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LRM ID: MDH238

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Wednesday, September 9, 1998

LEGISLATIVE REFERRAL MEMORANDUM

URGENT

TO: Legislative Liaison Officer - See Distribution below
Melinda D. Haskins
FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference
OMB CONTACT: Melinda D. Haskins
PHONE: (202)395-3923 FAX: (202)395-6148
SUBJECT: HHS Testimony on Implementation of the Multiethnic Placement Act of 1994 and the Interethnic Placement Provisions of 1996

DEADLINE: 2 PM Friday, September 11, 1998

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: HHS (Golden) will testify before the House Committee on Ways and Means' Subcommittee on Human Resources on September 15th.

THIS DEADLINE IS FIRM. IF WE DO NOT HEAR FROM YOU BY THE COMMENT DEADLINE, WE WILL ASSUME THAT YOU HAVE NO OBJECTION.

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LRM ID: MDH238 SUBJECT: HHS Testimony on Implementation of the Multiethnic Placement Act of 1994 and the Interethnic Placement Provisions of 1996

**RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM**

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

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The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

TESTIMONY OF OLIVIA A. GOLDEN

**Assistant Secretary for Children and Families
U.S. Department of Health and Human Services**

on

**THE IMPLEMENTATION OF THE MULTIETHNIC PLACEMENT ACT OF 1994
AND THE INTERETHNIC PLACEMENT PROVISIONS OF 1996**

before

**The Subcommittee on Human Resources
of
The House Committee on Ways and Means**

September 15, 1998

Dear Mr. Chairman and Members of the Subcommittee,

I am pleased to appear before you today to discuss the implementation and enforcement of the Multiethnic Placement Act of 1994, as amended and expanded upon by the Interethnic Placement provisions of Section 1808 of the Small Business Job Protection Act of 1996. Like the members of this Subcommittee, we in the Department of Health and Human Services are committed to ensuring that every child in the child welfare system is given the opportunity to grow up in a safe, stable, loving, permanent home. In fact, we have pledged to double the number of these children adopted over a five-year period. We are firmly dedicated to eradicating race-based discrimination that stands in the way of placing children in permanent homes.

We are proud that this Administration has been able to work in a bipartisan fashion with members of Congress in both Houses over the past several years to pass critical adoption and foster care legislation. The enactment of the Multiethnic Placement Act in 1994, passed with the strong support of the President, placed front and center the issues of adoption and children's need for permanency. The Multiethnic Placement Act, along with the 1996 Interethnic Placement provisions, the Court Improvement Program, and the Adoption and Safe Families Act of 1997, have all made significant contributions to strengthening the child welfare system of this country. By working together, we have enacted and are now implementing laws that make the health and safety of children our first consideration. We have put in place a legal framework that encourages timely decision-making in the adoption and foster care systems. And we

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have begun to tear down the many barriers to adoption, including the problem of discrimination on the basis of race or ethnicity.

While the important work of implementing the Multiethnic Placement Act continues, a great deal has changed since its enactment in 1994.

- When the Multiethnic Placement Act was enacted, we found 29 States and the District of Columbia had laws or policies that allowed race-based discrimination in foster care and adoption placements. Today, as a result of cooperative work with this Department, States have moved away from such race-based decisions. What this means to a child in States like Arkansas and California, is that he or she will no longer need to go through additional months of waiting while workers seek a family of the same race, when a family of a different race, is ready and able to adopt today.
- Twenty-nine compliance reviews (broad reviews of practices at the local, county, or multi-county level) have been conducted by the Office for Civil Rights (OCR) since August 1996. A compliance review conducted by OCR in 5 counties in Florida, for example, found that race was being used as a factor in the placement of children in foster care. In fact, it was determined that some caseworkers used race as a

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primary factor in placing children. These discriminatory practices are being corrected and children in Florida are now being placed in homes within their county of residence more frequently, and the time children wait for placement has been shortened.

- Technical assistance provided by both the Administration for Children and Families and the Office for Civil Rights in at least 40 States has resulted in the revision of countless regulations, policies and training curricula that guide the work of child welfare professionals, and has prompted the re-training of many private and public agency workers.
- The Secretary has personally written to all 50 governors urging their leadership in these critical endeavors. She has emphasized that we need their assistance in moving forward with the complex and important next phase of implementation -- gaining full compliance with the provisions of these laws by individual social workers, volunteers and supervisors who make key decisions affect the placement of specific children.

As these examples demonstrate, we have made important strides. But there is much that remains to be done to address the needs of abused and neglected children in our

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child welfare system. Over a half a million children are in foster care. And, based on our most recent data, we estimate that approximately 110,000 of these children are waiting to be adopted. Approximately 59 percent of these children are African American (Non-Hispanic), 29 percent are White (Non-Hispanic), 10 percent are Hispanic and 2 percent are of other races or ethnicities. The average age of children waiting to be adopted is between 7 and 8 years old. Over a quarter are over the age of 10. Many also have disabilities. Many of these children have spent long periods of time in foster care; in fact, their mean length of stay in foster care is almost four years.

As we move forward to ensure that these children are placed in safe and loving adoptive or permanent homes, we must address many obstacles. We must work to provide timely, adequate services that meet the needs of children and families. We must promote decision-making that reflects a child's sense of time. We must improve court procedures. We must address the need for better interjurisdictional cooperation among States and counties. We must recruit an expanded pool of families willing and able to serve as foster or adoptive parents for children in need, including children with special needs, minority children, older children and sibling groups. We must also continue our work to end, in practice as well as in policy, discrimination that causes children to remain in the impermanence of foster care.

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We simply cannot ask a child who has been maltreated, removed from his home and placed in multiple foster homes for as much as half of his life to wait even a moment longer than necessary finally to get to enjoy what every child deserves - the love and care of a family. This is the reason that we are committed to doing all we can from the Federal level to implement the Multiethnic Placement Act and Interethnic Placement provisions. But we know that the successful implementation of these statutes will require not only our ongoing commitment to implement and enforce the law, but leadership and dedication on the part of State and local officials with direct responsibility for the administration of child welfare programs all across this country.

I am pleased now to provide you with a more detailed overview of the Department's implementation of the Multiethnic Placement Act and Interethnic provisions.

Implementation of the Multiethnic Placement Act:

Since 1994, staff in both the Administration for Children and Families and the Office for Civil Rights within the Department of Health and Human Services have worked closely together to promote the full implementation of the Multiethnic Placement Act and the 1996 Interethnic Placement provisions. The Department has initiated a multi-pronged strategy to support implementation, including:

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- Issuing timely policy guidance to States;
- Reviewing State laws and policies;
- Providing technical assistance to public and private agency staff;
- Conducting reviews; and
- Investigating individual cases of alleged violations.

I would like to share with you some of the key steps the Department has taken in each of these areas.

Policy Guidance to States

Within six weeks of the passage of the Multiethnic Placement Act in 1994, the Department issued an Information Memorandum to State child welfare agencies and State civil rights officers summarizing the new law and transmitting a copy of the law's text. This was followed several months later with the publication of guidance in the Federal Register that reviewed key legal concepts and identified examples of practices that would be illegal under the Act, such as State policies that require searching for a same race placement for a specified period of time before allowing a child to be adopted by a family of another race. Consistent with the Supreme Court's *Adarand* decision, our guidance restricted consideration of race to exceptional, case-specific

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circumstances only. This was a very strict interpretation of the law and caused some to question whether it was overly restrictive.

Between October 1994 and June 1995, the Department conducted an initial review of all States' statutes, regulations and published policies on adoption and foster care to determine if they were in compliance with the Multiethnic Placement Act. Based on this review, on June 30, 1995, letters were sent to 29 States and the District of Columbia outlining problem areas of noncompliance with the Federal law and offering technical assistance. Among the issues identified through the Department's review were 28 State statutes or policies that gave discriminatory preference to same-race placements, 9 statutes that contained time requirements for searching for same-race placements before a transracial placement could be considered, and 5 statutes, regulations or policies that contained discriminatory racial preferences in recruitment of potential foster or adoptive families.

By October 21, 1995, one year after the enactment of the Multiethnic Placement Act, all but three States had amended their statutes, regulations and policies to bring them into compliance. Two of the remaining States came into compliance in July 1996, and the last State in April 1997. (This last State's delay in complying with the Federal law was due to the need for legislative action in a State in which the legislature meets only

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biannually.)

In addition to working with States to implement the non-discrimination provisions of the Multiethnic Placement Act, the Department also issued guidance to the States on the Act's requirements relating to diligent recruitment. Beginning in October 1995, States were required to amend their title IV-B Child and Family Services plans to address the steps they will take to recruit prospective foster and adoptive families who reflect the racial and ethnic diversity of children needing placements.

When, on August 20, 1996, the President signed into law the Small Business Job Protection Act of 1996, which included the provisions relating to the "Removal of Barriers to Interethnic Adoption," the Department reviewed the new law's impact on the ongoing implementation of efforts to prevent race- or ethnicity-based delays or denials of foster care or adoption placements. It was determined that, while the changes were significant, the basic issues of State law and policies had already been addressed in the Department's initial review of State laws and policies completed in 1995. The 1996 Interethnic Placement provisions affirmed the Department's strict interpretation and clarified Congress' intent to eliminate completely delays in placement where they were in any way avoidable. The law now explicitly reaffirmed that neither race nor ethnicity could be used as the basis for any denial of placement, nor could

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such factors be used as a reason to delay any foster or adoptive placement. It also put in place new and more effective enforcement policies.

Basic information about the 1996 Interethnic Placement provisions was transmitted to the States in November 1996, and more detailed guidance in June 1997. This guidance clarified the changes made to the Multiethnic Placement Act (including the elimination of language in the original statute that made the racial or ethnic background of the child a "permissible consideration" in determining the best interests of the child). It also explained new provisions that subject States and other entities receiving Federal funding to specific graduated financial penalties (in cases in which a corrective action plan fails to cure the problem within six months.) This guidance highlighted four critical elements of the Multiethnic Placement Act and the 1996 Interethnic Placement provisions.

1) Delays in placing children who need adoptive or foster homes are not to be tolerated, nor are denials based on any prohibited or otherwise inappropriate consideration.

2) Discrimination is not to be tolerated, whether it is directed toward adults who wish to serve as foster or adoptive parents, toward children who need safe and

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appropriate homes, or toward communities or populations which may heretofore have been under-utilized as a resource for placing children.

3) Active, diligent, and lawful recruitment of potential foster and adoptive parents of all backgrounds is both a legal requirement and an important tool for meeting the demands of good practice.

4) The operative standard in foster care or adoptive placement has been and continues to be "the best interests of the child." Any consideration of race, color or national origin in foster or adoptive placements must be narrowly tailored to advance the child's best interests and must be made as an individualized determination of each child's needs and in light of a specific prospective adoptive or foster parent's capacity to care for that child.

In addition to issuing guidance to the States on the law's requirements for policy and practice, the Department has also been working to develop regulations on the 1996 Interethnic Placement provisions' application of financial penalties under title IV E of the Social Security Act. We anticipate publishing this guidance as part of a Notice of Proposed Rulemaking very soon.

DRAFT FOR INTERNAL REVIEW - 9/9/98***Technical Assistance:***

Since the passage of the Multiethnic Placement Act in 1994, the Department has committed itself to providing effective training and technical assistance to both our regional office staff (who have the most frequent direct contact with State officials) and to the States themselves to ensure the successful implementation of this important new Federal law. In July 1995, staff from the headquarters and regional offices of the Children's Bureau within the Administration for Children and Families (ACF) and the Office for Civil Rights (OCR) jointly conducted training sessions for ACF and OCR staff in each of the 10 Federal regions and included at least one State site visit in each region. Similar technical assistance was then provided by regional staff to States to assist them in making needed changes to State laws, policies and regulations in order to ensure that they were in compliance with the Federal law. For example:

- The Department has worked with the State of Maine on several occasions to revise its policies and training manuals to ensure that they do not encourage illegal considerations of race. Later this month, staff from both OCR and ACF will conduct a training session for all State Department of Human Services adoption staff and the new State Adoption Coordinator to ensure that the revised policies are clear to those who are on the frontlines of implementation.

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- In Illinois and Missouri, the Department has alerted State officials to provisions of new laws or bills that contain provisions in violation of the Multiethnic Placement Act and Interethnic Placement provisions. As a result, these statutes have been corrected or repealed.
- Most recently, David Garrison, Acting Director of the Office for Civil Rights, and I sent a letter to all States reiterating our commitment to making the staff and resources of our respective offices available to States, at their request, to provide technical assistance on policy or practice issues.

Among other strategies, the Department has made extensive use of national and regional conferences and meetings as a forum to train on the requirements of the law. For instance, in Boston, OCR and ACF regional staff presented a workshop at the 25th annual New England Adoption Conference sponsored by the Open Door Society of Massachusetts, Inc. Over 1,500 adoptive parents, prospective adoptive parents, birth parents, foster parents, social workers and agency professionals attended the conference.

The ACF has also made available the Children's Bureau's National Resource Centers

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to support State implementation efforts. One of our Resource Centers, the National Resource Center on Legal and Court Issues, operated under a cooperative agreement with the American Bar Association's Center on Children and the Law, prepared a monograph on the Multiethnic Placement Act that was released shortly after the law went into effect. The publication has since been revised to reflect the changes made by the 1996 law, and was recently disseminated to all States. The monograph reviews the requirements of the law and contains practical suggestions for child welfare administrators and social workers who are responsible for implementing the law in the best interests of the children they serve.

We also have used our discretionary grants to further the purposes of the Multiethnic Placement Act, as amended. For instance, we have awarded grants under the Adoption Opportunities program to develop resource materials and community programs to preserve, strengthen and support families that adopt transracially. Further, because the number of children awaiting adoptive families continues to outstrip the available number of homes, we are supporting innovative efforts to expand the pool of families for waiting children drawn both from within and beyond their communities.

Monitoring and Compliance Reviews:

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The Department of Health and Human Services has developed three procedures for monitoring compliance with the Multiethnic Placement Act, as amended. These are:

- The Child and Family Services Reviews, conducted by the Administration for Children and Families (ACF);
- Complaint Investigations, conducted by the Office for Civil Rights (OCR); and
- Compliance Reviews, conducted by the OCR.

Under ACF's Child and Family Services Review, part of the revised child welfare monitoring strategy that we have been piloting, States first undertake a self-assessment, based to the extent possible on a review of existing data. This is followed by an on-site review involving Federal staff, as well as appropriate State and local officials. The on-site review involves an examination of a limited number of case records and interviews with a range of individuals involved in the delivery and receipt of child welfare services. Questions relating to the State's implementation of the non-discrimination and recruitment provisions of the Multiethnic Placement Act are included as part of the self-assessment. In addition, data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) and/or other State data are used as part of the self-assessment and may help to reveal patterns (e.g. differences in placement patterns related to race) which warrant a closer examination during the on-site review of

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individual cases. If ACF's review suggests potential noncompliance with the law, OCR will be notified so that a more in-depth investigation can be undertaken.

The OCR has responsibility for ensuring compliance with Title VI of the Civil Rights Act of 1964. Complaints by individuals who believe that they have been victims of discrimination are investigated by OCR. Since the passage of the Multiethnic Placement Act and the Interethnic Placement provisions of 1996, 18 complaints relating to adoption and foster care have been received and investigated.

- In one case, a private agency in Michigan was investigated for its policies relating to transracial placements. The case involved a medically fragile African American child, born weighing just one pound four ounces, who required foster care. When the infant was four months old (then weighing four pounds, six ounces), he was placed with a white foster family. After just two weeks with that family, the child was, at the request of a foster care worker and the worker's supervisor, moved to a different foster home, this one an African American family. The investigation revealed that the two employees had circumvented agency review procedures and violated agency policy against using race in placement decisions. They had also misrepresented the facts of the child's situation, both orally and in case documentation. As a result of the investigation, the supervisor was fired, and the

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worker, a new employee, placed on probation. The agency was also provided with technical assistance on the requirements of the Multiethnic Placement Act, as amended, to help guard against future violations of the law.

The OCR also conducts periodic reviews of the policies and practices of recipients of HHS funds to determine whether they are in compliance with the law. Generally, the scope of the inquiry in a compliance review is broader than in a complaint investigation, although some of the same data and information are compiled. Since August 1996, when the Interethnic Provisions were signed into law, the OCR has initiated 30 compliance reviews of recipients in 19 States. Typically, compliance reviews investigate county- and local-level entities, and private agencies, as well as the State agency. As a result of this type of review, we have required States to take a variety of corrective actions, including making policy changes; disseminating information on policy changes to staff and private agencies involved in placement decisions; training placement supervisors and workers; monitoring future placement practices; collecting racial and ethnic data to assess recruitment and placement patterns; and educating prospective adoptive parents.

Looking to the Future: Changing Front-line Practice

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We have accomplished much in the past few years. We have changed the law and the policy framework in which decisions are made about individual children so that decisions can be made truly on the basis of individual children's needs, and not on blanket assumptions about race. We have also taken important steps in educating and re-training administrators and workers in the States. Building on these actions, our work in the coming years will focus on affecting change in front-line practice all across the country. Decisions about placing children in specific foster or adoptive homes are made by literally thousands of social workers in both public and private agencies and by juvenile or family court judges. Clearly, reaching all of these individuals is beyond the ability of one Federal agency acting alone. Therefore, we will be reaching out to work collaboratively with State agencies, universities, professional organizations and others to ensure that all of these individuals understand and follow the law.

This work is tremendously important if we are to give the thousands of children awaiting adoptive homes a chance to begin new lives, as part of a new family. As challenging as this work will be, we are committed to continuing to bring the vision of the Multiethnic Placement Act, as amended, into reality.

Thank you for the opportunity to testify before the Subcommittee. I would be pleased to answer any questions you may have.

10TH STORY of Level 1 printed in FULL format.

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August 3, 1997, Sunday, ALL EDITIONS

SECTION: NEWS: Page A08

LENGTH: 1471 words

HEADLINE: JUST A GOOD FAMILY / LAW LESSENS REQUIREMENT FOR SAME-RACE ADOPTION

BYLINE: By Karen Angel, SPECIAL CORRESPONDENT

DATELINE: Maywood, N.J.

BODY:

Maywood, N.J. - In the backyard of the home of Tim Eustace and Kevin Williams, 8-year-old Kyle takes a running leap and lands on Eustace's back. The boy smiles broadly as his dad bounces him around. Meanwhile, as Williams watches, Kyle's brother, Corey, 3, sends himself down a yellow slide with the delighted shriek, "Happy holidays!" - even though it is March.

Kyle and Corey are African-American; their adoptive parents, Eustace and Williams, are white and gay. As foster children who are now transracial adoptees, the boys embody a national debate about finding the best solutions for the 500,000 children in foster care and the 100,000 children awaiting approval for adoption. Foster-care placements are often the key in determining a child's future parents: Half of all children adopted through public agencies, like Kyle and Corey, are in foster care and 90 percent of these children are adopted by their foster parents, according to the National Council For Adoption, a nonprofit research group in Washington, D.C.

The transracial adoption debate has spurred new legislation in recent years. In 1994, Congress passed the Multi-Ethnic Placement Act, which forbade public agencies from delaying or denying a foster-care placement or adoption based solely on race, although it permitted them to consider race. Last August, President Bill Clinton signed an amendment forbidding agencies from considering race altogether in the foster care and adoption placement process. Before the 1994 act, 43 states, including New York, had rules encouraging same-race placement.

The law has begun to alter same-race placement practices in some states, said William Pierce, president of the National Council For Adoption.

"A California agency that was getting money from the state to place black children only with black families told me that the state said, 'We won't give you any more money because you're doing same-race placement,'" he said. "And in Minnesota, the legislature and a Supreme Court task force are talking about the need to redo their law to comply with the federal law."

Some 50,000 public and private adoptions take place every year, with most transracial adoptions arranged through the private system, the council reports.

Jim
F41
Cyber

Newsday, August 3, 1997

Though no government agency has figures on transracial adoptions, the federal Department of Health and Human Services recently has taken steps to begin gathering such figures.

"We're working with the states to automate their reporting systems, which will help us better track where kids are in the system," said spokesman Michael Kharfen. "We monitor states that have practices where they consider the race of the child and the race of the family to ensure that they eliminate those practices and change their guidance manuals. We also have a reporting mechanism that families who feel they've been discriminated against can use."

Elizabeth Bartholet, a professor of adoption and family law at Harvard University, believes the recent multi-ethnic placement legislation will help change the public system's leaning toward race matching. "It's a powerful law that imposes serious penalties on public adoption agencies that use race to place children," she said. "If it is implemented in the spirit in which it was written, it will shake things up in all fifty states."

At least one family has already tested the law's power to help black parents as well as white.

Last year, the Rev. Walter Myers, 49, and his wife, Beverly, 48, both African-American, of Maynard, Mass., wanted to adopt their two white foster children, Marjorie, 8, and Catherine, 6.

After a public adoption agency denied the couple's initial application and the Department of Social Services rejected a subsequent appeal, they sought out a high-powered lawyer who is himself the parent of transracial adoptees. "It became clear the process was discriminatory," Myers said. "The reasons the agency gave for refusing us were either minor or contrived. DSS used the agency's report to deny us again."

But last December, after the agency learned of the Myers' intent to go to court with a team of six lawyers, the department approved the adoption.

"The new law was one of the reasons I decided to pursue the case," Myers said. "And the girls had been in our care for four years - they had become members of our family."

Statistics suggest some racial divisions nationwide are breaking down, helping to foster transracial adoption. Interracial marriages almost doubled between 1985 and 1995, from 792,000 to 1,392,000, according to the Census Bureau. International adoptions, which are often transracial, have risen to 11,340 in 1996 from 6,536 in 1992, the National Council For Adoption reports. And with recent court decisions allowing unmarried couples, straight or gay, to adopt children together, more potential parents are hitting the market. New York, New Jersey, Massachusetts, Vermont, Illinois, Indiana and the District of Columbia recognize this right.

Many transracial-adoption experts hail the growing variety of transracial adoptions, including interracial couples adopting multiracial children; black single parents adopting nonblack children; lesbian and gay couples adopting children of various races.

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"Let a thousand flowers bloom," said Randall Kennedy, a Harvard Law School professor who teaches a course on race relations. "We have a situation in which children are in need of families."

Most parents adopting across racial lines maintain that their children have not had any problems in their community or in their home.

"Transracial adoption does serve the best interests of the children," says sociologist Rita Simon, co-author of a 1994 study of 203 families. "They're not confused about who they are, and they're aware of their racial identity yet committed to their family."

At the same time, white parents who want to adopt black children are best prepared when they have a "sophisticated" racial identity - which means they've thought about what being white means, said Robert Carter, a professor at Columbia University's Teachers College who has researched transracial adoption.

"I'm not opposed to transracial adoption - I'm opposed to treating it as a right for white people," he said. "If you don't understand the subtleties of race, you're not going to be able to pass the meaning of race on to your child. Just taking your children to a club or telling them a story is not enough. It's a lifestyle."

Marilyn Harper, an African-American second-grade teacher in Madison, Wis., has a Korean son, a Korean daughter, a Guatemalan daughter, and a Russian daughter. Harper, 39, turned to private adoption after she and her husband, David, 40, who is white, were stymied by the public system for years. "I was shocked to hear public agencies say they would rather place a biracial child with a white family than with us," she said. "They felt it would give the child a better chance in life."

Harper said she was staunchly opposed to transracial adoption until she adopted her own children and realized it was more important to find good homes for such children as soon as possible. "I still believe the ideal placement is with a family of the same race," she said, "but I don't think kids should wait."

About 60 percent of all foster children who want to be adopted are African-American, experts say. In New York City, that figure rises to 80 percent, representing about 6,000 children. The number of African-American children in foster care has steadily risen, from 160,000 in 1990 to 220,000 in 1995, according to the American Public Welfare Association in Washington, D.C.

While blacks adopt at four times the rate of whites, according to the Department of Health and Human Services, they make up only 12 percent of the total population.

"Even if you have black people adopting and being foster parents at a rate way beyond their presence in the population, you still won't have enough black families," Kennedy said. "Race matching condemns children in institutional care."

Eustace, 40, a chiropractor, and Williams, 44, a social worker, have placed a high premium on giving their adopted sons, Kyle and Corey, who were born HIV-positive, a sense of their African-American heritage. Their approach includes books, museum outings and a planned trip to Senegal, the country of

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origin of the boys' biological family. And they have sought out a diverse circle of friends, including one couple with a Philippine son, an Alaskan American-Indian son, and an African-American son.

"We try to give the boys as much exposure as possible but no more than my parents gave me to my Irish heritage," Eustace said. "What's important is to raise young people to be good people. If that were more the focus, there would be a lot fewer problems."

GRAPHIC: Color Cover Photo by Paul Kerns-At their New Jersey home, Tim Eustace, left, and his companion, Kevin Williams, with their adoptive sons, brothers, Corey, 3, and Kyle, 8. (NS BD Edition)

LANGUAGE: English

LOAD-DATE: August 3, 1997

FACSIMILE TRANSMISSION
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Elena K.
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DATE:

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FROM: Samara Weinstein
Special Assistant to the
Assistant Secretary for Children and Families

Telephone: (202)401-6953
Fax: (202)401-4678

MESSAGE:

Nicole --

Attached please find for your information the policy issuance which interprets the Interethnic Placement provisions which amended the Multi Ethnic Placement Act (MEPA). This was sent out to our Regional Offices and the field -- essentially the State Child Welfare Agencies.

Also, I have enclosed the piece we drafted for a possible White House announcement on MEPA implementation and the Adoption 2002 Calendar of events.

Samara

Department of Health and Human Services
Administration for Children and Families
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Phone: (202) 401-9200

**Progress on Breaking Down Racial And Ethnic Barriers To Adoption
Implementing the Multi-Ethnic Placement Act (MEPA)**

The Clinton Administration has made great progress in prohibiting discrimination in adoption and foster care placements as a result of extensive efforts to implement the Multi-Ethnic Placement Act (MEPA), which President Clinton championed in 1994. Since the Department of Health and Human Services (HHS) issued guidance on compliance with MEPA in April 1995, HHS has worked with each state to ensure that their laws, policies and practices prevent discrimination and delays on the basis of race, culture and ethnicity.

As a result of our continued review, support and technical assistance, since MEPA was passed:

- Four states have revised their statutes;
- Eleven states have made regulatory changes; and
- Twelve states and the District of Columbia have amended policies or policy-related materials to prohibit adoption agencies from denying or delaying placement of a waiting child based on race, color and national origin.

Due to the Clinton Administration's commitment to removing racial and ethnic barriers to adoption, **currently 48 States and the District of Columbia have statutes, regulations, and written policies that are in full compliance with MEPA and with Title VI of the Civil Rights Act.** The two remaining States have already made substantial changes and are in discussions with the Department regarding the remaining changes necessary to achieve full compliance.

To strengthen MEPA, in August 1996 President Clinton signed the Small Business Job Protection Act of 1996 which included Interethnic Adoption provisions (IEP) imposing strict penalties on states for non-compliance with MEPA. As part of the Clinton Administration's plan to move children more rapidly from foster care to safe and permanent homes, HHS will issue guidance to states on these new provisions soon. In addition, HHS will continue to monitor states' progress, swiftly review any complaints and provide additional training and technical assistance to states to ensure that states comply with these laws.

ACF**Administration
for Children
and Families****U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration on Children, Youth and Families****1. Log No. ACYF-IM-CB-97-04****2. Issuance Date: 06-05-97****3. Originating Office: Children's Bureau****4. Key Words: The Small Business Job Protection Act of 1996,
Interethnic Adoption, and Multiethnic Placement
Act****INFORMATION MEMORANDUM**

TO: State Agencies Administering the Title IV-B Child and Family Services Program and the Title IV-E Foster Care and Adoption Assistance Programs

SUBJECT: GUIDANCE FOR FEDERAL LEGISLATION - The Small Business Job Protection Act of 1996 (Public Law (P.L.) 104-188), Section 1808, "Removal of Barriers to Interethnic Adoption"

**LEGAL AND
RELATED**

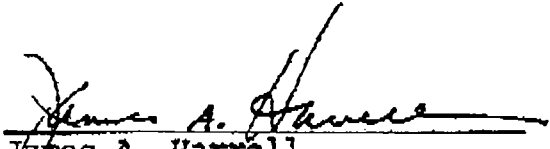
REFERENCES: The Small Business Job Protection Act of 1996 (Public Law 104-188); the Multiethnic Placement Act of 1994 (enacted as part of the Improving America's Schools Act, Public Law 103-382); the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193); titles IV-B (42 U.S.C. 620 et seq.) and IV-E (42 U.S.C. 670 et seq.) of the Social Security Act; Section 471(a) of title IV-E (42 U.S.C. 671(a)); 45 C.F.R. 1356; and ACYF-IM-CB-96-24.

PURPOSE: The purpose of this Information Memorandum is to provide State agencies and others with guidance and clarification that relates to Section 1808, "Removal of Barriers to Interethnic Adoption," of the Small Business Job Protection Act.

BACKGROUND: On August 20, 1996 President Clinton signed The Small Business Job Protection Act of 1996. Included in this new law was Section 1808 "Removal of Barriers to Interethnic Adoption." On November 14, 1996 the Children's Bureau issued an Information Memorandum (IM), ACYF-IM-CB-96-24, to State title IV-E/IV-B agencies informing them of the changes to the Multiethnic Placement Act (MEPA) of 1994 and the amendments to title IV-E.

GUIDANCE: The Department issued a memorandum (dated June 4, 1997) to the Office for Civil Rights (OCR) Regional Managers and the Administration for Children and Families (ACF) Regional Administrators to provide guidance in the implementation of MEPA as amended. Attached is the memorandum.

INQUIRIES: OCR and ACF Regional Office (lists attached)


James A. Harrell
Deputy Commissioner
Administration on Children, Youth
and Families

cc: OCR and ACF Regional Office

Attachments:

- A: June 4, 1997 Memorandum, SUBJECT: Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996 (without attachments)
- B: Section 1808, "Removal of Barriers to Interethnic Adoption," of the Small Business Job Protection Act of 1996 (P.L. 104-188)
- C: OCR and ACF Regional Office lists



DEPARTMENT OF HEALTH & HUMAN SERVICES

June 4, 1997

MEMORANDUM

TO : OCR Regional Managers
and
ACF Regional Directors

FROM : Dennis Hayashi /s/
Director, Office for Civil Rights
and
Olivia Golden /s/
Principal Deputy Assistant Secretary
Administration for Children and Families

SUBJECT : Interethnic Adoption Provisions of the Small Business
Job Protection Act of 1996

On August 20, 1996, President Clinton signed the Small Business Job Protection Act of 1996. Section 1808 of the Act is entitled "Removal of Barriers to Interethnic Adoption." The section affirms and strengthens the prohibition against discrimination in adoption or foster care placements. It does this by adding to title IV-E of the Social Security Act a State Plan requirement and penalties which apply both to States and to adoption agencies. In addition, it repeals Section 553 of the Multiethnic Placement Act (MEPA), which has the effect of removing from the statute the language which read "Permissible Consideration -- An agency or entity [which receives federal assistance] may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of such background as one of a number of factors used to determine the best interests of a child."

Congress has now clarified its intent to completely eliminate delays in placement where they were in any way avoidable. Race, culture or ethnicity may not be used as the basis for any denial of placement, nor may such factors be used as a reason to delay any foster or adoptive placement.

The Interethnic Adoption provisions maintain a prohibition against delaying or denying the placement of a child for adoption or foster care on the basis of race, color, or national origin of the adoptive or foster parent, or the child involved. They further add a title IV-E State Plan requirement which also prohibits delaying and denying foster and adoptive placements on the basis of race, color or national origin.

The provisions also subject States and entities receiving Federal funding which are not in compliance with these title IV-E State plan requirements to specific graduated financial penalties (in

Page 4

4

cases in which a corrective action plan fails to cure the problem within six months). ACF staff and OCR staff are working to develop a common protocol for determining compliance with these Interethnic Adoption provisions, as well as policy and procedures for ACF to use in applying the title IV-E requirements, developing corrective action plans and imposing penalties.

As a first step in implementing the new title IV-E State Plan requirement and the associated penalties, ACF expects to amend certain of its child welfare reviews to screen for compliance with MEPA and the Interethnic provisions. ACF will begin preliminary documentation of MEPA compliance during fiscal year 1997, while completing the work on formal review standards and protocols, which will be published as proposed regulations. States which are determined to be out of compliance will be engaged in corrective action planning immediately. The penalties imposed by the statute are graduated, and vary according to the State population and the frequency and duration of noncompliance. The Department has estimated that State penalties could range from less than \$1,000 to more than \$3.6 million per quarter, and penalties for continued noncompliance could rise as high as \$7 million to \$10 million in some States.

The Office for Civil Rights will continue to receive and investigate complaints related to MEPA, and in addition will conduct independent reviews to test compliance within the States. The Administration for Children and Families will also conduct reviews which focus on or include tests of MEPA compliance. The two HHS agencies will use the common protocol and review standards in order to assure uniform application of the statute, and equitable and effective enforcement.

The Congress has retained section 554 of MEPA, which requires that child welfare services programs 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. This is the section that requires States to include a provision for diligent recruitment in their title IV-B State Plans. The diligent recruitment requirement in no way mitigates the prohibition on denial or delay of placement based on race, color or national origin.

Set forth below is the language of the new provision. Key terms contained in MEPA that have been eliminated are shown, but struck.

A person or government that is involved in adoption or foster care placements may not--(a) [~~categorically~~] deny to any individual the opportunity to become an adoptive or a foster parent, [~~solely~~] on the basis of the race, color, or national

TO: Hillary Rodham Clinton
FROM: Jennifer Klein JK
DATE: 10/4/96
RE: Transracial Adoption

Carol Rasco asked me to write a note to you about the "Arkansas Minority Heritage Protection Act" signed by the President in Arkansas in 1987. Diane Blair called Carol to let her know that you were concerned about it.

The legislation required courts reviewing the placement of a child in a foster or adoptive home to give preference to (1) a relative, (2) a family with the same racial or ethnic heritage as the child, and (3) if a family of the same background were not available, to a family of a different race or heritage that was knowledgeable and appreciative of the child's racial or ethnic heritage. The legislation also allowed birth parents to express a preference for placing their child in a home with the same religious background.

The bill was passed at the very end of a legislative session. Carol would be happy to fill you in on her memory of the history of the legislation in Arkansas.

THE WHITE HOUSE

WASHINGTON

August 4, 1995

MEMORANDUM FOR THE FIRST LADY

FROM: Carol Rasco 
SUBJECT: Transracial Adoptions

You asked for an update on the Multiethnic Placement Act of 1994 (MEPA).

Progress on Enforcement: MEPA was signed into law in October 1994. In April of this year, HHS published guidelines on enforcing MEPA and informed the states of its plans for enforcement. This included a review of all relevant state laws, regulations, and published policies in order to identify any practices that violate MEPA.

On June 20, HHS informed 30 states that their practices do not comply with MEPA. Three of these states (Arkansas, California, and Minnesota) have laws contrary to MEPA. These 30 states were told to submit plans to HHS by August 15 that demonstrate how they will comply with MEPA. By law, states must come into compliance by October 21, 1995; however, those states that require a change in state law can apply for an extension until after the close of the state legislative session.

To date, most states appear to be cooperating and taking action to come into compliance. HHS has provided technical assistance to each state with a compliance problem, and has encountered little or no resistance. State legislatures in California and Minnesota are currently considering changes to their statutes; California has requested and will receive an extension until January 1996. In Illinois, a bill that would violate MEPA is now on the Governor's desk awaiting signature. HHS has advised Governor Edgar of this problem and believes that he will issue an amendatory veto that will bring the bill into compliance. Some Democratic state legislators are unhappy with this development.

HHS has also provided technical assistance to state human service departments on training social workers to comply with the law, which is important given the strong opposition to MEPA by the National Association of Black Social Workers.

HHS Approach on Enforcement: The article you read in the Little Rock Free Press quoted Senator Metzenbaum's claim that HHS weakened the final version of MEPA, and charged that HHS is now preparing regulations that will make transracial adoption more difficult. It also notes that the House welfare reform bill would deny federal funding to agencies that use race as a factor in placing children and help recruit black families by offering a tax credit to lower income families who adopt.

HHS's guidelines take an aggressive approach on enforcement of MEPA, which we believe Senator Metzenbaum now acknowledges. MEPA identifies the cultural, racial, or ethnic background of the child, along with the capacity of the prospective parents to meet the child's needs, as one of a number of factors that can be considered in the adoption decision, as long as this does not delay or deny an adoption. HHS's guidelines prohibit the use of race as a general criterion in the decision; and prohibit a number of practices that could elevate the importance of race as a factor, such as preferences or time limits. They permit race to be considered only as part of the individualized evaluation of each child, and require a specific showing as to how the consideration of race in the adoption decision would promote that child's interests. Some would read MEPA to allow a general preference for a family of the same race if that did not delay the adoption, but that is not HHS's reading of the law.

A number of states have asked how to handle the hypothetical situation of a choice between a black and a white family where all things are equal except for race. HHS has responded that this hypothetical situation is unrealistic, and that all decisions must be based on the needs of the individual child in question. States have expressed particular concern about infants, who obviously can not be questioned about their needs. These concerns raise the question of whether state workers will attempt to circumvent MEPA and maintain the status quo by certifying in each individual case that that particular child would be better off with a family of the same race.

The House welfare reform bill includes language that is intended to prohibit consideration of race under any circumstances, even for any individual child. However, from a technical perspective HHS believes the language is actually consistent with its current guidelines. On the Senate side, it appears that key Republicans believe that MEPA and the HHS guidelines are satisfactory and have no plan to follow the House's lead.

cc: Melanne Verveer
Abner Mikva
Marcia Hale

LITTLE ROCK

Free Press

News, Analysis and Opinion — Biweekly

Black White



Love May Be Color Blind, But
Adoption Laws Aren't

by David G. Miller

NIFF

Falling Between The Cracks In Custody?

A Black & White Decision?

Love may be color blind, but adoption laws aren't

By George Oxford Miller

In Arkansas today, 2,383 children are living in foster homes in court-mandated separation from their parents, primarily due to and physical abuse. The majority will eventually return to their families when their home situation improves. But 186 will. Though the actual number varies monthly, this group of 186 will wait in limbo while social workers search for families willing to adopt them.

The Department of Human Services currently has 20 black families and 77 white ones waiting to adopt. But they can't make a match with the kids in foster care. Of the available children are black. Of the adoptive families are white. Of these children are classified as "special children." In Arkansas, the special needs designation applies to children of color over two years old, white children over nine years old, sibling groups and kids with emotional, intellectual or medical problems.

On an average, each of these young people will have to wait three years or longer before being adopted. Yet countless studies confirm, and every case worker that such inordinate delays in finding a permanent family can create a lifetime of emotional and behavioral problems.

The timely placement of children for adoption by the Division of Child and Family Services hasn't always been as bad as it is. It's been worse. Fortunately, some of the administrative and procedural delays in finding willing families have changed, or will. Unfortunately, other problems remain as deeply entrenched in the system as ever.

Pulaski County Circuit/Chancery Judge Joyce Williams Warren described the procedure leading to the adoption of a child in foster care: "After the dependency neglect ruling, the child is placed in foster care and the state has 18 months to develop a case that recommends removal of parental rights and adoption, or return [the child] to the parent. If adoption is recommended, an adoption packet is prepared. In the past, that has taken six to nine months. Then another 18 to 24 months may pass before a family is approved. By then, the child has been in foster care for three years or longer. I once told a case worker that I'd like to get the child adopted before he's old enough to vote."

Indeed, the DCFS adoption portfolio lists a number of teenagers who will undoubtedly reach voting age before finding an adoptive family.

At least one procedural step in the shuffle from foster care to a loving family recently been streamlined. The adoption packet, which describes the child's complete case history and the criteria for placement, now is being developed totally by placement specialists in the adoption unit instead of depending on communications back and forth with various county foster care units. Centralizing the responsibility will help close

one of the black holes in adoption that so frustrates Warren.

New computers also will help alleviate delays due to the perennial case overload carried by placement workers. Ellye Burke, Chief Administrator for the Central Office of In-Home Services, the office which oversees adoptions, anticipates a statewide computer network by the end of the year. "With complete information about each child on the main-frame computer," she said, "foster workers will find it much easier to match families and children."

The current computer system is limited in the number of variables it can match between the child's and family's requirements. The new system, if approved, also will allow tracking and monitoring of each child's progress through the system before and after placement.

But the children in foster care in Arkansas and across the nation need more than high-tech solutions to get them into loving, permanent homes. Nationwide, 500,000 children are in foster care and 200,000 are available for adoption. Forty percent of those 200,000 are black, a disproportionately large number compared to the population. According to an Arkansas Department of Human Services document, "Too many children remain in foster care because of the disarray at every level of the child welfare delivery system."

Ironically, the problem isn't just bureaucracy, or even a lack of agency-approved families willing to adopt children with severe mental, emotional, and

physical handicaps. In many instances, the problem is race.

The consensus among adoption agency supervisors, social workers, and policy makers is that children should be placed with families of the same race as the child. The preference for same-race placement is dictated by law. After first establishing the child's family, "the court shall give preference to... a family with the same racial or ethnic heritage as the child and that is not feasible, to a family of different racial and ethnic heritage."

In 1981, a minority child eligible for adoption in Arkansas had to wait a full year in foster care before DCFS would even consider applications from white families. State Representative Pat Flanagan of Forrest City introduced a bill to limit the waiting period to six months. The National Black Social Workers Association came out of nowhere and presented black legislators to oppose the bill. Flanagan said, "Conservative whites also opposed the Flanagan withdrawal the bill and told the media that he would reintroduce it the day after racism died in Arkansas."

In a paradoxical twist of political and cultural correctness, many African-American activists have a new definition of a racist: a white person who wants to adopt a black child. So contends the National Association of Black Social Workers. Since 1972, the organization has consistently opposed transracial adoption as "cultural genocide." In a recent statement, the group stated that "African American children should not be

placed with white parents under any circumstances," and further concluded that even "the most sensitive, loving and skilled white parent could not avoid doing irreparable harm to an African-American child." The Rev. Jesse Jackson, however, disagrees with the NABSW. Testifying before Congress in support of the Multiethnic Placement Act (see sidebar), he declared, "a sense of permanence and the right to be unconditionally loved are essential to the mental well-being of any human."

Various court rulings have also disagreed with the NABSW same-race family position. The Supreme Court

ruled in 1967 that states cannot prohibit interracial marriage and ruled in 1984 that a white child cannot be taken away from a white mother, however she married a black man. The Court stated that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Choosing one race over another is a core liberty to resist racial prejudice that heightens public concern." Whether the prohibition against state-mandated race preference extends specifically to adoption is being tested by pending cases.

Researchers who have studied interracial families for decades also disagree that transracial adoption robs children of their cultural identity and ethnic heritage. For 28 years, American University law and public service professor Rita Simon tracked 304 white families who had adopted black children. She found that minority children growing up in white families did not become confused about their racial identities. "The data in our study, indeed in all the studies that have been done, show that transracial adoptions serve the children's best interest," Simon reported.

Despite convincing scientific research and explicit constitutional law, most adoption advocates agree, in as much as the word "agree" can be applied to the thorny issue of adoption, that the fears expressed by the NABSW cannot and should not be dismissed. When available, black families should have first preference for black children.

But the problem, simply stated, is one of supply and demand. There are not enough black families in Arkansas, or the nation, to adopt the numbers of black children available. According to one adoption advocate in the private sector, some agencies are having to find homes in Europe for African-American babies because of the lack of black families willing to adopt.

The Arkansas Division of Child and Family Services, the NABSW and other national advocacy groups contend that the problem is not lack of black families but lack of recruitment. The DCFS maintains a Black Family Outreach unit with three placement specialists dedicated to finding black families. Besides advertising and publicity, DCFS has provided grant money specifically for recruitment programs, such as Project STARS, which lasted for two years.

Most people agree that, ideally, black children should be raised in black families and acculturated with the values of their black heritage. But in an ideal world, adoption would not exist at all and children wouldn't languish in foster homes while adults argue about the "irreparable harm" done to black children if they are socialized to think like white people.

In the meantime, thousands of black children nationwide and scores in Arkansas are forced to live indefinitely in foster homes.

Ironically, many of these foster homes happen to be headed by white families. And, though discouraged in the past, the current trend is to encourage foster parents to adopt their wards. "About 40 percent of the adoptions that DCFS handles are by foster parents," Burke reported.

But as the debate arises, as depicted in



Little Rock Free Press June 15-22, 1995



mediately after the state-mandated wait of ten days after birth," Anne Harris of Adoption Services, a division of the Catholic Diocese of Little Rock, said. Like the DCFS, they can't find enough black families to take the supply of black infants. "We've been involved with transracial adoptions for ten years, always with the consent of the birth mother. I've seen how well it works. It's really better to place a child as soon as possible. Long-term foster care is not in the best interest of the child."

So what is the best interest of the child? The phrase is tossed around like a trump card in a poker game. The basic truth to recognize is that when a mother relinquishes her child, everyone suffers, but none more than the child. The phrase takes on a hypocritical ring considering the child is given away like an unwanted puppy. No wonder the child care professionals can't agree on what the "best interest" is.

Advocates of black culture use the "best interest" to justify keeping children in foster care while recruitment programs search for black families. Proponents of transracial adoption

contend that rapid placement in a loving home is the paramount consideration. The courts apply it on a case-by-case basis. And in 1995, whether racism had died in Arkansas or not, Rep. Pat Flanagan was back in the legislature with another version of his bill. Act 266 allows the courts to weigh the best interest of the child in being timely placed. If attempts at same-race placement are unsuccessful, the bill passed without opposition.

Attorney Kay McLeod was glad to see the modification of the law. "Now the court has the discretion to look at the best interest of the child on par with the race criteria."

Harris wished the bill would have gone even farther. "I would like the

law changed to allow the most suitable, qualified family, regardless of race," she said. Warren, an African-American, agreed. "Just a black child in a white home is a bunch of bologna," she said. "We live in a world of interracial marriages and mixed couples. A biracial or black child reared by a white family has just as much claim to the African-American heritage as a black child in a black home. Race is a factor that should be considered, but it shouldn't keep a loving family from adopting a child."

Adoption is an issue which questions the very bedrock of the Western world's concept of the nuclear family. Is the bond between parent and child stronger and more important than the genetic bond? Adopted children almost universally agree that it is, but they also experience a "void" that can never be filled unless they find their birth parents. As adults, many search for years to reclaim their genetic identity.

Transracial adoption adds the complexity of culture to the issue. Is the parent-child bond more important than cultural roots? Is love stronger than skin color, a loving family more important than racial or cultural purity? In Simon's study, 90 percent of the families said it was and recommended transracial adoption.

If cross-cultural adoption within America is in question, what about international adoption? Thousands of children in Eastern Europe and Asia live in orphanages, or worse, are abandoned on the streets. Should we ignore their plight because adoption might "do irreparable harm" to their cultural identity and make them think like Americans?

An article in *Vogue* quoted Sandi Khlonga, who had spent years in foster care, in a speech favoring transracial adoption. "Ethnic identity means absolutely nothing to a child who belongs to nobody," she said. ♦

(*Amy and Joe asked that their real names not be used.)

the recent movie "Losing Isaiah," when a white foster parent wants to place a black child. "I personally know a lot of cases where no plans existed to place a black child until the white foster family tried to adopt," said Little Rock adoption lawyer Kay McLeod, a member of the American Academy of Adoption Attorneys. "The DCFS uses very nebulous criteria to select families that exclude white families from adopting black children," she said.

Larry Stang, who directed Project STARS for the Cerebral Palsy Foundation to recruit black families, said, "Two and a half years ago, the belief was common that the DCFS didn't want trans-racial adoptions. In 1989, Arkansas was dead last in the nation in the ratio of private adoptions compared to state agency adoptions." In 1993, DCFS placed 108 children in adoptive homes. Sixty-one children were white, 38 black and nine of mixed race. Ninety-five were classified as special needs. Only three children were placed in families of a different race.

By law, DCFS placement workers have had little choice but to try to place white families well-intentioned efforts to adopt black children. Arkansas is one of eleven states with a statute that officially requires state social workers to search for same-race homes before considering a different race family. In contrast, Texas passed stringent legislation in 1993 to prohibit race as a consideration in adoption. But did it change anything? As is often the case across the nation, the case workers have the last word in placement and their attitudes prevail.

This past April, the Institute for Justice in Washington, D. C., filed suit in Austin, Texas, on behalf of a white couple who wanted to adopt

their black foster child. The child was taken from them and given to a black couple, who seven weeks later changed their minds. The white couple, though praised by case workers for their parenting abilities and who had cared for 14 black foster children, were told their home was not good enough.

Does this happen in Arkansas? Amy and Joe have four children by birth and eight by adoption. Seven are black children with special needs ranging from cerebral palsy, autistic behavior, fetal alcoholism, and epinabidia. "We always wanted a large family and my husband came from a family with two black/Japanese siblings," Amy said. "When we moved to Arkansas we adopted our first child, a white baby with special needs. Since then we've had to go out of state to adopt. Even though our home study is kept current, the Department of Child and Family Services won't consider us for black children. I know of one child that we've applied for and another white couple has applied for that has been in foster care for more than a year, and they still won't consider us."

Amy works closely with AASK (Ask About Special Kids), an organization that places children with special needs nationwide. "The last child we adopted was advertised on television nationally, but no black family applied. We took him because no one else wanted him. We're trying to adopt another child from Florida now."

Private adoption agencies don't have the constitutional and legal constraints of state agencies. Most adoptions of healthy babies in Arkansas and the nation are handled by private agencies and lawyers.

Most of our adoptions occur im-

Turnabout is unfair play

National legislation leaves transracial adoption in limbo, but bipartisan help (!) may be on the way

WASHINGTON, D.C. — Sen. Howard Mankin (D-Idaho) introduced the Adoption and Safe Families Act, which would federalize the process of placing children in adoption. The bill would require states to make every effort to place children in their own families, but if that fails, it would require states to place children in foster families. The bill would also require states to make every effort to place children in their own families, but if that fails, it would require states to place children in foster families. The bill would also require states to make every effort to place children in their own families, but if that fails, it would require states to place children in foster families.

and with America may define Mankin's mission. The uniform bill passed by the House Ways and Means Committee would deny federal funding to states that refuse to place children in their own families. Backing such a measure would mean that the bill would also require states to make every effort to place children in their own families, but if that fails, it would require states to place children in foster families. The bill would also require states to make every effort to place children in their own families, but if that fails, it would require states to place children in foster families.

CHRIS I talked to Diana already

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"Most of our adoptions occur im-



Turnabout is unfair play

National legislation leaves transracial adoption
in limbo, but bipartisan help (!) may be on the way

Last year, Sen. Howard Metzenbaum
(D-Ohio) sponsored the Multiethnic
Placement Act, which denied federal
funding to any agency that used race,
color or national origin to delay the
placement of children for adoption. But
in a typical Washington turnabout, in-
stead of easing transracial adoptions,
the final version bill made them more
difficult. "Some bastards at HHS (Depar-
tment of Health and Human Services) inter-
vened and did the bill great harm,"
Metzenbaum told Newsweek.

However, the fine print in GOP's Con-

tract With America may
Metzenbaum's grievances. The
reform bill passed by the House.
Means Committee would deny
funding to agencies that use race
in placing children for adoption. Bes-
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regulations to make transraci-
adoption even more difficult.

— George

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Jen Klein

Adoption: New law can't erase race issue

BY RACHEL L. JONES
Knight-Ridder/Tribune News Service

WASHINGTON — A new law making it easier for American families to adopt children of another race is likely to stir passions in the long-running debate over transracial adoption.

The Multiethnic Placement Act of 1994 aims to help thousands of black children now in foster care find permanent homes by lowering institutional barriers for families hoping to adopt a child of another race.

Under rules that went into effect Oct. 21, states and agencies that block adoptions because of race could lose the federal aid they now receive to help finance the adoption process.

Defenders of the new law say it addresses the problem of how to help a large and growing population of black children in foster care.

But critics worry that whites who adopt black children might be racially insensitive or culturally unprepared to tackle the responsibility.

Moreover, some blacks have complained about racial bias in the adoption process. They argue that social workers use negative stereotypes and misconceptions in determining their suitability as parents.

"It's slanted toward the needs of white parents without considering the bigger picture," said Charlotte Vick, assistant director of the North American Council on Adoptable Children in St. Paul, Minn.

Vick, who is white and has adopted four minority children, now all adults, thinks the furor over transracial adoption is singularly one-sided, not giving adequate consideration to racial compatibility.

"I'd like to think that this is only about giving kids to the people who want them," she said, "but there's too much evidence that you need to consider race in the process."

Of the 500,000 children in foster care in America, 40 percent are members of minorities, mostly black. Of the 60,000 children who are legally adoptable, nearly half are black.

Because black Americans make up only about 13 percent of the

Adoption in the U.S.

Most recent statistics:

Adoptions declining

Estimated number of children who had their adoptions finalized:

1982	22,000-24,000	1987	18,000-20,000
1983	19,000-21,000	1988	19,000
1984	18,000-20,000	1989	16,000
1985	17,000-19,000	1990	17,000
1986	17,000-19,000		

Age of adoption candidates

Median age

Time of adoption	Awaiting placement
1982 4.7 yrs.	1982 9.1 yrs.
1990 4.6 yrs.	1990 7.4 yrs.

NOTE: Figures do not include private adoptions



SOURCE: American Public Welfare Association

Adoptions by race

For 1990

Adoptions

White	51%
Black	29%
Hispanic	13%
Other	5%
Unknown	2%

Awaiting placement

White	38%
Black	40%
Hispanic	12%
Other	4%
Unknown	4%

How long it took

Median length of time children spent awaiting adoptive placement

1984	1.7 yrs.
1987	1.5 yrs.
1988	2.1 yrs.
1989	1.8 yrs.
1990	1.8 yrs.



Knight-Ridder Tribune/RON CODDINGTON and JUDY TREIBLE

American population, observers say there's no way they can fill the need for permanent homes.

The new law, which had been sponsored by Illinois Sen. Carol Moseley-Braun and former Ohio Sen. Howard Metzenbaum, aims to help children find permanent homes by:

- Reducing the length of time that children wait for adoptive placement.
- Ensuring that no individual is denied the opportunity to become an adoptive foster parent solely on the basis of race, color or national origin.
- Facilitating the identification and recruitment of foster or adoptive families that reflect the racial and ethnic diversity of waiting children.

Early versions of the legislation contained no language about considering a child's racial or ethnic background in adoption placements. It was expected to completely dismantle an agency's ability to use race as a factor in making placement decisions.

But vocal last-minute opposition, from such groups as the Children's Defense Fund and the Department of Health and Human Services, changed that. Also, for the past two decades the National Association of Black Social Workers has argued that the adoption of black children by whites was tantamount to "cultural genocide."

The group stands behind that sentiment.

"Most adopted children spend a lot of time grieving over the loss of family connections," said Leora

Neal, a NABSW program director. "Factor into that the loss of cultural ties, and the sense of not really belonging can become profound."

Ruth-Arlene Howe, an associate professor of law at Boston College, agrees.

"It is absolutely pie in the sky to say that race doesn't matter in the adoption process," said Howe, who hopes to start a national campaign to inform people about transracial adoption. "It doesn't connect with the reality of race in America, and it certainly neglects the child's rights."

Howe thinks child welfare agencies don't do a good job of recruiting black parents. Statistics show that when child welfare agencies diversify their staffs and make an effort to find and educate black families, more blacks adopt. But in many instances they are rejected out of hand, often because of racial biases.

But prejudices go both ways, as many white parents would attest.

Donna Mattias, a staff attorney for the Institute for Justice in Washington, said child welfare officials are eager to place black children in temporary foster care with whites but balk at giving them full custody.

"It's as if whites are good enough to care for a child during an emergency, but they're somehow flawed as potential parents," Mattias said. The institute was established this year to represent parents who have had difficulties adopting children of different racial backgrounds.

JIM BUNNING
4TH DISTRICT, KENTUCKY

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BUDGET COMMITTEE
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ASHLAND, KY 41101
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Congress of the United States

House of Representatives

MAY 13 1996

Washington, DC 20515-1704

May 10, 1996

President William J. Clinton
The White House
Washington, D.C. 20500

Dear President Clinton:

I am writing to express my gratitude for your apparent change of heart in providing loving families for children irrespective of race.

However, I would like to correct one point in your letter to the Speaker in which you express your support for the Adoption Promotion and Stability Act of 1996. In that letter, you stated that the bill was "consistent with the Administration's policy and my longstanding goal to end the historical bias against interracial adoptions, which too often has meant interminable waits for children to be matched with parents of the same race." This makes it sound as if you and your administration have been supporting our efforts to end the bias against interracial adoptions for some time, when, in fact, you and your administration have been a major source of our problem on this subject.

With regard to your personal "longstanding goals," I would remind you of the adoption legislation that you endorsed as Governor of Arkansas and which was enacted into law in 1987 (Ark. Code 9-9-102 (1987)). As you may recall that measure requires the court to give preferences to potential adoptive families with the same racial or ethnic heritage as the child. In this statute, race-matching is given preference over other types of adoptive arrangements.

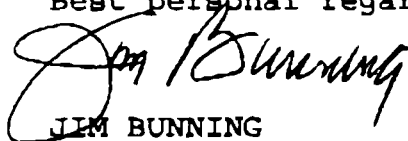
This statute has denied black children loving homes, has resulted in lawsuits being filed by potential adoptive families who were denied the opportunity to adopt because they were not the right color, and continues to elevate race over love to the point of bringing the state out of compliance with federal law.

These facts definitely tend to belie your claim of a personal "longstanding goal to end the historical bias against interracial adoption."

More recently, your newfound support for interracial adoption, if implemented, will also mark a significant reversal of your Administration's policy since your Administration has been a major source of the system-wide bias against interracial adoption which has locked so many minority children out of the adoptive process. As you know, Senator Howard Metzenbaum has publicly stated that your Administration gutted his well-intentioned adoption legislation in 1994 by insisting on amendments that weakened his bill and allowed race to be made a major consideration in adoption placements. Moreover, your Administration was responsible for the promulgation of regulations which went beyond the intent of the legislation in discriminating against interracial adoption.

Nonetheless, even though your newfound support of our effort to bring an end to the bias against interracial adoptions is a little more newfound than you would like to publically admit, and even though you have twice vetoed legislation that contained language virtually identical to the measure that you now are endorsing, we welcome your support and your change of heart on the subject.

Best personal regards,



JIM BUNNING
Member of Congress



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

November 21, 1995

102 STATE CAPITOL
ST. PAUL, MN 55155-1007
TELEPHONE: (612) 296-6100

The Honorable Janet Reno
U.S. Attorney General
U.S. Department of Justice
Room 4400
10th Street and Constitution Ave., N.W.
Washington, D.C. 20530

Dear Attorney General Reno:

I am writing to alert you to a serious disagreement between the Office of Civil Rights for the Department of Health and Human Services (OCR), and the State of Minnesota. This disagreement may result in a legal challenge by Minnesota of OCR's interpretation of the Multi-ethnic Placement Act of 1994 (MEPA).

Congress passed MEPA in response to concerns that thousands of children in foster care are waiting for adoption and that children of color wait longer than other children. MEPA prohibits agencies (state, or private agencies that receive federal funding) from delaying or denying placement of a child in foster care or for adoption on the basis of the race, color or national origin of the child, or of the adoptive or foster parents. MEPA allows an agency to consider the cultural, ethnic, or racial background of the child as one of a number of factors used to determine the best interests of a child. Noncompliance with MEPA is considered a violation of Title VI of the Civil Rights Act. OCR may penalize noncompliance with termination of federal funds.

MEPA instructed OCR to publish guidance to the agencies which would be responsible for implementing the law. OCR published the guidance in the Federal Register. Although the guidance is not a rule and OCR failed to employ any notice and comment procedures when it was developed, OCR is using the guidance as its enforcement tool to determine whether states are complying with MEPA.

Minnesota statutes concerning a child's heritage or background (the heritage act and related statutes) state that "the policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due, not sole, consideration of the child's race or ethnic heritage" in making decisions about foster care or adoptive placements. This policy is implemented with a statutory requirement that, when placement decisions are being made, unless there is good cause to the contrary, the first preference for placement is with relatives of the child. If relatives are not available, a family with the same racial or ethnic heritage as the child is the second preference. If neither of the first two preferences can be met consistent with the child's best interests, then placement must be made with a family that is knowledgeable and appreciative of the child's heritage. Although there is currently a statutory

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cc Chris Ceyf
fr Diane Fortner
I just saw this!

The Honorable Janet Reno

November 21, 1995

Page 2

period during which a search must be made for a "matching" placement, Minnesota agrees that that is contrary to MEPA and intends to amend the statute to eliminate the search period. Recent statistics indicate that in Minnesota children of color do not wait longer than other children for permanent placements.

In its guidance as well as in communications (both written and oral) with Minnesota, OCR has said that Minnesota's heritage statutes violate MEPA. Minnesota disagrees strongly with OCR's interpretation of MEPA as it applies to Minnesota's heritage laws. Minnesota believes that its laws are consistent with the plain language, as well as the intent of MEPA; and that OCR's very restrictive interpretation of MEPA is an abuse of agency discretion.

The basis for the state's position comes from the language of MEPA itself, and from the legislative history of the Act. MEPA specifically permits consideration of the "cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background." It also requires states 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 . . . homes are needed."

When this bill was debated on the Senate floor, Minnesota Senator David Durenburger asked Senator Howard Metzenbaum (the author of the bill) whether Minnesota's policy would be consistent with the Act. Senator Metzenbaum replied that it would, as long as decisions are made in the best interests of children. Comments by other legislators reflected an agreement that same-race placements are generally preferable, but that transracial placements should be used when same-race placements are not available.

Prior to the passage of MEPA, Minnesota and OCR entered into an agreement concerning implementation of Minnesota's heritage act provisions. A copy of that agreement is attached to this letter. In the agreement, Minnesota agreed that each child's case record should contain specific documentation about why any placement decision is in the best interests of the child. OCR does not allege that Minnesota is failing to implement the law consistent with the agreement. Instead, OCR takes the position that the agreement was made invalid by the passage of MEPA because it is based upon laws which violate MEPA.

Our office, along with the Minnesota Department of Human Services, has attempted to negotiate this dispute with OCR. Numerous conversations have been held with the OCR staff in the Chicago Regional Office, their counsel, Zachary Tobin, and with George Lyon, in the Office of General Counsel for OCR in Washington, D.C. While OCR has been willing to discuss this issue, their position remains unchanged. They believe that unless Minnesota amends its heritage act statutes, it is in violation of MEPA and subject to federal sanctions under Title VI of the Civil Rights Act.

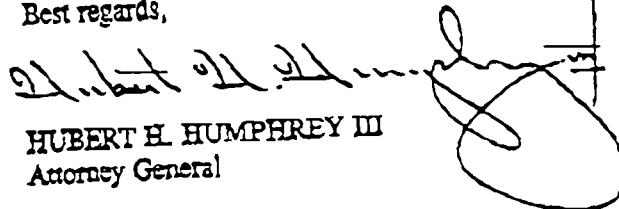
We have notified George Lyon with the Office of General Counsel for OCR in Washington that Minnesota does not intend to propose amendments to most of the heritage act statutes. He has asked for a statement of our position in writing by November 8, 1995.

The Honorable Janet Reno
November 21, 1995
Page 3

Thus, we find ourselves on the brink of a very public challenge to OCR. Based on contacts our office has made with attorneys in the Department of Justice, it appears that no one from DOJ reviewed the OCR guidance. I hope that you can look into this matter, to determine whether this can be resolved short of litigation.

I very much appreciate any help you can provide with this matter. Our concern is with the best interests of Minnesota's children, and we believe that Minnesota's heritage act is consistent with those interests. Thank you for your assistance.

Best regards,


HUBERT H. HUMPHREY III
Attorney General



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

FEB 13 1990

The Honorable Hubert H. Humphrey III
Attorney General
State of Minnesota
102 State Capitol
St. Paul, Minnesota, 55155-1002

Dear Attorney General Humphrey:

The Attorney General has asked me to respond to your letter regarding a disagreement between the State of Minnesota and the U.S. Department of Health and Human Services (HHS) regarding an interpretation of the Multiethnic Placement Act of 1994 (MEPA).

You write that the State's statutes and policies regarding placement of children in adoptive or foster homes are in compliance with the letter and spirit of MEPA, except for one statutory provision regarding a search period that you intend to eliminate.

As you know, MEPA was enacted to prevent the delay or denial of placement of children for adoption or in foster care on the basis of race, color or national origin of the child, or of the adoptive or foster parents. With respect to race and ethnicity, MEPA permits only the consideration of the specific cultural, ethnic, or racial needs of each individual child, and the ability of the prospective adoptive or foster parents to meet those needs, and then only as one of a number of factors used to determine whether such placement would be in the best interests of the child. Consequently, state statutes authorizing waiting periods and providing preferences are generally invalid under MEPA.

The State statutory provision at issue provides a general preference to a family with the same racial or ethnic heritage as the child, if relatives are not available to make a placement. This provision violates MEPA, and we concur with HHS's advice that this provision must be repealed if the State is to continue to receive federal funds.

Another State statute sets the State policy to ensure that the best interests of children are met by requiring due, not sole, consideration of the child's race or ethnic heritage. This policy is permissible if the State applies it exclusively by examining the specific cultural, ethnic or racial needs of the individual child and the ability of the prospective parents to

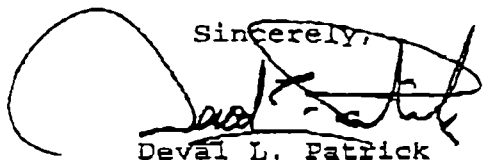
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The Honorable Hubert H. Humphrey III
Page 2.

meet those needs. Even then the State may consider it only as one of a number of factors in determining whether the placement is in the best interests of the child. The State may not implement this policy by replacing individualized determinations of need with generalizations about the needs of children of a particular cultural, racial or ethnic background.

I understand that the State has been granted a period until July 1996 to bring its statutes into compliance with MEPA, and I urge the State to continue to work with HHS to come to a resolution of this matter. The Department of Justice would be pleased to offer further assistance towards that end.

Sincerely,

A handwritten signature in black ink, appearing to read "Deval L. Patrick", is written over a horizontal line.

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

Bruce:

Just so we know what the Administration has ever said about a tax credit, I thought you might be interested in seeing Treasury's testimony from January of last year on the Contract with America adoption tax credit. It is fairly noncommittal so it doesn't preclude anything, though it says nice things about limiting it to special needs.

Diana

For Release Upon Delivery

Expected at 2:00 p.m.

January 10, 1995

STATEMENT OF LESLIE B. SAMUELS
ASSISTANT SECRETARY (TAX POLICY)
BEFORE THE
COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES

Mr. Chairman and distinguished Members of the Committee:

I am pleased to appear before this Committee today to present the Administration's views on the tax proposals in the series of bills collectively referred to as the "Contract with America."¹ The Contract raises broad issues of public policy concerning the proper size and scope of Federal government activity, the allocation of Federal budgetary resources, and the division of responsibilities between the Federal and State governments. In addition, the Contract contains several broad proposals, such as the proposed balanced budget amendment, which could indirectly have a major impact on the Federal tax system. These broad issues are beyond the scope of my testimony today, which will focus on the tax and tax-related provisions in the Contract and their tax policy implications.

There are fifteen tax and tax-related proposals in the Contract. The tax proposals are: (1) a \$500 per child refundable tax credit; (2) the "American Dream Savings Account;" (3) favorable tax treatment for long-term care insurance and services; (4) tax-free accelerated

¹ These bills include H.R. 2, the "Fiscal Responsibility Act," H.R. 3, the "Taking Back Our Streets Act," H.R. 4, the "Personal Responsibility Act," H.R. 5, the "Unfunded Mandate Reform Act," H.R. 6, the "American Dream Restoration Act," H.R. 7, the "National Security Restoration Act," H.R. 8, the "Senior Citizens' Equity Act," H.R. 9, the "Job Creation and Wage Enhancement Act," H.R. 10, the "Common Sense Legal Reforms Act," and H.R. 11, the "Family Reinforcement Act."

-10-

Discussion

The Administration supports an increase in the maximum investment that may be expensed for small businesses. The Omnibus Budget Reconciliation Act of 1993 (OBRA 93) increased the maximum from \$10,000 to \$17,500. We supported this Committee's version of OBRA 93 which, like the Contract, would have raised the maximum to \$25,000. Increasing the maximum to \$25,000 would provide an incentive for small businesses to increase their investment in capital assets. In addition, the proposal also would simplify tax reporting for eligible small businesses.

6. \$5,000 Refundable Tax Credit for Adoption Expenses

Current Law

The Tax Reform Act of 1986 repealed a deduction of up to \$1,500 for expenses related to special needs adoptions and replaced it with an outlay program with several components. States are required to reimburse families for costs associated with the process of adopting special needs children. The Federal government shares 50 percent of the first \$2,000 of such costs. Some special needs adoptees are eligible for continuing Federal-State Social Security assistance, including Medicare, under Title IV-E of the Social Security Act. Other adoptees may be eligible for continuing assistance under state-only programs.

Proposal

The proposal provides a refundable tax credit of up to \$5,000 for adoption expenses in tax years beginning in 1996 and subsequent years. The credit would be allowed for all adoptions, not solely for the adoption of a child with special needs. The credit would be phased out for taxpayers with AGI between \$60,000 and \$100,000.

The proposal would reduce tax receipts by \$1.4 billion over the five year FY1996 FY2000 period, and by \$3.3 billion over the ten-year FY1996 - FY2005 period.

Discussion

We believe that it is generally more cost-effective to target federal support for adoption to adoption of special needs children. By applying to all adoptions, this proposal provides benefits for adoptions that would occur even without the credit. In addition, administrative issues need to be addressed in the context of a refundable credit.

PART E—MULTIETHNIC PLACEMENT**Subpart 1—Multiethnic Placement****SEC. 551. SHORT TITLE.**

This subpart may be cited as the "Howard M. Metzenbaum Multiethnic Placement Act of 1994".

SEC. 552. FINDINGS AND PURPOSE.

(a) **FINDINGS.**—The Congress finds that—

(1) nearly 600,000 children are in foster care in the United States;

(2) tens of thousands of children in foster care are waiting for adoption;

(3) 2 years and 8 months is the median length of time that children wait to be adopted;

(4) 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; and

(5) active, creative, and diligent efforts are needed to recruit foster and adoptive parents of every race, ethnicity, and culture in order to facilitate the placement of children in foster and adoptive homes which will best meet each child's needs.

(b) **PURPOSE.**—It is the purpose of this subpart to promote the best interests of children by—

(1) decreasing the length of time that children wait to be adopted;

(2) preventing discrimination in the placement of children on the basis of race, color, or national origin; and

(3) facilitating the identification and recruitment of foster and adoptive families that can meet children's needs.

SEC. 553. MULTIETHNIC PLACEMENTS.

(a) **ACTIVITIES.**—

(1) **PROHIBITION.**—An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not—

(A) categorically deny to any person the opportunity to become an adoptive or a foster parent, (solely) on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or

(B) 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.

(2) **PERMISSIBLE CONSIDERATION.**—An agency or entity to which paragraph (1) applies may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child.

(3) **DEFINITION.**—As used in this subsection, the term "placement decision" means the decision to place, or to delay or deny the placement of, a child in a foster care or an adoptive

to seek the termination of birth parent rights or otherwise make a child legally available for adoptive placement.

(b) **EQUITABLE RELIEF.**—Any individual who is aggrieved by an action in violation of subsection (a), taken by an agency or entity described in subsection (a), shall have the right to bring an action seeking relief in a United States district court of appropriate jurisdiction.

(c) **FEDERAL GUIDANCE.**—Not later than 6 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall publish guidance to concerned public and private agencies and entities with respect to compliance with this subpart.

(d) **DEADLINE FOR COMPLIANCE.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), an agency or entity that receives Federal assistance and is involved with adoption or foster care placements shall comply with this subpart not later than six months after publication of the guidance referred to in subsection (c), or one year after the date of enactment of this Act, whichever occurs first.

(2) **AUTHORITY TO EXTEND DEADLINE.**—If a State demonstrates to the satisfaction of the Secretary that it is necessary to amend State statutory law in order to change a particular practice that is inconsistent with this subpart, 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 the date the guidance referred to in subsection (c) is published.

(e) **NONCOMPLIANCE DEEMED A CIVIL RIGHTS VIOLATION.**—Non-compliance with this subpart is deemed a violation of title VI of the Civil Rights Act of 1964.

(f) **NO EFFECT ON INDIAN CHILD WELFARE ACT OF 1978.**—Nothing in this section shall be construed to affect the application of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).

SEC. 554. REQUIRED RECRUITMENT EFFORTS FOR CHILD WELFARE SERVICES PROGRAMS.

Section 422(b) of the Social Security Act (42 U.S.C. 822(b)) is amended—

(1) by striking "and" at the end of paragraph (7);

(2) by striking the period at the end of paragraph (8) and inserting "; and"; and

(3) by adding at the end the following:

"(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."

Subpart 2—Other Provision**SEC. 555. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.**

(a) **IN GENERAL.**—Part A of title XI of the Social Security Act (42 U.S.C. 1301-1320b-13) is amended by inserting after section 1122 the following:

"SEC. 1123. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.

"In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because

Publica

42 USC

P. 02

Howard M.
Metzenbaum
Multiethnic
Placement Act
of 1994.
Adoption.
Foster care.
42 USC 5115a
note.

FAX NO. 2026193437

42 USC 5115a.

HHS OCR

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or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act is not enforceable in a private right of action.

(b) **APPLICABILITY.**—The amendment made by subsection (a) shall apply to actions pending on the date of the enactment of this Act and to actions brought on or after such date of enactment.

42 USC 1320a-2
note.

21



National

Adoption

Reports

*you just
found this
on MEPA
history.*

A newsletter from National Council For Adoption headquarters in Washington, DC

The Multi-Ethnic Placement Act of 1994: The Race Game

The Multi-Ethnic Placement Act (MEPA) sponsored by Senators Howard Metzenbaum (D-OH) and Carol Moseley Braun (D-IL) and the subject of several *NAR* stories (see Summer 93, Winter 93, Spring 94) passed on October 5 without the support of the National Council For Adoption (NCFA).

As *NAR* readers know, NCFA's position has not changed since NCFA's President Bill Pierce testified on July 15, 1993, and said, "the new racists are insisting on racial separatism" and he warned Congress "don't play the race game".

But the race game is precisely what has been played since that hearing. The final passage of the MEPA was only after the bill took many different forms. NCFA supported the bill as introduced (July 93). NCFA withdrew support for the version that passed out of the Senate Labor and Human Resources Subcommittee (October 93). NCFA supported a compromise version when it passed the Senate on a voice vote (March 94). But NCFA rejected the bill as amended when the Administration obbied the House to offer its amendments in the Conference (October 94). It was the House Offer which was ultimately brought to the floor of both legislative bodies and was signed into law by President Clinton.

To gain some insight into the race game and how it was played, it helps to start back at the hearing in July, 1993, when Joe Kroll of the North American Council on Adoptable Children (NACAC) testified that the "Office of Civil Rights currently only protects the interests of white adults" and that "the legislation as proposed is a repeat of that policy." To that Bill Pierce replied "What Joe (Kroll) wants you to do is to change your law, as I hear it, to water down the impact of the current Office of Civil Rights ruling."

Two questions ran through the hearing and impacted the legislation as it was marked up in the Subcommittee on Labor and Human Resources: (1) To what extent can race and ethnicity be used in making a placement decision under current Civil Rights ruling? and (2) How much delay will the government tolerate for the sake of making a same race placement?

Given the nature of the discussion prompted by the hearing, the changes in the legislation as it was marked up by the Committee were to be expected. NCFA's objections were listed in a memo written by NCFA's Director of Public Policy, Carol Statuto Bevan, and sent in November 1993 to the bill's sponsors and members of the Congressional Coalition on Adoption. NCFA

believed that the language that was added to the bill at that time was inconsistent with the purpose of the bill -- to decrease the length of time that children wait to be adopted. Specifically, the Committee added the word "unduly" before its prohibition of delay without time limits on the period that children can be held for same race placements.

What was billed as an "historic" meeting to discuss race and adoption issues was held in February 1994. The "summit" got financial
(please turn to page 1)

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Race Game

(continued from page 1)

support from the W.K. Kellogg Foundation and was sponsored by groups who were opposed to the original MEPA. These groups were somewhat satisfied by the addition of the word "unduly," but wanted recruitment language calling for more recruitment of minority parents added as well. These groups were Adoptive Families of America, Children Awaiting Parents, Institute for Black Parenting, National Adoption Center and NACAC. In a nationally-syndicated column published February 22, Mona Charen wrote that "the position of the NABSW and its sympathizers, among them the Children's Defense Fund (unofficially),... the American Bar Assn. (unofficially), and the Child Welfare League, is that because our society is so thoroughly racist, only Black parents can adequately arm a Black child to enter the combat zone that is American society."

NCFA, adoption researcher Rita Simon, Carol Coccia (National Coalition to End Racism in America's Child Care System) as well as Harvard Law Professors Elizabeth Bartholet, Randall Kennedy and Charles Fried offered the view that equal protection for Black children is denied when they are made to wait longer than white children for permanent loving homes. In a letter dated February 17th to Senator Metzenbaum, Bill Pierce summed up the meeting by writing, "The essential difference of opinion stated at the meeting was between those of us who said that the research is clear, that delay harms children, and those that say, without research, that transracial adoption hurts children. Since it is therefore a struggle between a

known practice that hurts kids and one which the available research says does not hurt kids, we feel the law should come down on our side."

And so it did, for a little while. Senator Metzenbaum dropped the offending word "unduly" in March and garnered NCFA support once again. The bill passed the Senate, with NCFA support in March, 1994. It was attached to the Improving America's Schools Bill, HR 6, and was the subject of a House-Senate Conference over the summer.

The Clinton Administration was silent on the bill for over one year, but in August, 1994, Donna Shalala, Secretary of the Department of Health and Human Services, wrote a letter to the Conferees that stated its concerns and urged acceptance of several key amendments. These amendments, wrote Carol Statuto Bevan in a September letter to the Conferees, would "gut the legislation, defeat the purpose of the bill, maintain the status quo or worse, make it even harder for Black children to exist in foster care."

One key Administration amendment proposed to change the penalty provision for violation of the proposed Act, charging that the "penalty proposed (elimination of all Federal financial participation in administrative costs of a state's foster care and adoption assistance program under part E of title IV of the Social Security Act) is severe and inflexible." One congressman expressed similar concerns to a children's advocate saying he was uneasy about taking money from organizations which serve children. The advocate's response was, "Sir, they will only lose the money if it is shown they aren't serving children." This change,

charged NCFA's Bevan, would move the penalties for violating the Act from mandatory penalties to discretionary. Moreover, the change was an attempt to make the penalties less severe and more flexible -- an approach unlikely to yield compliance.

NCFA was not alone in its opposition to the Administration-led changes. Elizabeth Bartholet led the Harvard charge and wrote to the Congress to reject this version of the bill (see Box, page 3). Earlier she had generated signatures from dozens of law professors warning that language qualifying the prohibition would have the effect of neutralizing or making existing legislation worse. The DeBoer Committee for Children's Rights rallied grassroots troops to make last minute calls to Congress.

There was a great deal of controversy surrounding NCFA's position. In a September 21 letter to Sen. Metzenbaum, Bill Pierce wrote about the controversy stating "The purpose of the campaign is obvious: confuse the issue and put a good face on racial discrimination which endangers and often kills children...." Bevan and

These amendments, wrote Carol Statuto Bevan in a September letter to the Conferees, would "gut the legislation, defeat the purpose of the bill, maintain the status quo or worse, make it even harder for Black children to exist in foster care."

(please turn to page 3)

Race Game

(continued from page 2)

Pierce worked feverishly the last weeks of September trying to rescue the legislation. As part of that process, Pierce talked to HHS Secretary Donna Shalala and other HHS officials about concerns that had been voiced, including fears that the Administration was misleading the public by trying to give discrimination in placement a more constitutional look. Sec. Shalala told NCFA that a powerful trio of forces had been lobbying for the Administration's amendments because they believed the amendments improved the Metzenbaum language: First Lady Hillary Rodham Clinton, Children's Defense Fund head Marian Wright Edleman and Shalala.

Again in a letter to Sen. Metzenbaum, Bill Pierce wrote: "...we wanted you to know that our long-standing position on your bill has not changed. All that seems to have changed in this city is that the clique of racial separatists who tried to derail your bill once before have changed tactics."

In the end, NCFA, the only national adoption organization to testify in support of the legislation on July 15, 1993 did not support the bill as passed in October, 1994. In fact, not one of the groups who now support the bill, including Children's Defense Fund, Child Welfare League of America, the ACLU, NACAC and Adoptive Families of America were at the hearing testifying in support one year ago.

And that is how the race game as played.

October 4, 1994

To: United States Senate
c/o Senator Larry Craig

We urge the Senate to reject the current version of Senator Metzenbaum's Multiethnic Placement Act, as embodied in H.R. 6. Recent Amendments weaken the Act, turning it from an Act designed to eliminate race discrimination in adoption and foster care placement, to one which endorses race matching.

The Act as it now reads permits the use of race to delay and deny placement, so long as agencies do not act "categorically" and "solely" on the basis of race. This language would enable, if not invite, agencies to continue the very practices which were the target of Senator Metzenbaum's original concern -- holding African-American children in foster care for years at a time rather than placing them with waiting white families.

The Act as it now reads mandates race-conscious recruitment of adoptive and foster parents with the goal of achieving a prospective parent pool that matches the racial composition of the foster child pool. So while the original Metzenbaum bill was designed to eliminate the rigid race matching practices that are responsible for locking black children into foster limbo, the amendments are designed to encourage race matching.

As we said in a Dec. 1, 1992 letter to Congress signed by dozens of law professors from around the nation, attached hereto, "what parentless children need most are not 'white' parents or 'black' parents or 'yellow' parents but loving parents able to raise children in a nurturing environment."

We appreciate the concerns that inspired Senator Metzenbaum to develop this legislation but it is our strong conviction, based on our experience with civil rights legislation generally, and with race matching policies and practices in the child welfare system in particular, that this legislation, in its current form, will make the problem worse, not better, from the perspective of the minority race children condemned to the foster care system.

We urge the Senate to reject this bill.

Sincerely,
Elizabeth Bartholet Charles Fried
Randall Kennedy Robert Mnookin
Laurence Tribe
Professors of Law, Harvard School of Law

Susan A. Freivalds

1415 Flag Avenue South
Minneapolis, MN 55426
612-544-6698
(phone and fax)

April 26, 1996

Diana Fortuna
Old Executive Office Building, Room 213
The White House
Washington, DC 20502

Dear Ms. Fortuna:

I enjoyed speaking with you today about the adoption expense tax credit, health insurance coverage for adopted children, and The Hague Convention on Intercountry Adoption. I am enclosing information on these topics for your review.

I will soon be announcing my new position as Executive Director of the National Adoption Foundation, a national nonprofit that provides information, services, and products for adoptive families to help them afford the expense of adopting a child. Specifically, the Foundation provides grants and below-market interest loans to qualified prospective adopters. In this position, I will continue to follow closely public policy concerning the finances of adoption and will be glad to help you in any way I can. Please don't hesitate to call upon me.

I am also representing the Joint Council on International Children's Services in its effort to secure ratification and help plan the implementation of the Hague Convention. The Joint Council is an affiliation of intercountry adoption agencies, from the smallest to the largest, and the parent groups and advocacy organizations interested in intercountry adoption. I encourage you to call on me for information about the Convention as well. I have been involved with its evolution over the past eight years or so, through the Joint Council, in my previous position as Executive Director of Adoptive Families of America, and as a member of the U.S. delegation to the negotiations at The Hague.

Thank you for your interest in adoptive families and children without permanent families.

Sincerely,



Susan Freivalds

**STATEMENT OF
SUSAN A. FREIVALDS**

*Gen - This is
good - I am
talking to
her. Diana*

**before
THE COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES**

January 18, 1995

**Adoptive Families of America
3333 Highway 100 North
Minneapolis, MN 55422
612-535-4829**

Statement of
Susan A. Freivalds

Adoptive Families of America
3333 Highway 100 North
Minneapolis, MN 55422
612-535-4829

Thank you for the opportunity to speak to you on behalf of adoptive and prospective families throughout the United States. It is a pleasure to be here.

I am Executive Director of Adoptive Families of America, a national support organization for adoptive and prospective adoptive families. We are not a child-placing agency; rather we provide education, information, and support to families built through adoption. We have a membership of 17,000 families and individuals, and are the umbrella organization for 300 local adoptive parent support groups, representing thousands more families. Our membership makes us the largest adoption organization in the nation. Personally, I am the mother of a 20-year-old daughter adopted as an infant. Ours is one of many adoption successes. This is a matter dear to my heart.

I am asking your support today for H.R. 11, Title I, concerning a refundable tax credit for adoption expenses. This issue is one that concerns adoptive families deeply--tax equity for family-building methods. I want to thank the committee for giving this issue high priority, because the current inequity in tax treatment of family-building expenses not only serves as a hardship to adoptive and prospective adoptive families, it also serves as a significant, substantial barrier to the adoption of America's waiting children.

1. Adoption expenses are a significant barrier for families hoping to adopt. A tax credit would address this concern, and help move adoptive families toward tax equity for their family-building expenses.

The expense of adopting a child is significant. We are currently advising prospective adoptive families to plan on costs of \$10,000 to \$12,000 for the adoption of a healthy newborn, whether through an agency or in an independent adoption. The adoption of a child from overseas will typically cost between \$10,000 and \$18,000. The adoption of a child with special needs can vary from having no unreimbursed expenses to a cost of perhaps \$10,000, depending on the circumstances of the child.

No one will disagree that these costs represent a lot of money. These expenses may include agency and attorney fees, legal expenses, medical costs of the child's birth and subsequent care, foster care for the child before placement with the adoptive family, support for the birthmother (as permitted by state law), travel of the adoptive parents and/or the child, and more. All these expenses are necessary and, of course, perfectly legal.

For many American families, these expenses are astronomical. The dream of a family for many American couples and singles has become a nightmare of rising expense. These costs can work to shut out from adoption many of those whom we might consider the best possible parents: moderate-income helping professionals, such as teachers, nurses, social workers, the clergy.

Families cope and borrow as best they can to afford to adopt. There is no insurance to cover this cost; there are no extended payment plans. Adoptive parents deplete their

savings, borrow from relatives, take out second mortgages, apply for additional credit cards. All these strategies serve to place the young parents in a precarious financial position as they start out their life as a family.

Provisions in H.R. 11, the "Family Reinforcement Act," allowing a tax credit of up to \$5,000 for qualified adoption expenses, would go a long way to addressing these concerns and to providing a measure of equity to adopting families. We receive calls daily from parents who wish to add to their family through adoption. Typically they tell us that they have the resources to raise a child or another child, but do not have the \$10,000 or so they need to complete the adoption. I believe this tax credit would greatly aid these families and prove a powerful incentive to the adoption of children.

2. An adoption tax credit should be available for all legal adoptions, not only as a matter of equity, but also because some children with special needs are not eligible for other incentive programs.

High adoption costs, and other associated inequities adopting families face, including but not limited to the inability to obtain paid or even unpaid parental leave when they adopt, remain a significant barrier to the adoption of America's waiting children. We have in place today several important, necessary, programs to facilitate the adoption of children with special needs, including Title IV-E adoption assistance, and these significant programs should not be disturbed by other changes we might enact.

? vs FMLA?

However, we must not lose sight of the fact that these current programs have limitations, typically applied by the states, that restrict the children with special needs to whom they apply. In other words, all children with special needs who would benefit from adoption are not eligible for these special programs. H.R. 11 correctly applies to all adoptions, insuring that some of America's most vulnerable children are not disadvantaged in their search for an adoptive family.

Adoptive Families of America member Debra McElroy of New Mexico illustrates the need for tax equity to apply to all adoptions. She writes:

It is always assumed that children with special needs, once a family who wants them is identified, come into that family without adoption expenses and with government subsidies that cover all their needs. But this is not always the case.

My own son, Nathaniel, is in every way a child with special needs, but because he was in the custody of a private agency--instead of the State of Florida--there was no help for us in the cost of his adoption or with his medical needs. Nathaniel was born 1-1/2 months prematurely--his first two weeks were spent in a pediatric ICU--with "failure to thrive" and developmental delays. Because the State of Florida did not have control, there was little cooperation in processing the paperwork. There was also no purchase of services available, no Medicaid or state coverage of the child's medical bills at any time, and no travel expense reimbursement to see our child or to bring him home. But we loved him from the moment we saw him.

It took all of our savings and some borrowing from relatives, but we finally were able to bring him home and finalize his adoption. Our total cost for his adoption, not including medical exams required prior to finalization, was \$16,000.

But we were lucky. We have a beautiful son to love. Friends of ours were not so fortunate. They tried to adopt a 5-month-old girl classified as special needs from Washington State. This child was born two months prematurely, with a club foot requiring some amputation, cataracts needing surgery, and dwarfism. The State of Washington offered no travel expense, no subsidy, and no purchase of services. Because she was special-needs classified, however, they would have reimbursed some of the medical co-payments, but only up to \$1,000.

My friends wanted this little girl. Her physical situation was not a difficulty for them, since they had previous experience with most of her defects. But the estimated cost of almost \$8,000 for the adoption, plus the expense of all the child's medical needs, were severe hardships, particularly when they considered the financial risks that could arise from the medical needs of their two other adopted children with special needs. In the end, they had to make the painful decision not to adopt this little girl.

These cases illustrate how imperative it is that a tax credit for adoption expenses not be restricted to only certain children. Too many children with special needs fall through the cracks of our system. Any tax credit put into place to help children should not have the unintended result of disadvantaging any special needs child.

3. A tax credit is a fiscally responsible way to provide incentives for the adoption of children.

Can we afford to support adoption this way? Where will the dollars come from to support the proposed adoption tax credit?

Study after study shows that adoption is not only the preferred solution for children who cannot be cared for by their birth families in terms of their emotional and mental health, but adoption is also the least-cost solution. Figures from Iowa comparing out-of-home care costs in 1994 find that, on a per-child, per-year basis, family foster care costs \$10,000; independent living, \$21,455; shelter care, \$30,111; and group care, \$40,414. A \$5,000 maximum one-time benefit to support a child's adoption pales in comparison to these yearly expenditures to support non-familial care of children.

4. Employers in the private sector can be encouraged to participate in providing aid to adoptive families and waiting children. Congress should exempt from taxation employee adoption assistance benefits provided by employers.

In examining ways that equity can be achieved for family-building methods, I encourage the committee to consider providing tax exemption for payments and reimbursements for adoption expenses made by employers to their employees who adopt. A 1993 study by employee benefits consultant Hewitt Associates, cited in "The State of Corporate Adoption Benefits" published by Wendy's International, Inc., found that approximately 18 percent of 1,000 large U.S. corporations now offer adoption-related benefits, up 6 percent from 1991. The average benefits plan provides an estimated \$2,000 maximum reimbursement per adoption.

These plans represent a praiseworthy way the private sector is stepping forward in aid of America's children and should be rewarded with beneficial tax treatment. However, these adoption expense reimbursement payments are typically taxable as regular income to the

employee, and are not deductible as a business expense to the employer. H.R. 11 could be improved by incorporating provisions to make these benefit payments tax exempt both to the employer and the employee. A Wendy's International survey of Fortune 1,000 corporations found that, for corporations not offering employee adoption assistance benefits, concern about their cost was the single most important reason cited. Tax deductibility of an adoption benefit, on a par with other employee benefits, would be a powerful means of removing this barrier to private sector participation.

As you consider the fiscal and equity issues presented by the proposals you are hearing today for beneficial tax treatment of adoption expenses, please keep in mind the children and the families you will be helping. It is indisputable that in current law and regulation the standing of families formed through adoption is unequal to that of families formed through birth. In spite of this, we take children who are not our own and make them our own. We raise them to become productive citizens of this country. We do this at tremendous initial expense and then give our children all that we can thereafter, just as any real parent would do, because we are real parents. Just ask our children. We ask that our government recognize this as well by working toward the equity we deserve.

3-12-1995 9:02PM FROM

MULTIETHNIC PLACEMENT ACT

IMPLEMENTATION STATUS

Since the Multiethnic Placement Act (MEPA) was enacted in October, 1994, the Department of Health and Human Services has taken aggressive actions to ensure that states comply with its prohibition against delaying or denying the adoption of children on the basis of race, color or national origin.

- ▶ **HHS quickly sent information to the states about the new law, issued guidance to the states to ensure full and prompt compliance, and reviewed state laws, regulations and published policies on adoption and foster care.**
- ▶ **Twenty-seven States and the District of Columbia were notified that their statutes, regulations or policies were not in compliance with the new law. Many of these States were operating under preferences for race-based placements, while others were allowing delays for purposes of making same-race placements -- impermissible policies which imposed barriers to the timely adoption of waiting children.**
- ▶ **HHS required states to take immediate action to comply with the letter and spirit of MEPA, and provided training, technical assistance and extensive materials to assist state efforts.**

Numerous States changed statutes, regulations and policies to eliminate the impermissible use of race, color or national origin in foster care and adoption placements. By January of 1996, 46 States were in compliance with HHS' strict enforcement of MEPA.

- ▶ **New Mexico, for example, put new regulations, policies and procedures into effect in October 1995, after HHS identified impermissible procedures establishing same race/ethnicity placement and allowing time periods to search for same race/ethnicity foster care and adoption placements.**
- ▶ **Three of the remaining four States (IA, KY and MN) are expected to make the changes required to ensure compliance with MEPA's prohibitions by July, 1996. Because of its bi-annual legislative calendar, the remaining State (AR) is expected to be in full compliance by April, 1997.**
- ▶ **HHS is also working closely with states to comply with MEPA's additional requirement that states provide for the diligent recruitment of potential foster and adoptive families who are capable of meeting the needs of children with various cultural, ethnic and racial backgrounds.**

The aggressive implementation of MEPA is one of many steps HHS has taken to promote the adoption of children, especially children with special needs.

5/7/96



Department of Justice

STATEMENT
OF
SETH P. WAXMAN
ASSOCIATE DEPUTY ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

CONCERNING
PROPOSED AMENDMENTS TO
THE INDIAN CHILD WELFARE ACT

PRESENTED ON
JUNE 26, 1996

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, I am Seth P. Waxman, Associate Deputy Attorney General at the Department of Justice. Thank you for inviting the Department to present its views on proposals to amend the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901 et seq. The Administration and the Attorney General support the right of Indian tribes to self-government and recognize the important needs of Indian children for caring families and nurturing homes. We understand that the proposals under consideration represent an effort to reach consensus among adoption attorneys and tribal representatives, including the National Congress of American Indians ("NCAI").

Recently, the application of ICWA to a relatively small number of voluntary adoption cases has evoked intense debate in Congress. Generally, in these cases Indian parents or a tribe, alleging that ICWA was not complied with or was evaded, seek to recover custody of the Indian children. The tragedy in these situations arises from the length of time consumed by the legal proceedings. Delay causes anguish and disruption, and one's heart goes out to all the parents and prospective parents, and especially to the children, who find themselves caught in the center of these disputes.

In considering amendments to ICWA, Congress should be mindful of ICWA's important purposes and tribal rights of self-government. The Justice Department supports the Committee's action on June 19, 1996, that eliminated Title III of the Adoption Promotion and Stability Act of 1996. Although the Department otherwise supports H.R. 3286, we opposed Title III because, in our view, it was inconsistent with tribal self-government in matters of tribal

membership. See Letter from Andrew Foia, Assistant Attorney General for Legislative Affairs to Chairman McCain, June 18, 1996.

We are informed by the Departments of the Interior and Health & Human Services that ICWA generally works well, particularly when the affected parties are apprised of their statutory rights and duties and its provisions are applied in a timely manner. We believe that many of the proposals developed by NCAI, tribal attorneys, and adoption attorneys move the debate in the right direction. These amendments would clarify ICWA, provide deadlines to reduce delay in custody proceedings, and strengthen federal enforcement tools to promote compliance with ICWA in the first instance. As noted below, our comments on the draft proposals are preliminary in nature. We would be pleased to assist the Committee in its effort to develop concrete proposals that are both respectful of tribal self-government and promote timeliness and certainty in voluntary adoptions of Indian children.

I. The Right of Indian Tribes to Self-Government

Since the formation of our Union, the United States has recognized that Indian tribes have the authority to govern their members and their territory. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). The United States has entered into hundreds of treaties and agreements with Indian tribes, pledging protection for Indian tribes and securing the tribes' rights to the "highest and best" form of government, "self-government." Ex parte Crow Dog, 109 U.S. 556, 568 (1883). ICWA is a constitutionally valid statute that is closely tied to Congress' "unique obligations" to Indian tribes by protecting the best interests of Indian children.

and families while promoting tribal rights of self-government. See Morton v. Mancari, 417 U.S. 535, 555 (1972).

II. The Statutory Framework of the Indian Child Welfare Act

The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of tribal membership, is fundamental to that relationship. ICWA establishes a dual jurisdictional system for Indian child custody proceedings: a) Congress confirmed the exclusive jurisdiction of tribal courts in Indian child custody proceedings when the Indian child is domiciled in tribal territory; 25 U.S.C. § 1911(a);¹ and b) Congress created a procedure to transfer off-reservation Indian child custody cases to tribal courts, but allowed state courts to retain jurisdiction of such cases where good cause exists. Notably, ICWA reserves the right of either parent to "veto" the transfer of a case involving their child to tribal court. 25 U.S.C. § 1911(b).

ICWA establishes substantive and procedural protections for Indian children, Indian families, and Indian tribes. In any involuntary state-court proceeding to place an Indian child outside the home, ICWA requires notice to the Indian parent or custodian and the child's tribe, and imposes a ten-day stay of proceedings, which may be extended to thirty days. 25 U.S.C. § 1912(a). ICWA also establishes a right to counsel for indigent parents and a right to examine records, and it requires state child welfare

¹ See Fisher v. District Court, 424 U.S. 382 (1976) (tribal courts have exclusive jurisdiction over adoptions of Indian children who are domiciled on the reservation).

agencies to make remedial efforts to prevent the breakup of the Indian family. 25 U.S.C. § 1912(b)-(d).

In any voluntary state-court proceeding for relinquishment of custody or parental rights, ICWA requires the court to certify that it has explained the consequences of the action and that the Indian parent has understood those consequences. 25 U.S.C. § 1913(a). No consent to adoption is valid if made before an Indian child is born or within ten days after birth.² *Id.* Consent to adoption may be withdrawn prior to entry of a final decree, 25 U.S.C. § 1913(c), and consent to foster care placement may be withdrawn at any time. 25 U.S.C. § 1913(b). After entry of a final adoption decree, a collateral action may be maintained only on the grounds of fraud or duress within two years of the decree, unless a longer period is provided for by state law. 25 U.S.C. § 1913(d).

III. The Operation of the Indian Child Welfare Act

The Department of Justice has only a limited role in the implementation of ICWA, so our knowledge of how, and how well, ICWA works is premised largely on the reports of the Departments of the Interior and Health and Human Services.³ They report that ICWA generally has worked well to preserve the integrity of Indian families and tribal relations, especially when parties are informed

² The ICWA ten-day protective period is consonant with many state laws. More than half of the states do not permit parental consent to adoption until 3 days after a child is born. M. Hansen, "Fears of the Heart," ABA Journal (November, 1994) at 59.

³ See Hearing Before the Senate Committee on Indian Affairs, (1995) (statement of Joann Sebastian Morris, Acting Director, Office of Tribal Services, BIA); *id.* (statement of Terry L. Cross, Executive Director, National Indian Child Welfare Ass'n); *id.* (statement of galashkibos, President, National Congress of American Indians).

about ICWA and it is applied in a timely manner.⁴ In fact, despite some recent concern about ICWA's application to certain off-reservation cases, legislators seem to agree that ICWA works. As Representative Pryce explained, "ICWA has worked, and it is still working." See Statement of Representative Pryce, 142 Cong. Rec. H4808-4809 (May 10, 1996).

Under ICWA, courts are able to tailor foster care and adoptive placements of Indian children to meet the best interests of children, families, and tribes. We understand that the vast majority of these cases are adjudicated without significant problems. The application of ICWA to a limited number of cases involving adoptive placements that are later challenged by biological parents or the child's tribe, however, has drawn criticism. This criticism, in turn, provides the impetus for amendments to the ICWA.

These cases are difficult and heart-rending, often having tragic consequences for all parties to the dispute. It is important to reiterate, however, that these problematic cases are not indicative of the manner in which ICWA operates in the vast majority of instances. Further, many of those cases would not have been problematic if ICWA's dictates had been complied with at the outset of the adoption process.

For example, among the cases commonly cited for the need to amend ICWA is the adoption that provided the factual predicate for the In re Bridger R. decision by the California Court of Appeal.

⁴ Other positive results reported under ICWA are the development of tribal juvenile codes, tribal court processes for addressing child welfare issues, and tribal child welfare services.

49 Cal. Rptr. 2d 507 (1996). In that case, twin girls of Indian descent were placed with a non-Indian family when their biological parents relinquished them to an adoption agency. The biological parents and the interested tribe subsequently challenged the adoption. The ensuing protracted litigation has disrupted the lives of all those who are involved in the dispute. Had ICWA been complied with in that instance, however, most of the delay -- and quite possibly the litigation itself -- would have been avoided. The biological parents would have been required to wait 10 days after birth to relinquish their rights, and when they did so they would have been instructed by a judge as to their rights under the statute and the consequences of their waiver of those rights. None of this occurred, and that created the problem. Bridget R., therefore, signals a need to fine-tune ICWA's statutory mechanisms to provide incentives that ICWA is complied with early on in the adoption process.

Many supporters of Title III, focussing solely on Bridget R. and other anomalous cases, make the assumption that ICWA's application to these cases will produce a particular outcome, namely, the removal of children from non-Indian adoptive parents. The facts of the very case addressed in the Supreme Court's seminal decision on ICWA, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), however, demonstrate that this assumption is mistaken. In Holyfield, three years after a state court had issued an adoption order placing Indian children domiciled on the reservation with a non-Indian family, the Supreme Court reversed the order, holding that the tribal court had exclusive jurisdiction

over the case. 490 U.S. at 52-53. The Supreme Court noted that "[h]ad the mandate of the ICWA been followed [at the outset] much potential anguish might have been avoided." *Id.* at 53-54. The Court deferred to the "experience, wisdom, and compassion of the Choctaw tribal courts to fashion an appropriate remedy." *Id.* at 54. Following transfer of the case to tribal court, the tribal court determined that it was in the children's best interest to remain in the current placement with Vivian Holyfield, the non-Indian adoptive parent. In order to preserve the link between the children and the tribe, the court made arrangements for continued contact with extended family members and the Tribe. As Holyfield demonstrates, ICWA does not resolve the ultimate issue of who should have custody of a particular Indian child; rather it allows courts to make that decision on a case-by-case basis taking into account the best interests of the child.

IV. Proposed Amendments to the Indian Child Welfare Act

The Administration and the Attorney General strongly support the Adoption Promotion and Stability Act of 1996, without Title III.⁵ The Department, however, opposes the Title III amendments to ICWA as passed by the House because they would interfere with tribal self-government and undercut tribal court jurisdiction.⁶

⁵ In a letter from Assistant Attorney General Fols to Speaker Gingrich, dated May, 10, 1996, the Department also indicated that to avoid Eleventh Amendment concerns, Title II should be amended to reflect that it is passed pursuant to both Congress' spending power and its enforcement authority under the Fourteenth Amendment.

⁶ As passed by the House, Title III of the Adoption Promotion and Stability Act of 1996 would have amended ICWA to provide that:

(a) th[e ICWA] does not apply to any child custody proceeding involving a child who does not reside or is not domiciled

The Supreme Court held in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that the power to determine tribal membership is a fundamental aspect of tribal self-government, akin to the power of the United States to determine citizenship. Tribal membership is thus a matter of tribal law which should be determined by tribal government institutions. As the Supreme Court explained in Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987): "Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority because tribal courts are best qualified to interpret and apply tribal law." Moreover, Congress found that States "have often failed to recognize the essential tribal relations of Indian people." 25 U.S.C. § 1901(5); see United States v. Kagame, 118 U.S. 318, 384-385 (1886).

Title III's proposal to establish a system wherein federal statutory protections turn not on tribal government determinations of tribal membership, but on a tribal member's degree of "social,

within a reservation unless--

(1) at least one of the child's biological parents is of Indian descent; and

(2) at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member.

(b) The factual determination as to whether a biological parent maintains significant social, cultural or political affiliation with the Indian tribe of which either parent is a member shall be based on such affiliation as of the time of the child custody proceeding.

(c) The determination that this title does not apply pursuant to subsection (a) is final, and, thereafter, this title shall not be the basis for determining jurisdiction over any child custody proceeding involving the child.

cultural, or political affiliation" with an Indian tribe is contrary to recognized rights of tribal self-government. To the extent that Title III authorizes state courts to make these determinations, it further undermines tribal self-government and the objectives of ICWA.

Moreover, Title III grafts onto ICWA a subjective and open-ended test that, if anything, will increase the quantum of litigation. The existing trigger for ICWA -- tribal membership and eligibility for tribal membership -- is readily discernible by an inquiry to the relevant tribal government. In contrast, the "social, cultural, or political affiliation" test incorporates subjective criteria more likely to create additional litigation, with attendant delays in the adoptive placement of Indian children, than to "streamline" adoptive placements.

V. Tribal Proposals for Reform of ICWA

A. Procedural Reforms

In response to some of the concerns raised in the context of voluntary adoptions, Indian tribes have made proposals to promote timeliness and certainty in voluntary adoptions. NCAI, which represents over 200 Indian tribes, has worked with tribal attorneys and adoption attorneys on proposals that, consistent with the right of Indian tribes to self-government, ICWA be amended by, inter alia, providing clear standards for notification to tribes in voluntary adoptive placements of Indian children; establishing deadlines for tribal intervention in such cases; and limiting the time for biological parents to withdraw consent to adoptive placements.

The Department supports efforts to develop consensus on proposals to increase certainty in the early stages of child custody proceedings and is willing to work with Congress to explore these provisions. The NCAI proposals relating to the procedural aspects of ICWA generally appear to provide a constructive alternative to the more radical changes of Title III, which represent a departure from the goals of ICWA and undermine tribal sovereignty.

B. Clarification of ICWA Requirements

The NCAI proposals also seek to clarify ICWA's requirements. The Department does not at this juncture have comments on the particular language of most of these, except one proposal that requires attorneys who facilitate adoptive placements to advise the parents of Indian children concerning the scope of the ICWA. The Department of Justice has reservations about this provision only to the extent that it might be construed to limit an attorney's ability to discuss the feasibility of various options with his or her client.

VI. Noncompliance and Enforcement

In testimony before this Committee in May 1995, the Department of the Interior and a number of other witnesses cited widespread noncompliance with ICWA by states.⁷ Reports by the Departments of the Interior and Health & Human Services on Indian child welfare

⁷ The Department of Health and Human Services issued a program instruction on August 11, 1995, requiring states beginning in FY 1996, to report measures taken under their child welfare service plans under Title IV-B of the Social Security Act to comply with ICWA.

also have emphasized enforcement problems.⁸ To address the problem of noncompliance, NCAI proposed criminal sanctions to discourage fraudulent practices in Indian adoptions. The proposed NCAI language would add a new Section 1924 to Title 25, making it a criminal violation to

(1) encourage[] or facilitate[] fraudulent representations or omissions regarding whether a child or parent is Indian, or (2) conspire[] to encourage or facilitate such representations or omissions, or (3) aid[] or abet[] such representations or omissions having reason to know that such representations or omissions are being made and may have a material impact on the application of this Act.

The section specifically exempts any "parent of an Indian child," which under the current ICWA definition includes both biological and adoptive parents. 25 U.S.C. § 1903.

As currently proposed, Section 1924 would apply broadly to "any proceeding or potential proceeding involving a child who is or may be an Indian child for purposes of this Act" and would target anyone who "encourages or facilitates fraudulent representations or omissions." Several of these phrases raise the constitutional concerns of vagueness and overbreadth. In addition, the underlying conduct targeted by proposed Section 1924, "fraudulent representations or omissions," is often difficult to prosecute. Parts 2 and 3 of the proposed sanctions, which address "conspiracy" and "aiding and abetting," are not necessary, because these offenses are already codified in 18 U.S.C. § 371 and 18 U.S.C. § 2. As the Committee considers this issue further, it may be fruitful

⁸ Opportunities for ACF to Improve Child Welfare Services and Protections for Native American Children, Off. of the Insp. Gen., Dept. of Health and Human Services (1994); Indian Child Welfare: A Status Report, Dept. of Interior (1988).

to consider 18 U.S.C. § 1001 as a model for sanctions to improve compliance with ICWA.

CONCLUSION

We hope today's hearing will promote consensus on proposals to amend ICWA in a manner that is both respectful of tribal self-government and conducive to certainty and timeliness in voluntary adoptions of Indian children.

We appreciate the efforts that the Chairman, the Vice Chairman, and the Committee are making to foster dialogue on issues related to ICWA, consistent with the government-to-government relations between the United States and Indian tribes.

STATEMENT OF ADA E. DEER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS,
DEPARTMENT OF THE INTERIOR, AT THE HEARING BEFORE THE SENATE
COMMITTEE ON INDIAN AFFAIRS, ON AMENDMENTS TO THE INDIAN CHILD
WELFARE ACT OF 1978.

June 26, 1996

Good morning, Mr. Chairman, Mr. Vice-Chairman, and Members of the Committee. I am pleased to be here to present the Department of the Interior's views on proposed amendments to the Indian Child Welfare Act of 1978. I will submit my written testimony for the record. The Department of the Interior does not support Title III of the House passed version of H.R. 3286, however, we do support the efforts of tribal governments and the National Congress of American Indians (NCAI) to improve the ICWA.

Background Information

Congress passed the Indian Child Welfare Act in 1978 (ICWA), after ten years of study on Indian child custody and placements revealed a high rate of out of home placements and adoptions. The strongest attribute of the ICWA is the premise that an Indian child's tribe is in a better position than a State or Federal court to make decisions or judgments on matters involving the relationship of an Indian child to his or her tribe. The clear intent of Congress was to defer to Indian tribes on issues of cultural and social values as they relate to child rearing.

In addition to protecting the best interests of Indian children, the ICWA has also preserved the cultural integrity of Indian tribes because it re-established tribal authority over Indian child custody matters. As a result the long term benefit is, and will be, the continued existence of Indian tribes.

Implementation of the ICWA

Admittedly there have been problems with certain aspects of the ICWA and ICWA should be revised to address these problems to ensure

that the best interests of Indian children are ultimately considered, particularly since interventions are rare. On the whole, however, the ICWA has fulfilled the objective of giving Indian tribes the opportunity to intervene on behalf of Indian children eligible for tribal membership in a particular tribe.¹

Implications of Proposed Amendments to the ICWA

We share the expressed concerns of tribal leaders and a majority of your Committee members about the proposed amendments to ICWA contained in H. R. 3286, Title III, which would seriously limit and weaken the existing ICWA protections available to Indian tribes and children in voluntary foster care and adoption proceedings. Although several problematic cases have been cited to support the introduction of the amendments, these cases do not warrant a unilateral and unfettered intrusion on tribal government authority.

We have grave concerns that the amendment language regarding tribal membership of Indian children will intrude on tribal sovereignty. If passed, Title III would authorize State court judges to delve into the sensitive and complicated areas of Indian cultural values, customs and practices which under existing law have been left exclusively to the judgment of Indian tribes.

Tribes have the right to determine their own membership. The right stems from the nature of tribes as political entities with some sovereign powers. A tribe's power over its membership includes establishing the membership requirements, the procedures for enrollment, and the benefits that go with membership. The proposed amendments, however, fail to recognize the diversity with which the more than 550 tribal governments have chosen to determine their

¹ Opportunities for ACF to Improve Child Welfare Services and Protections for Native American Children, Office of the Inspector General, Dept. of Health and Human Services (1994); Indian Child Welfare: A Status Report, Department of the Interior (1988).

tribal membership. As an example of this diversity, many tribes have blood quantum requirements while others have ancestral lineage or community membership criteria. Thus, tribal enrollment is not a unified system. Each tribe establishes its own criteria; a right supported by the Supreme Court. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Despite the complexities respecting tribal membership, the proposed amendments in Title III appear to assume that eligibility criteria for tribal enrollment or membership are the same for all tribes. There is a presumption that an Indian child or parent who is not enrolled at the time of a child custody proceeding is not "Indian." Moreover, it is unclear whether tribal or State courts would make determinations as to who is a tribal member. If these determinations will be made by State courts, the proposed language is vague and could be open to broad interpretation.

Because the United States has a government-to-government relationship with Indian tribes, the Department of the Interior is committed to the protection of their sovereign status, including the preservation of tribal identity and the determination of Indian tribal membership as it relates to voluntary child custody proceedings under the ICWA. For the reasons that I have specifically outlined, the Department does not support the Title III as passed by the House.

Tribally Developed Legislative Alternative

I have received numerous phone calls, faxes and letters from tribes and tribal organizations expressing their deep concerns regarding the amendments to ICWA as contained in Title III. Tribes came together at the NCAI Mid-Year Conference in Tulsa during the week of June 3, 1996. The result of their efforts was to develop a consensus-based legislative alternative to the proposed amendments

that have been offered thus far.

We have examined the recommendations and proposed legislative language endorsed by NCAI. Based on our review to date, we believe that the tribal amendments will clarify the applicability of the ICWA to voluntary child custody matters so that there are no ambiguities or uncertainty in the handling of these cases.

The tribally developed amendments clearly address the concerns which led to the introduction of Title III of H.R. 3286, including time frames for ICWA notifications, timely interventions and sanctions, definitive schemes for intervention, limitations on the time for biological parents to withdraw consent to adoptive placements, and finality in voluntary proceedings.

In closing, we appreciate the good faith efforts of tribal governments in addressing the ICWA-specific concerns raised by certain members of the Congress and pledge to devote the necessary time and energy in working with the tribes toward the resolution of these matters. I would like to thank you Mr. Chairman, and Mr. Vice-Chairman for your assistance in having this section struck from the legislation during the markup last Wednesday. This Administration will endeavor to ensure that tribal sovereignty will not be compromised, specifically the right of tribal governments to determine tribal membership and the right of tribal courts to determine internal tribal relations.

This concludes my prepared statement. I will be pleased to answer any questions the Committee may have.