan Goldsmith (R-Poway), is opposed by the Assn. of Black Social Workers, which has long contended that trans-racial adoptees grow up confused about their identities and unprepared for racism. The legislation

Los Angeles Times, May 7, 1995

specifies that race or ethnicity should not be the sole basis for denying an adoption or foster home placement. That would put the state partly in compliance with MEPA, but under the newly issued guidelines other parts of California adoption law may have to be changed. Those parts include the requirement that agencies emphasize, during the first 90 days, matching children with prospective families by race and ethnicity.

At issue in Sacramento and Washington is the welfare of foster care children -- totaling about 445,000 nationwide, nearly half of them minority members. The National Adoption Information Clearinghouse reports that adoptable children wait, on average, more than two years, eight months; the wait for minority children averages a third longer.

California adoption law needs to be amended to comply with the MEPA guidelines, but the federal law itself should not be repealed to eliminate consideration of race and ethnicity. It would be fine to do so if we were truly a colorblind society. That, sadly, is not the case.

LANGUAGE: ENGLISH

LOAD-DATE: May 8, 1995

5TH STORY of Level 1 printed in FULL format.

Copyright 1995 The Times Mirror Company
Los Angeles Times

June 4, 1995, Sunday, Valley Edition

SECTION: Metro; Part B; Page 17

LENGTH: 739 words

HEADLINE: ADOPTION RULES SHOULD NOT BE BLACK OR WHITE;
CALIFORNIA LAW DISCOURAGES COUPLES FROM CROSSING COLOR LINES. BUT NATURE
SANCTIONS FAMILIES IN ALL SORTS OF CONFIGURATIONS, SO WHO ARE WE TO INSIST ON
'MATCHED' SETS?

BYLINE: By DIANA BEARD-WILLIAMS, Diana Beard-Williams of Palmdale is executive
director of the Coalition for the Empowerment of Children and Families. She has
degrees in sociology and urban affairs.

BODY:

About six months ago, I met a black social worker who engaged me in a
spirited conversation about whether black children should be adopted by white
couples.

This is a longstanding issue in California, because transracial adoptions are
discouraged although not prohibited. A state law requires a 90-day search for
adoptive parents of the child's racial or ethnic background. Meanwhile there are
several hundred more African American children in California needing adoption
than African American couples likely to adopt them.

The issue was rekindled last month by the issuance of federal guidelines
warning that, under a 1994 law, agencies receiving federal aid may not delay or
deny the placement of children because of racial considerations.

My social worker acquaintance, reflecting the dominant view of the Assn. of
Black Social Workers, did not think white folks should dare to cross the line
and adopt African American children.

"But they're getting homes," I said.

"But are they the right homes?" she said.

"Do they seem capable of loving and cherishing and providing for the kids?" I
asked.

"Doesn't matter." She dismissed me with the wave of her hand. "They don't
understand what being black is all about."

Even though I'm African American and accused of being Afrocentric at times, I
was left with a feeling that maybe even I didn't understand what being black in
1990s America was all about. Still, I do not think it's about wearing your
blackness like a chip on your shoulder. The social worker left me feeling she
would sacrifice the welfare and interest of a black child out of a misguided
sense of racial pride.

Los Angeles Times, June 4, 1995

The Assn. of Black Social Workers believes that if you haven't felt the stigma of racism and don't know what it's like to be society's footstool, you are incapable of adequately preparing a black child for a racist, cruel America. From its perspective, that is more important than love, care and a nurturing home environment.

*

The black social workers claim that black children who are adopted by white parents grow up confused about their identities and unprepared for racism. The reality is that most children are confused about their identities at some point in their adolescence, and I'd rather they run the risk of learning about racism later in life than be denied the beauty, love, wonder and support of being part of a family.

The organization has clung to this dogma despite the switch in national policy (which some in Congress want to strengthen even further). It opposes a bill moving through the state Legislature that specifies that race should not be the sole basis for denying an adoption.

According to a Los Angeles County supervisor of child protective services with whom I spoke, monthly reports suggest that the transracial adoptions and foster-care placements that do occur are just as successful on the whole as single-race placements and sometimes better.

The saddest fact here is that there are 79,000 children in California and 500,000 children nationwide who need loving homes. About 40% are African American, and black children are three times as likely to remain in long-term foster care as Latino or white children. Where, then, do these children look for the familial experience we enjoy if African American parents are not available or capable of adopting?

The federal government has taken an important step with the Multiethnic Placement Act of 1994, issuing a profound proclamation on this issue. Some states, such as Texas, have proclaimed that race cannot be given any more weight than any other adoption criteria. What a revolutionary concept -- and one that should have prevailed many, many years ago.

*

Today's families come in all sorts of shapes, sizes and configurations. If nature doesn't preclude such interesting combinations, who are we to insist on "matched" sets?

Of course there will be problems to face. There will be the challenges of white parents having to come to terms with the prejudice their black child will face, how to advise the child in such matters and learning that this is not a colorblind society.

But those problems are far more palatable to me than the notion that a misguided sense of racial pride and protectiveness is literally condemning black children to a life without parents and without love. The solution is neither as simple as Newt Gingrich's orphanages or as confining as separatist restrictions.

Los Angeles Times, June 4, 1995

GRAPHIC: Photo, (DIANA BEARD-WILLIAMS)

LANGUAGE: ENGLISH

LOAD-DATE: June 5, 1995

15TH STORY of Level 1 printed in FULL format.

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AP Worldstream

April 25, 1995; Tuesday 14:06 Eastern Time

SECTION: International news

LENGTH: 547 words

HEADLINE: Government Issues Rules Designed To Facilitate Interracial Adoptions

BYLINE: JENNIFER DIXON, Associated Press Writer

DATELINE: WASHINGTON

BODY:

The federal government is pressuring states to reverse longstanding, racially based practices preventing white families from adopting black and other minority children.

New rules implement the Multiethnic Placement Act of 1994 prohibiting states, or adoption agencies that receive federal funds, from delaying or denying placement of a child solely on the basis of race, color or national origin. The rules were being published Tuesday in the Federal Register.

The law, which takes effect Oct. 21, also requires states to step up recruiting efforts for potential foster and adoptive parents reflecting the ethnic and racial diversity of children needing homes.

States or agencies that violate the law risk being sued in court and losing federal funds.

Officials of the Department of Health and Human Services say up to 30 states have laws or policies encouraging adoption agencies to place children with parents of the same race or effectively discouraging families from applying to adopt children of a different race.

In some states, available families have been forbidden to adopt children of a different race or ethnicity.

The new Health and Human Services policies are designed to help the growing numbers of children in foster care who are awaiting adoption. As of 1990, the most recent year for which figures are available, 20,000 children were available for adoption, and an additional 49,000 were in the process of becoming available legally.

Although about equal numbers of black and white children are available, Health and Human Resources officials believe there are fewer potential adoptive black families than white families, partly because of bureaucratic red tape and financial requirements.

Officials said Monday the number and the racial make-up of the pool of potential adoptive families are not known.

AP Worldstream, April 25, 1995

The new guidelines allow agencies to consider a child's cultural, ethnic and racial background, as well as the capacity of the prospective family's ability to meet the needs of a child.

But when an adoption agency considers race in its decision, it must be on an individual basis. Officials said race is more likely to be a factor in the adoption of older children.

LANGUAGE: ENGLISH

LOAD-DATE: April 25, 1995

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October 8, 1994, Metro Edition

SECTION: News; Pg. 1B

LENGTH: 951 words

HEADLINE: U.S. adoption bill clouds state picture;
The Multiethnic Placement Act, which has passed the U.S. Senate, may become law. It marks a shift in focus from Minnesota's Heritage Act, which emphasizes the importance of race in adoptions.

BYLINE: Wayne Washington; Staff Writer

BODY:

It was supposed to clear the air.

But in Minnesota, where transracial adoption has sparked several brushfires of controversy in recent years, the air is only more clouded now that a federal bill de-emphasizing race in foster care and adoptions has passed the Senate and is likely to become law. While no provisions of the bill conflict with Minnesota's law on transracial adoption, some lawyers who are familiar with adoption law say it offers a philosophical shift from a Minnesota statute that emphasizes the importance of race in adoption and foster care placements.

They contend that the measure, could be an important legal opening for white families seeking to adopt black, Asian-American or Hispanic children.

The bill pushed by Sen. Howard Metzenbaum, D-Ohio, which passed the Senate on Wednesday, states that it is not to be interpreted as an alteration of the Indian Child Welfare Act, a federal law that mandates that American Indian children be placed in same-family or same-race homes unless "good cause" is shown why they should not be. However, there is no specific mention of the Minnesota Heritage Act, a state law that lays out the factors to be considered in making adoption or foster care placements.

Like the Indian Child Welfare Act, the Heritage Act says race should be an important - but not the sole - factor in deciding where to place a child. Metzenbaum's Multiethnic Placement Act acknowledges the importance of race, but some of its wording has raised eyebrows.

The bill says that "child welfare agencies should work to eliminate racial, ethnic and national origin discrimination and bias in adoption and foster care recruitment, selection and placement procedures."

It also requires that agencies that receive federal aid for foster care and adoptions should not "delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color or national origin of the adoptive or foster parent, or the child involved."

Mark Fiddler, executive director of the Indian Child Welfare Law Center, said white families who want to adopt a minority child could feel empowered by

Star Tribune, October 8, 1994

Metzenbaum's bill.

"If I were them I would feel that way," he said. "If I were a Hispanic family or a black family, I would feel somewhat threatened by this."

Robert DeNardo, a supervisor with the Family and Children's Services Division of the state Department of Human Services, said the federal bill does not conflict with the Heritage Act.

"It's consistent with the direction we've taken," he said. "There are children in Minnesota who are being adopted by people of different racial backgrounds and that will continue."

Lawyers who handle adoption cases say counties now look hard and long for minority homes to place minority children in because they don't want to conflict with the Heritage Act, which lists race behind family as the second-most important factor in deciding where to place a child. They wonder, with the federal measure's de-emphasis on race, whether counties will speed up those searches and become more willing to allow white families to adopt minority children.

"The Heritage Act was not intended to have black children languish in foster care for the rest of their lives," said Wright Walling, a lawyer who handles adoption cases. "The counties have taken it as a blanket rather than look at each case. Hopefully, we will see some balancing out."

Metzenbaum introduced the bill after watching a "60 Minutes" story on the difficulties white families faced in trying to adopt black children who needed a home. A Metzenbaum news release hailing the bill's passage states that "the legislation encourages transracial adoption when an appropriate same-race placement is not available."

Such language worries Lester Collins, executive director of the Council on Black Minnesotans, which has monitored foster care placements for more than six years. He disagrees with Walling and others who believe that the Heritage Act has bullied counties into launching all-out, time-consuming searches for same-race placement homes. Minority children not covered under the Indian Child Welfare Act are still winding up in white homes, Collins said, and the language of the Metzenbaum bill doesn't reflect that. "It would almost appear as if children of color are not being placed in white homes because of efforts to place them in minority homes," he said. "I absolutely don't believe that's the case." Collins said more efforts are needed to recruit minority homes for minority children in the system.

The issue of placing minority children in minority homes has surfaced in several high-profile adoption cases in Minnesota. Perhaps most notable was the court fight over Baby D, a black toddler who was sent to live with her biological grandparents over the objections of white foster care parents who wanted to adopt her. Metzenbaum's bill says more efforts are needed to recruit foster care and adoptive families of all races, but Collins and others criticize it for not providing funds or guidelines for that recruiting.

Arthur Treadwell, executive director of the African American Adoption Project, said more emphasis should be placed on finding minority homes for minority children. As for the rest of the bill, Treadwell said he could see

Star Tribune, October 8, 1994

how some might view it as a legal opening for white families to adopt minority children. He doesn't read it that way, however. "It's got a little something for everybody," he said. "You just have to know how to use it."

LANGUAGE: ENGLISH

LOAD-DATE: October 10, 1994

THE WHITE HOUSE
WASHINGTON

April 14, 1995

MR. PRESIDENT:

The attached are materials relating to your meeting on transracial adoption Monday -- in particular your concern about how our proposed policy would square with the Piscataway case.

Ab and Bill wanted you to get an early copy so you would have time to review.


Todd Stern



OLC RESPONSE TO POTUS CONCERN ABOUT PISCATAWAY

Issue: Do the MEPA Guidelines contradict position of U.S. in Piscataway¹ by failing to allow race to be used to break a tie?

Answer: No.

1. In Piscataway, the consideration of race in the employment of teachers was permissible to achieve the state's compelling interest in diversity. That race was considered by the School Board in Piscataway only to break a tie between two employees when one had to be laid-off merely demonstrates that the use of race to achieve the state's compelling interest in diversity was narrowly tailored and did not unduly trammel the white teacher's rights.

2. In the context of child placement, the state's compelling interest is in advancing the best interests of the child. (No one has suggested that the state's interests in diversity or remedying the effects of past discrimination should be pursued in the child placement context.) Once the state has determined that two families are "equal" in their ability to meet the needs of the child, it no longer has a compelling interest that can be satisfied through race-conscious decision making in the child placement context.

3. The basic thrust of MEPA Guidelines is that an agency receiving federal funds may take race into account only if it has made an individualized determination that the facts and circumstances of the specific case require the consideration of race to advance the best interests of the specific child. For example, a state may determine that a particular child has a strong sense of identity with a particular racial, ethnic, or cultural community that should not be disrupted.

4. In Piscataway, the United States seeks to uphold a lawful affirmative action policy. The MEPA Guidelines are not an affirmative action program. They do not seek to permit race conscious decision making in order to promote diversity or to impose a remedy for past discrimination.

5. An illegitimate use of race does not become legitimate when used to break a "tie." All race-conscious decision making must be justified by a compelling interest effected through narrowly tailored means.

¹ The Piscataway School Board's discretionary consideration of race under a voluntary affirmative action plan to decide whom to retain between two equally qualified teachers of identical seniority was permissible under Title VII of the Civil Rights of 1964 because such consideration was necessary to ensure faculty diversity within the high school's business education department.

THE WHITE HOUSE THE PRESIDENT HAS SEEN

WASHINGTON
April 5, 1995

41695

MR. PRESIDENT:

The attached memo concerns a draft HHS guidance implementing the Metzenbaum transracial adoption bill. That bill prohibits rejection of adoptive or foster parents solely on the basis of race. The guidance is due April 22.

Your go-ahead is sought on one key issue: the extent to which racial generalizations may be considered in adoption or foster placements. OLC's view, reflected in the guidance, is that any generalizations about race are unconstitutional; race-based considerations are permissible only if deemed to serve the best interests of a given child based on an individualized determination. Under this view, adoption agencies *may not* conclude as a general matter, that, other things being equal, same-race adoptions are preferable.

OLC's approach, which HHS now agrees to, will generate criticism from groups including the NAACP and Child Welfare League. As a matter of policy, some will find it objectionable that racial generalizations are barred even in tie-breaker situations. As a matter of federalism, the guidance will preempt the practices of many states. And OLC's approach barring racial considerations may have some spillover effect on the affirmative action debate.

On balance, OLC, Mikva and Galston all believe HHS should issue the guidance. Leon and George concur.

Approve ☐

Disapprove ☐

Discuss ☒

John Podesta
Todd Stern

*John W.
Punnett*

THE WHITE HOUSE

WASHINGTON
April 3, 1995

THE PRESIDENT HAS SEEN
4/6/95

95 APR 3 P7:24

MEMORANDUM FOR THE PRESIDENT

FROM: ABNER J. MIKVA *ajm*
BILL GALSTON *WAG*
CHRISTOPHER D. CERF *cc*

SUBJECT: Implementation of The Multiethnic Placement Act

Background

The Multiethnic Placement Act of 1994 (MEPA) prohibits adoption agencies that receive federal assistance from "categorically" denying "any person the opportunity to become an adoptive or foster parent solely on the basis of . . . race, color or national origin." The Act further provides that race may be a "permissible consideration . . . as one of a number of factors used to determine the best interests of the child." Now the administration's challenge is to draft a "guidance" for the states implementing and interpreting the Act.

As you know, the Department of Justice's Office of Legal Counsel (OLC) has consistently argued that the permissible consideration of race in MEPA must be narrowly construed if it is to pass constitutional muster, and you have expressed your support for that position. Attached for your information and review is a proposed "guidance" for the states drafted to reflect OLC's constitutional analysis. During the process that produced this document, the Department of Health and Human Services has advocated an interpretation that would allow a somewhat broader consideration of race in adoption and foster care placements. Nonetheless, HHS is now willing to accept this more restrictive standard.

Core Approach of the Guidance

Compelled by constitutional considerations, the guidance makes clear that that race may only be considered in very narrow, child-specific circumstances: "An adoption agency may take race into account only if it has made an individualized determination that the facts and circumstances of the specific case require the consideration of race in order to advance the best interests of the specific child." For example, an agency could take into account a particularized race-based need in the case of a 12-year old African-American child who had previously been placed exclusively with African-American foster parents and had developed a strong sense of racial identity that would be compromised by a prospective placement. More generalized assumptions about transracial adoptions, however, would be impermissible. For example, agencies would not be allowed to

systematically prefer (as some now do) same-race adoptions into single-parent homes over transracial adoptions into two-parent homes. Under this proposed guidance, moreover, agencies would even be barred from using race as a "tie breaker" when all other factors relating to a prospective adoption are viewed as equal.

Discussion

As HHS and others have pointed out, this approach is not without its complications:

(1) As a matter of **expectations**, many ordinary Americans of all races would be surprised to learn that race-based generalizations are categorically barred, even as a tie-breaker. More particularly, while up to now the administration been criticized by those who wish to narrow the use of race in adoptions, the restrictive approach of the guidance would probably generate sharp criticism from groups such as the Child Welfare League and the NAACP.

(2) As a matter of **federalism**, the guidance will have the effect of limiting states' discretion in an area in which they historically have been predominant. Under any theory, MEPA would preempt existing statutes and practices in many states, including the Arkansas law enacted in 1987. An approach that explicitly prohibits any race-based generalizations would result in an even broader preemption: more states would be affected, and the range of positions to which they could fall back would be significantly narrowed.

(3) The constitutional arguments against the use of race in adoptions could spill over into a broader dispute about the role of race in our constitution and society. Specifically: although the issues are conceptually distinct and the lead court cases are different, the administration's position on transracial adoption could well become entangled in the broader debate over affirmative action.

Conclusion

These concerns notwithstanding, we believe the approach taken in the guidance is (1) consistent with your expressed desire to narrow the role of race in placement decisions and (2) compelled by constitutional considerations.

By statute, the guidance must be published by April 22. We are now prepared to proceed. If you want additional information concerning this matter, or if you want a further discussion to explore in greater detail the potential administrative and political consequences of this step, please so advise us.

Proceed _____

Let's discuss _____

HHS DRAFT WITH OLC COMMENTS

POLICY GUIDANCE**Race, Color, or National Origin As Considerations in
Adoption and Foster Care Placements****BACKGROUND**

On October 20, 1994 President Clinton signed the "Improving America's Schools Act of 1994," Public Law 103-382, which includes among other provisions, Section 551, titled "The Multiethnic Placement Act of 1994" (MEPA).

The purposes of that Act are: to decrease the length of time that children wait to be adopted; to prevent discrimination in the placement of children on the basis of race, color, or national origin; and to facilitate the identification and recruitment of foster and adoptive parents who can meet children's needs.

To accomplish these goals the Act identifies specific impermissible activities by an agency or entity (agency) which receives Federal assistance and is involved in adoption or foster care placements. The law prohibits such agencies from "categorically denying to any person the opportunity to become an adoptive or foster parent solely on the basis of the race, color, or national origin of the adoptive or foster parent or the child" and "from delaying or denying the placement of a child solely on the basis of race, color, or national origin of the adoptive or foster parent or parents involved." Under the Act, these prohibitions also apply to the failure to seek termination of parental rights or otherwise make a child legally available for adoption.

The law does permit an agency to consider, in determining whether a placement is in a child's best interests, "the child's cultural, ethnic, and racial background and the capacity of prospective foster or adoptive parents to meet the needs of a child of this background." If an agency chooses to include this factor among those to be considered in making placement decisions, it must be considered in conjunction with other factors relevant to the child's best interests and must not be used in a manner that delays the placement decision.

The Act also seeks to ensure that agencies engage in active recruitment of potential foster and adoptive parents who reflect the racial and ethnic diversity of the children needing placement. Section 554 of the Act amends Section 422(b) and Part A of Title XI of the Social Security Act. The amendment specifies the following requirements for child welfare services

programs: "[Each plan for child welfare services under this part shall . . .] (9) provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed."

The Multiethnic Placement Act is to be viewed in conjunction with Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits recipients of Federal financial assistance from discriminating based on race, color, or national origin in their programs and activities and from operating their programs in ways that have the effect of discriminating on the basis of race, color, or national origin.

The Administration for Children and Families (ACF) and the Office for Civil Rights (OCR) in the Department of Health and Human Services (HHS) have the responsibility for implementing these laws. OCR has the responsibility to enforce compliance with Title VI and its implementing regulation (45 CFR Part 80), as well as other civil rights laws. ACF administers programs of Federal financial assistance to child welfare agencies and has responsibility to enforce compliance with the laws authorizing this assistance.

Private, as well as public, adoption and foster care agencies often receive Federal financial assistance, through State Block Grant programs, programs under Title IV-E of the Social Security Act, and discretionary grants. The assistance may reach an agency directly, or indirectly as a subrecipient of other agencies. Receipt of such assistance obligates recipients to comply with Title VI and other civil rights laws and regulations and with the requirements of the Social Security Act. Further, the Civil Rights Restoration Act of 1987 confers jurisdiction over entities any part of which receive any Federal funds.

This guidance is being issued jointly by ACF and OCR, pursuant to Section 553(a) of MEPA, to enable affected agencies to conform their laws, rules, and practices to the requirements of the Multiethnic Placement Act and Title VI.

DISCUSSION

A. Race, Culture, or Ethnicity As A Factor In Selecting Placements

1. Impermissible Activities

In enacting MEPA, Congress was concerned that many children, in particular those from minority groups, were spending lengthy periods of time in foster care awaiting placement in adoptive

homes.¹ At present, there are over twenty thousand children who are legally free for adoption but who are not in preadoptive homes. While there is no definitive study indicating how long children who are adoptable must wait until placement, the available data indicate the average wait may be as long as two years after the time that a child is legally free for adoption, and that minority children spend, on average, twice as long as non-minority children before they are placed. Both the number of children needing placements and the length of time they await placement increase substantially when those children awaiting termination of parental rights are taken into account.

MEPA reflects Congress' judgment that children are harmed when placements are delayed for a period longer than is necessary to find qualified families. The legislation seeks to eliminate barriers that delay or prevent the placement of children into qualified homes. In particular, it focuses on the possibility that policies with respect to matching children with families of the same race, culture, or ethnicity may result in delaying, or even preventing, the adoption of children by qualified families. It also is designed to ensure that every effort is made to develop a large and diverse pool of potential foster and adoptive families, so that all children can be quickly placed in homes that meets their needs.

In developing this guidance, the Department recognizes that states seek to achieve a variety of goals when making foster or adoptive placements. For example, in making a foster care placement, agencies generally are concerned with finding a home that the child can easily fit into, that minimizes the number of adjustments that the child, already facing a difficult situation, must face, and that is capable of meeting any special physical, psychological, or educational needs of the child. In making adoption placements, agencies seek to find homes that will maximize the current and future well-being of the child. They evaluate whether the particular prospective parents are equipped to raise the child, both in terms of their capacity and interests to meet the individual needs of the particular child, and the capacity of the child to benefit from membership in a particular family.

Among the factors that many state statutes, regulations, or policy manuals now specify as being relevant to placement decisions are the racial, ethnic, and cultural background of the child. Some states specify an order of preference for placements, which make placement in a family of the same race,

¹ MEPA applies to decisions regarding both foster care and adoption placements. In discussions regarding the bill, members of Congress focused primarily on problems related to adoption decisions.

culture, or ethnicity as the child a preferred category. Some states prescribe set periods of time in which agencies must try to place a child with a family of the same race, culture, or ethnicity before the child can be placed with a family of a different race, culture, or ethnicity. Some states have a general preference for same race or ethnicity placements, although they do not specify a placement order or a search period. And some states indicate that children should be placed with families of the same race or ethnicity provided that this is consistent with the best interests of the child.

Establishing standards for making foster care and adoption placement decisions, and determining the factors that are relevant in deciding whether a particular placement meets the standards, generally are matters of state law and policy. Agencies which receive Federal assistance, however, may use race, culture, or ethnicity as factors in making placement decisions only insofar as the Constitution, MEPA, and Title VI permit.

In the context of child placement decisions, the United States Constitution and Title VI forbid decision making on the basis of race or ethnicity unless the consideration advances a compelling governmental interest. The only compelling governmental interest, in this context, is protecting the "best interests" of the child who is to be placed. Moreover, the consideration must be narrowly tailored to advancing the child's interests and must be made as an individualized determination for each child. An adoption agency may take race into account only if it has made an individualized determination that the facts and circumstances of the specific case require the consideration of race in order to advance the best interests of the specific child. Any placement policy that takes race or ethnicity into account is subject to strict scrutiny by the courts to determine whether it satisfies these tests. Palmore v. Sidoti, 466 U.S. 429 (1984).

A number of practices currently followed by some agencies clearly violate MEPA or Title VI. These include statutes or policies that:

- establish time periods during which only a same race/ethnicity search will occur;

- establish orders of placement preferences based on race, culture, or ethnicity;

- require caseworkers to specially justify transracial placements; or

- that otherwise have the effect of delaying placements, either before or after termination of parental rights, in order to find a family of a particular race, culture, or ethnicity.

Other rules, policies, or practices that do not meet the constitutional strict scrutiny test would also be illegal.

2. Permissible Considerations

MEPA does specifically allow, but not require, agencies to consider "the child's cultural, ethnic, and racial background and the capacity of prospective foster or adoptive parents to meet the needs of a child of this background" as one of the factors in determining whether a particular placement is in a child's best interests.

When an agency chooses to use this factor, it must be on an individualized basis. Agencies that provide professional adoption services usually involve prospective parents in an educative family assessment process designed to increase the likelihood of successful placements. This process includes providing potential adoptive parents with an understanding of the special needs of adoptive children, such as how children react to separation and maltreatment and the significance of the biological family to a child. Adoption specialists also assess the strengths and weaknesses of prospective parents. They help them decide whether adoption is the right thing for them and identify the kind of child the family thinks it can parent. Approved families are profiled, as are the waiting children.

When a child becomes available for adoption, the pool of families is reviewed to see if there is an available family suitable for the specific child.² Where possible, a number of families are identified and the agency conducts a case conference to determine which family is most suitable. The goal is to find the family which has the greatest ability to meet the child's psychological needs.³ The child is discussed with the family, and decisions

² Among the child-related factors often considered are:

- the child's current functioning and behaviors;
- the medical, educational and developmental needs of the child;
- the child's history and past experience;
- the child's cultural and racial identity needs;
- the child's interests and talents;
- the child's attachments to current caretakers.

³ Among the factors that agencies consider in assessing a prospective parent's suitability to care for a particular child are:

- ability to form relationships and to bond with the specific child;
- the ability to help the child integrate into the family;

are made about the placement of the specific child with the family. This process helps prevent unsuccessful placements, and promotes the interest of children in finding permanent homes.

To the extent that an agency looks at a child's race, ethnicity, or cultural background in making placement decisions, it must do so in a manner consistent with the mode of individualized decision-making that characterizes the general placement process for all children. Specifically, in recruiting placements for each child, the agency must focus on that child's particular needs and the capacities of the particular prospective parent(s).

In making individualized decisions, agencies may examine the capacity of the prospective parent(s) to meet the child's psychological needs that are related to the child's racial, ethnic, or cultural background. This may include assessing the attitudes of prospective parents that relate to their capacity to nurture a child of a particular background. Agencies are not prohibited from discussing with prospective adoptive and foster parents their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity, just as they discuss issues related to other characteristics, such as sex, age, or disability; nor are they prohibited from considering the expressed preference of the prospective parents as one of several factors in making placement decisions.

Agencies may consider the ability of prospective parents to cope with the particular consequences of the child's developmental history and to promote the development of a positive sense of self, which often has been compromised by maltreatment and separations. An agency also may assess a family's ability to nurture, support, and reinforce the racial, ethnic, or cultural identity of the child and to help the child cope with any forms of discrimination the child may encounter. When an agency is making a choice among a pool of generally qualified families, it may consider whether a placement with one family is more likely to benefit a child, in the ways described above or in other ways that the agency considers relevant to the child's best interest.

Under the law, application of the "best interests" test would permit race or ethnicity to be taken into account in certain

-
- the ability to accept the child's background and help the child cope with her or his past;
 - the ability to accept the behavior and personality of the specific child;
 - the ability to validate the child's cultural, racial and ethnic background;
 - the ability to meet the child's particular educational, developmental or psychological needs.

7-

narrow situations. For example, for children who have lived in one racial, ethnic, or cultural community, the agency may assess the child's ability to make the transition to another community. A child may have a strong sense of identity with a particular racial, ethnic, or cultural community that should not be disrupted. This is not a universally applicable consideration. For instance, it is doubtful that infants or young children will have developed such needs. Ultimately, however, the determination must be individualized. Another example would be when a prospective parent has demonstrated an inability to care for, or nurture self-esteem in, a child of a different race or ethnicity. In making such determinations, an adoption agency may not rely on generalization about the identity needs of children of a particular race or ethnicity or on generalizations about the abilities of prospective parents of one race or ethnicity to care for, or nurture the sense of identity of, a child of another race, culture, or ethnicity. Nor may an agency presume from the race or ethnicity of the prospective parents that those parents would be unable to maintain the child's ties to another racial, ethnic, or cultural community.

B. Recruitment Efforts

As recognized in the Multiethnic Placement Act, in order to achieve timely and appropriate placement of all children, placement agencies need an adequate pool of families capable of promoting each child's development and case goals. This requires that each agency's recruitment process focuses on developing a pool of potential foster and adoptive parents willing and able to foster or adopt the children needing placement. The failure to conduct recruitment in a manner that seeks to provide all children with the opportunity for placement, and all qualified members of the community an opportunity to adopt, is inconsistent with the goals of MEPA and could create circumstances which would constitute a violation of Title VI.

An adequate recruitment process has a number of features. Recruitment efforts should be designed to provide to potential foster and adoptive parents throughout the community information about the characteristics and needs of the available children, the nature of the foster care and adoption processes, and the supports available to foster and adoptive families.

Both general and targeted recruiting are important. Reaching all members of the community requires use of general media- radio, television, and print. In addition, information should be disseminated to targeted communities through community organizations, such as religious institutions and neighborhood centers. The dissemination of information is strengthened when agencies develop partnerships with groups from the communities from which children come, to help identify and support potential foster and

adoptive families and to conduct activities which make the waiting children more visible.

To meet MEPA's diligent efforts requirements, an agency should have a comprehensive recruitment plan that includes:

- * a description of the characteristics of waiting children;
- * specific strategies to reach all parts of the community;
- * diverse methods of disseminating both general and child specific information;
- * strategies for assuring that all prospective parents have access to the home study process, including location and hours of services that facilitate access by all members of the community;
- * strategies for training staff to work with diverse cultural, racial, and economic communities;
- * strategies for dealing with linguistic barriers;
- * non-discriminatory fee structures; and
- * procedures for a timely search for prospective parents for a waiting child, including the use of exchanges and

other interagency efforts, provided that such procedures must insure that placement of a child in an appropriate household is not delayed by the search for a same race or ethnic placement.

Agencies receiving Federal funds may not use standards related to income, age, education, family structure, and size or ownership of housing, which exclude groups of prospective parents on the basis of race, color, or national origin, where those standards are arbitrary or unnecessary or where less exclusionary standards are available.

ENFORCEMENT

As provided in Section 553(d)(1) of MEPA, covered agencies or entities are required to comply with the Act no later than six months after publication of this guidance, i.e., October __, 1995. Pursuant to Section 553(d)(2) of MEPA, if a state demonstrates to the satisfaction of the Secretary of HHS that it is necessary to amend state statutory law in order to change a particular practice that is inconsistent with MEPA, the Secretary may extend the compliance date for the state a reasonable number of days after the close of the first state legislative session

beginning after [insert date of publication of this guidance]. In determining whether to extend the compliance date, the Secretary will take into account the constitutional standards described in Part A of this guidance. Because states need not enforce unconstitutional provisions of their laws, statutory amendments are not an essential precondition to coming into compliance with respect to any such provisions.

HHS emphasizes voluntary compliance with the law and recognizes that covered agencies may want further guidance on their obligations under these laws. Accordingly, HHS is offering technical assistance to any covered agency seeking to better understand and more fully comply with the Multiethnic Placement Act. Organizations wishing to be provided with technical assistance on compliance with the nondiscrimination provisions of MEPA should contact [name of contact person] of OCR at [phone number]. Organizations wishing to be provided with technical assistance regarding required recruitment efforts should contact [name of contact person] of the Administration on Children and Families at [phone number].

The Multiethnic Placement Act provides two vehicles for enforcement of its prohibition against discrimination in adoption or foster care placement. First, pursuant to Section 553(b), any individual who is aggrieved by an action he or she believes constitutes discrimination in violation of the Act has the right to bring an action seeking equitable relief in a United States district court of appropriate jurisdiction. Second, the Act provides that noncompliance with the prohibition is deemed a violation of Title VI.

OCR has published regulations to effectuate the provisions of Title VI. 45 C.F.R. Part 80. Any individual may file a complaint with OCR alleging that an adoption or foster care organization funded by HHS makes placement decisions in violation of the Multiethnic Placement Act and Title VI. OCR may also initiate compliance reviews to determine whether violations have occurred. If OCR determines that an adoption or foster care organization makes discriminatory placement decisions, OCR will first seek voluntary compliance with the law. Should attempts at voluntary compliance prove unsuccessful, OCR will take further steps to enforce the law.

These steps may involve referring the matter to the Department of Justice with a recommendation that appropriate court proceedings be brought. HHS may also initiate administrative proceedings leading to the termination of the offending agency's Federal financial assistance. These proceedings include the opportunity for a covered agency or entity to have a hearing on any OCR findings made against it. 45 C.F.R. § 80.8.

At any point in the complaint investigation process or during the pendency of fund termination proceedings, organizations may agree to come into voluntary compliance with the law. OCR will work closely with organizations to develop necessary remedial actions, such as training of staff in the requirements of Title VI and MEPA, to ensure that their efforts at compliance are successful.

When a state fails to develop an adequate recruitment plan and expedite the placement of children consistent with MEPA, the Secretary through ACF and OCR will provide technical assistance to the state in the development of the plan and where necessary resolve through corrective action major compliance issues. When these efforts fail the Secretary will make a determination of appropriate proportional penalties.

White Couple Seeks Custody of 2 Blacks

By STEVEN A. HOLMES

WASHINGTON, April 12 — Addicted to the crack passed to him in the womb, Matthew left the hospital nine days after his birth in 1992 in the arms of Lou Ann Mullen, his foster mother. Ms. Mullen, looking at his unruly shock of dark hair and wizened face, gave him the nickname of Little Man.

But a month after lovingly nursing the infant back to health, Ms. Mullen and her husband, Scott, broached the subject of adoption, only to be rebuffed by their social worker. Little Man was black. The Mullens were not.

"I was told, Don't even think about it," Ms. Mullens said on Tuesday in a telephone interview at her home in Lexington, Tex. "He's a baby; he's black; he's going into a black home."

Matthew and his older brother, Joseph, 6, whom the Mullens also want to adopt, have become symbols of the latest permutation of the emotion-laden battle over public policies based on race. Convinced that thousands of black children are languishing in foster care while social workers prevent them from being adopted by eligible white families, an unlikely coalition of liberals and conservatives is pressing for what they call color-blind adoption policies.

A little-noticed provision of the bill to overhaul the welfare system that passed the House last month says any agency receiving Federal money cannot deny or delay the placement of any child in foster care or adoption on the basis of the race, color or nationality of the child or of the prospective parents.

On Thursday, a group of liberals and conservatives will file a suit on behalf of the Mullens in state court in Austin, Tex., to have race matching in adoption declared unconstitutional.

The debate over interracial adoptions has united some old enemies. For example, the group filing the suit includes Laurence H. Tribe and Randall Kennedy, two law professors at Harvard University who are ardent supporters of affirmative action, as well as Clint Bolick, who successfully led the fight against the appointment of Lani Guinier to head the Justice Department's civil rights division. Mr. Bolick is head of the Institute for Justice, a Washington public interest law firm that frequently challenges racial-preference policies.

"It doesn't make me in the least uncomfortable," Mr. Tribe said when asked about his association with Mr. Bolick, whom he has been critical of in the past. "I pick issues based on their substance and not on the personalities of the people in-

involved."

Forty-three states have laws that encourage public adoption agencies to match a child with prospective parents of the same race. Critics say social workers who want to preserve the children's cultural identities often use these laws to keep black children in foster care while they conduct what sometimes turn out to be fruitless searches for black families willing or able to adopt.

"These policies are seriously harmful to black children, requiring that black kids who could get good homes be left in foster care," said Elizabeth Bartholet, a professor of law at Harvard University. "There is not an iota of evidence in all the empirical studies that transracial adoption does any harm at all, compared to same-race adoption. There is plenty of evidence that delay in adoption does do harm."

But members of the National Association of Black Social Workers and some black conservatives contend that adopting children of the same race is necessary to help them maintain a sense of racial identity and that the efforts to expunge race from adoption decisions is merely a way of allowing whites to raid the black community for babies.

"White babies are in extremely short supply," said Zena Oglesby, executive director of the Institute for Black Parenting, a Los Angeles company that places black children with black families. "The going price is \$20,000. Asian countries and other countries are passing laws to stop Americans from adopting their babies. The only healthy babies around are black and brown. These laws are about making those babies more available."

While precise figures are hard to come by, experts say that about 40 percent of the 100,000 children awaiting adoption are black. And while blacks adopt children at a higher rate than whites do, they cannot keep up with the demand caused by more and more black children being placed in foster care.

While Mr. Bolick insists that his involvement in the case is part of a general philosophy of attacking what he terms the regulatory welfare state, he also says his criticism of race-matching fits in with his fight against racial preference programs.

"There is no question in my mind that this is a vestige of the Jim Crow era as far as using race as a criterion for social policy," he said. "It is also very consistent of our view — and a very strong example of our view, that allowing government the power to discriminate in any instances is a very troublesome concession."

Mr. Bolick, Mr. Tribe and Ms. Bartholet say they are also against giving adoption agencies a time limit to match children racially before allowing a transracial adoption. "Once one starts down the road of let's wait a little while to find a

racially suitable family, that's a very slippery slope," Mr. Tribe said. "Once you allow the principle that it's O.K. to wait for a short time, there is no principled way to say waiting twice as long is not also O.K."

Linda Edwards, spokeswoman of the Texas Department of Protective and Regulatory Services, said, "We have been following the law which says that race cannot be the determining factor in adoption."

But lawyers for the Mullens say that although Texas law does not allow race to be the determining factor, social workers in the Mullens case have made it so.

The Mullens already are a multi-ethnic family. Mr. Mullens is white, and his wife is an American Indian. They have two foster children, a girl, 11, and a boy, 9, who are black, and an 8-year-old daughter they adopted through a private agency, who is half-black and half-white. They also have an 11-year-old biological daughter.

The court papers say the couple provided foster care for 22 children, 14 of whom are black, since 1987. So far, they say state authorities have given them high marks for the quality of the care they have provided.

GOP Plan Revives Adoption Battle

Welfare Proposal Would Cut State Aid Over Delay in Minority Matches

By Barbara Vobejda
Washington Post Staff Writer

A Republican welfare reform plan is resurrecting an old and contentious debate over whether social workers should attempt to match children and adoptive families by race.

Under legislation adopted in the House last month a state could lose every penny of its federal child protection money if it delays the adoption of minority children to place them with minority families.

No other misdeed by a state would invite such harsh punishment under the Republican plan, not serving Twinkies for school lunch, not cutting off cash aid to the poor, not even ignoring child abuse.

Critics say that with this multimillion-dollar threat, Republicans have taken a sledgehammer to an exceedingly complex and sensitive social issue. But authors of the language say they wanted to correct misdirected policies that keep minority children trapped in foster care.

"The problem is that you've got so many minority kids that are bottled up, that could be adopted and would be adopted but for that problem," said Rep. E. Clay Shaw Jr. (R-Fla.), who heads the House subcommittee that drafted the bill.

For many in the welfare debate, the subject of transracial adoption was considered important but tangential to the central mission, to get welfare recipients to work and revamp a seriously flawed national system.

But the House included much less severe penalties for violating the bill's mandate to put welfare parents to work. A state that fails to move a single welfare recipient into a job would lose just 5 percent of its federal payment for cash assistance, compared with losing its entire child protection grant for violating the interracial adoption provision.

House Republicans left little room for interpretation, approving language that prohibits a state or agency receiving federal funds from "delaying or denying the placement of a child for adoption or into foster care, or otherwise discriminating in making a placement decision" on the basis of race, color or national origin.

Now, even some of the measure's sponsors are arguing that the sanction ought to be revisited when the

"The problem is that you've got so many minority kids that are bottled up, that could be adopted."

—Rep. E. Clay Shaw Jr. (R-Fla.)

Senate takes up welfare reform after the Easter recess.

"I think the penalty probably is a little too harsh," said Rep. Jim Talent (R-Mo.), and Shaw said he did not think a state should lose its entire child protection block grant "for a single incident.... That's not going to happen."

Opponents of the House measure say there is a wide consensus among social workers that adoption agencies should make every effort to place minority children with minority families, unless it causes a child to languish in foster care.

"We would agree, if you can't find a black family, go ahead and place the child with a white family," said Leora Neal, who co-chairs the National Association of Black Social Workers' task force on foster care and adoption. But she added, "Adoption itself is traumatic to the kids because they're cut off from their biological family.... Transracial adoption just adds another layer."

She argued that these children are often not fully accepted by the white community and, at the same time, it is difficult for them to feel part of the African American culture.

The House welfare bill replaced dozens of federal programs with five lump sum payments that would go directly from Washington to the states, eliminating hundreds of regulations and giving states much more discretion in running their own welfare programs. One of those payments, a child protection block grant, would provide \$3.9 billion to states next year to place abused and neglected children in foster care and adoptive families.

The House Republicans acted out of dissatisfaction with legislation approved in October last year, which would allow agencies to consider the ethnic background of a child and "the capacity of the prospective" parents "to meet the needs of a child of this background" in placement decisions.

That language "sent a signal, go ahead and race match as long as you play by these rules," said Carol Statuto Bevan, director of public policy for the National Council for Adoption. "If you don't send a clear message that discrimination is not going to be tolerated... you're going to continue to have delays."

The subject of interracial adoption has prompted controversy since the early 1970s, when the National Association of Black Social Workers condemned the practice, saying minority children fare better with minority families.

Over the years, it has become common for adoption agencies to attempt to match children with prospective families by their ethnic or racial background. Now, 43 states lean toward race matching and three states require race to be considered in placements, according to the National Council for Adoption.

Both sides in the debate say it is acceptable to match children and families by race if it does not create a delay in placement, but they disagree over whether the practice is causing serious delays.

About 445,000 American children are in foster care, and for those in line to be adopted, the median wait is 2 years and 8 months. According to the National Adoption Information Clearinghouse, nearly half of the children in foster care are minorities, and black children stay in foster care a third longer than the national median.

Opponents of the House language say racial matching alone does not cause the delay in placing black children. They note that these children are often older, handicapped or difficult to place for other reasons. David Liederman, executive director of the Child Welfare League of America, said if the House bill is enacted, state agencies and social workers will "do whatever is expedient because they don't want to be penalized. They might do interracial placements when they might not have had to."

THE WASHINGTON POST

THURSDAY, APRIL 13, 1995

The Republicans Seize the High Ground on Transracial Adoption

Here's a twist: House Republicans, under the aegis of the Contract With America, are coming to the aid of defenseless little African-American children while the Clinton administration sits on the sidelines.

The issue is transracial adoption. A bill sponsored by liberal Democratic Sen. Howard Metzenbaum last year was supposed to prevent discrimination in adoption cases because of race. But Mr. Metzenbaum, now retired, laments that his effort—endorsed by President Clinton—was hijacked by the Department of Health and Human Services, apparently to placate black social workers who have

than the current debate suggests.

Few areas, for example, have been more controversial than integrating police and fire departments. But it's undeniable that in a lot of cities, it's safer today for the fire department to go into certain areas because the trucks aren't manned only by whites, and that community policing in high crime areas is more successful because of an influx of minorities.

The impact on the private sector has been real and beneficial. A personal example: When I joined this newspaper almost three decades ago there were precious few women or minorities on the news staff. Today about one out of five Journal news staff employees is a member of a minority group, and about 40% of the staff is female. As recently as 12 years ago there were no minority reporters in the Washington bureau and not that many women; today more than 10% of the Washington reporters are minorities and almost a third are women. Some more-qualified—on paper—white males may have been passed over. But The Wall Street Journal is a far better newspaper today because of a more diverse staff.

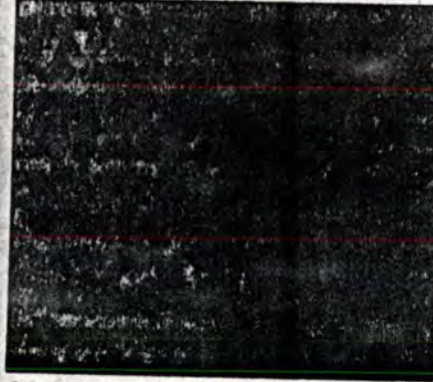
Yet opponents continue the canard about reverse discrimination, with ludicrous assertions like white males are an "endangered species." For all the racial progress we've made in America, can any sensible person say, with a straight face, that many white males would trade places with many blacks or women?

But it's also true that some affirmative action has outlived its usefulness and too often has been turned into politically destructive quotas. When race-based considerations become the dispositive factor, it offends most Americans.

That's the history of transracial adoption for the past 20 years. Because of the black social workers, thousands of black children have been disadvantaged: There are as many as 100,000 children in foster

care today waiting to be adopted, and 40% are African-American. These black children, on average, wait twice as long as white children to be adopted.

Howard Metzenbaum's view was simple: When there are two equally qualified prospective parents, preference can be given to same-race adoptions, and where there are special factors—a child who has been in several foster homes of the same race—racial factors can be considered. Otherwise, race never should be used to



delay finding, or to deny, a baby or a young child caring parents.

But by gutting this legislation in the closing days of the last Congress, HHS threatens not only to create lousy social policy but to cause constitutional problems too. Walter Dellinger, who heads the Justice Department's Office of Legal Counsel, privately has expressed "serious concerns" that the transracial adoption measure may permit race to play a broader role than is constitutionally allowed.

The courts have consistently held that race-based governmental decisions are impermissible except in the context of affirmative action, specifically meaning they either must redress prior discrimination or promote integration. Obviously, government sanctioned, race-based decisions on adoptions wouldn't qualify.

Mr. Dellinger has argued that guidelines should be adopted that very narrowly limit the use of race in any child-placement decisions. For instance, race could be considered only in the context of specific needs for a specific child. But privately HHS is considering guidelines that would allow delays of up to a year in order to find a adoptive parent of the same race. "That would be a cruel abomination and is totally contrary to what I, and President Clinton, intended," thunders Mr. Metzenbaum.

Jim Bunning, meanwhile, was not only following the GOP Contract but reflecting a personal experience too. His daughter's recent adoption of an African-American baby was delayed, apparently because of race-based considerations. He and Mr. Metzenbaum talked on Tuesday for the first time and are in basic agreement.

One legitimate concern of some African-Americans has been that adoption can be so expensive—\$5,000 to \$10,000 is not unusual—that it amounts to economic discrimination. But another part of the GOP Contract promises a \$5,000 refundable tax credit for adoption for anyone making up to \$60,000. Although some tax experts worry that the refundable credit invites fraud—early indications suggest ominous levels of fraud in the heralded earned-income tax credit—Rep. Bunning insists "we'll keep the refundable part" of that tax break in subsequent legislation.

The congressional Republican agenda is largely oblivious to the plight of black children. Moreover, as the National Council for Adoption complains, the separate GOP plan to turn foster care and adoption assistance into block grants to the states inadequately protects the interests of some of these innocent children.

But on the symbolic issue of transracial adoption, Jim Bunning has put the GOP on the high ground, as President Clinton is undercut by his own Department of Health and Human Services.

Politics & People

By Albert R. Hunt



long opposed transracial adoption as "racial genocide."

House Republicans, led by Rep. Jim Bunning of Kentucky, leapt into the breach and, as part of the big welfare bill approved by the House Ways and Means Committee yesterday, would make it illegal for adoption agencies that get federal funds to discriminate. Although this would overturn the legislation that bears his name, Sen. Metzenbaum may support it.

The whole issue crystallizes larger problems the Democrats confront with race-based decisions. The efforts by the Clinton administration's Department of Health and Human Services to weaken transracial adoptions raise serious constitutional concerns, according to the Clinton administration's Justice Department.

This is precisely what enables critics to depict affirmative action as race-based special treatment rather than as an effort to fight past discrimination and promote diversity. In fact, affirmative action has been more successful

Postscript: Last week's column criticizing the Department of Health and Human Services for undermining the White House on the transracial adoption legislation produced a call from a participant, Bill Clinton. The president said he threw a "hissy fit" over HHS's actions and has tapped White House aide Bill Galston to ensure that his wishes are carried out. He said he continues to believe that with appropriate guidelines and regulations the legislation enacted last year can greatly facilitate transracial adoptions.

THE WHITE HOUSE

WASHINGTON

March 27, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: WILLIAM GALSTON *WAG*
CHRISTOPHER D. CERF *CDR*

SUBJECT: Implementation of The Multiethnic Placement Act

Introduction

The Multiethnic Placement Act of 1994 (MEPA) prohibits adoption agencies that receive federal assistance from "categorically" denying "any person the opportunity to become an adoptive or foster parent solely on the basis of . . . race, color or national origin." The Act further provides that race may be a "permissible consideration . . . as one of a number of factors used to determine the best interests of the child."

As you know, we are now required to issue a guidance to the states interpreting and implementing. During the effort to draft this guidance, an impasse has developed between the Department of Health and Human Services (HHS) and the Department of Justice's Office of Legal Counsel (OLC). The purpose of this memorandum is to define the core differences and to present options for your consideration and decision.

The Core Issue

HHS contends that agencies engaged in the task of assessing a particular child's best interests should be permitted to rely on certain generalizations about transracial adoptions. For example, all other things (including delay) being equal, an agency should be permitted to presume that same-race adoptions are preferable.

OLC argues that any such generalization would be unconstitutional. Under established Supreme Court precedent, the only "compelling interest" that would justify race-based judgments would be a narrowly tailored effort to serve the "best interests" of a particular child. For example, an agency could take into account a particularized race-based need in the case of a 12-year old African-American child who had previously been placed exclusively with African-American foster parents and had developed a strong sense of racial identity that would be compromised by a prospective placement. More generalized assumptions about transracial adoptions, however, would be impermissible.

Specific Issues in the Draft Guidance

This core disagreement over the use of race in making placement decisions is reflected at a number of points in the draft guidance. For example, despite OLC's constitutionally-based objection, HHS declines to include a statement that "an adoption agency may take race into account only if it has made an individualized determination that the facts and circumstances of the specific case require the consideration of race in order to advance the best interests of the specific child." Similarly, HHS declines to include a specific elaboration of the principle that "generalizations about the identity needs of a particular race or ethnicity" would be improper.

In short, HHS retreats from any clear, unambiguous articulation of the principle that race may only be considered in very narrow, child-specific circumstances. HHS takes this view for at least three reasons:

(1) As a matter of policy, it may be appropriate to make use of some generalizations about race--for example, as a "tie breaker."

(2) As a matter of federalism, the federal government should allow the states to retain considerable discretion in an area in which they have historically been predominant. Under any theory, MEPA would preempt existing statutes and practices in many states, including the Arkansas law enacted in 1987. Under OLC's approach, more states would be preempted, and their range of discretion would be more limited.

(3) As a matter of constitutional interpretation: while acknowledging troubling issues, HHS does not agree that the kind of race-based generalizations it would permit are clearly unconstitutional.

Discussion

In making your determination, the constitutional issue is obviously paramount. Arguments based on policy or federalism cannot withstand OLC's conclusion (shared by the White House Counsel's office) that the kinds of race-based generalizations defended by HHS--no matter how well intended--would violate the Constitution. In addition, OLC's position is more consistent with your expressed desire to narrow the role of race in placement decisions.

HHS offers a number of arguments against this course, including the following:

(1) The OLC position is inconsistent with the Administration's broad commitment to increased state flexibility and would if adopted embroil us in a morass of conflict and litigation with the states.

(2) OLC's proposed guidance would be viewed by some members of Congress as unduly narrowing the intent of the 1994 statute.

(3) While up to now the administration been criticized by those who wish to narrow the use of race in adoptions, the restrictive OLC approach would generate sharp criticism from groups such as the Child Welfare League and the NAACP.

(4) OLC's constitutional arguments against the use of race in adoptions would spill over into a broader dispute about the role of race in our constitution and society. Specifically: although the issues are conceptually distinct, the administration's position on transracial adoption could well become entangled in the debate over affirmative action.

Recommendation

Despite HHS's arguments, which are not without basis in fact, we believe that OLC's constitutional judgment must take priority. Accordingly, we recommend that at the points of disagreement, you should accept OLC's language for the guidance.

Action

Accept

Reject

Discuss