

The Multiethnic Placement Act  
Minorities in Foster Care and Adoption



U.S. COMMISSION ON CIVIL RIGHTS

Washington, DC 20425

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BRIEFING  
REPORT



JULY 2010

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# **The Multiethnic Placement Act: Minorities in Foster Care and Adoption**

A Briefing Before  
The United States Commission on Civil Rights  
Washington, DC

Briefing Report



Letter of Transmittal

The President

The President of the Senate

The Speaker of the House

Sirs and Madam:

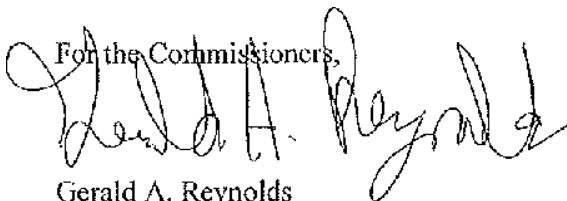
The United States Commission on Civil Rights (Commission) is pleased to transmit this report, *The Multiethnic Placement Act: Minorities in Foster Care and Adoption*. A panel of experts briefed members of the Commission on September 21, 2007 regarding the enactment of the Multiethnic Placement Act (MEPA) and its effect on reducing the amount of time minority children spend in foster care or wait to be adopted. The panelists also discussed transracial adoptions and whether they serve children's best interests and assessed the Department of Health and Human Services' (HHS) effectiveness in enforcing MEPA. Based on that discussion, the Commission developed the findings and recommendations that are included in this report.

Among its findings, the Commission notes that the number of children in foster care, a disproportionate number of whom are black, has grown over the last generation. However, since MEPA and its subsequent amendments became law, the adoption of black children by white couples has increased and the amount of time they spent in foster care decreased by four months on average between 2000 and 2004. The Commission also noted that although MEPA encourages state and local entities to recruit foster and adoptive parents who reflect the ethnic and racial diversity of the children, it does not discourage transracial adoption or require a preference for same-race placement,

The Commission recommends that HHS continue its vigorous enforcement of MEPA by conducting compliance reviews and imposing sanctions as necessary to ensure that states, agencies and government personnel are in compliance with its provisions prohibiting the use of race in placement decisions. The Commission also recommends that Congress allow reimbursement for legal guardianship similar to that currently provided for adoption, reiterating an earlier recommendation made by the General Accountability Office. This would help increase the number of homes available for permanent placement of African American and other special needs children. Most importantly, it is in children's best interests to be placed in safe and secure homes.

Part A, which consists of the body of this report, was approved by Commissioners Gaziano, Melendez, Reynolds, Taylor, and Thernstrom on December 4, 2009. Commissioners Heriot and Yaki abstained. Commissioner Kirsanow did not vote. Vote tallies for each of the Commission's findings and recommendations, which make up Part B of the report, are noted therein.

For the Commissioners,



Gerald A. Reynolds  
Chairman





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## Executive Summary

The Multiethnic Placement Act of 1994 (MEPA)<sup>1</sup>, was intended to encourage timely decision-making in the adoption and foster care systems, including addressing the problem of discrimination on the basis of race or ethnicity. The act was introduced by Senators Howard Metzenbaum (D-OH) and Carol Moseley-Braun (D-IL) to promote the best interests of children in out-of-home care by ensuring that they have permanent, safe, stable and loving homes suited to their individual needs. Of particular concern to Congress was the chronically low permanent placement rate of African American and other minority children due to the practice of racial and ethnic matching policies, and the limited success agencies were having in finding African American and other minority adoptive families.<sup>2</sup>

MEPA prohibits the delay or denial of foster care or adoption based solely on race, color, or national origin, and requires state agencies to make diligent efforts to expand the pool of foster and adoptive parents who represent the racial and ethnic backgrounds of children in foster care. These mandates apply to any agency that receives federal funds and is involved in some facet of foster care or adoptive placement. Congress believed that these two approaches would increase the pool of minority adoptive families and remove barriers to children's placement with available qualified adopters.

In 1996, MEPA was amended by the Removal of Barriers to Interethnic Adoption Act (IEP)<sup>3</sup> which removed the word "solely" from MEPA's prohibition against delaying or denying an adoptive placement on the basis of race, color, or national origin. IEP retained the requirement that states diligently recruit potential foster and adoptive families who reflected the ethnic and racial diversity of children. IEP also added provisions addressing the rights of prospective adoptive parents and made noncompliance with MEPA/IEP a violation of Title VI of the Civil Rights Act of 1964.<sup>4</sup>

To better understand the issues involved in transracial adoption and to assess whether MEPA was achieving its purpose, the U.S. Commission on Civil Rights (the Commission) conducted a briefing in Washington, DC on September 21, 2007. The following five questions were posed to nine panelists:

1. Has enactment of MEPA removed barriers to permanency facing children involved in the child protective system?

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<sup>1</sup> Multiethnic Placement Act of 1994, Pub. L. 103-382, 108 Stat. 4056.

<sup>2</sup> McRoy written statement, pp. 93-94 of this report.

<sup>3</sup> Pub. L. No. 104-188, 110 Stat. 1755(1996) (codified at 42 U.S.C. §§ 671(a)(18), 1996(b)). It provides that not later than January 1, 1997, neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—(a) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or (b) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

<sup>4</sup> 42 U.S.C. § 1996b (2009).

2. Do transracial adoptions serve the children's best interest or do they have negative consequences for minority children, families, and communities?
3. How effectively is the Department of Health and Human Services (HHS) enforcing MEPA?
4. What impact has HHS's enforcement of MEPA had on the efforts of prospective foster care or adoptive parents to adopt or provide foster care for minority children?
5. Has the enactment of MEPA reduced the amount of time minority children spend in foster care or the wait to be adopted?

Joan Ohl, the Commissioner for the Administration on Children, Youth and Families at HHS, stated that HHS and its Office for Civil Rights have moved beyond simply providing interpretative guidance. The agency now determines whether states are in noncompliance with MEPA and enforces its mandated financial penalties. While there is no official Federal definition of "transracial adoption,"<sup>5</sup> Commissioner Ohl cited statistics from HHS's database which showed that the percentage of adoptions in which at least one parent differed from the child in at least one racial or ethnic category has increased for non-Hispanic African American children and decreased for Hispanic and non-Hispanic white children. In addition, the average length of the adoption process has declined for African American children, as well as for Hispanic and non-Hispanic white children.<sup>6</sup> Commissioner Ohl stated that it was likely that MEPA was one of the causal factors but emphasized that the law's broad intended focus was to remove and eliminate discrimination in child welfare.<sup>7</sup>

Kay Brown, Acting Director of the Education Workforce and Income Security Team at the Government Accountability Office (GAO) discussed a GAO study on the overrepresentation of black children in foster care.<sup>8</sup> The study was based on results of a nationwide Web-based survey of state child welfare administrators in 50 states and the District of Columbia; site visits to five states; analyses of state reported data; and interviews with federal agency officials, researchers, and other experts. Ms. Brown identified higher rates of poverty as one of the factors causing black children to enter foster care in higher proportions than other children. Other factors, including bias, cultural misunderstanding, and distrust between child welfare officials and the families they serve, also contributed to the disproportionate removal of children from their homes, she said. The GAO study found that once African American children are removed from their homes, HHS data show that they remain in foster care about nine months longer than white children. For children who cannot be reunited with their families, state officials reported difficulties in finding appropriate permanent homes, in part

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<sup>5</sup> Ohl written statement, p. 48 of this report.

<sup>6</sup> The average length of time to adoption has declined from 55 to 47 months for African American children, 43 to 36 months for Hispanic children and 39 to 33 months for non-Hispanic white children.

<sup>7</sup> Ohl written statement, p. 52 of this report.

<sup>8</sup> See *African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care*, GAO-07-816 (Washington, DC: July 2007) (hereafter referred to as *African American Children in Foster Care*). The report is also available on the HHS Web site: <http://www.gao.gov/new.items/d07816.pdf> (accessed Mar. 12, 2009).

because of the challenges in recruiting adoptive parents, especially for youth who are older or have special needs.<sup>9</sup>

J. Toni Oliver, Co-Chair of the Family Preservation Focus Group, National Association of Black Social Workers, contended that MEPA ignores or accepts racial disparities at the initiation of child welfare services and focuses only on the resulting outcomes. She contended that MEPA has not eliminated minority overrepresentation in child welfare, but acknowledged that its requirement to recruit prospective foster and adoptive parents that match the ethnic and racial makeup of the communities of the children in foster care has been beneficial.<sup>10</sup> Ms. Oliver said that in large states such as California, Illinois, New York, and Texas, the proportion of black children in foster care ranged from three to more than 10 times that of white children, and the foster care system in these states and their cities was almost exclusively black. Ms. Oliver argued that the child welfare system as a whole has negative consequences for minority children, and that the focus should be more on the policies of a public welfare system that is difficult for minority families to navigate, resulting in the removal of children from their homes and their placement into the foster care system at disproportionately higher rates.

Joseph Kroll, Executive Director of the North American Council on Adoptable Children, argued that HHS was interpreting the law to mean that adoptive families should not be given special training to enable them to meet the unique needs of adopted children of a different race. He stated further that if adoptive families are not prepared for what their children may face, neither the families nor the adopted children will be well-served. Mr. Kroll claimed that HHS's Office for Civil Rights has focused on only one of the two requirements of MEPA (the removal of barriers to transracial adoptions), and has made no effort to enforce the law regarding the diligent recruitment effort. Mr. Kroll also argued that MEPA is being used to protect the interests of white adults rather than the interests of minority children. He stated that the best interests of minority children need to be considered first.

Rita J. Simon, of the School of Public Affairs, Washington College of Law at American University, gave a synopsis of a longitudinal study from her book, *Adoption, Race, and Identity: From Infancy to Young Adulthood*. Researchers followed the lives of 213 families in Illinois, Missouri, Wisconsin, Minnesota, and Michigan over a 20-year period beginning in 1970. In the first round of interviews, parents of these families were asked general questions ranging from demographics to their reasons for adopting a child of a different race. The most common response to the latter was that they could not have a first or second birth child and wanted children. The children in these families were well aware of their race or ethnicity. During the second round of interviews, only the parents were interviewed. Although they were happy with the adoptions overall, one-third of the parents reported their adopted children were exhibiting problems such as stealing from other members of the family. In the last round of interviews, the children, then adolescents, reported feeling comfortable with their racial identity. At that time, more than 90 percent of the parents reported that they were happy they had adopted across racial lines. Dr. Simon stated that an important aspect of the

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<sup>9</sup> Brown written statement, p. 63 of this report.

<sup>10</sup> 42 U.S.C. § 422(b) (2009).

20-year study was that it showed that transracial adoption causes no special problems among the adoptees or their siblings.<sup>11</sup>

Thomas Atwood, President and Chief Executive Officer of the National Council for Adoption, stated that transracial adoption led to a healthy, positive outcome for children, as evidenced by studies of transracially adopted children that reveal outcomes consistent with those of children adopted by parents of the same race. Mr. Atwood claimed that states misinterpret MEPA and abandon good social work practices for fear of violating the act. He stated that MEPA serves the best interests of children in the following ways: 1) it reduces obstacles to transracial adoption and foster care placement, which has resulted in successful transracial placement; 2) Part B of MEPA prohibits consideration of race when such consideration would delay or deny a child's placement;<sup>12</sup> 3) Part A of MEPA allows children access to transracial placements by restricting racial discrimination against prospective parents;<sup>13</sup> 4) it allows for exceptions in "circumstances where the child has a specific and demonstrable need for a same race placement"; and 5) it requires states to provide for the diligent recruitment of racially diverse parents. Mr. Atwood said that HHS should make greater efforts to clarify these issues and that states should reform their policies and guidelines to follow the actual meaning of MEPA, rather than the mistaken notion that MEPA prohibits any discussion or consideration of race.

Ruth G. McRoy, Ruby Lee Piester Centennial Professor Emerita at the University of Texas at Austin and Evan B. Donaldson Adoption Institute Board Member and Senior Fellow reported that the majority of children enter foster care because of parental neglect, while others enter as a result of physical or sexual abuse, developmental problems resulting from prenatal exposure to drugs and alcohol or some combination of these factors. She acknowledged that although there have been small increases in the number of transracial adoptions of African American children, there are thousands who are still awaiting permanent placement, especially older children. Dr. McRoy stated that data indicate that half the adoptive mothers of black children in foster care are 50 years of age or older and usually are related to or have been foster parents to the children. She also argued that if more services were provided to birth families, many African American children would not even enter foster care and languish there indefinitely. According to her, there are 510,000 children in the nation's foster care system, and the transracial adoption issue is small compared to the difficulty of finding permanent families for the 129,000 children needing adoption.

Elizabeth Bartholet, Professor of Law and Director of the Child Advocacy Program at Harvard Law School, disagreed with other panelists who argued that efforts to recruit African American parents were insufficient, citing the same rates of adoption by African Americans and whites (in her view a sign of successful recruitment), there was no need to do more to recruit potential families. She attributed the rate of African American adoptive families to a government policy of creating differential standards favoring minority applicants under a

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<sup>11</sup> Simon written statement, p.80 of this report.

<sup>12</sup> 42 U.S.C. § 5115a(a)(1)(B) (2009).

<sup>13</sup> 42 U.S.C. § 5115a(a)(1)(A) (2009).

system of race-matching children with parents that was practiced for decades.<sup>14</sup> In her opinion, MEPA is a very important law because it knocks down barriers to, and expedites the placement of, black children, and sends a clear message that states cannot and should not prefer same-race families in placing children. Dr. Bartholet distinguished between “racial sensitivity screening” and sensitizing prospective parents, and she agreed that there was nothing wrong with sensitizing adoptive parents to the realities of a race-conscious society but cautioned against a state-imposed orthodoxy on how minority children should be raised.

Linda Spears, Acting Senior Vice President of the Child Welfare League of America, stated that over the years, the number of children and the nature of those children in the system has changed dramatically and white children now constitute a small portion of the children in need of adoption planning and services. She indicated that the number of children in the nation’s out-of-home care system who need adoption has increased tremendously because of numerous social conditions and policy changes, as well as the needs of these children. In addition to the challenges mentioned throughout the briefing, these children are considered special-needs by virtue of being hard to place. She said when she interviewed both black and white service providers, she concluded that lack of competence rather than racism led to confusion about how to provide services for children and families of color before neglect and abuse, and, subsequently, removal from the home, occurred.

The panelists fielded questions from the Commissioners on issues including:

- The number of children, by race and ethnicity, who are made available for adoption annually or have been put up for adoption in recent years, and the racial makeup of the potential adoptive homes;
- The relationship between family structure in the black community and poverty resulting in the higher number of black children available for adoption;
- The recruitment efforts being undertaken to increase the pool of minority adoptive parents and whether efforts at the local level within each state will be measurable;
- The term “special needs” and its application to African American children, as well as the institutionalization of these children; and
- Training on race and racism for adoptees and adoptive parents.

A transcript of this briefing is available on the Commission’s website, [www.usccr.gov](http://www.usccr.gov), and by request from the Publications Office, U.S. Commission on Civil Rights, 624 Ninth Street, NW, Room 600, Washington, DC, 20425, (202) 376-8128, [publications@usccr.gov](mailto:publications@usccr.gov).

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<sup>14</sup> MEPA, Briefing transcript, p. 118.





## Findings and Recommendations

### Findings

1. The Multi-Ethnic Placement Act (MEPA), amended by the removal of barriers to inter-ethnic adoption provisions, was broadly intended to remove and eliminate discrimination in child welfare, both for the benefit of children who needed permanent homes, and for the benefit of prospective parents who wished to provide permanent homes. Additionally, the passage of MEPA rendered child welfare policies and law consistent with the principle of non-discrimination by race. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano and Taylor voted in favor. Commissioners Heriot, Melendez, and Yaki abstained. Commissioner Kirsanow did not participate in the vote.]
2. By enacting MEPA, Congress intended to remove barriers to transracial adoptions so as to reduce the disproportionate number of minority children awaiting placement. It was also intended to reduce the number of children remaining in non-permanent home care for long periods. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioner Gaziano voted in favor. Commissioners Heriot, Melendez, Taylor, and Yaki abstained. Commissioner Kirsanow did not participate in the vote.]
3. The number of children in foster care has grown over the last generation. A disproportionate number of foster children are black. On average, black children remain in foster care longer than children of other racial and ethnic backgrounds. Some experts believe the causes of these disproportions include, but are not limited to, racial bias, poverty, and the prevalence of single-parent families. [Chairman Reynolds, and Commissioners Gaziano and Taylor voted in favor. Vice Chair Thernstrom and Commissioners Heriot, Melendez, and Yaki abstained. Commissioner Kirsanow did not participate in the vote.]
4. Since the amended MEPA became law in 1996, the adoption of black children by white couples has increased. From 2000 to 2004, the time black children spent in foster care had decreased by four months on average. Multiracial adoption has increased, as has adoption out of foster care. [Chairman Reynolds, and Commissioners Gaziano and Taylor voted in favor. Vice Chair Thernstrom and Commissioners Heriot, Melendez, and Yaki abstained. Commissioner Kirsanow did not participate in the vote.]
5. Children are better off in permanent family settings than in foster care. [Chairman Reynolds, and Commissioners Gaziano, Heriot, and Taylor voted in favor. Vice Chair Thernstrom and Commissioners Kirsanow, Melendez, and Yaki abstained.]
6. Extensive research has shown that transracial adoption does not produce psychological or other social problems in adopted children, especially if parents are properly selected and prepared for raising children of a different race. Also, according

- to experts, transracial adoption does not seem to affect children's racial and ethnic identity. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano, Kirsanow and Taylor voted in favor. Commissioners Heriot, Melendez, and Yaki abstained.]
7. MEPA encourages state and local entities to recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children. It does not discourage transracial placements nor does it require a preference for same-race placements. The fact that black parents are adopting at the same rate as white parents suggests that successful recruitment of black parents is taking place. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano and Taylor voted in favor. Commissioners Heriot, Kirsanow, Melendez, and Yaki abstained.]
  8. MEPA's prohibition of racial discrimination in child placement does not prevent agencies from discussing with prospective adoptive and foster parents their feelings, capacities, and preferences with respect to caring for a child of a particular race or ethnicity. Nor does it prevent sensitizing parents to the problems that children might face after adoption by families of a different race or ethnicity than theirs. [Chairman Reynolds and Commissioners Gaziano and Taylor voted in favor. Vice Chair Thernstrom and Commissioners Heriot, Kirsanow, Melendez, and Yaki abstained.]
  9. Since enactment of the 1996 amendments to MEPA, the Removal of Barriers to Inter-Ethnic Adoption Act, HHS has conducted compliance reviews which found that a number of agencies and personnel have circumvented MEPA's provisions prohibiting consideration of race in placements. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano, Kirsanow, and Taylor voted in favor. Commissioner Melendez voted against. Commissioners Heriot and Yaki abstained.]
  10. In a study of state adoption policies, the Government Accountability Office (GAO) found that states consider the provision of federal subsidies to parents who adopt a child with special needs to be helpful in reducing racial disproportionality in adoptions. As used in adoption, "special needs" is a term states use for children who have characteristics they believe make adoption more difficult (e.g., being of older age, having a disability, being a member of a minority group). [Chairman Reynolds and Commissioner Taylor voted in favor. Vice Chair Thernstrom and Commissioners Gaziano, Heriot, Kirsanow, Melendez, and Yaki abstained.]

## **Recommendations**

1. It is in the best interests of the child to be placed in a safe and stable home. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano, Heriot, Kirsanow, and Yaki voted in favor. Commissioner Melendez abstained. Commissioner Taylor did not participate in the vote]
2. The U.S. Department of Health and Human Services (HHS) should continue with its vigorous enforcement of MEPA's antidiscrimination prohibitions. [Chairman

Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano, Kirsanow, Taylor, and Yaki voted in favor. Commissioners Heriot and Melendez abstained.]

3. HHS should continue to conduct compliance reviews and impose sanctions as necessary to ensure that states, agencies and personnel are in compliance with the MEPA provisions prohibiting the use of race in placement decisions. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano, Kirsanow, and Taylor voted in favor. Commissioner Melendez voted against. Commissioners Heriot and Yaki abstained.]
4. Federal subsidies to parents who adopt a child with special needs are helpful in moving minority race children from foster care to adoption and, therefore, should be maintained. [Chairman Reynolds and Commissioners Taylor and Yaki voted in favor. Vice Chair Thernstrom and Commissioners Gaziano, Heriot, Kirsanow, and Melendez abstained.]
5. In order to increase the number of homes available for the permanent placement of African American and other special needs children, Congress should allow reimbursement for legal guardianship similar to that currently provided for adoption. (Previously recommended by GAO). [Chairman Reynolds and Commissioners Taylor and Yaki voted in favor. Commissioners Gaziano, Heriot, Kirsanow, and Melendez abstained. Vice Chair Thernstrom did not participate in the vote]
6. The practice of actively recruiting same-race foster and adoptive parents must not result in discouraging transracial adoptions and placements, and it must not result in diminished efforts to find qualified adoptive parents regardless of their race. [Chairman Reynolds, Vice Chair Thernstrom, and Commissioners Gaziano, Kirsanow, and Taylor voted in favor. Commissioners Heriot, Melendez, and Yaki abstained.]



## **Summary of Proceedings**

### **First Panel: Enacting and Enforcing MEPA and an Assessment of Minority Children in Foster Care**

Commissioner Joan Ohl, Administration on Children, Youth and Families, U.S. Department of Health and Human Services

Kay Brown, Acting Director, Education Workforce and Income Security Team, Government Accountability Office

### **Second Panel: The Best Interests of Children and the Role of Race**

J. Toni Oliver, Co-Chair Family Preservation Focus Group, National Association of Black Social Workers

Joseph Kroll, Executive Director, North American Council on Adoptable Children

Dr. Rita Simon, School of Public Affairs, Washington College of Law, American University

### **Third Panel: Has MEPA Achieved Its Goal?**

Thomas Atwood, President and Chief Executive Officer, National Council for Adoption

Dr. Ruth McRoy, Evan B. Donaldson Adoption Institute

Dr. Elizabeth Bartholet, Professor of Law and Director of Child Advocacy Program, Harvard Law School

Linda Spears, Acting Senior Vice President, Child Welfare League of America

## ***First Panel: Enacting and Enforcing MEPA and an Assessment of Minority Children in Foster Care***

### **Joan Ohl**

HHS Commissioner for the Administration on Children, Youth and Families, Joan Ohl, indicated that the Multiethnic Placement Act (MEPA) was enacted as a result of much debate about adoption policies and same-race placement. She stated that at the heart of the debate was the need to promote the best interest of children by ensuring that they had permanent, safe, stable, and loving homes suited to their individual needs. However, placement delays and denials based upon illegal discrimination increased the risk that a growing number of children, especially minority children, in the child protective system would never be placed in a permanent home.<sup>1</sup> The purpose of MEPA was to remove and eliminate discrimination in child welfare for both children in need of permanent homes and prospective adoptive/foster parents.

In 1996, MEPA was amended by the provisions of the Removal of Barriers to Interethnic Adoption Provisions (IEP).<sup>2</sup> The purpose of the IEP amendments was to remove from MEPA what members of Congress believed was potentially misleading language and to further clarify that discrimination against children in need of suitable homes or prospective adoption placement was illegal.<sup>3</sup> Commissioner Ohl stated that IEP also strengthened MEPA's compliance and enforcement procedures, including the withholding of federal funds and the rights of individuals to bring action in federal court against the state or any entity alleged to have violated MEPA. Commissioner Ohl indicated that Congress passed MEPA and its amendment in order to bring the nation's child welfare policies in line with established civil rights law.<sup>4</sup>

Although MEPA was spurred by debate surrounding transracial adoption and same-race placement policies, there is no federal definition of transracial adoption.<sup>5</sup> However, according to Commissioner Ohl, the Data and Technology Division within the Bureau of Child, Youth and Families defines transracial adoption as adoptions where the adoptive parents have at least one racial or ethnic characteristic that differs from the adopted child.<sup>6</sup> According to Commissioner Ohl, research shows that transracial adoptees of color are no more likely than white in-racial adoptees to engage in negative social behavior.<sup>7</sup> She said that studies have also shown that transracial adoptees exhibit academic competence, a clear indication of

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<sup>1</sup> Joan Ohl, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, pp. 9–10, (hereafter cited as Ohl Testimony, Briefing Transcript).

<sup>2</sup> The Howard M. Metzenbaum Multiethnic Placement Act of 1994 as amended by Pub. L. 104-188, 110 Stat. 1983 (1996). See 42 U.S.C. §§ 671(a), 1996 (2009).

<sup>3</sup> Ohl Testimony, Briefing Transcript, p. 10.

<sup>4</sup> *Ibid.*, pp. 10–11.

<sup>5</sup> *Ibid.*, p. 11.

<sup>6</sup> *Ibid.*, p. 11.

<sup>7</sup> *Ibid.*, p. 11.

positive wellbeing. Transracial adoptees, she said, are adopted faster than in-racial adoptees of color, which results in a lesser amount of time children languish in foster care without the benefit of a permanent family.<sup>8</sup> She stated that between 1996 and 2003, the average amount of time for an African American child to be adopted was 17.7 months compared to 15 months for children of other races.<sup>9</sup>

Commissioner Ohl stated that both the Administration for Children and Families (ACF) and the Office for Civil Rights (OCR), within the U.S. Department of Health and Human Services (HHS), work on MEPA jointly, and the administration has moved beyond simply providing interpretative guidance to finding states in violation of the law and imposing its mandated financial penalties.<sup>10</sup> In 2003, OCR issued a letter of findings and ACF imposed a \$1.8 million penalty when it concluded that Hamilton County, Ohio, and the state of Ohio had violated both MEPA and Title VI of the Civil Rights Act of 1964.<sup>11</sup> In 2005, OCR issued a letter of findings and ACF imposed a penalty of \$107,481.07 when it determined that the South Carolina Department of Social Services violated both MEPA and Title VI.<sup>12</sup> According to Commissioner Ohl, these letters emphasized that strict scrutiny was the appropriate standard of constitutional review and that the law permits consideration of race, color, or national origin on rare occasions to the degree that it is absolutely necessary.

In addition to issuing letters of findings, penalties, and corrective action plans, OCR and ACF have taken additional steps to eliminate adoption and foster care delays or denials due to race, color, or national origin. According to Commissioner Ohl, OCR has conducted 130 investigations and entered into agreements with several state agencies to modify their practices.<sup>13</sup> Commissioner Ohl also indicated that through the issuance of policy statements and technical assistance, ACF has reinforced its commitment to rigorous enforcement of MEPA.<sup>14</sup>

Commissioner Ohl indicated that MEPA's mandatory penalties are steep and cut into federal funds states need to operate their child welfare systems, providing a strong incentive for agency directors and staff to comply with the law.<sup>15</sup> She said MEPA actions against Ohio and South Carolina, in combination with other broad nationwide technical assistance efforts, have increased states' knowledge and awareness of what is and is not accepted legal practice.<sup>16</sup>

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<sup>8</sup> Ibid., pp. 11–12.

<sup>9</sup> Ibid., p. 12. These data were obtained from the Adoption and Foster Care Reporting System (AFCARS), which is a collection of case information on all children in foster care for whom child welfare agencies have the responsibility for placement.

<sup>10</sup> Ibid., p. 12.

<sup>11</sup> Ibid., pp. 12–13. For information on the letter of findings, *see also*, <http://www.hhs.gov/ocr/office/news/2004/complianceact.html> (accessed Jan. 22, 2009).

<sup>12</sup> Ibid., p. 13.

<sup>13</sup> Ibid., p. 14.

<sup>14</sup> Ibid., p. 14.

<sup>15</sup> Ibid., p. 15.

<sup>16</sup> Ibid., p. 15.



In response to the Commission's inquiry as to whether MEPA has been effective in reducing the amount of time children spend in foster care, Commissioner Ohl stated, "MEPA legislation was enacted in part to prevent children from languishing in out-of-home care until foster or adoptive parents of the same race were found. So when we look at whether the enactment of MEPA has reduced the amount of time minority children spend in foster care or wait to be adopted, it is important to keep in mind the law's broader intended focus, which is to eliminate and remove discrimination in child welfare."<sup>17</sup>

Commissioner Ohl noted that according to the Adoption and Foster Care Reporting System (AFCARS), the percentage of non-Hispanic African American children who were adopted by at least one parent who differed from them in at least one characteristic or ethnic characteristic increased from 24 percent in 2000 to 31 percent in 2005.<sup>18</sup> The percentage of Hispanic children who were adopted by at least one parent who differed from them in at least one characteristic or ethnic characteristic decreased from 72 percent in 2000 to 63 percent in 2005. For non-Hispanic white children, the percentage decreased from 11 percent in 2000 to eight percent in 2005.<sup>19</sup> Between fiscal years 2000 and 2005, the amount of time to discharge from foster care declined four months for African American children, two months for Hispanic children, and not at all for non-Hispanic white children.<sup>20</sup> The average time for adoption has declined to eight months for African American children, seven months for Hispanic Children, and six months for non-Hispanic white children.<sup>21</sup> Commissioner Ohl stated that these declines cannot be attributed solely to MEPA, given the directions and percentage changes and trends of the aforementioned data; however, it is likely that MEPA was one of the causal factors in these outcomes.<sup>22</sup> Commissioner Ohl also stated that the Adoption and Safe Families Act (AFSA) may have played a role in these declines which merited further review.

In closing, Commissioner Ohl added that aside from looking at the aforementioned outcomes, ACF does an extensive child and family service review and examines the recruitment efforts of foster and adoptive parents in all 50 states, the District of Columbia, and Puerto Rico.<sup>23</sup>

## **Kay Brown**

Ms. Brown stated that although children of all races are equally likely to suffer from abuse and neglect according to HHS data, a Government Accountability Office (GAO) study showed that African American children across the nation were more than twice as likely as

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<sup>17</sup> Ibid., p. 16.

<sup>18</sup> Ibid., pp. 16–17.

<sup>19</sup> Ibid., p. 17.

<sup>20</sup> Ibid., p. 17.

<sup>21</sup> Ibid., p. 17.

<sup>22</sup> Ibid., p. 17.

<sup>23</sup> Ibid., p. 18.

white children to enter foster care.<sup>24</sup> Ms. Brown also stated that although state data show patterns of disproportionate representation in foster care for Native American children, and in certain locations for Hispanic and Asian subgroups, the report she was discussing focused on African American children.

According to Ms. Brown, the Chairman of the House Committee on Ways and Means, the Honorable Charles B. Rangel, was concerned about why black children were overrepresented in foster care and asked GAO to study 1) the major factors that influence the proportion of African American children entering and remaining in foster care versus those of other races and ethnicities; 2) the extent to which states and localities have implemented strategies that appear promising in addressing this issue; and 3) how key federal child welfare policies have influenced this issue.<sup>25</sup> Ms. Brown stated that the GAO study was “based on the results of a nationwide web-based survey of state child welfare administrators in 50 states and the District of Columbia, as well as site visits to five states, analyses of state reported data, and interviews with cognizant federal agency officials, researchers and issue area experts.”<sup>26</sup>

Ms. Brown indicated that state child welfare directors and researchers reported a complex set of interrelated factors beginning with a higher rate of poverty among African American families. She said that, although children of all races live in poverty to some degree, African American children as a whole are nearly four times more likely than children of other races to live in poverty.<sup>27</sup> Studies have shown that families living in poverty have difficulty gaining access to social services, counseling, and housing services that could assist in helping families stay together.<sup>28</sup> Other factors, including bias or cultural misunderstanding and distrust between child welfare decision makers and the families they service, also contribute to the disproportionate removal of children from their homes.<sup>29</sup> Ms. Brown indicated that according to HHS data, once African American children are removed from their homes, they remain in foster care about nine months longer than white children.<sup>30</sup> State officials attribute these extended stays to similar factors, such as challenges parents have in obtaining subsidized housing, substance abuse treatment, and other required services before children can be reunited with their parents.<sup>31</sup> For those children who cannot be reunited with their families, state officials reported difficulties in finding appropriate permanent homes because of problems recruiting adoptive parents willing to adopt older or special-needs youth.<sup>32</sup> Ms. Brown stated that African American families are more likely than white families to rely on

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<sup>24</sup> Kay Brown, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 19, (hereafter cited as Brown Testimony, Briefing Transcript). See also, *African American Children in Foster Care*, p. 1.

<sup>25</sup> Brown Testimony, Briefing Transcript, pp. 19–20.

<sup>26</sup> *Ibid.*, p. 20.

<sup>27</sup> *Ibid.*, p. 20.

<sup>28</sup> *Ibid.*, p. 20.

<sup>29</sup> *Ibid.*, pp. 20–21.

<sup>30</sup> *Ibid.*, p. 21.

<sup>31</sup> *Ibid.*, p. 21.

<sup>32</sup> *Ibid.*, p. 21.

kinship care as a source of foster care. This type of care is less traumatic for children, but it extends their time in foster care.<sup>33</sup>

In response to the second purpose of the GAO study, Ms. Brown indicated that most states reported implementing strategies deemed promising for reducing the overrepresentation of African American children in foster care. While researchers and officials agree that no single strategy would fully address the issue, they support increasing access to support services and the availability of permanent homes, using staff training and formal risk assessment tools to reduce bias, and, searching for fathers and paternal kin.<sup>34</sup>

Ms. Brown indicated that in regard to the study's third objective, states reported that some federal policies decreased the disproportionality, but others increased it.<sup>35</sup> She said that nearly half of the child welfare directors surveyed reported that the ability to use federal social services block grants, such as the Temporary Assistance for Needy Families, was helpful.<sup>36</sup> These grants, when used for preventive services and family supports, are appropriate for African American and other families living below poverty. States also indicated that federal policies that promote adoption, such as the requirement under MEPA to recruit minority adoptive families diligently, were helpful.<sup>37</sup> Ms. Brown said that 22 states reported that this requirement contributed to a decrease in the proportion of African American children in foster care; however, state officials claimed it was difficult to recruit a racially and ethnically diverse pool of foster and adoptive parents. HHS reported that more than half of all states were not meeting the federal performance goals for this requirement.<sup>38</sup> State officials noted a shortage of willing, appropriate, and qualified parents to adopt African American children, particularly older ones. Researchers cited a lack of federal guidance and state and local agency resources to implement new recruiting and training initiatives.<sup>39</sup> Ms. Brown indicated that because of these challenges, nine states in the GAO survey reported that the policy requiring diligent recruitment had no effect on the proportion of African American children in foster care, and 15 states reported that they were unable to determine the effect on African American children.<sup>40</sup>

According to Ms. Brown, states considered the federal provision for subsidies to parents who adopt a child with special needs as helpful in reducing disproportionality.<sup>41</sup> Ms. Brown indicated that according to HHS data, from 2003 to 2005, states designated more than 80 percent of adoptions as special needs, thus enabling families to receive federal financial

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<sup>33</sup> Ibid., pp. 21–22.

<sup>34</sup> Ibid., p. 22.

<sup>35</sup> Ibid., p. 22.

<sup>36</sup> Ibid., p. 23.

<sup>37</sup> See 42 U.S.C. § 622(b)(7) (2009).

<sup>38</sup> Brown Testimony, Briefing Transcript, p. 23.

<sup>39</sup> Ibid., p. 23.

<sup>40</sup> Ibid., pp. 23–24.

<sup>41</sup> Ibid., p. 24. Ms. Brown stated that as used here, “special needs” is a term states use for children having characteristics believed to make adoption more difficult, such as being of older age, having a disability, or being a member of a minority group.

subsidies for these adoptions.<sup>42</sup> Despite these subsidies, however, over the past five years, African American children have consistently experienced lower rates of adoption than children of other races and ethnicities.<sup>43</sup>

According to Ms. Brown, states reported being constrained by the lack of subsidies for legal guardianship,<sup>44</sup> which provides permanent families for children and reduces the number of children in foster care. She also said that state child welfare directors found MEPA's provision encouraging race-neutral adoptions had less effect than other policies in reducing the African American presence in foster care.<sup>45</sup> Eighteen states reported that it had no effect, 15 reported that it would help reduce disproportionality, and 12 states indicated that they were unable to determine the effect.<sup>46</sup> A 2003 HHS study noted that the implementation of MEPA was hindered by confusion over what the law allowed and prohibited. Ms. Brown said that officials in states recently visited by GAO also blamed such confusion for hindering their implementation of MEPA.<sup>47</sup>

Ms. Brown stated that issues affecting the disproportionate representation of African American children in foster care are pervasive, continuing, and complex.<sup>48</sup> Those issues appear at each decision point in the welfare process and to some degree have an effect on nearly every state. She said that despite HHS' dissemination of information, states indicated that they needed additional information and technical assistance to strengthen their efforts to reduce the overrepresentation of African American children in foster care.<sup>49</sup>

## Discussion

Vice Chair Thernstrom led the discussion by asking how many children, by race and ethnicity, are made available for adoption annually or have been put up for adoption in recent years. Commissioner Ohl replied that there were approximately 500,000 children in the foster care system in any given year and roughly 115,000 children were ready to be adopted.<sup>50</sup> As of 2004, 38 percent of the 115,000 children ready to be adopted were African American, two percent Alaskan Natives, 14 percent Hispanic, 38 percent white (non-Hispanic), and the percentage of Asian Americans was negligible.<sup>51</sup> Vice Chair Thernstrom then inquired as to the racial makeup of the parental pool or potential adoptive homes. Commissioner Ohl

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<sup>42</sup> Ibid., p. 24.

<sup>43</sup> Ibid., p. 24.

<sup>44</sup> Ibid., p. 24. Ms. Brown stated that "legal guardianship is formally recognized under federal law as a permanent placement option and is available for relatives who want to permanently care for children without necessarily adopting them."

<sup>45</sup> Ibid., p. 25.

<sup>46</sup> Ibid., p. 25.

<sup>47</sup> Ibid., pp. 25–26.

<sup>48</sup> Ibid., p. 26.

<sup>49</sup> Ibid., p. 26.

<sup>50</sup> U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 27, (hereafter cited as MEPA, Briefing Transcript).

<sup>51</sup> Ibid., pp. 27–29.

replied that the state, not HHS, collects this type of data.<sup>52</sup> Vice Chair Thernstrom asked whether it was safe to assume that the number of African American adoptive homes was less than the 38 percent of African American children waiting to be adopted. Commissioner Ohl could not answer definitively because she did not have that data, but she added that when ACF performs its child and family service reviews of states, it looks at recruitment and whether there are sufficient adoptive placements that meet the needs and reflect the diversity of the children who are both in foster care and ready to be adopted.<sup>53</sup>

Vice Chair Thernstrom then asked Ms. Brown if poverty and family structure, particularly the high rate of single parent households in the black community, were closely related and resulted in the higher number of black children available for adoption. Vice Chair Thernstrom suggested that both poverty and family structure had an impact on the availability of adoptive parents since young single mothers are not going to seek another child for which to care.<sup>54</sup> Ms. Brown said that her data showed that children living in single-parent families are more likely to be at risk of harm than children living in two-parent families.<sup>55</sup> Commissioner Ohl added that when she was Secretary of Health and Human Resources in West Virginia, she worked extensively with faith- and community-based organizations to ensure that there was a diversity of potential placements for both foster care and adoption. She said that it takes diligent recruitment efforts, and HHS holds states accountable for using effective strategies for recruiting adoptive and foster care parents.<sup>56</sup>

Commissioner Melendez asked what was being done to recruit minority adoptive parents. Commissioner Ohl responded that HHS provides states across the country with extensive training regarding recruitment<sup>57</sup> and offers a national program, AdoptUSKids, which provides training and technical assistance to help states find and support foster and adoptive families for waiting children. AdoptUSKids also includes a Web site ([www.AdoptUsKids.org](http://www.AdoptUsKids.org)), which is a tool for connecting foster and adoptive families with waiting children throughout the United States. It features an online photo-listing service that highlights children awaiting adoptions<sup>58</sup> and offers free registration and participation for home-studied families and foster adoption professionals.<sup>59</sup> Commissioner Ohl stated that as of August 2007, over 8,500 children featured on [AdoptUSKids.org](http://AdoptUSKids.org) were removed from that Web site because they were adopted.<sup>60</sup> She added that she expects that number to hit 10,000 relatively soon.

Aside from training and technical assistance, Commissioner Ohl said that HHS has launched several public service announcements and campaigns in collaboration with the Ad Council.

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<sup>52</sup> *Ibid.*, p. 29.

<sup>53</sup> *Ibid.*, p. 30.

<sup>54</sup> *Ibid.*, pp. 30–32.

<sup>55</sup> *Ibid.*, p. 31.

<sup>56</sup> *Ibid.*, p. 32.

<sup>57</sup> *Ibid.*, p. 33.

<sup>58</sup> *Ibid.*, p. 33.

<sup>59</sup> See Commissioner Ohl's written statement attached to this report.

<sup>60</sup> MEPA, Briefing Transcript, p. 33.

One of the campaigns, which focused on the recruitment of adoptive families for children older than nine years of age, won a national award.<sup>61</sup> Although Commissioner Melendez indicated that he thought HHS was providing a wide range of education, he inquired as to what Commissioner Ohl thought the minimal training and education should be for families adopting transracial children since every state has some flexibility to recruit differently.<sup>62</sup> Commissioner Ohl responded that ACF was preparing a PowerPoint presentation with OCR that would target states and communities. She added that within a few months, ACF would be providing Webcast training to states and communities. Vice Chair Thernstrom asked if there was a video that she could watch if she was a prospective parent.<sup>63</sup> Commissioner Ohl said that in addition to videos, there was a wealth of materials on the AdoptUSKids Web site.

Commissioner Melendez asked if local action in each state would have measurable effectiveness in recruiting minority adoptive parents. Commissioner Ohl indicated that ACF looked at recruitment when it 1) reviewed the annual plans that states submitted as part of their Title IV B funding, and 2) performed the child and family service reviews.<sup>64</sup> Commissioner Ohl explained that child and family service reviews involved pulling records and having ACF take an extensive look at cases and everyone involved in each case. She said that the child welfare system must change in coordination and collaboration with the court system,<sup>65</sup> and that there have been program improvement plans in every state, the District of Columbia, and Puerto Rico. While change was occurring in child welfare across the country, she said it was not happening as quickly as some people might like.

Commissioner Taylor inquired why there were so few Asian Americans in the child welfare system. Commissioner Ohl suggested it had a lot to do with how such families took care of one another; when families step in to help those children, they do not come to the attention of the child welfare system.<sup>66</sup> Commissioner Taylor asked what is present in the Asian American community that is absent from the African American community. Ms. Brown responded that she did not have the data to answer that question because the focus of GAO's study was African American children.<sup>67</sup> Vice Chair Thernstrom asserted that the answer to Commissioner Taylor's question was the higher percentage of intact families.<sup>68</sup>

Commissioner Taylor then asked how long minority children have been included in the definition of special needs. Ms. Brown responded that states have the ability to determine which factors make it difficult for children to be adopted.<sup>69</sup> Commissioner Ohl indicated that

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<sup>61</sup> Ibid., p. 34.

<sup>62</sup> Ibid., p. 34.

<sup>63</sup> Ibid., p. 36.

<sup>64</sup> Ibid., p. 37.

<sup>65</sup> Ibid., p. 38.

<sup>66</sup> Ibid., p. 40.

<sup>67</sup> Ibid., p. 40.

<sup>68</sup> Ibid., p. 41.

<sup>69</sup> Ibid., pp. 41–42.

when she was Secretary of Health and Human Resources 10 years ago, minority children, as well as sibling groups and older children, were included in the definition of special needs.<sup>70</sup>

## ***Second Panel: The Best Interests of Children and the Role of Race***

### **J. Toni Oliver**

Ms. Oliver began by stating that her intent was “to make a case that shows how MEPA does not remove barriers to permanency facing children involved in the foster care system.”<sup>71</sup> According to Ms. Oliver, MEPA actually ignores or accepts racial disparities on the front end of child welfare services and only focuses on the resulting outcome.<sup>72</sup> Ms. Oliver also stated that, although MEPA had in no way eliminated discrimination in child welfare, it did have one redeeming feature, which was its requirement to recruit prospective foster and adoptive parents reflective of the ethnic and racial communities of the children in foster care.<sup>73</sup> She claimed that enforcement decisions on this requirement have been ignored since the inception of MEPA.

In providing a historical perspective of the foster care system, Ms. Oliver indicated that the foster care population more than doubled within a 17-year span, increasing from 262,000 in 1982 to 586,000 in 1999.<sup>74</sup> The growth in the foster care population was concentrated in cities with significant black populations. Ms. Oliver noted that black families were more likely than any other ethnic group to have their children removed and placed into foster care.<sup>75</sup> According to Ms. Oliver, in 1986, black children made up 15 percent of the United States population under the age of 18, but accounted for 25 percent of those entering foster care and 35 percent of those remaining in foster care at the end of the year.<sup>76</sup> According to HHS’ AFCARS report, at the end of October 2000, black children accounted for 42 percent of all children in foster care, although they represented only 17 percent of the nation’s youth.<sup>77</sup> Ms. Oliver indicated that Asian and Latino children were underrepresented in the foster care system. Latino children, who outnumber black children the nation’s population, accounted for only 15 percent of the foster care population.<sup>78</sup> In 1995, California reported that five percent of all black children versus less than one percent of Latino children were in foster care.<sup>79</sup> Asian Pacific Islander children represented only one percent of the nation’s foster care population.

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<sup>70</sup> Ibid., p. 42.

<sup>71</sup> J. Toni Oliver, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 46, (hereafter cited as Oliver Testimony, Briefing Transcript).

<sup>72</sup> Oliver Testimony, Briefing Transcript, p. 47.

<sup>73</sup> Ibid., p. 47.

<sup>74</sup> Ibid., p. 47.

<sup>75</sup> Ibid., pp. 47–48.

<sup>76</sup> Ibid., p. 48.

<sup>77</sup> Ibid., p. 48.

<sup>78</sup> Ibid., p. 48.

<sup>79</sup> Ibid., p. 48.

According to Ms. Oliver, the proportion of black children in the foster care system ranged from three to more than 10 times that of white children in large states such as California, Illinois, New York, and Texas.<sup>80</sup> The foster care system in these states and/or their cities was almost exclusively black. For example, black children accounted for more than 75 percent of the Illinois foster care system, and 95 percent of the foster care population in Chicago and over 70 percent in San Francisco.<sup>81</sup> Ms. Oliver stated further that at the end of 1997, of the 42,000 children in New York City foster care, only 1,300 or three percent were white.<sup>82</sup> Of New York City's foster care population, black and Latino children made up 73 and 24 percent, respectively; and in central Harlem, one in three black children were placed into foster care while the odds for white children were one out of 385.<sup>83</sup> White children accounted for 30 percent of New York's total population, but only three percent of its foster care population.<sup>84</sup>

Ms. Oliver indicated that over representation in the foster care system was greater in areas where black families were fewer in number, which researchers refer to as the "visibility hypothesis."<sup>85</sup> In observing census data in California, where blacks constituted 15 percent of the census, they were placed in foster care at a rate three times greater than their census proportion.<sup>86</sup> Where blacks constituted less than two percent of the census, their foster care placement rate was 15 times greater.<sup>87</sup>

According to Ms. Oliver, a 1997 HHS national study stated that minority children, particularly African American children, were more likely to be in foster care than receive in-home services when they had the same problems and characteristics as white children.<sup>88</sup>

In response to the Commission's question as to whether transracial adoption served the best interest of minority children or had negative consequences, Ms. Oliver indicated that the child welfare system as a whole had negative consequences on minority children.<sup>89</sup> In order to address the effect of child welfare policies on African American families, she said it was critical to understand how race influenced child welfare decision making. She acknowledged that the child welfare system was designed to detect and address neglect and abuse in poor families, and that African American families are disproportionately poor. Rarely, do children in foster care come from affluent families.

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<sup>80</sup> Ibid., p. 48.

<sup>81</sup> Ibid., p. 49.

<sup>82</sup> Ibid., p. 49.

<sup>83</sup> Ibid., p. 49.

<sup>84</sup> Ibid., p. 49.

<sup>85</sup> Ibid., p. 49.

<sup>86</sup> Ibid., p. 49.

<sup>87</sup> Ibid., p. 49.

<sup>88</sup> Ibid., pp. 49–50.

<sup>89</sup> Ibid., p. 50.



Ms. Oliver indicated that according to Dorothy Roberts,<sup>90</sup> nearly all studies show that poverty, not maltreatment, was the single most important predictor of placement in foster care and the amount of time spent there. These studies highlighted that poor children are more likely to 1) be reported to child protective services, 2) have reports substantiated, 3) be removed from their home, and 4) remain in out-of-home substitute care for long periods of time.<sup>91</sup>

According to Ms. Oliver, studies have also shown that high-poverty zip codes in comparison to medium-poverty zip codes have three times as many substantiated cases of physical abuse.<sup>92</sup> According to a 1992 study, families receiving welfare were at the greatest risk for involvement with the children welfare system, especially for neglect. Ms. Oliver indicated that the overrepresentation of disadvantaged children in the foster care system is due more to greater monitoring of poor families, the use of public hospitals as opposed to private physicians, greater numbers of social service workers and police cruising neighborhoods, public housing, and a higher rate of reporting abuse than to increased incidents of abuse.<sup>93</sup> One researcher indicated that middle class families have latitude for irresponsibility that poverty does not afford.<sup>94</sup>

As indicated by Ms. Oliver, several studies have cited inadequate housing as the reason black children enter the foster care system and are not reunited with their parents.<sup>95</sup> Ms. Oliver noted an article that asserted parental income, rather than the severity of the alleged child maltreatment or the parent's psychological makeup, was a better predictor of why children are removed from the home.<sup>96</sup> A 1997 HHS national study found that black children in foster care were more likely to come from families who had housing problems, and that among families with housing problems, white families were offered housing services at nearly twice the rate of black families (43 percent versus 25 percent, respectively).<sup>97</sup> Black families were more likely to be offered parenting skills services, a benefit not as tangible as housing services.<sup>98</sup>

In highlighting findings from the National Incidence Study of Child Abuse and Neglect, Ms. Oliver stated that black parents were no more likely than parents of other racial and ethnic groups to mistreat their children, and there was no difference in maltreatment rates between single-parent and two-parent families when income was held constant.<sup>99</sup> While this study

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<sup>90</sup> Ibid., p. 50. Dorothy Roberts is a Professor of Law at Northwestern University Law School and the author of *Shattered Bonds: The Color of Child Welfare* (New York: Basic Civitas Books, 2003), in which she argued that the overwhelming number of black children in foster care points to racial bias.

<sup>91</sup> Ibid., pp. 50–51.

<sup>92</sup> Ibid., p. 51.

<sup>93</sup> Ibid., p. 51.

<sup>94</sup> Ibid., p. 51.

<sup>95</sup> Ibid., p. 53.

<sup>96</sup> Ibid., p. 53.

<sup>97</sup> Ibid., p. 53.

<sup>98</sup> Ibid., p. 53.

<sup>99</sup> Ibid., p. 53.

found a strong connection between income and child mistreatment, poverty alone, more than any other factor, resulted in the scrutinizing of families.<sup>100</sup> The study suggested that racial and ethnic groups received differential attention during different phases of the referral, investigative, and services allocation process.<sup>101</sup> Ms. Oliver noted that there was documentation indicating that black children were more likely than white children with similar injuries to be identified as abused.<sup>102</sup>

According to Ms. Oliver, research shows racial bias is also present in the reporting of drug use. For example, she said drug testing occurs almost exclusively in public hospitals where poor people are more likely to obtain services, while private physicians who treat well-off women refrain from drug testing.<sup>103</sup> She claimed that research also showed that black women were far more likely than white women to be reported for prenatal substance abuse and to have their newborns placed in foster care.<sup>104</sup> Although she said that the *New England Journal of Medicine* found no significant difference between drug use along racial or economic lines, Ms. Oliver claimed that African American women were ten times more likely than their white counterparts to be reported to government authorities.<sup>105</sup> Ms. Oliver cited a 1993 study of women whose newborn babies tested positive for cocaine, wherein African American women were 72.9 percent more likely than white women and twice as likely as their Latino counterparts to have their babies removed by child protective services.<sup>106</sup>

In her closing remarks, Ms. Oliver charged that MEPA punished poor families—African American families in particular—by taking their children. She urged less focus on too few adoptions and more on what she deemed a foster care system that removes too many children from their homes.

## Joseph Kroll

Mr. Kroll, an international transracial adoptive parent, began his presentation by stating that the North American Council on Adoptable Children (NACAC) has evolved from an organization that was composed of primarily transracial adoptive families, specifically white adults and children of color.<sup>107</sup> However, after NACAC published *Barriers to Same Race Placement*, it was branded as an opponent of transracial adoption, which he denied. Mr. Kroll indicated that NACAC focuses primarily on the following: 1) that children and families of color have an opportunity to be matched within their communities, which is one of the goals of the MEPA/IEP legislation, and 2) that families who adopt transracially have adequate

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<sup>100</sup> Ibid., pp. 53–54.

<sup>101</sup> Ibid., p. 54.

<sup>102</sup> Ibid., p. 54.

<sup>103</sup> Ibid., p. 54.

<sup>104</sup> Ibid., p. 54.

<sup>105</sup> Ibid., p. 55.

<sup>106</sup> Ibid., p. 55.

<sup>107</sup> Joseph Kroll, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 57, (hereafter cited as Kroll Testimony, Briefing Transcript).

training so that they can parent their children appropriately.<sup>108</sup> Mr. Kroll has witnessed the rejection that occurs when adopted children reach the age of 20–21 and choose to identify with their culture of origin.<sup>109</sup> This is one of the reasons Mr. Kroll believes it is important to prepare families so that they can provide their children options when they choose their racial identity.<sup>110</sup>

Mr. Kroll acknowledged that he was part of the discussions surrounding the passage of MEPA, and met three times with Senator Metzenbaum. During these direct meetings, Mr. Kroll grew to understand Senator Metzenbaum's anger over the case in Ohio where a child was moved from a white to a black family and died.<sup>111</sup> Mr. Kroll stated, however, that he did not think legislation should be enacted based on only one case. He said that as the legislation evolved, Senator Metzenbaum acquired an understanding of the opposite side, which was that families of color allegedly were being systematically denied access to children in their own communities.<sup>112</sup> NACAC has documented that 50 percent of black and two-thirds of Latino children in the private sector were transracially adopted.<sup>113</sup> According to Mr. Kroll, not much has changed, in that even in today's private sector, the vast majority of infants are adopted transracially.<sup>114</sup>

Mr. Kroll spoke about two items of interest in terms of the discussion on MEPA and whether or not race should be a factor in adoption and foster care. First, on October 5, 1994, Senator Metzenbaum commented, "Let me make my position clear. If there is a white family and a black family that want to adopt a black child and they are equal in all respects, then the black family ought to have preference."<sup>115</sup> Mr. Kroll felt that it was clear from this comment that Senator Metzenbaum stated for the record that race should be a factor.<sup>116</sup> Second, the co-sponsors acknowledged the importance of the second half of the bill focusing on increasing the pool of appropriate and available prospective families for children from their own communities.<sup>117</sup>

Mr. Kroll acknowledged that there were discussions in the foster care and adoption community concerning MEPA; however, he claimed that the IEP amendments were passed in 1996 without discussions on the record in Congress.<sup>118</sup> He further stated that the bill passed despite the fact that in March 1995, during the block grant debate, Congressman (now Senator) Jim Bunning (R-KY) claimed that MEPA was not working.

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<sup>108</sup> Kroll Testimony, Briefing Transcript, p. 57.

<sup>109</sup> *Ibid.*, p. 58.

<sup>110</sup> *Ibid.*, p. 58.

<sup>111</sup> *Ibid.*, p. 58.

<sup>112</sup> *Ibid.*, pp. 58–59.

<sup>113</sup> *Ibid.*, p. 59.

<sup>114</sup> *Ibid.*, p. 59.

<sup>115</sup> *Ibid.*, p. 59. *See also* 140 CONG. REC. S.14169 (daily ed. Oct. 5, 1994) (statement of Sen. Metzenbaum).

<sup>116</sup> *Ibid.*, p. 59.

<sup>117</sup> *Ibid.*, pp. 59–60.

<sup>118</sup> *Ibid.*, p. 60.

In responding to the question of whether or not transracial adoptions served the children's best interest or had negative consequences for minority children, families, and communities, Mr. Kroll said that HHS was interpreting the law to mean being color blind in training families, which he claimed was a disservice and naïve.<sup>119</sup> He said a 2003 HHS memorandum<sup>120</sup> instructed state child welfare agencies to ensure that they did not take action that deterred families from pursuing foster care or adoption across lines of race, color, or national origin. He claimed this has had a chilling effect. Even though it did not read as an explicit prohibition against preparing families to address issues of race and culture, it had in effect hampered such preparation.<sup>121</sup>

In response to the question about how effectively HHS enforced MEPA/IEP, Mr. Kroll responded that although HHS's Office for Civil Rights was charged with enforcing MEPA, "the enforcement has focused only on one of the two requirements, removal of barriers to transracial adoptions, with no enforcement efforts directed to the law's requirement of diligent recruitment of families who represent the racial and ethnic backgrounds of children in foster care."<sup>122</sup> According to Mr. Kroll, HHS had performed 130 investigations, all of which related to the delay or deny portion of MEPA.<sup>123</sup>

Mr. Kroll questioned why there had not been enforcement efforts directed toward the recruitment portion of MEPA since nearly half of the states in the child welfare service reviews failed to pass.<sup>124</sup> He claimed that a review of the child welfare policy manual did not show the means by which to enforce this portion of the law.<sup>125</sup> He considered this a mistake and urged taking a look at the recruitment of families as required by the second part of MEPA.

It has been argued that MEPA, through transracial adoption, would result in the adoption of children across age groups. Mr. Kroll said that this has not come about; roughly two-thirds of transracial adoptions in 2002 were of children under age five, and older children were more often adopted by relatives.<sup>126</sup>

In closing, Mr. Kroll indicated that NACAC offered, through his prepared testimony, a series of recommendations that focused on keeping children as close as possible to their family, community, and the people who could meet their needs.<sup>127</sup> He said, "the Civil Rights Act of 1964 is being interpreted to help gain white families access to children of all races, but it is

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<sup>119</sup> *Ibid.*, p. 62.

<sup>120</sup> U.S. Department of Health and Human Services, Information Memorandum ACYF-CB-IM-03-01, Mar. 21, 2003. Available at [http://www.acf.hhs.gov/programs/cb/laws\\_policies/policy/im/2003/im0301.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2003/im0301.htm) (accessed Jan. 22, 2009).

<sup>121</sup> Kroll Testimony, Briefing Transcript, p. 61.

<sup>122</sup> *Ibid.*, p. 62.

<sup>123</sup> *Ibid.*, p. 62.

<sup>124</sup> *Ibid.*, p. 62.

<sup>125</sup> *Ibid.*, p. 62.

<sup>126</sup> *Ibid.*, pp. 62–63.

<sup>127</sup> *Ibid.*, p. 64.

not necessarily protecting the best interests of minority children. And I think that until we acknowledge that the Civil Rights Act is being used more to protect the interests of white adults rather than minority children, that we're missing the point. And if the Act interpretation really has this impact, then maybe we need to review the Civil Rights Act of 1964 because the best interests of minority children need to be considered first."<sup>128</sup>

### Rita Simon

Dr. Simon testified before Congress in support of MEPA, and her research was used to support its passage.<sup>129</sup> One of her studies was published in the book *Adoption, Race, and Identity: From Infancy to Young Adulthood*.<sup>130</sup> It involved following 213 families in Illinois, Missouri, Wisconsin, Minnesota, and Michigan over a 20-year period beginning in 1970, covering both their birth and adopted children from the ages of three or four years through adulthood.<sup>131</sup> Sixty-five percent of the children who were adopted in these families were black, 11 percent were Native American, five percent were Korean, five percent were Mexican, and 14 percent were white.<sup>132</sup> The names of these families were obtained from the Open Door Society.<sup>133</sup>

Dr. Simon indicated that the first time the children were interviewed, they were given the doll test, where the children were given a black doll, a white doll, and in this case, an Asian-looking doll. The children were asked numerous questions including which doll was prettier or smarter; which doll would they want as a friend; and which doll looked like them.<sup>134</sup> Dr. Simon stated that this study was the first one in which the children did not pick the white doll as the prettier or smarter one, or the one they would like to have as a friend; and the children correctly identified the doll that looked like them.<sup>135</sup> Dr. Simon found that at a very young age, these children understood who they were. Their parents were asked questions such as their demographics, occupation, and religion; why they chose their occupation; and why they wanted to adopt a child of a different race. At the time, the most common reason for adoption was that the parents could not have a first or second birth child and they wanted children.<sup>136</sup>

During the second round of interviews, when the children were about nine or 10 years of age, only the parents were interviewed. For the most part, the parents reported that things were going well; however, one-third of the parents indicated that the adopted children were

<sup>128</sup> Ibid., p. 64. See also, Joe Kroll, "Re: U.S. Commission on Civil Rights MEPA briefing on September 21, 2007," e-mail to Margaret Butler, U.S. Commission on Civil Rights, Mar. 11, 2009, 1:14 p.m.

<sup>129</sup> Rita Simon, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 65, (hereafter cited as Simon Testimony, Briefing Transcript).

<sup>130</sup> Rita J. Simon, Howard Altstein, *Adoption, Race, and Identity: From Infancy to Young Adulthood* (Westport, CT: Praeger Publishers, 1992).

<sup>131</sup> Simon Testimony, Briefing Transcript, pp. 65–66, 68.

<sup>132</sup> Ibid., p. 66.

<sup>133</sup> Ibid., p. 68.

<sup>134</sup> Ibid., pp. 68–69.

<sup>135</sup> Ibid., p. 69.

<sup>136</sup> Ibid., p. 70.

stealing within the family.<sup>137</sup> Dr. Simon indicated that according to clinicians, this is common among adoptive children and is a test to see if the adoptive parents will continue to love and keep the children even if they do things that are wrong.<sup>138</sup>

When the children reached adolescence, both they and their parents were interviewed separately. Stealing was no longer an issue, but there were reported substance abuse problems among the adopted children, which also plagued the birth children.<sup>139</sup> There were no differences between the birth, transracially adopted, and white adopted children when they were given the Self-Esteem Scale and the Family Integration Scale.<sup>140</sup> According to Dr. Simon, there was a great deal of openness in these families.

By the fourth time Dr. Simon met with the children, most were adults in college or living and working in the same community.<sup>141</sup> According to Dr. Simon, the National Association of Black Social Workers (NABSW) often referred to these children as “Oreos,” black on the outside but white on the inside.<sup>142</sup> She stated that these children were comfortable with their racial identity, felt that they were no less black than children of the ghetto, and laughed at the NABSW’s characterization of them.<sup>143</sup> Dr. Simon found that there was still a great deal of contact with the adoptive family. The children all felt connected to their adopted parents and recommended that agencies and prospective parents recognize the importance of learning about the child’s racial history and culture, and that they make that history and culture part of the child’s and family’s life.<sup>144</sup>

When the parents were asked how they felt about adopting across racial lines, more than 90 percent said they were happy they had done so.<sup>145</sup> Some of the parents who adopted older children indicated that for those that had been abused in foster care, there were some problems. In addition, some children had physical problems and illnesses which the social workers did not reveal.<sup>146</sup> Some of the parents who adopted across racial lines had to change their lifestyle. For example, some moved into more integrated neighborhoods, some joined black churches, some acquired black friends, and some made certain their children attended integrated schools.<sup>147</sup>

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<sup>137</sup> Ibid., p. 70.

<sup>138</sup> Ibid., p. 70.

<sup>139</sup> Ibid., pp. 70–71.

<sup>140</sup> Ibid., p. 71. These scales measure the degree to which adopted children feel integrated within their family.

<sup>141</sup> Ibid., p. 72.

<sup>142</sup> Ibid., pp. 72–73.

<sup>143</sup> Ibid., p. 73.

<sup>144</sup> Ibid., p. 73.

<sup>145</sup> Ibid., p. 73.

<sup>146</sup> Ibid., p. 73.

<sup>147</sup> Ibid., p. 74.

Dr. Simon said that in the book *In Their Own Voices*,<sup>148</sup> she conducted in-depth interviews with 24 adult male and female transracial adoptees.<sup>149</sup> A follow-up to this study, *In Their Parents' Voices*, summarized interviews with 16 of the parents of the transracial adoptees.<sup>150</sup> Currently, Dr. Simon is conducting a study in which the white siblings in these families are being asked “what was it like to have a black brother or sister?”<sup>151</sup>

Dr. Simon has also studied Asian and Hispanic adoptees, the results of which were presented in *Intercountry Adoptees Tell Their Stories*.<sup>152</sup> In addition, she has interviewed Native Americans who were adopted before the passage of the Indian Child Welfare Act. Dr. Simon asserted that the results of all of the aforementioned studies, with one exception, show that transracial adoption serve the children's best interest.<sup>153</sup> The one exception, which Dr. Simon indicated was not a complete exception, was the Native American interviews. According to Dr. Simon, some of the Native American adoptees indicated that their parents adopted them because they considered them savages and wanted to civilize them.<sup>154</sup> Some of the Native Americans adoptees indicated that their parents wanted to make good Christians out of them.

## Discussion

Vice Chair Thernstrom said that she was bothered by the fact that Ms. Oliver separated family structure from poverty.<sup>155</sup> According to Vice Chair Thernstrom, single-parent households, or households of single earners, no earners, or very young parents are highly susceptible to living below poverty.<sup>156</sup> Ms. Oliver responded that this issue was complex, and numerous organizations that have researched it find that racial disparities at every level of the child welfare decision making process as creating the disproportionality.<sup>157</sup> She reiterated that when you control for income, family composition, maltreatment, abuse, and neglect, the outcomes for African American children in the child welfare system are more negative than any other ethnic group.<sup>158</sup>

Vice Chair Thernstrom asked Mr. Kroll how issues such as race and racism should be handled in this context, what message should be delivered, and what message did he deliver to his Asian-American daughter that he thought was extremely important.<sup>159</sup> Mr. Kroll

<sup>148</sup> See Rita J. Simon, Rhonda M. Roorda, *In Their Own Voices: Transracial Adoptees Tell Their Stories* (New York: Columbia University Press, 2000).

<sup>149</sup> Simon Testimony, Briefing Transcript, p. 66.

<sup>150</sup> *Ibid.*, p. 66.

<sup>151</sup> *Ibid.*, p. 67.

<sup>152</sup> *Ibid.*, p. 67. See also Heather Simon, Rita J. Simon, *Intercountry Adoptees Tell Their Stories* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2007).

<sup>153</sup> *Ibid.*, p. 67.

<sup>154</sup> *Ibid.*, p. 67.

<sup>155</sup> MEPA, Briefing Transcript, pp. 72–75.

<sup>156</sup> *Ibid.*, p. 74.

<sup>157</sup> *Ibid.*, p. 75.

<sup>158</sup> *Ibid.*, p. 75.

<sup>159</sup> *Ibid.*, p. 76.

responded that he had the opportunity to provide his daughter, at an early age, with access to her ethnic community through support groups and through a Korean day care provider. These interactions exposed her to the Korean language, culinary traditions, communal experience, and identity.<sup>160</sup> When his daughter became a teenager, she rejected being Asian, but when she attended an almost all-white college, she was forced to deal with this identity issue.<sup>161</sup> Mr. Kroll said he supported his daughter as she struggled with her identity, but that some of her friends did not have that support from their families, who viewed the struggle as a rejection of whiteness.<sup>162</sup> According to Mr. Kroll, families have to be prepared to help their children and provide them with all of the options.

Vice Chair Thernstrom then asked Mr. Kroll exactly what message would he like delivered to a black child in a white family about race and racism in America.<sup>163</sup> Mr. Kroll stated, “a 16-year-old black male has got to be prepared to be stopped by a policeman and know how to react so that he is not physically harmed.”<sup>164</sup> Mr. Kroll suggested that an adoptive parent who would never experience or understand what it is like to be a black male could seek a black father to mentor his or her black son.<sup>165</sup>

Commissioner Kirsanow acknowledged the discussion about teaching black adoptees what it is like to be black, and commented that the notion that black transracial adoptees may not be adequately prepared by white parents for what it is like to be black in America may be a result of failure of acculturation.<sup>166</sup> He then inquired as to whether there has been any effect on black adoptees’ abilities to thrive. Dr. Simon indicated that when the adult transracial adoptees were interviewed, they felt that they could live in both the white and black community and felt comfortable with their black identity.<sup>167</sup>

Mr. Kroll opined that a lot of the families that Dr. Simon referenced had training through their association with the Open Door Society, and were thus better prepared to help their children deal with race-related issues. Mr. Kroll voiced concern that race related issues were being ignored and urged that families be given help to deal with them.

In response to the issue of what it was like to be black in America, Dr. Simon shared a story about her daughter, who dated a black man while attending a university located in an all-white neighborhood. According to Dr. Simon, each time the boyfriend visited her daughter, police stopped and questioned him. When he explained that he was visiting his girlfriend, the police replied that there were no blacks in that neighborhood and demanded proof of the

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<sup>160</sup> Ibid., p. 76.

<sup>161</sup> Ibid., p. 76.

<sup>162</sup> Ibid., p. 77.

<sup>163</sup> Ibid., p. 78.

<sup>164</sup> Ibid., p. 78.

<sup>165</sup> Ibid., pp. 79–80.

<sup>166</sup> Ibid., p. 95.

<sup>167</sup> Ibid., p. 95.



relationship. After her daughter married this man, Dr. Simon asked him how he felt about this experience. He replied that he got used to it.<sup>168</sup>

Ms. Oliver indicated that not only are black men scrutinized, but so are black women.<sup>169</sup> Ms. Oliver stated that her daughters have been in bookstores seldom frequented by blacks and were followed as though they were going to shoplift.<sup>170</sup> Ms. Oliver also told the story of a friend who took several Hispanic and African American boys from his program into the Waldorf Astoria Hotel because the boys had never seen the inside of the hotel. The friend went in and thought the boys were behind him. When the friend turned around he realized the boys were still on the outside being scrutinized to try to determine why they were there at the hotel.<sup>171</sup> Ms. Oliver stated that these are the kinds of things that are not part of the white experience.<sup>172</sup>

Vice Chair Thernstrom indicated that America has changed since the mid-1960s and acknowledged that color still matters, but in her view the answer is not the same as it was four or five decades ago.<sup>173</sup> Ms. Oliver agreed that society had changed, but while she was not afraid now of being lynched in Atlanta, she believed there was still some covert racism.<sup>174</sup>

Commissioner Melendez asked Mr. Kroll if children one-to-five years of age tended to be more often adopted transracially. Mr. Kroll replied that whether through public or private adoption,<sup>175</sup> younger children were more often adopted transracially, with older children waiting longer for adoption. Children over the age of nine were especially in need of families, but were adopted more often by single aunts and grandmothers.<sup>176</sup>

Commissioner Melendez asked why a race of people losing a significant portion of its children to transracial adoption wouldn't want to prevent this drain.<sup>177</sup> He cited Native Americans' concern over the loss of their children through transracial adoption, which led to the Indian Child Welfare Act.<sup>178</sup> Mr. Kroll replied that his recommendations were based on this act, which he believed provided appropriate remedies to the loss of cultural identity and family connections involved in transracial adoptions.

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<sup>168</sup> *Ibid.*, pp. 80–81.

<sup>169</sup> *Ibid.*, pp. 82–83.

<sup>170</sup> *Ibid.*, p. 83.

<sup>171</sup> *Ibid.*, p. 83.

<sup>172</sup> *Ibid.*, pp. 83–84.

<sup>173</sup> *Ibid.*, p. 84.

<sup>174</sup> *Ibid.*, p. 84.

<sup>175</sup> *Ibid.*, p. 84.

<sup>176</sup> *Ibid.*, p. 85.

<sup>177</sup> *Ibid.*, pp. 85–86.

<sup>178</sup> *Ibid.*, p. 86. *See also* 25 U.S.C. §§ 1901-1963 (2009).

Commissioner Melendez said he thought delays in adoption helped spark MEPA, but asked if the main reason for the act was opening access to transracial adoption.<sup>179</sup> Mr. Kroll acknowledged the delay issue, but added: “You had an awful lot of white adults who for the first time were told that their race is a disadvantage to them. Because you are white, you do not have access to these black children. And I think that was one of the major factors that came into play.”<sup>180</sup>

Commissioner Taylor asked Mr. Kroll to clarify whether opening access to white parents achieved MEPA’s goal or missed it altogether. Mr. Kroll responded that he viewed the Civil Rights Act as having the effect of allowing white families broader opportunity to adopt; because even though there were black and Latino families wanting to adopt, they lacked access to the system or the necessary savvy to work the system.<sup>181</sup> He added that in the case of younger children, it was the adults’ rights that were being honored rather than what was best for the children.<sup>182</sup> As for adopting older children, he said, all options needed to be explored, regardless of the race of the parents, adding that there were also a significant number of older white children waiting to be adopted.<sup>183</sup> Commissioner Taylor then asked if young minority children were better off because of MEPA, despite Mr. Kroll’s criticisms.<sup>184</sup> Mr. Kroll replied that children are always better off in families,<sup>185</sup> but added that “families in the communities that the kids come from have lost some access to the parenting of those children.”<sup>186</sup> He claimed that this was because part A of MEPA was better enforced than part B.<sup>187</sup>

Commissioner Taylor asked Ms. Oliver what she thought should be emphasized other than the current emphasis on putting children into care away from family-like settings.<sup>188</sup> She stated that front-end services, which include prevention or reunification, were much more cost effective and less traumatic to children,<sup>189</sup> and that spending money on the back end did not address discriminatory practices that forced children into the system too quickly.<sup>190</sup> She noted that if the incentive was in a different place, then services could be provided within communities to help families keep their children rather than have them removed. Birth families were not given the same support as foster parents, she said, which decreased the likelihood of children returning to their birth families.<sup>191</sup> Without resources to improve

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<sup>179</sup> MEPA, Briefing Transcript, p. 87.

<sup>180</sup> *Ibid.*, p. 87.

<sup>181</sup> *Ibid.*, p. 89.

<sup>182</sup> *Ibid.*, p. 89.

<sup>183</sup> *Ibid.*, p. 90.

<sup>184</sup> *Ibid.*, p. 90.

<sup>185</sup> *Ibid.*, pp. 90–91.

<sup>186</sup> *Ibid.*, p. 91.

<sup>187</sup> *Ibid.*, p. 91.

<sup>188</sup> *Ibid.*, p. 91.

<sup>189</sup> *Ibid.*, p. 92.

<sup>190</sup> *Ibid.*, pp. 92–93.

<sup>191</sup> *Ibid.*, p. 93.

themselves and demonstrate their capabilities to state welfare agencies, they fail to win their children back.<sup>192</sup>

When Commissioner Taylor asked Ms. Oliver if kinship care support was a step in the right direction, she replied yes,<sup>193</sup> adding there was far less abuse in kinship than foster care.<sup>194</sup> Commissioner Taylor then asked if the kinship care approach was more frequently used in the African American community than in other communities.<sup>195</sup> Ms. Oliver did not know; however, she stated that most jurisdictions were looking at ways to provide more kinship care services.<sup>196</sup>

### **Third Panel: Has MEPA Achieved Its Goal?**

#### **Thomas Atwood**

Mr. Atwood stated that National Council for Adoption (NCFA) is an adoption research education and advocacy organization that has advanced adoption and child welfare policies by 1) promoting the adoption of children out of foster care, 2) presenting adoption as a positive option for women with unplanned pregnancies, 3) reducing obstacles to transracial adoption, and 4) making adoption more affordable for families.<sup>197</sup>

Mr. Atwood said that according to the 2000 census, roughly one out of every six adopted children in the United States had a parent of a different race.<sup>198</sup> Mr. Atwood said that studies of transracially adopted children revealed outcomes consistent with those of children adopted by parents of the same race.<sup>199</sup>

Mr. Atwood acknowledged Dr. Simon's work, along with a 2004 study in the *Journal of Orthopsychiatry*, which concluded that transracial adoptions did not harm the adjustment, family bonding, or normative development of children.<sup>200</sup> Mr. Atwood also cited a Search Institute Survey, "Growing Up Adopted," which found that transracially adopted youth were no more at risk than their counterparts in same-race families in terms of identity, attachment, and mental health.<sup>201</sup>

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<sup>192</sup> Ibid., p. 93.

<sup>193</sup> Ibid., p. 93.

<sup>194</sup> Ibid., p. 94.

<sup>195</sup> Ibid., p. 94.

<sup>196</sup> Ibid., p. 94.

<sup>197</sup> Thomas Atwood, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 102, (hereafter cited as Atwood Testimony, Briefing Transcript).

<sup>198</sup> Atwood Testimony, Briefing Transcript, p. 102.

<sup>199</sup> Ibid., p. 102.

<sup>200</sup> Ibid., p. 102.

<sup>201</sup> Ibid., p. 103. See also Benson, Peter L., Anu R. Sharma, and Eugene C. Roehlkepartain, *Growing Up Adopted: A Portrait of Adolescents & Their Families* (Minneapolis, MN: Search Institute, 1994).

While transracial adoption is good for children, Mr. Atwood indicated that it can present additional changes to an adoptive family. These challenges, he claimed, arise from a surrounding culture that finds transracial adoption strange and that still contains strains of racism.<sup>202</sup> While the decision to adopt should not be made on the basis of reactions from other individuals, he said that it was important for parents to anticipate the reaction of family, neighbors, associates, and strangers. Because it can be obvious that the child is not genetically related to the parents, they may face intrusive questions or even racist remarks that would not be raised in a same-race adoption.<sup>203</sup> In addition, adoption professionals generally agree that transracial adoptive parents should assure that their children feel comfortable in their racial identity and teach them about their cultural heritage.

Mr. Atwood stated that it is hard to assess how much MEPA alone has affected transracial adoption. He said statistics showed that since 1997, when the Adoption and Safe Families Act<sup>204</sup> and MEPA/IEP went into effect, the number of adoptions out of foster care increased from 31,000 to 50,000 a year and has remained at 50,000 per year for six years straight.<sup>205</sup> Because HHS does not track transracial adoptions, it may be impossible to prove conclusively that MEPA/IEP contributed to those increases; however, African American children continue to be disproportionately represented in the foster care system.<sup>206</sup>

Mr. Atwood opined that due to misinterpretations of MEPA and HHS guidelines, states are abandoning good social work practices for fear of violating the act.<sup>207</sup> A common misinterpretation is the idea that state agencies can run afoul of the law just by discussing the issue of race with prospective parents, and a common fear is that a wrong word could be interpreted as discrimination.<sup>208</sup> Mr. Atwood indicated that any regulation that indiscriminately prohibits parental education and self-assessment is based on a misinterpretation of MEPA.

Mr. Atwood stated that MEPA serves the best interest of children in several ways. First, it reduces obstacles to transracial adoptive and foster placements.<sup>209</sup> Second, Part B of MEPA prohibits consideration of race when such consideration would delay or deny a child's placement.<sup>210</sup> This language clearly states that parental self-assessments and agency education of parents are allowed. In addition, HHS' *Questions and Answers Regarding the Multiethnic Placement Act of 1994 and Section 1808 of the Small Business and Job Protection Act of 1996*<sup>211</sup> states "Agencies are not prohibited from discussing with prospective adoptive and foster parents their feelings, capacities and preferences regarding

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<sup>202</sup> Atwood Testimony, Briefing Transcript, p. 103.

<sup>203</sup> Ibid., p. 103.

<sup>204</sup> Pub. L. 105-89, 11 Stat. 2115(1997)

<sup>205</sup> Atwood Testimony, Briefing Transcript, p. 104.

<sup>206</sup> Ibid., p. 104.

<sup>207</sup> Ibid., p. 104.

<sup>208</sup> Ibid., pp. 104-05.

<sup>209</sup> Ibid., p. 105.

<sup>210</sup> Ibid., p. 105. See also 42 U.S.C. § 1996b(1) (2009).

<sup>211</sup> See <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/q&a.html> (accessed Mar. 12, 2009).

caring for a child of a particular race or ethnicity.”<sup>212</sup> Third, Part A of MEPA allows children access to transracial placements in their best interest by restricting racial discrimination against prospective parents.<sup>213</sup> Fourth, MEPA permits exceptions in “circumstances where the child has a specific and demonstrable need for a same race placement.”<sup>214</sup> This would apply in the case of an older child who would prefer an in-racial placement. Finally, MEPA requires states to provide for the diligent recruitment of racially diverse parents. Mr. Atwood asserted that if this requirement were fulfilled, then there would be an increase in same race placements.<sup>215</sup>

While Mr. Atwood acknowledged that HHS’s MEPA guidelines are fairly clear and helpful, he noted that some of its guidance could be clearer.<sup>216</sup> Mr. Atwood also asserted that HHS had not done enough to enforce the requirement that states conduct diligent recruitment of racially and ethnically diverse parents. According to him, although 20 percent of children in foster care are waiting to be adopted, only 1.3 percent of all federal child welfare dollars available are spent on adoptive and foster care recruitment and training.<sup>217</sup>

Mr. Atwood noted that some child welfare advocates assert that if all things are equal between prospective placements, then case workers should choose in-racial over transracial placement.<sup>218</sup> While acknowledging that this is an appealing argument in theory, he indicated that there are always differences between placement options and “things” are rarely, if ever, equal.<sup>219</sup>

In closing, Mr. Atwood stated that the problems with the treatment of race in placement decision making does not lie primarily with MEPA or HHS enforcement, but with state agencies and case workers’ misinterpretations of MEPA and HHS’ MEPA guidelines.<sup>220</sup> He argued that MEPA allows for common-sense consideration of race and ethnicity in placement decisions (including prospective parent education, self-assessment, and recruitment), but does not allow agencies to use racial generalizations in making individual placement decisions. He said that HHS should make greater efforts to clarify these issues and states should reform their policies and guidelines to follow the actual meaning of MEPA rather than the mistaken notion that MEPA prohibits any discussion or consideration of race.<sup>221</sup>

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<sup>212</sup> *Ibid.*, pp. 105–06.

<sup>213</sup> *Ibid.*, p. 106. *See also* 42 U.S.C. § 5115a(a)(1)(A) (2009).

<sup>214</sup> *Ibid.*, pp. 106–07. *See also* 42 U.S.C. § 5115a(a)(2) (2009).

<sup>215</sup> *Ibid.*, p. 107.

<sup>216</sup> *Ibid.*, p. 107.

<sup>217</sup> *Ibid.*, p. 107.

<sup>218</sup> *Ibid.*, p. 107.

<sup>219</sup> *Ibid.*, p. 108.

<sup>220</sup> *Ibid.*, p. 108.

<sup>221</sup> *Ibid.*, pp. 108–09.

## Ruth McRoy

Dr. McRoy noted that the policies surrounding MEPA/IEP were based on four primary assumptions: 1) there were large numbers of white families looking to adopt minority children in foster care; 2) there were insufficient numbers of African American families able or willing to adopt; 3) there was the belief that a large number of minority children would not achieve permanency unless race matching policies were prohibited and transracial adoptions were promoted broadly; and 4) children fared just as well or better when they were adopted transracially.<sup>222</sup> Dr. McRoy indicated that the issue was whether or not these assumptions were true and what, if any, impact MEPA has had on the adoption of African American children in the child welfare system.<sup>223</sup>

According to Dr. McRoy, MEPA/IEP has created a different status for African American children who are adopted from the foster care system with regard to racial, ethnic and cultural identity. This status diverges significantly from that recognized in law for American Indian/Alaskan Native children, children who are adopted internationally, and children who are adopted through private adoption agencies that do not receive federal funds.<sup>224</sup> While MEPA prohibits an agency receiving federal funding from considering race and ethnicity in the foster or adoptive placement of a child, the Indian Child Welfare Act of 1978<sup>225</sup> places strong value on racial/ethnic heritage by giving statutory preferences to the placement of Native American children with members of their own tribes or other Indian tribes.<sup>226</sup> Similarly, the Hague Convention<sup>227</sup> and the Intercountry Adoption Act of 2000<sup>228</sup> require that attention be paid to children's cultural, racial, religious, ethnic and linguistic background needs and the preparation of parents to meet those needs.<sup>229</sup>

Dr. McRoy said it was important to look more closely at children in foster care. According to 2006 AFCARS data, 510,000 children were in foster care and were on average 10 years of age; 166,482 (32 percent) of these children were African American.<sup>230</sup> Also in 2006, 129,000 children were awaiting adoption, and 41,591 (32 percent) of these children were African American.<sup>231</sup> The children who had been awaiting adoption were an average of 5 years of age when they were removed from their parents and had been in foster care an average of 25 months since parental rights were terminated, meaning these children were now an average

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<sup>222</sup> Ruth McRoy, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, pp. 109–10, (hereafter cited as McRoy Testimony, Briefing Transcript).

<sup>223</sup> McRoy Testimony, Briefing Transcript, p. 110.

<sup>224</sup> *Ibid.*, p. 110.

<sup>225</sup> 25 U.S.C. §§ 1901-1963 (2009)

<sup>226</sup> McRoy Testimony, Briefing Transcript, p. 110.

<sup>227</sup> The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M 1138.

<sup>228</sup> Pub. L. 106-279, 114 Stat. 825 (2000) (codified at 42 U.S.C. §§ 14901-14954).

<sup>229</sup> McRoy Testimony, Briefing Transcript, pp. 110–11.

<sup>230</sup> *Ibid.*, p. 111.

<sup>231</sup> *Ibid.*, p. 111.

8.2 years of age.<sup>232</sup> Dr. McRoy noted that the 2007 GAO report on disproportionality, *African American Children in Foster Care*<sup>233</sup>, stated that “according to Health and Human Services’ adoption data over the last five years, African American children as well as Native American children have consistently experienced lower rates of adoption than children of other races and ethnicities.”<sup>234</sup>

Dr. McRoy stated that it was important also to examine the reasons children enter foster care in the first place. The major reason is because of parental neglect, while others enter due to physical or sexual abuse and prenatal exposure to drugs and alcohol.<sup>235</sup>

Dr. McRoy acknowledged that, although there have been small increases in the number of transracial adoptions of African American children, there were thousands who were still awaiting permanent placement, especially older children.<sup>236</sup> The U.S. Children’s Bureau indicated that in 2000, older African American children were more than three times as likely as older white children to be adopted by a single female.<sup>237</sup> Data also indicate that half the adoptive mothers of black children in foster care are 50 years of age or older and usually are related to or have been foster parents to the children.<sup>238</sup>

Dr. McRoy suggested that if more services were being provided in the front end, many of these African American children would not enter and languish in foster care.<sup>239</sup> She said that although the incidence of child abuse and neglect does not vary significantly by race or ethnic groups, African American children are represented in the system at a rate 2.26 times greater than their proportion of the United States population.<sup>240</sup> They are also more likely than other children, she said, to be removed from their families and less likely to be adopted when parental rights have been terminated.<sup>241</sup>

Dr. McRoy indicated that a number of interrelated factors may influence these disproportionate outcomes. According to the GAO report, these factors included high rates of poverty, difficulty in accessing support services to provide a safe environment and prevent removal and racial bias, and cultural misunderstandings in child welfare decision making.<sup>242</sup> The GAO report also cited the following reasons African American children experienced longer stays in foster care: 1) the lack of appropriate adoptive homes; 2) the greater likelihood of using kinship care; and 3) the lack of access to supportive services needed for

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<sup>232</sup> Ibid., p. 111.

<sup>233</sup> See <http://www.gao.gov/new.items/d07816.pdf> (accessed Mar. 12, 2009).

<sup>234</sup> Ibid., pp. 111–12.

<sup>235</sup> Ibid., p. 112.

<sup>236</sup> Ibid., p. 112.

<sup>237</sup> Ibid., p. 113.

<sup>238</sup> Ibid., p. 113.

<sup>239</sup> Ibid., p. 113.

<sup>240</sup> Ibid., p. 113.

<sup>241</sup> Ibid., p. 113.

<sup>242</sup> Ibid., p. 114.

reunification.<sup>243</sup> According to the GAO report, if states could offer these services to birth families, many child removals could be prevented, resulting in the preservation of more birth families.<sup>244</sup>

To ensure that African American children do not languish in foster care, Dr. McRoy made the following recommendations: 1) the best interest of the child should always be paramount in decisions regarding children's foster care and adoption placements; 2) the racial ethnic identity needs of children should be addressed throughout the adoption process as well as after the adoption, and federal and state rules and laws should indicate that race is one factor that can be taken into consideration in matching prospective adoptive families and children; 3) all foster and adoptive families should receive some level of training in parenting children of diverse backgrounds, but families adopting transracially should receive additional training and services to ensure that they can meet the children's needs; and 4) the barriers to same-race foster care and adoptive placements need to be eliminated, which can be achieved by state agencies contracting with African American agencies for initial placements, rather than merely seeking help in placing older children and those who are the most difficult to place for adoption.<sup>245</sup>

Dr. McRoy also recommended that state agencies follow the MEPA requirement diligently to recruit more families that reflect the diversity of the children, and that financial resources be made available to support and enforce this requirement.<sup>246</sup> She said that NACAC recently released a report of 24 African-American adoption agencies in the United States that have had success in finding black adoptive families, and suggested that these agencies could help states become compliant with the MEPA recruitment requirement.<sup>247</sup>

In closing, Dr. McRoy noted that there were 129,000 children in the nation's foster care system awaiting permanent families, and the transracial adoption issue was small in comparison to the problem of finding permanent families for these children.<sup>248</sup>

### **Elizabeth Bartholet**

Dr. Bartholet stated that she had encouraged the passage of MEPA because she was concerned about the number of minority children in the child welfare system being grossly disproportionate to their numbers in the total population.<sup>249</sup> She claimed that prospective adopters were overwhelmingly white because they were in a better financial position to parent additional children.<sup>250</sup>

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<sup>243</sup> Ibid., p. 114.

<sup>244</sup> Ibid., p. 114.

<sup>245</sup> Ibid., pp. 115–17.

<sup>246</sup> Ibid., p. 117.

<sup>247</sup> Ibid., pp. 117–18. *See also*, <http://www.nacac.org/howtoadopt/AAagencies.html>

<sup>248</sup> Ibid., p. 118.

<sup>249</sup> Elizabeth Bartholet, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 119, (hereafter cited as Bartholet Testimony, Briefing Transcript).

<sup>250</sup> Bartholet Testimony, Briefing Transcript, p. 120.



As other panelists, Dr. Bartholet had numerous conversations with Senator Metzenbaum. She believed that the 1994 MEPA Act was unworkable because it allowed race to be used as a factor in the placement of children.<sup>251</sup> Dr. Bartholet indicated that for two decades prior to the passage of MEPA, there was a constitutional rule allowing child welfare agencies to use race as one factor, but not systematically. Under that rule, she said, child welfare agencies in all 50 states used race systematically.<sup>252</sup> She found the 1996 MEPA more practical because it disallowed race as a factor. If race had been allowed even slightly, she argued, it would have taken over child welfare decision making as it did before enactment of the 1996 MEPA.<sup>253</sup>

Dr. Bartholet opined that MEPA is a very important law because 1) it knocks down barriers to and expedites the placement of black children, and (2) it sends the message that the state cannot or should not indicate a preference for same-race families in placing children.<sup>254</sup> She stated “same race matching policies were direct descendants of white supremacy and black separatism. And I think that is not the path our country has chosen to take for very good reasons. And I see MEPA as directly in line with the interracial marriage case *Loving v. Virginia*.”<sup>255</sup>

Dr. Bartholet disagreed with the panelists who felt that more should be done to recruit potential African American families.<sup>256</sup> According to Dr. Bartholet, African Americans were adopting at the same rate as whites, which was a sign of successful recruitment.<sup>257</sup> She reiterated that differential and aggressive recruitment of black prospective adopters has been occurring for decades, and that considering other problems in adoption, racial recruitment should not be the primary thrust.<sup>258</sup>

Dr. Bartholet said that while HHS was acting appropriately, it could afford to be more aggressive.<sup>259</sup> She was excited about recent HHS actions regarding two decisions and opinions it issued in the Ohio and South Carolina investigations.<sup>260</sup> In these decisions, it made clear that the 1996 MEPA does not allow race to be a factor in the placement of children, and that no special screening can be done of prospective transracial adoptive parents. The decisions can be found on the HHS Web site, but she claims the agency has not publicized the cases because it did not want to shame these states.<sup>261</sup> She thinks the decisions should be publicized because states need to know that infringement of MEPA is a serious violation of civil rights law.<sup>262</sup>

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<sup>251</sup> Ibid., p. 121.

<sup>252</sup> Ibid., p. 121.

<sup>253</sup> Ibid., p. 122.

<sup>254</sup> Ibid., p. 122.

<sup>255</sup> Ibid., p. 123. See also 388 U.S. 1 (1967).

<sup>256</sup> Ibid., p. 120.

<sup>257</sup> Ibid., p. 120.

<sup>258</sup> Ibid., p. 120.

<sup>259</sup> Ibid., p. 121.

<sup>260</sup> Ibid., p. 124.

<sup>261</sup> Ibid., p. 127.

<sup>262</sup> Ibid., p. 127.

Dr. Bartholet distinguished racial sensitivity screening from sensitizing prospective parents.<sup>263</sup> MEPA clearly prohibits screening based on questions such as religious preference, neighborhood location, private socializing, artifacts on display at home, etc.<sup>264</sup> She stated, “it’s deeply wrong for the state through the mouth of a social worker to say we know how black kids should be raised and here’s the orthodoxy, and we want to know if you are going to toe the line. Because if you aren’t, you won’t get the kid.”<sup>265</sup> She saw nothing wrong with sensitizing parents since society is not race-blind.<sup>266</sup>

International adoption was different from domestic adoption, she asserted, and she urged the United States to lead in terms of not preventing children from being adopted because it perceives children as belonging to a racial group that has exclusive rights to them.<sup>267</sup> In addition, she asserted that under the Hague Convention some of the regulations, such as the requirement that children be held for two months before they can leave this country to go to other countries for adoption, are in direct violation of MEPA<sup>268</sup> because this requirement is a form of matching on the basis of national origin.<sup>269</sup>

### Linda Spears

According to Ms. Spears, the Child Welfare League of America develops best practices in child welfare and implements these guidelines throughout the United States.<sup>270</sup> Over the years, she said, the number and nature of the children in the welfare system has changed, affecting the strategies used to attain permanency for children. For instance, white children now constitute a small proportion of the children in need of adoption planning and services, yet she stated that agencies continue to provide services for these children. In contrast, the number of children in the nation’s out-of-home care system who are in need of adoption has increased tremendously.<sup>271</sup> Ms. Spears indicated that this increase is the result of numerous social conditions and policy changes, as well as the quality and nature of the needs of these children.<sup>272</sup> In addition to these challenges and others that have been mentioned throughout the briefing, she said that children of color are considered special needs by virtue of being hard to place.<sup>273</sup>

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<sup>263</sup> *Ibid.*, pp. 125–26.

<sup>264</sup> *Ibid.*, p. 125.

<sup>265</sup> *Ibid.*, pp. 125–26.

<sup>266</sup> *Ibid.*, p. 126.

<sup>267</sup> *Ibid.*, p. 127.

<sup>268</sup> *Ibid.*, pp. 127–28.

<sup>269</sup> *Ibid.*, p. 128.

<sup>270</sup> Linda Spears, Testimony before the U.S. Commission on Civil Rights, briefing on the Multiethnic Placement Act: Minorities in Foster Care and Adoption, transcript, Washington, DC, Sept. 21, 2007, p. 129, (hereafter cited as Spears Testimony, Briefing Transcript).

<sup>271</sup> Spears Testimony, Briefing Transcript, p. 130.

<sup>272</sup> *Ibid.*, p. 130.

<sup>273</sup> *Ibid.*, p. 130.

Ms. Spears stated “the degree to which there is disproportionality is substantial at the reporter level, before children are investigated and substantiated for abuse and neglect, prior to the decision of placement.”<sup>274</sup> She found this as clear evidence that disproportionate decisions continue to be made across services. In fact, she reported that when she interviewed service providers who were black and white, she discovered that confusion and lack of competence, as opposed to racism, prevented workers from accessing services for children and families of color before neglect and abuse occurred.<sup>275</sup>

In her examination of the education, child welfare, and juvenile justice systems, Ms. Spears found that disproportionality starts when children of color are very young. In poor communities, these children are 10 times more likely than their peers to be reported as abused and neglected.<sup>276</sup> Additionally, prior to entering the child welfare system, children of color were disproportionately more likely than their peers to have been identified for special services. According to Ms. Spears, when the social workers who identified these at-risk children were interviewed, they reported that they did not know where to go or how to access family services and support, and did not feel comfortable or competent enough to engage the family in effectively sorting through its service and support needs.<sup>277</sup>

Ms. Spears indicated that transracial adoption can serve children well and that no child should have to wait. She noted that the standards at the Child Welfare League of America call for the placements to be in the best interests of children, and agencies can and should honor the birth parents’ request for a same-race placement if it is appropriate and in the best interest of the child.<sup>278</sup> Ms. Spears said the Child Welfare League of America believes that to meet the best interests of children of color in the child welfare system, the disproportionate impact of these children, as well as their needs, must be addressed.<sup>279</sup> Early intervention and support services must be the number one priority, she urged, and the treatment needs of children in the child welfare system must be met. She said that studies have shown a disproportionality of services for children by race for those entering or already in the child welfare system.<sup>280</sup> Any child welfare agency in the country, she said, will tell you that they cannot get mental health services, housing services, or basic services for the children they serve.<sup>281</sup>

Ms. Spears acknowledged that several panelists noted that prevention is critically important and that funding of the welfare system needs to be restructured to address this issue. In closing, she indicated that there may be disagreement as to how the child welfare system should be restructured, but everyone is in agreement that it needs to be restructured.

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<sup>274</sup> *Ibid.*, p. 132.

<sup>275</sup> *Ibid.*, p. 132.

<sup>276</sup> *Ibid.*, p. 133.

<sup>277</sup> *Ibid.*, p. 133.

<sup>278</sup> *Ibid.*, p. 134.

<sup>279</sup> *Ibid.*, p. 135.

<sup>280</sup> *Ibid.*, p. 136.

<sup>281</sup> *Ibid.*, p. 136.

## Discussion

Vice Chair Thernstrom asked Dr. Bartholet what her thoughts were on witness assertions about discriminatory reporting accounting for the disproportionately high number of African American children eligible for adoption.<sup>282</sup> She also asked what was done with the older children who were hard to place and whether well run boarding schools were available for these children.<sup>283</sup>

Dr. Bartholet indicated that she did not believe disparate entry into the foster care system equated with discrimination;<sup>284</sup> however, she did believe that it demonstrated that there has been historic discrimination.<sup>285</sup> Dr. Bartholet also said that abuse and neglect were poverty related.<sup>286</sup> According to Dr. Bartholet, white and black children who are removed from their parents today come into the system as a result of serious abuse and neglect and not discrimination, and in fairness to the children, more should be removed.<sup>287</sup> In these circumstances, she said it would be discrimination to keep the children at home.<sup>288</sup>

Dr. Bartholet believes in prevention and argued in her book for support services such as early home visitation.<sup>289</sup> Vice Chair Thernstrom asked if she knew of any individuals who possessed excellent skills in this area. Dr. Bartholet responded that David Olds' research showed that early home visitation reduced abuse and neglect, reduced second and third pregnancies, and motivated mothers to return to school and seek employment.<sup>290</sup> Mr. Olds' model was expensive, she said, but research showed that it was cost effective because it reduced welfare and unemployment benefit expenditures, as well as reduced child abuse and neglect.<sup>291</sup> Mr. Olds' research was included in her book, *Nobody's Children*.

Dr. Bartholet voiced skepticism of doing more family preservation,<sup>292</sup> noting that when reviewing family preservation research, she found that families that had access to a social worker 24 hours a day/seven days a week continued to inflict abuse and neglect at the same rate as before these services were provided.<sup>293</sup>

In response to Vice Chair Thernstrom's questions on institutions, Dr. Bartholet indicated that there were institutions for hard-to-adopt older children.<sup>294</sup> She also stated that a number of

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<sup>282</sup> MEPA, Briefing Transcript, p. 138.

<sup>283</sup> Ibid., p. 138.

<sup>284</sup> Ibid., p. 140.

<sup>285</sup> Ibid., p. 140.

<sup>286</sup> Ibid., p. 140.

<sup>287</sup> Ibid., pp. 141, 144.

<sup>288</sup> Ibid., p. 144.

<sup>289</sup> Ibid., p. 141.

<sup>290</sup> Ibid., p. 142.

<sup>291</sup> Ibid., p. 142.

<sup>292</sup> Ibid., p. 143.

<sup>293</sup> Ibid., p. 143.

<sup>294</sup> Ibid., p. 145.

people believe that because many of the older children are so damaged, they may not be able to function in a family type setting, thus more needs to be done in terms of institutions.<sup>295</sup> Dr. Bartholet did note, however, that many experts in the medical field have said that as a general matter, institutions did not work well for kids.<sup>296</sup> She stated that the Adoption and Safe Families Act<sup>297</sup> should be taken more seriously and children in abusive and neglectful homes should be moved more quickly into foster care and on to adoption.<sup>298</sup> Dr. McRoy acknowledged that many of the older children were in group homes, foster care, or in residential homes.<sup>299</sup> Although 20,000 to 25,000 children age out of the system each year, they still wish they had families.<sup>300</sup>

Ms. Spears indicated that she did not allude to family preservation services during her statement, but was speaking about how the need for services often went unmet when informers first reported neglect, abuse, and serious harm.<sup>301</sup> She indicated that the focus should begin on the very front end when neglect is first reported and continue throughout the entire child welfare process.

Dr. McRoy stated that in addition to the lack of resources and support services, impoverished birth families often do not have access to adequate legal representation.<sup>302</sup> Thus, economically better off families often are able to prevent their children from being removed from the home. Dr. McRoy noted that one of the most successful prevention programs was family group conferencing, (which occurs on the front end), whereby families and social workers are brought together to identify strategies to keep children from going into the foster care system.<sup>303</sup> Point of Engagement, a model in Compton, California, has significantly reduced the number of children coming into the system.<sup>304</sup> The moment a hospital calls Point of Engagement about a child who may have been prenatally exposed to drugs or alcohol, a team is dispatched to meet with the family and identify remedial and support resources within the family or community.<sup>305</sup> Dr. McRoy noted that often children whose parents receive this help never enter the child welfare system.

Dr. McRoy recently interviewed a young person who had been in 38 foster placements.<sup>306</sup> She indicated that the foster care system can be even more abusive than the original family.<sup>307</sup> She reiterated that the majority of the children come into the system because of

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<sup>295</sup> *Ibid.*, p. 145.

<sup>296</sup> *Ibid.*, p. 145.

<sup>297</sup> Pub. L. 105-89, 11 Stat. 2115 (1997).

<sup>298</sup> MEPA, Briefing Transcript, p. 146.

<sup>299</sup> *Ibid.*, p. 148.

<sup>300</sup> *Ibid.*, p. 148.

<sup>301</sup> *Ibid.*, pp. 146–47.

<sup>302</sup> *Ibid.*, p. 147.

<sup>303</sup> *Ibid.*, p. 147.

<sup>304</sup> *Ibid.*, p. 147.

<sup>305</sup> *Ibid.*, pp. 149–50.

<sup>306</sup> *Ibid.*, p. 148.

<sup>307</sup> *Ibid.*, p. 148.

parental neglect, and if there were available resources such as treatment, support services, child care, and jobs, the problem would be alleviated.<sup>308</sup>

Dr. McRoy stressed that more needs to be done to prevent children from entering the foster care system. She also suggested implementing MEPA's requirement to recruit minority adoptive families, encourage agencies to reach out to programs with proven success, and prepare waiting lists of minority families wanting and waiting to adopt. She said that when children do enter the system, they should be connected with families expeditiously.<sup>309</sup>

Dr. Bartholet noted that normally when children are removed from the home because of neglect, it is due to serious circumstances.<sup>310</sup> She also noted that neglected children die as a result of neglect at a higher rate than abused children die of abuse.

Dr. Bartholet did not believe family group conferencing was as successful as many people claimed. She indicated that although children were being kept in the family, research showed they were still being abused and neglected at the same rate.<sup>311</sup> She noted her skepticism about kinship care because neglect tends to be an extended family problem.<sup>312</sup> It would be preferable for the grandmother to raise the child, assuming the grandmother is fully fit to parent, but often this is not the case, given that it was the grandmother who produced the parent who abused and neglected the grandchild.

Mr. Atwood noted that there was agreement that the foster care financing system needed to be restructured so that it could better provide for early intervention services.<sup>313</sup> Mr. Atwood agreed with Mr. Kroll that finding placement within the community should be a significant factor in adoption and foster care,<sup>314</sup> but he also agreed with Dr. Bartholet that special effort should be made not to place a child within a community or family that would cause further abuse.<sup>315</sup> Mr. Atwood further noted that considering community in child placement is not the same as considering race, because the former deals with a familiar place.<sup>316</sup>

Commissioner Taylor asked the panelists if they believed disproportionate entry was linked to active discrimination.<sup>317</sup> Ms. Spears indicated that ignorance and inability, and institutional, long-term, and cultural legacies, all exist at some level but the degree to which they exist is unknown.<sup>318</sup> Dr. McRoy indicated that children are brought into the system based upon stereotypes of families—especially low-income families of color—and it was

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<sup>308</sup> *Ibid.*, p. 148.

<sup>309</sup> *Ibid.*, pp. 148–49.

<sup>310</sup> *Ibid.*, p. 150.

<sup>311</sup> *Ibid.*, pp. 150–51.

<sup>312</sup> *Ibid.*, p. 151.

<sup>313</sup> *Ibid.*, p. 152.

<sup>314</sup> *Ibid.*, p. 153.

<sup>315</sup> *Ibid.*, p. 153.

<sup>316</sup> *Ibid.*, p. 153.

<sup>317</sup> *Ibid.*, p. 154.

<sup>318</sup> *Ibid.*, pp. 154–55.

these stereotypes that led social workers to bring in one child and not another.<sup>319</sup> This, she said, was identified as a major issue and was addressed by GAO in its report. GAO researched the interaction of different factors that led to the disproportionate entry of children into the child welfare system and the disparities that occurred in family reunification and adoption.<sup>320</sup>

Commissioner Taylor was interested in Ms. Spears' characterization of how black and white social workers screen cases differently although they ask the same questions. He asked for an explanation, and said that if this was due to cultural incompetence, what did it say about the process? Ms. Spears indicated that it was difficult for social workers to judge the use of physical discipline in communities of color, although this lack of knowledge could be a training issue.<sup>321</sup> Often, she said, social workers will excuse certain behavior because of the stereotype that it is acceptable in the community. She stated, "I believe both conscious and unconscious racism exists throughout our society and it's going to exist in this area just as it exists in other areas."<sup>322</sup> Although Dr. Bartholet indicated that she thought racism existed, she went on to state that it is a limited explanatory factor for the fact that black children are disproportionately represented in foster care.<sup>323</sup> Dr. Bartholet opined that to send a drug-affected child to the home of a drug-abusing parent was a prescription for disaster for the child.<sup>324</sup>

Dr. McRoy highlighted that the issue of disparities is not unique to child welfare,<sup>325</sup> since it appeared in the criminal justice, health care, and mental health systems, too. She noted that often decisions are based upon stereotypical beliefs about the race of the client. Some states require workers to take the course "Undoing Racism," to begin to address the historical and negative perceptions and stereotypes that have determined outcomes in child welfare cases.<sup>326</sup>

Commissioner Melendez inquired how to address race and ethnicity in talking to prospective adoptive families, and whether there were examples where state social service providers were complying with MEPA and succeeding in educating families about race and ethnicity issues.<sup>327</sup> Dr. Bartholet indicated that race and ethnicity could legally be talked about under MEPA as long as screening was not being done for purposes of pass/fail decisions as to which parents could adopt or for which children they would be allowed to adopt.<sup>328</sup> She

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<sup>319</sup> Ibid., p. 155.

<sup>320</sup> Ibid., p. 155.

<sup>321</sup> Ibid., p. 156.

<sup>322</sup> Ibid., p. 157.

<sup>323</sup> Ibid., p. 157.

<sup>324</sup> Ibid., p. 158.

<sup>325</sup> Ibid., p. 158.

<sup>326</sup> Ibid., p. 159. "Undoing Racism Workshop: Anti-Racism Training for Social Work Practitioners and Educators" is a 2 ½ day workshop offered by the People's Institute for Survival and Beyond. *See* <http://www.pisab.org/index.cfm?fuseaction=Page.viewPage&pageId=497> (accessed Mar. 12, 2009).

<sup>327</sup> Ibid., pp. 160, 162.

<sup>328</sup> Ibid., p. 160.

claimed that singling out transracial parents and giving them extra education that other parents do not receive is illegal under MEPA.<sup>329</sup> Dr. Bartholet agreed with how training was being done currently under the guidelines, with everyone, including transracial parents, attending together. Mr. Atwood believed that agencies could discuss race with prospective parents in either (a) parent education, regarding the challenges presented by transracial adoptions or (b) parent self-assessment, in which parents are asked to consider their own suitability for a transracial placement.<sup>330</sup> Dr. McRoy noted that many agencies were reluctant to offer training for fear that they would be in violation of MEPA.<sup>331</sup> Dr. McRoy believes that not only should parents be prepared, but children should be too, since they are entering into a family that is totally different from their own.<sup>332</sup> Ms. Spears indicated that both children and prospective parents needed baseline training that encompassed issues such as mental health, separation and loss, and culture.<sup>333</sup> Those parents dealing with intensively needy children in any area, she said, need specialized and additional skills to support the children's needs.

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<sup>329</sup> *Ibid.*, p. 160.

<sup>330</sup> *Ibid.*, pp. 161–62.

<sup>331</sup> *Ibid.*, pp 162–63.

<sup>332</sup> *Ibid.*, p. 163.

<sup>333</sup> *Ibid.*, p. 164.





## Statements: First Panel

[NOTE: All statements are unedited.]

### ***Joan Ohl***

#### **Commissioner, Administration on Children, Youth and Families, U.S. Department of Health and Human Services**

I have been invited here this morning to provide the Administration's perspective on the Multiethnic Placement Act (MEPA) and, more generally, on the extent to which race should be a factor in foster care and adoption placement decisions.

Specifically, the U.S. Commission on Civil Rights has expressed interest in the Administration's views on whether the enactment of MEPA has removed barriers to permanency facing children involved in the child protective system; whether transracial adoption serves the children's best interest, or has negative consequences for minority children, families, and communities; how effectively the U.S. Department of Health and Human Services (HHS) is enforcing MEPA; the impact HHS' enforcement of MEPA has had on the efforts of prospective foster care or adoptive parents to adopt or provide foster care for minority children; and whether the enactment of MEPA has reduced the amount of time minority children spend in foster care or wait to be adopted.

It is my hope that this briefing will lead to a better understanding of the appropriateness of transracial adoption and whether the purpose for which MEPA was enacted is being achieved.

The Multiethnic Placement Act (MEPA) was signed into law by President Clinton in 1994 as part of the Improving America's Schools Act. MEPA was enacted after much debate about transracial adoption and same-race placement policies. At the heart of this debate is the need to promote the best interests of children by ensuring that they have permanent, safe, stable, and loving homes suited to their individual needs. However, placement delays and denials based on illegal discrimination increase the risk that the growing number of children, especially minority children, in the child protective system will never find a permanent home. It was the sense of Congress that some of the key factors contributing to the long waits experienced by these children are the race, color, and national origin matching policies and practices of public agencies. These policies, along with agency policies that generally discouraged minorities from becoming foster or adoptive families, resulted in too many children languishing in foster care. MEPA was broadly intended to remove and eliminate discrimination in child welfare, both for the benefit of children who needed permanent homes, and for the benefit of prospective parents who wished to provide permanent homes for children.

In 1996, MEPA was amended by the provisions for Removal of Barriers to Interethnic Adoption (IEP) included in the Small Business Job Protection Act of 1996. The IEP amendments were supposed to remove what some members of Congress felt was potentially misleading language in the original provisions of MEPA and to further clarify that discrimination against children in need of suitable homes or prospective adoptive parents is illegal. In addition, IEP strengthens compliance and enforcement procedures, including the withholding of Federal funds and the right of individuals to bring an action in Federal court against the State or other entity alleged to have violated MEPA.

Congress took a significant step in passing MEPA and its amendments to bring our Nation's child welfare policies in line with the body of established civil rights law. This law makes clear that race, color and national origin should not and may not preclude or delay a child from being placed into a loving and permanent home.

The debate about transracial adoption and same-race placement policies spurred MEPA. However, to date, there is no official Federal definition of "transracial adoption." Within the Administration for Children, Youth and Families, the Children's Bureau's Data & Technology Division defines transracial adoption as adoptions where the adoptive parents differ in at least one racial or ethnic characteristic from the adopted child.

Keeping in mind the Children's Bureau's Data Division's definition of transracial adoption, the research—much of which has been conducted by my fellow colleagues and panelists here today—shows that transracial adoptees of color were no more likely to engage in negative social behaviors than white inracial adoptees (e.g., they are no more likely to abscond or engage in drug use). And studies also show that transracial adoptees have exhibited academic competence, a clear sign of positive well-being.

But even more importantly, transracial adoptees experience speedier adoptions than inracial adoptees of color on the whole, reducing the time these children are allowed to "languish"—a term now synonymous with foster care—in care, without the benefits of a permanent family.<sup>1</sup> Using AFCARS data for example, between 1996 and 2003 the average waiting time for African American children was 17.7 months, while the average waiting time for children of all other races was 15.0 months.<sup>2</sup>

On the issue of adoptive parent recruitment, the Collaboration to AdoptUsKids, a product of the Children's Bureau, has made great strides in formulation and implementation of a national adoptive family recruitment and retention strategy. The AdoptUsKids initiative is designed to find and support foster and adoptive families for waiting children by providing new and enhanced recruitment tools and training and technical assistance (T/TA) to States and Tribes. The Collaboration to AdoptUsKids also operates the AdoptUsKids.org website, encourages and enhances adoptive family support organizations, and conducts a variety of

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<sup>1</sup> Hansen, Mary Eschelbach, and Daniel Pollack. 2007. Transracial Adoption of Black Children: An Economic Analysis. *The Berkeley Electronic Press: ExpressO Preprint Series*, 2007: <http://law.bepress.com/expresso/eps/1942>.

<sup>2</sup> AFCARS data, U.S. Children's Bureau, Administration for Children, Youth and Families.

adoption research projects. AdoptUsKids.org is a tool for connecting foster and adoptive families with waiting children throughout the United States. Registration and participation on the site is free for homestudied families and foster adoption professionals.

In June of 2006, the U.S. Department of Health and Human Services announced the launch of a new adoption advertising campaign encouraging the adoption of older children in foster care; the initiation of a new series of English and Spanish language public service advertisements (PSAs) designed to encourage the adoption of older children and teens from foster care were developed in collaboration with the Ad Council and AdoptUsKids.

The campaign is an extension of the previous award-winning PSA campaign, launched in 2004, which focused on the adoption of children eight and older. Not only have these advertisements won major kudos from the advertising industry, but since the launch of the website, over 8,200 children (as of August, 2007) featured on AdoptUSKids.org have been placed with permanent adoptive families.

With respect to the Multiethnic Placement Act, this Administration can and should be credited with decisive action on the enforcement front. As a representative of ACF, one of the two MEPA enforcement agencies, I'm proud to say that we have finally moved beyond simply providing interpretive guidance, to take action—action in the form of decisions finding states in violation of the law and imposing the financial penalties mandated by MEPA for such violations.

The first enforcement decision involved Hamilton County, Ohio in 2003. After a 4½ year investigation, the Office for Civil Rights (OCR) issued a Letter of Findings, concluding that Hamilton County and Ohio had violated MEPA as well as Title VI of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000(d)), and ACF issued a Penalty Letter imposing a \$1.8 million penalty.

The Letter of Findings confirmed that under MEPA child welfare workers cannot routinely consider race, color or national origin in the foster care or adoption placement process. OCR explained that, among other things, MEPA prohibits:

- routine consideration of race, color or national origin in foster care and adoption placement decisions;
- routine consideration of race in the context of a transracial placement and
- applying different or more rigorous scrutiny to consideration of transracial placements as compared with same-race placements.

Specifically in Hamilton County, we found illegal administrative rules requiring that:

- home-studies of prospective adoptive parents seeking transracial/transcultural placements include a determination of whether a prospective parent is able to “value, respect, appreciate and educate a child regarding a child’s racial, ethnic and cultural heritage, background and language and. . .to integrate the child’s culture into normal daily living patterns;”

- the agency assess the racial composition of the neighborhood where prospective families live and
- prospective parents prepare a plan for meeting a child's transracial/transcultural needs.

A notable historical footnote in the Hamilton County case is that U.S. Senator Howard Metzenbaum, the author of MEPA, represented the State of Ohio, which is where ACF levied the first MEPA penalties. Metzenbaum served for almost 20 years (1974, 1976-1995), introducing MEPA in order to encourage transracial adoption when appropriate and believed that it is better for children to be adopted by parents of another race than not to be adopted at all. Metzenbaum stressed that policies that virtually prohibit multiethnic foster care and adoption are unconstitutional, harmful and must be stopped.

Hamilton County's Corrective Action and Resolution Plan (which we call Hamilton County's CARP) with ACF and OCR was executed on July 15, 2004. As a result of the agreement with OCR and ACF, Ohio has taken numerous actions designed to avoid discriminatory practices, including promulgating revised state administrative rules and policies, enhancing state monitoring and oversight of Ohio counties and private agencies who contract with counties to provide certain child welfare services, and providing state-wide training for child welfare staff regarding compliance with Section 1808, Title VI and other relevant Federal and state laws, administrative rules, policies and practices.

As a result of the CARP agreement, Hamilton County is subject to continued monitoring to ensure its compliance with Title VI, its MEPA State plan requirements and the CARP agreement. In addition to complying with state-wide regulations and policies required by the CARP agreement, Hamilton County has revised certain aspects of its child welfare policies and practices and began conducting annual audits of adoption subsidies provided to adoptive families to help ensure these subsidies are not provided in a racially discriminatory manner. Ohio continues to implement the provisions of the CARP as a MEPA Monitor—who is helping to ensure that State practice complies with the law—is in place and has begun monitoring visits to county agencies.

The second enforcement decision involved South Carolina in 2005. Here, OCR issued a Letter of Findings explaining that the South Carolina's Department of Social Services had violated both MEPA and Title VI, and ACF issued a Penalty Letter imposing a penalty of \$107,481.70.

The Letter of Findings emphasized that strict scrutiny is the appropriate Constitutional standard of review, and that the law forbids any routine consideration of race, color or national origin, allowing its consideration only on rare occasions and even then only to the degree it can be demonstrated to be absolutely necessary.

Specifically, we found illegal South Carolina's practices of:

- honoring birth parents' racial preferences (the law requires agencies to make placement decisions "independent of the biological parent's race, color or national origin preference");
- subjecting prospective transracial parents to greater scrutiny (for example, making inquiries into 1) the prospective parents' ability to adopt transracially; 2) the prospective parents' ability to nurture a child of a different race and 3) the racial makeup of the prospective parents' friends, neighborhoods, and available schools);
- treating prospective parent racial preferences with greater deference than other preferences; and
- the manner in which the agency took race into consideration, including use of race as a "tie-breaking" factor, matching for skin tone, and use of young children's racial preferences.

South Carolina's Corrective Action Plan (CAP) with ACF and OCR was executed on July 2, 2007. The CAP requires South Carolina to take various remedial measures to correct the MEPA and Title VI violations that OCR delineated in its Letter of Findings against South Carolina and for which ACF took financial penalties. Among other things, the provisions require South Carolina to review and revise (as necessary) all of its forms, policies and procedures that are inconsistent with MEPA, Title VI, or both, and to submit the revised policies to ACF and OCR for review and approval. Similarly, South Carolina must develop and implement wide spread MEPA training for all of its foster care and adoption workers, as well as all of its contractors. South Carolina is required to designate a MEPA Monitor, who will help to ensure that State practice complies with the law. The CAP also requires South Carolina to notify the individuals named in the Letter of Findings, as well as other individuals who applied to or are waiting to adopt from South Carolina's child welfare system that it is working to create a child welfare system that is free from discrimination. Also under the CAP, South Carolina is required to collect and submit to ACF and OCR various reports that include data on various aspects of its child welfare system.

South Carolina remains in the early stages of implementing its CAP. To date (August 2007), South Carolina has revised some of its policies, and has sent those revisions to ACF and OCR for review. South Carolina also is in the process of working on implementing its training requirements, as they are required to make significant progress on many issues within six months of signing the CAP. Other terms of the CAP extend for a year, or even up to five years after signature. We believe that the terms of the CAP, and South Carolina's work in implementing the terms, will help to ensure that South Carolina's child welfare system is accessible to all families, and provides children with an opportunity to be fostered or adopted without the barrier of discrimination.

Since the enactment of the MEPA, OCR and ACF have taken additional steps to ensure that delays or denial in the placement of a child for adoption or foster care due to race, color, or national origin are eliminated. In addition to these cases where Letters of Findings, ACF Penalty Letters, and corresponding Corrective Action Plans have been issued, there are

ongoing activities in place to ensure effective MEPA compliance. OCR has conducted over 130 investigations of race, color or national origin discrimination in child welfare practice and engaged in compliance efforts in numerous cases, resulting in agreements by several state agencies to modify their practices. And ACF has, through policy statements and technical assistance, (e.g., IM-97-04, IM-98-03, 2003 Internal Evaluation Instrument) reinforced its commitment to rigorous enforcement of MEPA. All told in terms of technical assistance through our National Resource Centers, the Administration on Children, Youth and Families has engaged States in MEPA-related compliance efforts and trainings on nearly 50 separate occasions since 1999 (NRC for Adoption—31, and NRC on Legal and Judicial Issues—15, since 1999).

The ability to foster or adopt a child without race, color or national origin discrimination warrants and receives our uninterrupted attention. Toward that end, we are continuing to develop common protocols that will assist States in their efforts to implement policies and procedures that ensure non-discriminatory practice in making foster care and adoption placement decisions. We similarly respond to State and other inquiries about MEPA on a regular basis.

The enforcement action and penalties taken by the MEPA enforcement agencies of the U.S. Department of Health and Human Services ups the ante in a way that agency directors and agency workers are not likely to disregard. The mandated penalties for MEPA violations are steep, and cut into the Federal funds upon which States depend to operate their child welfare systems.

Our recent MEPA enforcement actions against Hamilton County, Ohio and South Carolina, in combination with other broad, nationwide technical assistance efforts have certainly increased States' knowledge and awareness of what is and is not acceptable legal practice.

The Commission has inquired about whether MEPA has been effective in terms of reducing the amount of time children spend in foster care. I will address that issue now. The Multiethnic Placement Act legislation was enacted, in part, to prevent children from languishing in out-of-home care while foster or adoptive parents of the same race were found. So when we start to look at whether the enactment of MEPA has reduced the amount of time minority children spend in foster care or wait to be adopted, it is important to keep in mind the law's broad intended focus, which was to remove and eliminate discrimination in child welfare.

The Adoption and Foster Care Reporting System (AFCARS) collects case level information on all children in foster care for whom State child welfare agencies have responsibility for placement, care or supervision, and on children who are adopted from the State's public child welfare agency. AFCARS can provide some data (e.g., the length of time in out-of-home care and the length of time to be adopted) to help clarify whether MEPA has been effective.

In order to conclude that MEPA is the primary reason there may or may not have been a decline in time to discharge and/or adoption for minority children, we first have to determine what an impact of MEPA might look like. To do that, we have to develop a definition of

transracial adoption since, as you'll recall, there is no Federal definition. As I stated earlier, the Children's Bureau's (Data & Technology Division) considers a transracial adoption instances where the adoptive parents differ in at least one racial/ethnic characteristic from the adopted child.

Using that definition, the graph<sup>3</sup> (FIGURE 1) on the next page contains trend data for the largest racial/ethnic groups. It shows that the percentage of Black or African-American-Non-Hispanic children who were adopted by at least one parent who differed from them in at least one racial or ethnic characteristic increased between FY 2000 and FY 2005 from 24% to 31%. It decreased from 72% to 63% for Hispanic children, and decreased for White non-Hispanic children from 11% to 8%.

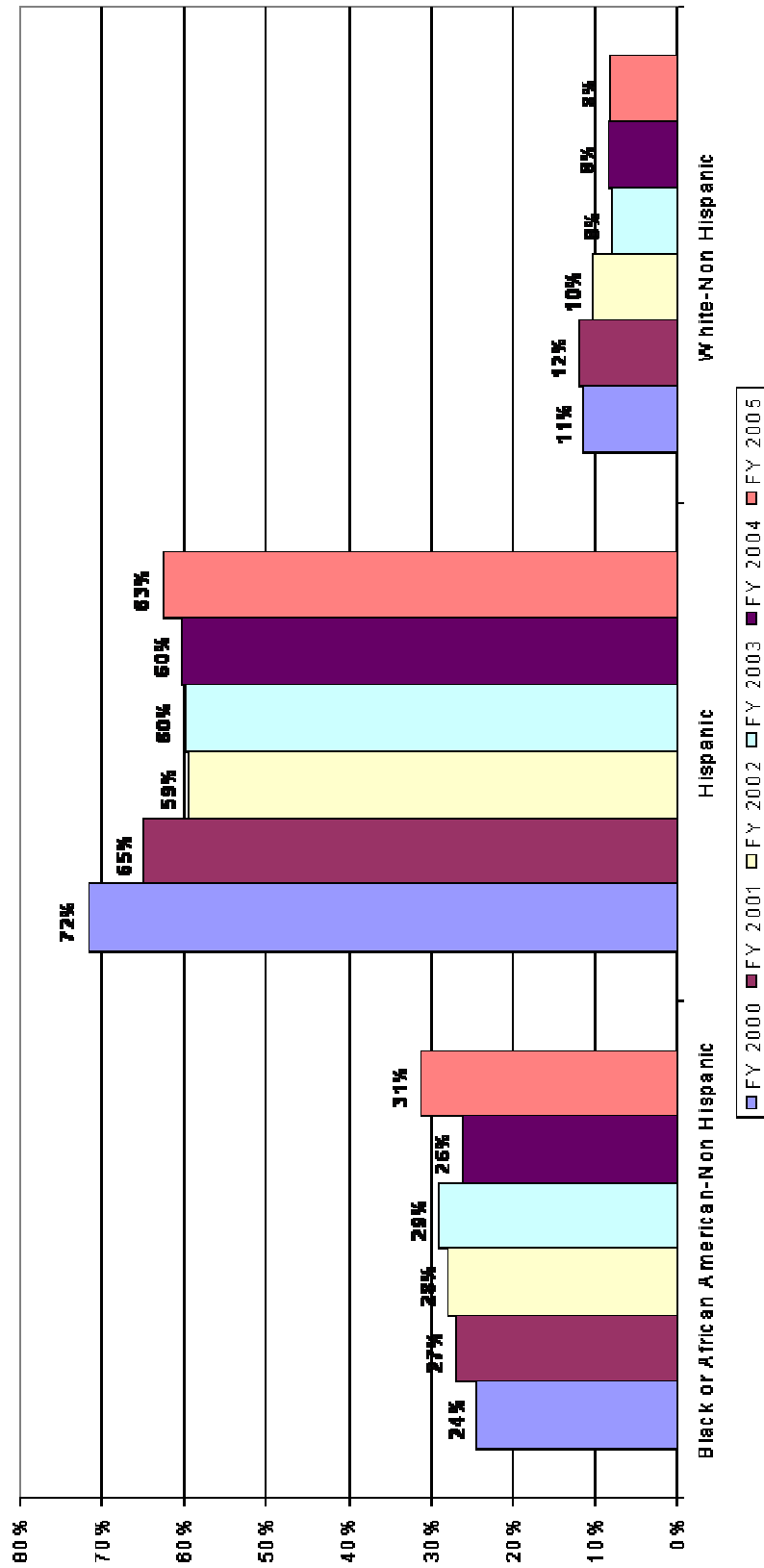
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<sup>3</sup> Based on data submitted by states as of January 2007. Source: AFCARS data, U.S. Children's Bureau, Administration for Children, Youth and Families.



FIGURE 1

**Trend in the Percentage of Children Adopted by at Least One Parent Who Differed from Them in at Least One Racial/Ethnic Characteristic**



The next two graphs<sup>1</sup> (FIGURE 2: “Trend in Average Number of Months to Discharge” and FIGURE 3: “Trend in Average Number of Months to Adoption for Largest Racial/Ethnic Groups”) show the trend in length of stay to discharge and, specifically, to adoption for the largest racial/ethnic groups. For clarity’s sake, when a child welfare agency no longer has care and placement responsibility for the child, the child is considered “discharged” from foster care.

Discharge can occur as a result of a variety of reasons, including:

- reunification with parents or primary caretaker(s)—the child was returned to his or her principal caretaker(s) home;
- living with other relatives—the child went to live with a relative other than the one from whose home he or she was removed;
- adoption—the child was legally adopted;
- emancipation—the child reached majority according to State law by virtue of age, marriage, etc.
- guardianship—permanent custody of the child was awarded to an individual;
- transfer to another agency—responsibility for the care of the child was awarded to another agency (either in or out of the State);
- runaway—the child ran away from foster care placement;
- death of child—the child died while in foster care.

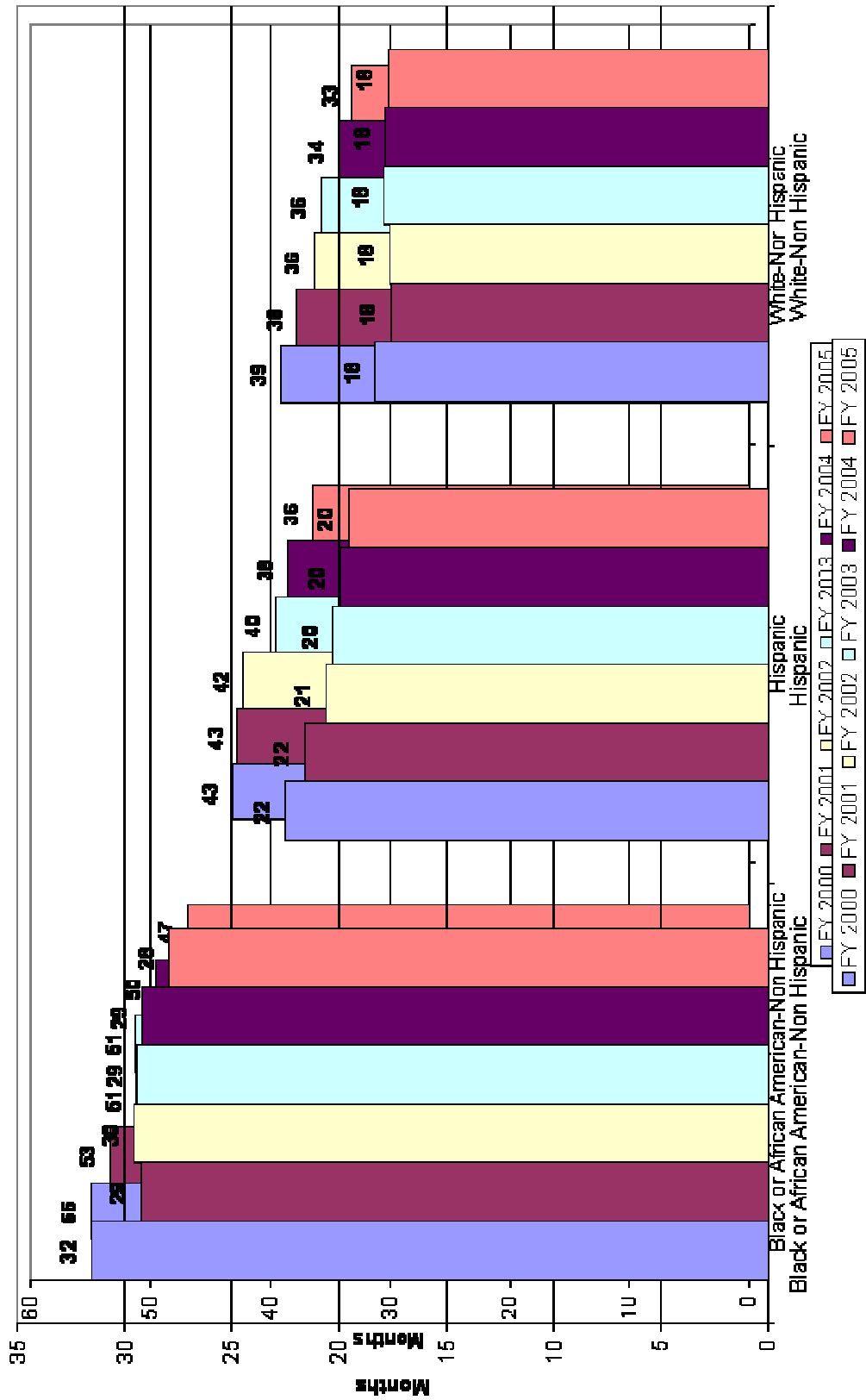
The average time to discharge for Black or African-American non-Hispanic children has declined by four months from FY 2000 to FY 2005, by two months for Hispanic children, and has not declined at all for White non-Hispanic children. The average time to adoption has declined by eight months for Black or African-American children, seven for Hispanic children, and six for White non-Hispanic children.

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<sup>1</sup> Based on data submitted by states as of January 2007. Source: AFCARS data, U.S. Children’s Bureau, Administration for Children, Youth and Families.

FIGURE 2

**Trend in Average Number of Months to Discharge  
Trend in Average Number of Months to Adoption for Largest Racial/Ethnic Groups**



### General Comments/Conclusion

We are unable to conclude that the declines for the Black or African-American non-Hispanic and Hispanic children are solely a result of MEPA, given that the direction of the percentage change in transracial adoptions were different for Black or African-American non-Hispanic children and Hispanic children (i.e., increase for Black or African-American non-Hispanic Children and decrease for Hispanic children). But it is likely that MEPA is at least one of the causal factors in this encouraging outcome.

In addition, one would need to account for the independent effects of the Adoption and Safe Families Act (ASFA) on these declines in length of stay, as it is likely that the extent of these declines, especially when compared to the trend for White non-Hispanic children, is a result of how much longer their lengths of stay were compared to that of White non-Hispanic children to begin with. I think the only thing that can be concluded from the data is that we cannot isolate MEPA's impact on either the rate of transracial/ethnic adoption or length of stay to discharge or, specifically, adoption on White non-Hispanic children.

I want to emphasize that it quite clearly, MEPA has had an extraordinarily positive and important impact on the foster care-and adoption- experiences of *individual* children and families, but the number of children is not large enough to produce a trend in a large national database such as AFCARS.

In addition to MEPA, ASFA, and our AdoptUsKids adoption campaign, our Child and Family Services Reviews also serve as another tool used to monitor and improve outcomes for children awaiting foster and adoptive placement decisions. The Child and Family Services Reviews (CFSR) are designed to enable the Children's Bureau to ensure that State child welfare agency practice is in conformity with Federal child welfare requirements, to determine what is actually happening to children and families as they are engaged in State child welfare services, and to assist States to enhance their capacity to help children and families achieve positive outcomes.

Each CFSR is a two-stage process consisting of a Statewide Assessment and an onsite review of child and family service outcomes and program systems. For the Statewide Assessment, the Children's Bureau prepares and transmits to the State the data profiles that contain aggregate data on the State's foster care and in-home service populations. The data profiles allow each State to compare certain safety and permanency data indicators with national standards determined by the Children's Bureau.

After the Statewide Assessment, an onsite review of the State child welfare program is conducted by a joint Federal-State team. The onsite portion of the review includes: (1) case record reviews; (2) interviews with children and families engaged in services; and (3) interviews with community stakeholders, such as the courts and community agencies, foster families, and caseworkers and service providers.

At the end of the onsite review, States determined not to have achieved substantial conformity in all the areas assessed are required to develop and implement Program

Improvement Plans (PIPs) addressing the areas of nonconformity. The Children's Bureau supports the States with technical assistance and monitors implementation of their plans.

States that do not achieve their required improvements sustain penalties as prescribed in the Federal regulations. All 50 States, the District of Columbia, and Puerto Rico completed their first review by 2004. No State was found to be in substantial conformity in all of the seven outcome areas or seven systemic factors. Since that time, States have been implementing their PIPs to correct those outcome areas not found in substantial conformity. The second round of reviews began in the spring of 2007, and at the date of this briefing we have completed second round reviews with 13 states, with one more scheduled for this fiscal year, 19 in FY 2008, 16 in FY 2009, and 3 in FY 2010.

With regard to foster and adoptive placement permanency, the CFSRs measure whether children have continuity and stability in their living situation, and whether the continuity of family relationships and connections is preserved for these children. These reviews examine in minute detail, such items as whether concerted efforts were made, or are being made to achieve a finalized adoption in a timely manner; whether children who entered foster care during the period under review were re-entering within 12 months of a prior foster care episode; and whether concerted efforts were made to maintain the child's connections to his or her neighborhood, community, faith, extended family, Tribe, school and friends.

Since MEPA legislation was passed, limited research has been published on the outcomes of transracial adoption. Overall, the studies have failed to yield significant differences in the short-term outcomes for transracial versus intracial adoptees. We strongly believe that moving a child from foster care into a permanent, loving home is an important short and long term outcome in and of itself, both for the child and for the family that adopts the child.

It is intuitive to most of us that law in general and MEPA specifically does not hold within itself the means or a guarantee of its enforcement. Relying on a single person (or position), organization, or agency to enforce such a law is not only unrealistic, but counterproductive. Congress passed MEPA to make clear that a policy of race, color or national origin matching in foster care and adoption is as antithetical to our civil rights laws as other more commonly discussed forms of discrimination. The Department will continue to work towards creating and enforcing a discrimination-free child welfare system that focuses on securing loving, permanent homes for children, irrespective of race, color or national origin. But in the final analysis, it is up to all Americans, and particularly those who work with the children and families who are a part of the child welfare system, to strive to make foster care and adoption free from race, color and national origin discrimination.

Thank you for your time today, and your concern about this important issue.

### **Supporting Research**

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### **HHS/ACF Guidance Memoranda**

**1997:** IM-97-04: Issued June 5, 1997. 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".

DHHS issued this 1997 Guidance Memorandum allowing consideration of race in some circumstances, and makes clear that race cannot be used in the normal course but only in exceedingly rare situations.

“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.”

**1998:** IM-98-03: Issued May 8, 1998. INFORMATION ON IMPLEMENTATION OF FEDERAL LEGISLATION—Questions and answers that clarify the practice and implementation of section 471(a)(18) of title IV-E of the Social Security Act.

The General Accounting Office (GAO) conducted a study on States' implementation of the Interethnic provision of the Small Business Job Protection Act of 1996 and raised several questions. The purpose of this memorandum is to inform States, Tribes and private child placement agencies of the responses to these questions.

**Internal Evaluation Instrument:** In 2003, an internal self-evaluation instrument was developed by ACYF and OCR to help states assess their compliance with the Multiethnic Placement Act of 1994 and the Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996.

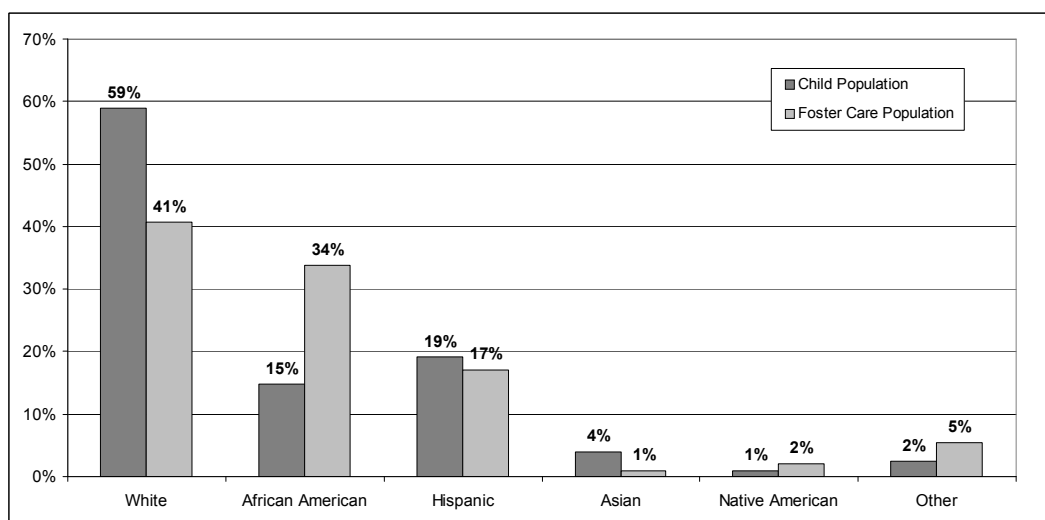
The voluntary form is only for the use of the state and should not be submitted to the Federal government. Items guide administrators through a review of foster and adoptive parent recruitment activities, screening and preparation of prospective foster and adoptive parents, training curricula for foster/adoptive parents and staff, licensing procedures, child assessments, and the selection and placement process. Quality assurance and compliance monitoring systems also are addressed. The questions are intended to identify potential areas for discrimination or placement delays prohibited by Federal law.

**Kay Brown**

**Acting Director, Education, Workforce and Income Security Team,  
Government Accountability Office**

I am pleased to be here today to discuss our recent report on African American children in foster care.<sup>1</sup> As you may know, children of all races are equally as likely to suffer from abuse and neglect, according to the HHS data. However, these data show that African American children across the nation were more than twice as likely to enter foster care compared with White children in 2004. State data also show patterns of disproportionate representation in foster care for Native American children, and in certain localities, for Hispanic and Asian subgroups. The figure below depicts the extent to which these children were represented in foster care and in the general population at the end of fiscal year 2004.

**Proportion of Children in Foster Care Settings, End of Fiscal Year 2004**



**Source: GAO Analysis of 2004 Census and 2004 AFCARS data**

Concerned about why African American children are overrepresented in foster care, the Chairman of the House Committee on Ways and Means asked GAO to study three things:

1. The major factors that influence the proportion of African American children entering and remaining in foster care compared to children of other races and ethnicities;
2. The extent that states and localities have implemented strategies that appear promising in addressing this issue; and

<sup>1</sup> *African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care*, GAO-07-816 (Washington, D.C.: July, 11, 2007).



3. The ways in which key federal child welfare policies may have influenced this issue.

Our report is based on the results of a nationwide Web-based survey of state child welfare administrators in 50 states and the District of Columbia<sup>2</sup>, site visits to five states<sup>3</sup>, analysis of state-reported data, and interviews with cognizant federal agency officials, researchers, and issue area experts.

In terms of the factors that cause African American children to enter foster care in higher proportion than other children, state child welfare directors and researchers reported a complex set of interrelated factors beginning with a higher rate of poverty among African American families. While families of all races live in poverty to some degree, nationally, African Americans are nearly four times more likely than others to live in poverty. Studies have shown that, under these circumstances, families have difficulty gaining access to social services and appropriate housing that can help families stay together. However, research suggests that these factors do not fully account for differing rates of entry into foster care. State child welfare directors we surveyed also responded that bias or cultural misunderstanding and distrust between child welfare decision makers and the families they serve also contribute to the disproportionate removal of children from their homes.

Once African American children are removed from their homes, HHS data show that they remain in foster care about 9 months longer than White children. State officials attributed these longer lengths of stay to similar factors, such as challenges parents have gaining access to subsidized housing, substance abuse treatment, and other services that may be needed before children can be reunified with their families. For children who cannot be reunited with their families, state officials reported difficulties in finding appropriate permanent homes, in part because of the challenges in recruiting adoptive parents, especially for youth who are older or have special needs. In addition, African American families are more likely than White families to rely on relatives to provide foster care. Although this type of foster care placement, known as kinship care, can be less traumatic for children, it is also associated with longer lengths of stay.

In terms of our second objective on state actions, most states in our survey reported implementing some strategies that experts have identified as promising for reducing African American representation in foster care. While researchers and officials stressed that no single strategy would fully address the issue, strategies that specifically address the causes I mentioned above were considered promising. These included strategies designed to increase access to support services, reduce bias, and increase the availability of permanent homes. For example, strategies used by more than 33 states to improve access to services included collaboration with neighborhood-based organizations to increase awareness and use of local services, and interagency agreements among various state agencies that may serve the same clients. Most states sought to reduce bias by including the family in making key decisions and by recruiting and training staff with the skills to work with people of all ethnicities. To

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<sup>2</sup> Of these, 48 responded.

<sup>3</sup> California, Illinois, Minnesota, New York and North Carolina.

move children more quickly from foster care to permanent homes, more than half of states reported performing a diligent search for fathers or paternal kin of children in foster care who might be willing to provide a permanent home. They also reported recruiting African American adoptive families and offering subsidies to guardians who were not willing or able to adopt, similar to what is currently allowed for adoptive families.

Although research on the effectiveness of strategies has been limited, public and private officials in the forefront of research and implementation said that the ability to analyze data, work across social service agencies, and sustain leadership was fundamental to any attempt to address racial disproportionality. HHS has taken steps to help states in their efforts through outreach and technical assistance. However, state child welfare directors generally reported in our survey that they needed additional support to analyze data and disseminate corrective strategies.

For our third objective—on federal policies, states reported that they considered some federal policies helpful in decreasing disproportionality in their child welfare systems, while they viewed other federal policies as having the opposite effect. Linking back to the factors contributing to the disproportionality, about half of the child welfare directors we surveyed reported that using federal social services block grants, such as Temporary Assistance for Needy Families, was helpful. These grants, when used for preventive services and family supports, can be particularly relevant for African American and other families living in poverty.

States also considered federal policies that promote adoption as helpful. One federal adoption policy generally considered beneficial is the requirement under MEPA/IEP to diligently recruit minority adoptive families. In our survey, 22 states reported that this requirement contributes to a decrease in the proportion of African American children in care. However, state officials said it was a challenge to recruit a racially and ethnically diverse pool of potential foster and adoptive parents, and HHS reported that more than half of states are not meeting the federal performance goals for recruitment. State officials noted the shortage of willing, appropriate, and qualified parents to adopt African American children, particularly older children. Researchers also cited a lack of resources among state and local agencies and a lack of federal guidance to implement new recruiting and training initiatives. Perhaps because of these challenges, 9 states in our survey reported that the policy requiring diligent recruitment had no effect on the proportion of African American children in care, and 15 states reported that they were unable to tell.

Another federal adoption policy states considered helpful in reducing disproportionality was the provision under Title IV-E that provides subsidies to a parent who adopts a child with special needs. Special needs is a state-defined term for children having characteristics that states believe make adoption more difficult, such as being of older age, having a disability, or being a member of a minority group. In 2003 through 2005, HHS data showed that states designated more than 80 percent of adoptions as special needs adoptions, enabling families to receive federal financial subsidies. However, over the last 5 years, African American children have consistently experienced lower rates of adoption than children of other races and ethnicities, according to HHS adoption data.

States report being constrained by the lack of federal subsidies for legal guardianship similar to those provided for adoption. Legal guardianship is formally recognized under federal law as a permanent placement option and provides a means for families who want to permanently care for children without necessarily adopting them. It is considered a particularly important way to help African American children exit foster care. In fact, subsidizing guardianships has demonstrated its value in providing permanent families for children and in reducing the number of African American children in foster care. It may also be cost-effective, given the experiences of the states that implemented this strategy using federal waivers. Because of these factors, it may be appropriate to reconsider the current distinctions that provide subsidies for adoption but not for guardianship.

Not all federal adoption policies were considered helpful by states in reducing disproportionality. For example, the MEPA/IEP provision encouraging race-neutral adoptions was reported by states to have less effect than other policies in reducing African American representation in foster care. Although 15 states reported that this provision would help reduce disproportionality, 18 states reported that this provision had no effect, and an additional 12 states reported that they were unable to tell. An HHS study reported in 2003 that implementation was hindered by confusion about what the law allowed or prohibited, and state officials in states we visited said that ongoing confusion and disagreement continued to hinder implementation.

In conclusion, I would like to emphasize that issues surrounding the disproportionate representation of African American children in foster care are pervasive, continuing, and complex. They affect nearly all states in this nation to varying degrees. In efforts to reduce African American representation in foster care, state and local child welfare officials face numerous challenges. Despite the steps that HHS has taken to disseminate information about these strategies, states report that they need further information and technical assistance to strengthen their current efforts.

## Statements: Second Panel

### *J. Toni Oliver*

#### **Co-chair Family Preservation Focus Group, National Association of Black Social Workers**

The stated intention of MEPA was to remove barriers to permanency facing children involved in the child protective system, and intensive recruitment for underserved populations. However, although nationally adoptions doubled from 1995 to 2005, disproportionality for African American children in foster care in particular, remained unchanged. An August 2005 Congressional Research Report on Disproportionality; AFCARS (Adoption and Foster Care Analysis and Reporting System) data; Child Welfare League of America reports on Disproportionality; Annie E. Casey Reports on Disproportionality; and most recently, a July 2007 GAO report on African American Children in Foster Care all share the same perspective and findings:

- African American children are four times more likely to be in protective custody, more likely to stay in foster care for longer periods of time and less likely to either be returned home or adopted (CWLA)
- The average African American child is not at any greater risk for abuse and neglect than the average Caucasian child. In fact, no significant or marginal race difference in the incidence of maltreatment has ever been found by the National Incidence Study (of Child Abuse and Neglect), however, African American, Hispanic and Asian/Pacific Islander children have a disproportionately higher rate of maltreatment investigations than Caucasian children.
- The average mean age of children waiting to be adopted is 7 years old (adopting.org), and 67% of the children in foster care are age 6 and over. However, the majority of children placed transracially are below age 5.
- Washington State tracked disproportionality from 2001 and in a 2005 FY report found that the number of African American children in care longer than 2 year remained virtually unchanged and the number of Native American children in care increased.

Most agencies are so intimidated by MEPA that they avoid any discussion of race with families who are considering adopting across racial lines, leaving parents with no opportunity to discuss the impact of race and racism a child of color may experience; how to enable the child to develop safe and healthy coping mechanisms; and how to enable a child to develop a healthy racial/cultural identity. Given the opportunity for discussion, transracial adoptive parents could be better prepared to meet a child's holistic needs. Instead, many families are caught off guard with unexpected reactions from family and friends and unwelcome and inappropriate comments and reactions from the community in general and have no idea where to go for support. After the adoption, few agencies are equipped or even welcome

requests for support from families. Unfortunately, there are only a few agencies/organizations in the country that recognize the complexity of transracial adoption and proactively provide programs to assist families and adoptees resolve the issues that are inherent with such placements. The Institute for Black Parenting and NABSW's Adoption Counseling and Referral Service offer programs and support groups for parents who have adopted transracially and youth and young adults who have been transracially adopted. The North American Council on Adoptable Children and PACT, an adoption alliance in California have a parent preparation training programs for families considering adopting transracially.

MEPA appears to be couched in a belief system that transracial adoption is a viable answer to the lengthy period of time children of color wait to be adopted. However, it ignores the fact that children of color enter the child welfare system disproportionately and inappropriately and ignores the experience that all families, especially families of color experience navigating the public agency system in their quest to adopt such as the length of the adoption process and the length of the wait for a placement and being turned away if are seeking to adopt children under 4 years old (Urban Institute, National Adoption Center). Interestingly, the age range of the majority of transracial adoptive placements is the age range that families of color experience the most difficulty adopting.

Poverty is rated #1 as the major factor influencing a child's entry into foster care. In spite of the wide spread acceptance and recognition of the influence of poverty, federal legislation seeks to punish poor families by taking their children; expecting them to ameliorate the conditions that caused their children to be removed from them without adequate access to and/or availability of resources and little to no support in accessing services. Since its flagship statement in 1972, the National Association of Black Social Workers has advocated for family preservation services for African American children who come to the attention of the child welfare system rather than disproportionate removal. Only recently, are we hearing this being recommendation echoed by organizations, task groups and think tanks across the country. Hopefully, the US Commission on Civil Rights will recognize that a focus on racial equity in child welfare begins with addressing disproportionality and racial disparities in every aspect of the child welfare system—beginning with entry. Focusing exclusively on the adoption ignores the racial disparities and gross systemic inadequacies that create and exacerbate the problems encountered with adoption.

Families who become involved with public child welfare services are exclusively poor families with limited to no access to supportive services. The question must be asked why are we so eager to take away children from families who need services and give the services they need to the families with whom the children are placed. In fact, the farther removed a child is from their family and a family-like setting, the more state and federal dollars go in to support those placements. A service that is much less traumatic for families; has much better permanency outcomes and a much more cost effective for federal and state budgets is family preservation (Casey Family Programs, Dorothy Roberts, Black Administrators in Child Welfare, Chapin Hall, GAO). In spite of its appropriateness and effectiveness, the trends for decades have been to allocate fewer and fewer federal and state dollars for family preservation services. The current legislative focus and family preservations funding

disincentive fuels the problems experienced with adoption services. Changing funding incentives in child welfare changes outcome and has far reaching proportions. One significant connection is that of child welfare and juvenile justice. A Child Welfare League report suggests that disproportionality in the Juvenile Justice system may have roots in child welfare in that “cultural and racial bias in child welfare decision-making may compound the problem (entry into the Juvenile Justice system) long before children reach the just system.” The report goes on to say “smaller studies have confirmed that minority children in the child welfare system experience disadvantages in areas such as the range and quality of services offered, how quickly their cases are handled, the kind of support offered to their families and the eventual outcomes.”

Many agencies who complain of not having a sufficient pool of prospective adoptive families of color do nothing to recruit them and at the same time, when families respond to recruitment efforts, they complain of no or sluggish follow up (Urban Institute, National Adoption Center). While MEPA has an expectation of adoptive family recruitment of prospective parents reflective of the racial and ethnic diversity of children in care, to be effective this expectation should require documentation of recruitment efforts, documentation of the number of families recruited; documentation of the number of recruited families who begin the adoption process and documentation of the number of recruited families who receive adoptive placements.

MEPA assumes the answer to the length of time children wait to be adopted is to promote transracial adoption; however, there is overwhelming evidence that the problem begins with disproportional entry and continues with racial disparities at every level of child welfare decision making. As such, the answer to the length of time children wait to be adopted lies at the front door of the child welfare system (entry), not at the back (adoption). By focusing on the back door, MEPA’s reality is that 13 years after its passage, children of color remain disproportionately represented in the public child welfare system, experience the longest stays in foster care and the poorest adoption placement rates.

**Joseph Kroll****Executive Director, North American Council on Adoptable Children**

Mr. Chairman and Members of the Commission, I thank you for this opportunity to appear before you today to discuss implementation of the Multiethnic Placement Act (MEPA) of 1994 and the 1996 Interethnic Adoption Provisions (IEAP) that amended MEPA.

I am Joe Kroll, executive director of the North American Council on Adoptable Children (NACAC). I also serve on the boards of the National Foster Parent Association and Voice for Adoption, a coalition of more than 50 states, local, and national adoption organizations. More importantly, I am a parent of two children, one a young woman who was adopted transracially from Korea when she was an infant.

NACAC strongly believes that race matters in child welfare and that MEPA/IEAP, as implemented, has done little, if anything to help waiting or older children of color find families more quickly and has gone too far in a misguided effort to be colorblind. NACAC follows a dual strategy to help foster and adopted children of color:

- We support same race placements by researching and identifying the barriers faced by prospective foster and adoptive parents of color, and providing assistance to minority parent groups and specialized adoption agencies.
- We support families who adopt transracially and transculturally by providing education and training to help them handle the special challenges.

We believe that both of these strategies could be much better supported through federal legislation and advocacy, and would do far more to promote the best interests of children of color in foster care. Current efforts to promote colorblind child welfare practice are naïve at best, and do not serve the best interests of either African American or Latino children OR the families who adopt them. We are all reminded daily that race matters in this country—whether through stories of racial profiling by the police or by statistics on racial disparities in educational achievement. In a country where nooses are hung on trees to discourage black students from speaking out, we cannot doubt that racism is alive and well.

**Background**

Before I answer some specific questions on MEPA/IEAP, I need to provide some background on the legislation's history.

The initial interest in addressing racial matching policies can be traced to the death of Reece Williams in 1989. Reece, an African American child, was originally placed with a white foster family in Hamilton County, Ohio. When the three-year-old Reece's parental rights were terminated, he was placed with an African American family in New York who subsequently killed him. Senator Howard Metzenbaum (OH) blamed racial matching policies for the death, and began looking for ways that federal legislation could address the issue.

The debate raged on for four years until October 1992 when *60 Minutes* aired a very one-sided report that highlighted Reece's murder and practice where children were moved for race-matching purposes. At the same time, the National Committee for Adoption and its allies channeled the anger among white parents who believed they were being denied the opportunity to adopt black infants. Senator Metzenbaum reacted to the stories by committing to pass MEPA before he retired.

Unsurprisingly, policy makers and the media paid no attention to the nearly universal practice of placing white children only with white adoptive families or to the impact of "same race" adoptive placements on the welfare of white children. The media and decision makers also totally ignored research documenting that half of black infants (under 2) and two-thirds of Latino infants in the care of private agencies were already being adopted transracially.<sup>1</sup>

Although for many people the primary racial concerns in adoption were about white parents' access to black infants and toddlers, MEPA was alleged to be the solution for the longer waits older African American foster children experienced and their over representation in care. Researchers and adoption practitioners sought to make clear to policy makers that the longer waits of children of color were caused by a number of factors and that difficulties finding families interested in adopting older children and youth of color posed a particular challenge.<sup>2</sup> White families were not being deprived of the right to adopt these children; most were simply not interested.

### **Legislative Intent**

The long, heated discussions about MEPA showed that many policymakers believed that race does matter in child welfare. During negotiations on MEPA between the House and Senate, representatives of the Congressional Black Caucus insisted on the inclusion of language promoting the recruitment of families that reflect the racial and ethnic background of foster children. This provision was intended to address the fact that too few families of color are sought to be foster or adoptive parents.

Although he did not want to see placements delayed or denied because of race, Senator Metzenbaum agreed that race should be a factor in placement decisions:

But that does not mean that when a black child comes up for adoption that somebody should stand in the way of that child being adopted by a white family if the white family is fully capable, and in a position to provide loving care and wholesome guidance for that young person, and there is not a black person of equally capable characteristics also wanting to adopt that black child.

Let me make my position clear: If there is a white family and a black family that want to adopt the black child and they are equal in all respects, then the black family ought to have preference.<sup>3</sup>

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<sup>1</sup> North American Council on Adoptable Children, *Barriers to Same Race Placement*, 1991.

<sup>2</sup> NACAC, 1991.

<sup>3</sup> *Congressional Record Senate S14169*, October 5, 1994.



Other Senate sponsors also supported the idea of reaching out to communities of color while supporting transracial placement when a family of color is not available:

In approaching the issue of multicultural placements we have been guided by the principle that a transracial placement is a valid method of providing a child with a loving home when an appropriate same race placement is not available. The amendments made to the Multiethnic Placement Act do not in any way detract from this principle. In fact, the amendments in several respects enhance it.

First, the amendments further limit the use of race in a placement decision to only permit consideration of the racial, ethnic or cultural background of a child and the capacity of the prospective parent 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. Second, the amendments emphasize the recruitment of prospective foster and adoptive families from various racial, ethnic and cultural backgrounds. Increasing the pool of appropriate and available prospective parents will be a significant step toward decreasing the amount of time that children wait for out-of-home placements....

DAN COATS,  
NANCY KASSEBAUM,  
DAVID DURENBERGER,  
HOWARD METZENBAUM,  
CAROL MOSELEY-BRAUN,  
PAUL SIMON.<sup>4</sup>

### **The 1996 Amendments**

Even before the U.S. Department of Health and Human Services (HHS) had time to issue regulations to implement MEPA, Representative Jim Bunning (KY) claimed that MEPA was “not working.”<sup>5</sup> Without hearings or statements for the record, the Interethnic Placement Act was drafted, stating that race was not to be considered as a factor in decisions regarding foster care or adoption placements. It was inserted into the omnibus bill Small Business Protection Act and became law in August 1996.

### **Specific Questions**

#### **1. Has enactment of MEPA removed barriers to permanency facing children involved in the child protective system?**

In a soon-to-be published, in-depth analysis of transracial adoption, author Susan Livingston Smith concludes: “The assumptions underlying the development of MEPA-IEP were not accurate, and the anticipated outcomes of the law—to expedite adoptions of children of color in foster care by promoting transracial adoption—have not come to pass.”<sup>6</sup>

There is no compelling evidence that MEPA removed barriers to permanence for foster children. Reductions of length in time in care and increases in adoption did not occur until

<sup>4</sup> *Congressional Record Senate S14201*, October 5, 1994.

<sup>5</sup> *Congressional Record*, March 25, 1995.

<sup>6</sup> Susan Livingston Smith, “Adoptive Families for African American Children in Foster Care: The Role of Transracial Adoption,” to be published.

after implementation of the Adoption and Safe Family Act (ASFA) of 1997. Adoptions began increasing from 27,000 in 1997 to more than 50,000 in 2000 and have remained constant thereafter. During the same period there has been a decrease in the length of time that children spend in care, but that is more likely a factor of ASFA timelines because ASFA directly addressed children's need for permanence and dramatically reduced timelines for permanency planning efforts.

While we may never know if MEPA has helped children find permanent families, we do know that since the passage of MEPA children of color have been increasingly placed transracially while white children are still placed almost exclusively with same race families. In 1995, 2.4 percent of white children were placed with parents of another race, compared to 2.8 percent in 2001. African American children were placed transracially 14.2 percent of the time in 1995, compared to 16.9 percent in 2001. Transracial placements of Latino children increased more dramatically—from 20.7 percent in 1995 to 37.8 percent in 2001.<sup>7</sup> If MEPA truly led to colorblind child welfare practice, we would expect increases in transracial placements for children of all races, not just children of color.

In Hennepin County (Minneapolis), Minnesota—featured in the *60 Minutes* story mentioned above for moving African American children to same race families—transracial placements are rampant. In 2004, over 75 percent of the county's African American children were placed with parents of another race.<sup>8</sup>

Other data suggests that MEPA has helped white families adopt children who were already more likely to find permanent families. AFCARS data document that two-thirds of transracial adoptions of African American children are of children five and younger, not the older children and youth who often struggle to find a permanent family.<sup>9</sup>

## **2. Do transracial adoptions serve the children's best interest or does it have negative consequences for minority children, families, and communities?**

As a successful transracial adoptive parent, I can say unequivocally that transracial adoption can be an extremely positive experience for both children and parents. It works when prospective adoptive parents are "as fully prepared as possible for the adoption of a particular child," and those who train parents focus on "the child's...cultural, racial, religious, ethnic, and linguistic background." I have just described the current regulations of the U.S. State Department regarding international adoptions under the Hague Convention.

Unfortunately and in complete contrast, in implementation of MEPA/IEAP, agencies have been led to ignore race so completely that they cannot adequately prepare families for transracial placement. As HHS stated in an Information Memorandum:

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<sup>7</sup> Mary Eschelbach Hansen and Rita J. Simon, "Transracial Placement in Adoption with Public Agency Involvement: What Can We Learn from the AFCARS Data?" *Adoption Quarterly*, Volume 8, Number 2, 2004.

<sup>8</sup> Personal communication, Cathy Bruer-Thompson, Hennepin County Adoption Program Training Manager, September 2007.

<sup>9</sup> Penelope L. Maza, Children's Bureau, "Adoption Data Update," presented at the CWLA National Conference, February 2004.

State child welfare agencies...must ensure that they do not take action that deters families from pursuing foster care or adoption across lines of race, color, or national origin. Whether subtle or direct, [such] efforts...cannot be tolerated.<sup>10</sup>

While this may not read as an explicit prohibition against preparing families to address issues of race and culture, it has in effect seriously stifled such preparation. In Ohio, adoption preparation training has been dramatically watered down so that it could not possibly discourage a prospective transracial adopter. In other cases, agencies simply avoid all discussion of race and culture because they fear such discussions might “deter families from pursuing foster care or adoption across lines of race, color, or national origin.” During a recent training, for example, a caseworker reported that white foster parents interesting in adopted an African American foster child stated that they did not allow their birth children to have African American friends. The worker’s supervisors instructed her not to discuss the issue with the family for fear of violating MEPA.<sup>11</sup>

The Hague regulations, by contrast, focus on children’s best interests and assert that parents’ need to be prepared for adoption “outweighs any concern that the [required parent training] will discourage families from adopting.”

Decades of research on transracial adoption firmly supports three conclusions:

- Transracial adoption in itself does not produce psychological or social problems in children.
- There are challenges faced by transracial adopted children and their families, and the way families address these challenges affect a child’s development.
- It is particularly important that children adopted from foster care be placed with families who can address their specific needs, including their racial/ethnic needs, to maximize their opportunity to achieve their fullest potential.<sup>12</sup>

Research by Robert Carter showed that transracial adoptees in their 20s and 30s do not have the skills that other African Americans have to successfully confront the racism and discrimination they experience.<sup>13</sup> In a study of transracial families, McRoy, Zurcher, et al. found that there was a strong correlation “between the transracially adopted black children’s perception of their racial identity and their parents’ perceptions. Generally, if the parents ... tended to de-emphasize racial identity to the child, the child acquired similar perceptions.”<sup>14</sup> Many studies have linked racial identity to child’s self-esteem.

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<sup>10</sup> U.S. Department of Health and Human Services, Information Memorandum ACYF-CB-IM-03-01, March 25, 2003.

<sup>11</sup> Smith, to be published.

<sup>12</sup> Smith, to be published.

<sup>13</sup> Carla M. Curtis, “The Adoption of African American Children by Whites: A Renewed Conflict,” *Families in Society: The Journal of Contemporary Human Services*, March 1996.

<sup>14</sup> Ruth G. McRoy, Louis A. Zurcher, Michael L. Lauderdale, and Rosalie E. Anderson, “Self-esteem and Racial Identity in Transracial and Inracial Adoptees,” *Social Work*, November 1982.

Children’s best interests are served when agencies work to honestly inform would-be parents about the special needs of children who are available for adoption—including the effects of abuse and neglect or in-utero exposure to alcohol or drugs, and issues of race, ethnicity, and national origin. Children’s best interests, in short, are not served by uninformed, unprepared families who ignore their children’s racial identity. If engaging parents in discussions of race makes prospective parent uncomfortable—or even challenges their thoughts about transracial parenting—that should be acceptable. Ultimately, the government’s goal must be to ensure that parents are thoroughly prepared and ready to meet their children’s many needs—physical, emotional, *and* cultural.

### **3. How effectively is the Department of Health and Human Service (HHS) enforcing MEPA?**

HHS is enforcing only one provision of MEPA/IEAP. Enforcement has focused solely on the “delay or deny” provisions of the act and ignored the diligent recruitment section entirely. In fact, the entire section in the Code of Federal Regulations focuses on the “delay or deny” provision and subsequent penalty. There is no mention of the need to enforce the provision mandating recruitment of families of color, and there have been no fines or investigations of failures of this portion of MEPA.

HHS has conducted more than 130 investigations of alleged violations of MEPA’s delay or deny provisions and has fined agencies in only two cases: Hamilton County and the state of Ohio in 2003, and the state of South Carolina in 2006. After most other investigations, agencies have agreed to make changes requested by HHS.

Child and Family Service Reviews (CFSR), enacted after ASFA, require states to identify compliance with the recruitment provision of MEPA. Only 22 states even reported having plans for diligent recruitment for families who reflect the racial and cultural backgrounds of children in care.<sup>15</sup> No states have been investigated by HHS or fined as a result of being graded “Area Needing Improvement” during the CFSR.

This lack of enforcement has resulted in little progress on recruiting families of color. The Local Agency Survey, designed to assess the impact of MEPA/IEAP and ASFA, found that only 8 percent of responding agencies had created new recruitment resources following MEPA/IEAP.<sup>16</sup>

Again, this suggests that the focus of MEPA/IEAP is on white families’ access to children of color, rather than recruiting and preparing families to be the best possible parents for foster children who need families.

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<sup>15</sup> Smith, to be published.

<sup>16</sup> Smith, to be published.

**4. What has been the impact of HHS's enforcement of MEPA on the efforts of prospective foster care or adoptive parents to adopt or provide foster care for minority children?**

MEPA/IEAP—and its uneven enforcement—have had a chilling impact on the child welfare field. In an odd twist, workers are sometimes afraid to place children with the very African American families they were required to recruit for fear of showing bias against non-African American families.

Some agencies choose to place children with the family at the top of the waiting list, without regard for that family's ability to best meet the child's need. Others fear that when an agency has two home studied families who are equally able to parent a child—one who shares the child's race or ethnicity, and one who doesn't—the agency cannot consider race in choosing one over the other. Such placement decisions are clearly not in a child's best interests, which require a thorough evaluation of each family's ability to meet a particular child's specific needs.

With the perceived threat of a lawsuit or fine looming overhead if they place children of color with families of color, some agencies have regrettably little incentive to recruit as widely and intensively as they should for families of color.

**5. Has the enactment of MEPA reduced the amount of time minority children spend in foster care or wait to be adopted?**

AFCARS reports suggest that length of time care for minority children have gone down over the last decade—just as stays in care have gotten shorter for white children. There is no proof that shorter stays for children of color are due to MEPA/IEAP. According to AFCARS data from 2002, two-thirds of transracial adoptions of black children occurred when they were five and under. Older children—those who are harder to place and more likely to languish in care—are much more frequently adopted by kin. Two-thirds of relative adoptions of black children occur when they are six and older.<sup>17</sup> One could argue that the black children's stays in care have been reduced because so many relatives have stepped up to provide them with a permanent family.

**NACAC Recommendations**

While it is likely that MEPA/IEAP led to some increases in transracial placements, there is no evidence that the law has helped the older foster children it was designed to serve. Because NACAC believes MEPA/IEAP is hampering agencies' efforts to promote each child's best interests and to attract more foster and adoptive families of color, we are advocating for federal legislation to replace provisions of MEPA/IEAP with statutory language that codifies the principles listed below:

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<sup>17</sup> Maza, February 2004.

- A child's best interests should always be paramount in placement decisions.
- In any foster care or pre-adoptive placement, preference shall be given to placement with a child's relative or fictive kin when those families can safely meet the child's needs.
- States, counties, and other agencies with responsibility for children in foster care must recruit and retain prospective foster and adoptive families from communities that reflect the racial, ethnic, cultural, and linguistic background of children in their foster care system.
- Placing agencies must *fairly and equally consider* these recruited families for foster and adoption placements. We all know that recruitment is only the first step. Agencies must also be able to welcome newly recruitment families and fairly assess their ability to meet children's needs.
- Placing agencies must assess a prospective foster or adoptive family's ability to meet a child's needs—including racial, ethnic, cultural, and linguistic needs—when making a foster or adoptive placement and, in placement decisions, must consider the child's cultural, racial, ethnic, and linguistic needs as well as prospective parents' capacity to address other needs the child may have.
- When making transracial or transcultural foster or adoption placements, state, county, and other agencies with responsibility for children in foster care must provide training and other supportive services to ensure that foster and adoptive parents are adequately prepared and supported to meet their children's racial, ethnic, cultural, and linguistic needs.
- A foster or adoptive placement should not be delayed or denied due solely to the race, color, national origin/ethnic background, or primary language of either the child or prospective parent.
- Financial incentives or penalties will encourage state, county, and other agencies with responsibility for children in foster care to comply with provisions listed above:
  - agencies that do not comply shall lose a portion of their Title IV-E foster care or adoption assistance funding; or
  - the federal government will develop an incentive program to reward agencies for recruiting families that reflect the racial, ethnic, cultural, and linguistic background of children in their foster care system, and for placing children with families who can meet the children's racial, ethnic, cultural, and linguistic needs.

In today's diversified but still racist society, NACAC cannot comprehend how agencies can guard children's well-being without recognizing how much race influences every person who lives in this country. We must replace MEPA/IEAP with legislation that focuses on the best interests of children in our nation's foster care system, and truly ensures that they find permanent, loving, and culturally sensitive families as quickly as possible.

**Rita J. Simon****School of Public Affairs and Washington College of Law, American University**

My remarks this morning are based on research I have done on various aspects of transracial adoptions for almost 40 years. The studies include following 204 families in the Midwest over a 20 year period and interviewing the parents, the adopted, and the birth children from the time the children were four years old until they were adults. Another study involved conducting in depth interviews with 24 adult male and female transracial adoptees (TRAs) (*In Their Own Voices*). My co-author on that and other studies is Rhonda Roorda who is herself a TRA. We followed that study up with one in which we interviewed 16 of the parents of the TRAs. At the present time, Rhonda and I are almost through interviewing the birth siblings of the TRA respondents. The major question we are asking in that study is what was it like to have a black or bi-racial brother or sister.

I have also studied Asian and Hispanic adoptees and most recently (the book is in press) Native Americans who were adopted by white families before the Indian Child Welfare Act (ICWA) of 1978 was passed.

On the whole, the results of all of the studies with one modification show that TRA serves the childrens' best interest. The one modification is the study of Native Americans.

But first the longitudinal study. We first met the families in the 20 year study in 1971, when they agreed to our request that we interview the parents and each of the children (those adopted and those born to them) in their homes. When we first met these families, their adopted children were between the ages of three and seven years of age. They lived in five cities in the Midwest: Chicago, Illinois; St. Louis, Missouri; Minneapolis, Minnesota; Ann Arbor, Michigan; and Madison, Wisconsin. There were 204 families with 167 biological children and 199 adopted children, 157 of whom were transracially adopted. The focus of our first and subsequent encounters with these families was the racial identity, awareness and attitudes of the adopted non-white children and their white siblings.

The most important finding that emerged from our first encounter with the families was an absence of a white racial preference or bias on the part of the white and non-white children. Contrary to other findings that had thus far been reported, the children reared in these homes appeared indifferent to the advantages of being white, but aware of and comfortable with the racial identity imposed on them by their outward appearance. By and large, the parents of these children were confident that the atmosphere, the relationships, the values, and the lifestyle to which the children were being exposed would enable successful personal adjustments as adults. In writing about the results of our study in 1975, we emphasized that transracial adoption appeared to provide the opportunity for children to develop awareness of race, respect for physical differences imposed by race, and ease with their own racial characteristics, whatever they may be.

When we returned to these families in 1979, we contacted only the parents by mail and telephone. We felt it was important to have even such an abbreviated contact because most of the children were about to enter adolescence or were already young teenagers and it was a

propitious time to take a second reading. We learned in 1979 that the “extremely glowing, happy portrait” that we had painted seven years earlier now had some blemishes on it. It showed signs of stress and tension. We noted that:

For every five families in which there were the usual pleasures and joys along with sibling rivalries, school-related problems, and difficulties in communication between parent and child, there was one family whose difficulties were more profound and were believed by the parents to have been directly related to the transracial adoption.

The serious problem most frequently cited by the parent was the adopted child’s (usually a boy) tendency to steal from other members of the family. We described parents’ accounts of the theft of bicycles, clothing, stereos, and money from siblings’ rooms, so that brothers and sisters had resorted to putting locks on their bedroom doors. Another serious problem was the parents’ rather painful discoveries that the adopted children had physical, mental, or emotional disabilities that were either genetic or the results of indifferent or abusive treatment received in foster homes.

On learning about the stealing, we consulted therapists and they told us that the children were testing their parents to see if they would love them and keep them even if they misbehaved. What did we find now that the children were adolescents and young adults? First, the stealing from family members had ceased completely. Second, almost all of the parents said that if they had to make the decision today about whether to adopt transracially, they would do it again, and they would recommend it to other families. They believe that they and the children born to them have benefited from their experiences. Their birth children have developed insights, sensitivity, and a tolerance that they could not have acquired in the ordinary course of life. Their transracial adoptee may have been spared years in foster homes or institutions. They have had the comfort and security of loving parents and siblings who have provided them with a good home, education and cultural opportunities, and the belief that they are wanted.

We found that almost all of the families made some changes in their lives as a result of their decision to adopt. Most of the time, however, the changes were not made merely because of their decision to adopt a child of a different race, but because they decided to add another child to the family. Thus, the parents talked about buying a bigger house, adding more bedroom space, having less money for vacations and entertainment, and allowing less time for themselves. In retrospect, most of the parents do not dwell on what they wished they had done but did not do; nor do they berate themselves for things they did and wished they had not done. Most of them feel that they did their best. They worked hard at being parents and at being parents of children of a different race.

In the early years, many of them were enthusiastic about introducing the culture of the TRAs’ backgrounds into the family’s day-to-day life. This was especially true of the families who adopted American Indian and Korean children. They experimented with new recipes; sought out books, music and artifacts; joined churches and social organizations; traveled to the Southwest for ceremonies; and participated in local ethnic events. The parents of black children primarily introduced books about black history and black heroes, joined a black church, sought out black playmates for their children, and celebrated Martin Luther King’s



birthday. In a few families, a black friend is the godparent to their transracially adopted child. One mother told us: "Black parents regard us as black parents."

Almost all of the parents said that they were affected by the stance of the National Association of Black Social Workers and that of the Native American Councils in the 1970s vis-à-vis the adoption of black and Indian children by white families. Almost all of the parents thought that the position taken by those groups was contrary to the best interests of the child and smacked of racism. They were angered by the accusations of the Black Social Workers that white parents could not rear black children, and they felt betrayed by groups whose respect they expected they would have. Race, they believed, was not and should not be an important criterion for deciding a child's placement. In their willingness to adopt, they were acting in the best interest of a homeless, neglected, unwanted child. One parent said: "Our children are the ones no one wanted. Now they are saying you are the wrong family."

Much of what I have said thus far has been derived largely from the parents' interviews. I would like to comment now on findings from the children's data. All of the children in the study were asked to complete a Self-Esteem Scale, which in essence measures how much respect a respondent has for his or her self. A person is characterized as having high self-esteem if he/she considers him/herself a person of worth. Low self-esteem means that the individual lacks respect for him or herself. Because we wanted to make the best possible comparison among our respondents, we examined the scores of our black TRAs separately from those of the other TRAs and from those of the white born and white adopted children. The scores for all four groups were virtually the same. No one group of respondents manifested higher or lower self-esteem than the others.

The lack of difference among our respondents on the Self-Esteem Scale reminds us of the lack of difference we reported for these children in the first study when we asked them to choose dolls of different races. On the basis of all the responses to the items in which dolls were used to measure racial attitudes, racial awareness, and racial identity, we found no consistent differences among the adopted and non-adopted children and among the black and other transracially adopted children.

Our 1977 study was the first to report that there were no white racial preferences among American black and white children. The responses suggested that the unusual family environment in which these children were being reared might have caused their deviant racial attitudes and resulted in their not sharing with other American children a sense that white is preferable to other races. We noted that the children's responses also demonstrated that their deviant racial attitudes did not affect their ability to identify themselves accurately.

Both sets of responses, those obtained in 1971 and in 1984, consistently portray a lack of difference between black and white children in these special, multiracial families, when differences have been and continue to be present between black and white children reared in the usual single-racial family. Something special seems to happen to both black and white children when they are reared together as siblings in the same family.

The lack of differences among our adolescent responses is again dramatically exemplified in our findings on the Family Integration Scale which included such items as: "People in our family trust one another; my parents know what I am really like as a person; I enjoy family life." The hypothesis was that adopted children would feel less integrated than children born into the families. But the scores reported by our four groups of respondents (black TRAs, other TRAs, white born, and white adopted) showed no significant differences and, indeed, among the three largest categories (not including the white adoptees), the mean scores measuring family integration were practically identical: 15.4, 15.2, and 15.4.

Turning to the matter of perceptions about race and racial identities, we reported that 71 percent of the transracial adoptees said that they had no problem with the fact that they were the only black or Korean or Indian person in the family. By the time of our study, they simply took it for granted. And the same percentages of TRAs as white children answered "No" to the item that asked, "Have there been times in your life when you wished you were another color?" We did find, however, that then we asked them to identify themselves so that someone whom they had never met would recognize them at a meeting place, many more of the TRAs than white children mentioned race. Such a choice, though, may have more to do with the practicalities of the situation than with any sense of "affect" or evaluation. If one is black or Korean or Indian in a largely white area, recognition is much easier.

About the 20-year study, I believe it is important to emphasize that our studies show that transracial adoption causes no special problems among the adoptees or their siblings. We have observed black children adopted and reared in white families and have seen them grow up with a positive sense of their black identity and a knowledge of their history and culture. We are not saying that all adoptions involve smooth sailing for the adoptees and their parents, or that there are no emotional and psychic costs to adoption. Our data show that the transracial aspect does not involve special problems, traumas, or heartbreak. There was, for example, not a single instance of a disrupted adoption among the families we studied.

I want briefly to comment now on the next and current series of research I am doing on transracial adoption. I am working with Rhonda Roorda, a young woman who was transracially adopted when she was less than 2 years old. These works involve in-depth interviews with 12 adult women and 12 adult men who had been transracially adopted.

The twelve women ranged in age from 22 to 28. Eight of them were adopted when they were 3 months old or younger. The other four were 1 year, 18 months, 2 years and 6 years old. But the 6 year old had been living with the family as a foster child since her birth. Five of the twelve describe themselves as "mixed," the others as black. Of the twelve male participants, eight were adopted before they were 6 months old, one was adopted when he was 2, two were adopted when they were 5, and one lived with a white family in a southern, rural Virginia community from 1954 to 1959 when he was between 13 and 18 years of age.

The stories told by the adoptees reveal their thoughts on family, adoption, and self-identity issues from their viewpoint now as adults. While this book substantiates the claims empirically demonstrated by traditional researchers (from the mid-1970s to the early 1990s) primarily in the fields of social work and child development that love and stability are

essential in establishing healthy families, including those families made through transracial adoption, *In Their Own Voices* further stretches the reader to ask the critical question, is love (and stability) enough? Do parents of transracial adoptees have to make changes in their lives on such matters as the neighborhoods they live in, the churches they attend, the friends they have?

The second volume in this series, *In Their Parents' Voices*, picks up where *In Their Own Voices* leaves off, this time drawing from the personal accounts of the adoptive parents, many of whom had the opportunity to read about their sons' and daughters' intimate discussions on their adoptive experiences. The parents reflect upon their journeys opting to adopt and raise black and biracial children against the backdrop of the Civil Rights Movement and the controversy over transracial adoption. In this volume parents representing 16 families from the first volume talk candidly about their reasons for adopting, the adoption process, the challenges and triumphs they encountered in raising their children, and the relationships they have with their adult children; in many cases with their children's spouses and grandchildren. The parents express their opinions on transracial adoption, the stance taken in the early 1970s in opposition to transracial adoption, and offer recommendations to other adoptive families who are in the process of raising children of color.

The third study, which we are currently still working on, *In Their Siblings' Voices*, describes the experiences and reactions of 19 of the children who were born to the parents. Five children were born after their parents had adopted at least one non-white child, and fifteen children were born before their parents had adopted transracially. The major theme of this volume is how the respondents characterized what it was like to have a black brother or a black sister. In each of the interviews we ask the white siblings to describe their relationship as children and as adults with their black or bi-racial brother or sister. How, in their view, did it affect their family's interaction and their relations with aunts, uncles, cousins and grandparents, and what influence did it have on their own choice of friends, and on whom they dated and married.

Finally, I shall comment briefly on a study I have recently completed on adult Native Americans who had been transracially adopted before the 1978 law was passed forbidding such adoptions. That book is currently in production...it should be out in March 2008. I worked on the Native American study with Sarah Hernandez who is herself Native American, but not transracially adopted. In that study we conducted 20 interviews with 13 women and seven men. The women ranged in age from 25 to 59 years old and the men from 28 to 53 years. Seventeen participants were adopted by white families, one by an Hispanic family, one by a black family and one was raised in foster care by black and Hispanic families.

Of the seven men and thirteen women who participated in this study, six of the men and ten of the women described very close, warm relationships with their adoptive families and feeling very positive about their experiences growing up with non-Native parents and siblings. The four remaining participants, one man and three women, described their relationship with their adoptive parents as negative. For the participants who expressed a

negative relationship with their adoptive parents, there is still a sense of bitterness and anger. As adults, all four of them have cut off ties with their adoptive families.

Four female respondents and one male respondent characterized their adoptive parents as racists. One of them said “my parents told me they adopted me because I was a savage and they wanted to make me a human being.” Three of the four female respondents not only characterized their adoptive parents as racist, but also accused them of verbally and/or physically abusing them. For example, one woman believes that one of her foster family “wanted to beat the Indian out.” Another remembers her adoptive mother scrubbing her skin and complaining that she couldn’t tell “what was dirt and what was skin.” Another, who characterized her adoptive family as racist, says she was physically abused by her adoptive mother. When she was six years old, her adoptive mother threw her out in snow. She fell into a coma and almost lost both of her legs.

Among the six male and ten female respondents who reported positive experiences, they described their parents as “wonderful,” “warm and loving,” and supportive and helpful when they decided to search for their birth parent. Fourteen of the sixteen respondents who characterized their experiences as positive, also noted that their adoptive parents could not and as a result did not attempt to contribute to their adopted child’s sense of cultural identity. Several respondents believed that their adoptive parents “did the best they could.”

All of the participants strongly advised adoptive parents to establish a connection within the Native community and urged non-Native families who adopted Native children to do as much as possible to make them aware of their cultural heritage and history. The women also specifically recommended attending powwows, visiting reservations, seeking out other Native children and having books in their home about the history of Native Americans and their treatment by the white American community.

The majority of participants were raised in predominantly white neighborhoods and indicated that they were discriminated against in school by their peers and in some instances, their teachers. Of the twenty participants, twelve females and two males reported racist encounters. The degree of racism they encountered varied from subtle to hostile.

As adults, all of the participants indicated that they feel secure about their identities as Native Americans. Although they all feel secure about their Native identities, many of them admit that they still have a lot to learn about their tribal culture, history and traditions. Many have relied upon their birth families to help them with this process.

Nineteen of the twenty respondents actively searched for their birth families. Fifteen of the nineteen participants reunited with their birth families. Of these fifteen, twelve maintain that they have established positive relationships with their birth families. The remaining three indicated that they have met their birth families, but they decided not to pursue a relationship with them.

All twenty respondents indicated that they are supporters of the Indian Child Welfare Act and believe that Native children should be raised in Native households. However, eighteen of the

twenty respondents conceded that non-Native families can raise Native children to be happy, healthy, well-adjusted adults. Many of the sixteen respondents who indicated that they were raised in a positive environment by non-Native families seem to struggle with these two conflicting ideas. One of the women maintains that she is “thankful for the family in which she grew up,” and says, “Am I glad I was adopted? Yes.” But she also notes that she is “really glad that we have the ICWA and that we put a stop to what’s going on.” Another of the women respondents argues that “all things being equal, if you can get a stable Indian family, they should be allowed to adopt an Indian kid...because it was hard at times growing up and saying, this is my white family, even though they were great parents.” A third woman believes that regardless of race, “everybody deserves a family.” However, she says, “Do I think that transracial adoption is the best option? No, I don’t because I had a family that was really, really trying to help me, culturally...And, no matter how much they tried to help me and support me, and did help me and support me, it was all about the Native community...the Native community helped me go through this.”

The one study that I shall not comment on this morning involved interviews with Asian and Hispanic transracial adoptees. I did that study with my then research assistant, Heather Ahn-Redding, who herself was born in Korea and was adopted by white parents. Those studies, especially the interviews with the Asian transracial adoptees, were very positive.

## Statements: Third Panel

### **Thomas Atwood**

#### **President and Chief Executive Officer, National Council for Adoption**

My name is Thomas Atwood, and I serve as president and chief executive officer of the National Council For Adoption (NCFA). NCFA is an adoption research, education, and advocacy nonprofit whose mission is to promote the well-being of children, birthparents, and adoptive families by advocating for the positive option of adoption. Since its founding in 1980, NCFA has advanced adoption and child welfare policies that promote the adoption of children out of foster care, present adoption as a positive option for women with unintended pregnancies, reduce obstacles to transracial and intercountry adoption, and make adoption more affordable for families. On behalf of NCFA, I thank you for this opportunity to present at your briefing on the Multiethnic Placement Act (MEPA).

#### **Transracial Adoption, Good for Children**

Transracial adoption is a healthy, positive outcome for children, notwithstanding additional challenges that may arise due to a surrounding culture that finds it curious and also still contains strains of racism. Today an increasing number of families are multiracial or multicultural by adoption, as more and more parents have decided to adopt across racial, ethnic, and cultural lines, in our own country and abroad. According to the 2000 census, approximately one out of every six adopted children in America has a parent of another race.

Studies of transracially adopted children have not revealed any significant differences in terms of adjustment or development that diverge sharply from the patterns and outcomes of children adopted by parents of the same race. This has led such studies to conclude that transracial adoption does not harm the adjustment, family bonding, or normative development of children.<sup>1</sup> “Growing Up Adopted,” a massive Search Institute survey of 715 adoptive families, which included 881 adopted adolescents, reported that children adopted transracially fared as well as Caucasian adopted children in same-race families. The authors noted, “Transracially adopted youth are no more at-risk in terms of identity, attachment, and mental health than are their counterparts in same-race families.”<sup>2</sup>

Children who are adopted into a permanent family—including those adopted across racial or ethnic lines—fare better and experience far more positive outcomes than children who remain in foster care or institutions. Many transracially adopted individuals report feeling a deep connection and trust within their adoptive families, and not at the expense of their racial

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<sup>1</sup> Burrow, A. L., and G.E. Finley, “Transracial, Same-Race Adoptions and the Need for Multiple Measures of Adolescent Adjustment,” *Journal of Orthopsychiatry* (2004), pp. 577–583.

<sup>2</sup> Benson, Peter L., Anu R. Sharma, and Eugene C. Roehlkepartain, *Growing Up Adopted: A Portrait of Adolescents & Their Families* (Minneapolis, MN: Search Institute, June 1994), pp. 7–8, 34.

heritage. Transracial adoption also has a positive effect on American society and culture at large, promoting greater tolerance and diversity.

### **Additional Challenges in Transracial Adoptive Parenting**

Adoption professionals agree that transracial adoption can present additional challenges to an adoptive family. When weighing the decision to adopt transracially, prospective parents should consider a number of important questions. How do they expect their family members will react to a child of another race? Are the schools in their area diverse, filled with children from a variety of cultures and backgrounds? What about their neighborhood, church, and social circle?

The decision to adopt transracially should not be made on the basis of reactions from others. But it is important for parents to consider and be aware of what their family may experience following a transracial adoption. Questions may be asked about the child's adoption that might not be asked in a same-race adoption, as other people will notice immediately that the child is not genetically related to his or her parents. It is up to the child's parents to be aware of how the child feels and to respond to questions in ways that help both curious outsiders and the child himself to better understand and appreciate adoption.

Adoption professionals also generally agree that parents of transracially adopted children should help to equip their children with a healthy sense of family belonging, personal and racial identity, and cultural connections. Age-appropriate opportunities for cultural exploration should be taken together, as a family. Children who know their background—including their racial and ethnic heritage, and how they joined their families—are more likely to grow in their understanding and acceptance of adoption than children whose families do not speak openly about adoption or racial differences. Many parents of transracially adopted children have found friendship and helpful advice by joining support groups of families affected by transracial adoption.

### **MEPA's Results**

It is difficult to assess how much MEPA by itself has reduced the amount of time minority children spend in foster care or waiting to be adopted. The Department of Health and Human Services (HHS) does not provide data regarding the numbers of transracial adoptions. Moreover, the federal government itself does not place much confidence in national statistics prior to fiscal year 1998, as few states were in compliance with the current Adoption and Foster Care Reporting and Analysis System (AFCARS) standards at that time.<sup>3</sup> However, it is likely that MEPA has succeeded in expediting the placement of many African-American and minority children with loving, permanent families. For this reason, it should be applauded.

Since 1997, when the Adoption and Safe Families Act and MEPA's Interethnic Adoption Provisions (IEAP) went into effect, adoptions out of foster care have increased from 31,000 a year to more than 50,000—and have remained at more than 50,000 for six years straight.

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<sup>3</sup> Those in favor of MEPA based their arguments at the time on individual studies suggesting that inracial adoption practices correlated with longer wait times for African-American children.

While the level of detail in data collection by HHS is inadequate to prove conclusively that MEPA and IEAP contributed to those increases, such can be reasonably inferred. However, African-American children continue to be disproportionately represented in foster care, and this disproportion should be of great concern to child welfare advocates and policy makers.

While MEPA has contributed to addressing this problem, it certainly could never remove all barriers to the adoption of minority children from foster care. For example, African-American children are often more likely to be placed in kinship care, which, studies suggest, correlates with a longer stay in the foster care system. African-American parents also report difficulties in accessing the type of social services required for reunification more often than Caucasian parents, generally for cultural or socioeconomic reasons.<sup>4</sup>

### Two Cheers for MEPA

The key MEPA language follows:

A person or government that is involved in adoption or foster care placements may not—(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or (B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

The goal of MEPA—to reduce placement delays and denials based on racially discriminatory factors—is a complex and challenging goal. On the one hand, policy makers wanted to allow certain considerations of race in placements, including parent education and self-assessment regarding transracial adoption and the targeted recruitment of adoptive and foster parents from all racial and ethnic groups. On the other hand, policy makers sought to restrict race from being an obstacle to a child’s placement and to protect children from arbitrary same-race placements even when it was in the child’s best interests to remain with different-race parents with whom he or she had already bonded. MEPA, and the HHS guidelines regarding MEPA, are not perfect, but correctly interpreted they largely achieve this goal. However, based on misinterpretations of MEPA and the guidelines, states are abandoning good social work practices, for fear of violating MEPA.

A common misinterpretation is the idea that state agencies can run afoul of MEPA from only discussing the issue of race with prospective parents, because a wrong word could be interpreted as discrimination. But to say that race should not “delay or deny” a child’s placement does not mean that the challenges that can be posed by transracial adoption may not be discussed. It does not mean that parents should not be asked to assess themselves regarding their suitability for transracial adoption. On the contrary, MEPA, correctly interpreted, allows social workers to educate parents regarding these challenges and how to meet them. Making parents aware of issues common to transracial adoption does not delay or deny placement, and this education is an important part of the social worker’s adoption counseling responsibility. Educating and counseling parents regarding transracial adoption

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<sup>4</sup> United States Government Accountability Office, (July 2007), “African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care,” p. 4.



can be managed in ways that neither delay nor deny placement and thus, are not prohibited by MEPA. Any regulation that indiscriminately prohibits such education is based on a misinterpretation of MEPA.

Ohio provides a typical example of this misinterpretation. The Ohio Administrative Code deems it illegal for an adoption agency to “steer” foster or prospective adoptive parents away from parenting a child of another race, color, or national origin. Caseworkers in Ohio are thus reluctant to raise the subject of race, lest a question or comment be misinterpreted as an attempt to “steer” the decision of a prospective adoptive or foster parent. This state regulation is too vague and unclear to guide caseworkers in ways that comply with MEPA. The regulation should make clear that caseworkers may and should educate parents regarding the potential challenges of transracial adoption.

MEPA serves the best interests of children in several ways:

- **Reduces obstacles to transracial adoptive and foster placements for children in need of families:** There are many children who need families, including a disproportionate number of minority children, and the record of transracial placements is very successful. Racial differences between prospective parent and child should not prevent or delay children from having families.
- **Prohibits consideration of the race of prospective parent and child when such consideration would delay or deny a child’s placement:** This is the most important language in MEPA and provides a clear standard to guide caseworkers. Clearly, parental self-assessments and parent education are allowed under this guideline. Including such good practices as part of agency’s preparation of prospective parents are not deemed to delay or deny placement.
- HHS’s “Questions and Answers Regarding the Multiethnic Placement Act of 1994 and Section 1808 of the Small Business and Job Protection Act of 1996” (from here on referred to as HHS’s “MEPA Questions and Answers”) clarifies this point. Regarding parents’ self-assessment of their own suitability for transracial adoption, HHS states in answering question 2, “...[P]rospective parents [should be] provided the information they need realistically to assess their capacity to parent a particular child,” and “...[A]gencies are not prohibited from discussing with prospective adoptive and foster parents their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity....”
- Regarding parent education and training for transracial placements, HHS states in answering question 7: “...[P]rospective parents should be offered, typically through training provided by an agency, information sufficient to confirm or broaden their understanding of what types of children they might most appropriately provide a home for.”
- **Allows children access to transracial placements in their best interests, but not as a right for adults:** By not allowing agencies to deny based on race any individual the opportunity to foster or adopt, MEPA protects children from arbitrarily imposed same-race placements when it would be in their best interest to remain with the different-race parents with whom they had already bonded. In providing this

- protection, however, part (A) does not create a right to adopt, as stated in HHS's "A Guide to the Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996 Chapter 2: The Provisions of MEPA-IEP" (henceforth referred to as HHS's "Guide to MEPA"): "Because placement decisions are based on the needs of the child, no one is guaranteed the 'right' to foster or adopt a particular child."
- Thus, part (A) prohibits the subjective application of generalizations regarding race to individualized placement decisions, per HHS's "MEPA Questions and Answers": "An agency may not rely on generalizations about the needs of children of a particular race or ethnicity, or on generalizations about the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity." This guidance does not in any way interfere with the agency's professional responsibility to provide for parental self-assessment and parent education regarding transracial placements. Nor does it limit the agency's responsibility to recruit prospective parents from all racial and ethnic groups.
  - **Allows prospective adoptive and foster parents to indicate their willingness and ability to accept a transracial placement or not:** One of the agency roles allowed under MEPA is to discuss with parents their feelings, capacities, and preferences regarding caring for a child of a particular race or ethnicity. With appropriate counseling and education from the agency, prospective parents can best judge their suitability for a transracial placement (which MEPA provides for, with some exceptions).
  - **Allows education of parents regarding the potential additional challenges and responsibilities of transracial placements:** The best interests of children and the professional code of social work require that prospective parents are educated regarding these issues.
  - **Provides for exceptions to allow for generally prohibited consideration of race, according to the HHS's "Guide to MEPA," in "circumstances where the child has a specific and demonstrable need for a same-race placement":** In answer to question 14, HHS's "MEPA Questions and Answers" states that "Where it has been established that considerations of race, color or national origin are necessary to achieve the best interests of a child, such factor(s) should be included in the agency's decision-making." The most common example is the case of an older child who would prefer an inracial placement.
  - **Requires states to make diligent efforts to recruit racially diverse parents:** MEPA 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 foster and adoptive homes are needed." Fulfilling this requirement would help states to provide parents for same-race placements.

### **Needed Improvements to HHS Management of MEPA**

In HHS's "MEPA Questions and Answers," question 10 reads: "If an action by a public agency will not delay or deny the placement of a child, may that agency use race to differentiate between otherwise acceptable foster placements?" Question 17 reads the same,

only substituting the words “adoptive parents,” for “foster placements.” The HHS answer to both questions is one word, “No.” This answer flies in the face of a plain reading of the MEPA “delay or deny” language. In applying part (B) to this question, if considering race is disallowed in the case where a child’s placement is delayed or denied, then logically it is allowed if there were no delay or denial. Presumably, then, HHS has used part (A) to disallow such an action. In any case, HHS should explain its rationale for this negative one-word answer. Without further explanation, it leaves the workers and managers responsible for interpretation quite confused.

Another problem with HHS’s MEPA execution is that the department has apparently done little to enforce states’ requirement to conduct “diligent recruitment” of racially and ethnically diverse parents. Even though more than 20 percent of children in foster care are waiting to be adopted, 1.3 percent of all federal child welfare dollars available are spent on adoptive and foster parent recruitment and training combined, according to NCFR research. Given that spending pattern, states’ recruitment efforts could not have been as thorough as called for under MEPA.

Finally, HHS should count and report the numbers of transracial adoptions. Conducting these counts that would not be inconsistent with MEPA and it would provide valuable information about how transracial adoption is benefiting children.

### **Conclusion**

Some child welfare advocates assert that, “all things being equal” between prospective placements, caseworkers and agencies should choose inracial placements over transracial placements. This is a somewhat appealing argument, in theory. However, there are always differences between placement options; “things” are rarely if ever “equal.” With few exceptions, MEPA appropriately does not allow race, color, or national origin to be the deciding factor in a placement, including when different-race prospective parents are similar in their qualifications. Another problem with the appealing concept of an “all things being equal” preference for same-race placements is that any language that could be drafted to provide for this discretion would leave a giant “loophole,” which would render placement decisions vulnerable to subjective inconsistency and ideologically driven manipulation.

The problems with the consideration of race in placement decision making today do not lie primarily with MEPA; nor do they lie mainly with HHS enforcement. They lie mainly with state agencies’ and caseworkers’ misinterpretations of MEPA itself and of HHS’s MEPA guidelines. MEPA allows for commonsense consideration of race and ethnicity in making placement decisions—including prospective parent counseling and education regarding transracial placements, and recruitment of prospective parents from America’s diverse racial and ethnic communities. It does not allow agencies to use generalizations regarding race and ethnicity in making individual placement decisions, nor should it. HHS should make greater efforts to clarify these issues, and states should reform their policies and guidelines to follow the actual meaning of MEPA, rather than the mistaken notion that MEPA prohibits any consideration of race.

The National Council For Adoption applauds the Commission on Civil Rights' leadership in analyzing MEPA and its application, transracial foster and adoptive placements, and how adoption and child welfare policy and practice can better serve minority children in foster care. NCFA appreciates this opportunity to work with you in these vital efforts to benefit children and families. Thank you very much.

**Ruth McRoy**

**Evan B. Donaldson Adoption Institute**

**Finding Permanency for African American Children in the Child Welfare System:  
Implications of MEPA/IEPA<sup>1</sup>**

Transracial adoption is defined as the adoption of a child from a different race/ethnicity than the race/ethnicity of the adoptive parent(s). It is a practice that continues to be a subject of debate in our society as well as across the globe. Numerous books and articles have addressed this practice over the past 50 years, often driven by polarizing agendas. This body of work has been used and misused to fuel a false dichotomy on transracial adoption—portraying transracial adoption as either “good” or “bad” for children. As with so many issues, the answers are not absolute: the best interest of a particular child is determined by many considerations, one of which may be race.

Over the past three decades, there have been substantial changes in the practice of transracial and intercountry adoption in the US and the policies that govern these practices. Efforts have been made to address the removal of Native American children from their families and tribes; the number of international adoptions by U.S. citizens has grown dramatically, with greater attention to practice and policy; and child welfare legislation has been enacted in the United States that both promotes foster care and adoptive placements with families of children’s racial and cultural heritage *and* forbids the denial or delay of the foster or adoptive placement of a child in state custody due to racial considerations.

With the implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption scheduled for early 2008, the U.S. will soon have three federal policies concerning transracial adoption. The Hague Convention was adopted in 1993 and, to date, has been ratified by approximately 71 countries. It was established to regulate abuses in international adoption and to protect the rights of children, birthparents, and adoptive parents. Article 16 of the Hague Convention states that a child’s country of origin must “give due consideration to the child’s upbringing and to his or her ethnic, religious and cultural background” and “determine, on the basis in particular of the reports relating to the child and the prospective adoptive parents, whether the envisaged placement is in the best interests of the child.” The Hague Convention on Intercountry Adoption, and the implementing Intercountry Adoption Act of 2000 (Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993) require that adoption agencies carefully attend to how parents will meet the needs of children adopted from another race, ethnicity, or culture.

The U.S. signed the Hague Convention and plans to ratify it early in 2008 when all implementing regulations are in place. These regulations, issued by the U.S. Department of State in February, 2006, include a focus on children’s racial and ethnic needs in two ways. First, they require that prospective adoptive parents receive 10 hours of pre-adoption training

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<sup>1</sup> This testimony is based upon the forthcoming Evan B. Donaldson Adoption Institute’s policy brief, *Adoptive Families for African American Children in Foster Care: The Role of Transracial and Inracial Adoptions*.

which, among other topics, must address the “long-term implications for families who become multi-cultural through intercountry adoption” (Section 96.48). Second, adoption service providers are to counsel parents about the child’s history, including a focus on the child’s “cultural, racial, religious, ethnic, and linguistic background” (Riggs & Kroll, 2006).

The Indian Child Welfare Act (ICWA) of 1978 established federal standards for the removal of Indian children from American Indian families including provisions to ensure the placement of Indian children in foster or adoptive homes that would reflect the unique values of the tribes. If placement in a child’s extended family cannot be done, then the next order of placement is a family from another Indian tribe and then other Indian families approved by the tribe.

Unlike ICWA and the Hague, the Multiethnic Placement Act of 1994 (MEPA) and its subsequent amendments, the Interethnic Adoption Provisions (IEP) enacted in 1996, prohibit child welfare agencies that receive federal funding from considering race, color or national origin in the foster and adoptive placement of children in foster care except in extraordinary circumstances. These policies represent very different policy approaches to the role of race in adoption. Of the three US policies regarding the role of race in adoption decision making, it is only MEPA-IEP that prohibits the consideration of race in the placements of children with foster and adoptive families.

This paper focuses primarily on the evolution and implementation of MEPA/IEP as a policy and practice approach to meeting the needs of African American children in foster care who cannot be safely reunited with their parents or placed with kin. It will specifically address the following five questions identified for consideration by the U.S. Commission on Civil Rights:

1. Has the enactment of MEPA removed barriers to permanency facing children involved in the child protective system?
2. Has the enactment of MEPA reduced the amount of time minority children spend in foster care or wait to be adopted?
3. How effectively is the Department of Health and Human Services (HHS) enforcing MEPA?
4. What impact has HHS’ enforcement of MEPA had on the efforts of prospective foster care or adoptive parents to adopt or provide foster care for minority children?
5. Does transracial adoption serve children’s best interest or does it have negative consequences for minority children, families, and communities?

### **Trends in the Adoption of African American Children from Foster Care**

In examining the controversial issue of the impact of MEPA on the transracial adoption of African American children in foster care, it is important to consider the historical context as well as the competing interests, policies and practices which have impacted its implementation. Throughout most of the 19<sup>th</sup> century and beyond, transracial adoption in the United States rarely occurred and was illegal in many states. During this era, adoption was largely arranged informally and to the extent that efforts were made to “match” children and

adoptive families, religion was the most important criteria. By the mid 20<sup>th</sup> century, adoption had become professionalized, and adoption professionals assumed the responsibility for matching children and parents. They utilized a wide range of criteria which were considered vital to a proper “match” in a social environment which required that children and adoptive parents resemble one another as closely as possible: physical appearance, race, cultural background, and potential talents. Given the highly segregated social environment of the US during the 1950s and 1960s and anti-miscegenation laws, transracial adoption was extremely rare (Freundlich, 2000).

Although there were a few instances of transracial placements as early as the 40’s, transracial adoption of African American children in the U.S. really began in the 1960s as a result of two significant developments: (1) changes in the demographic profile of children placed for adoption as the number of healthy White infants relinquished for adoption began to decline and increasingly, adoption agencies began to place children of color with adoptive families; and (2) the civil rights movement which significantly altered societal views of racial relationships.

Historically, racial matching in adoption was standard practice. For example, in 1958, the Child Welfare League of America’s Adoption Standards suggested that children with the same racial characteristics as their adoptive parents could be more easily integrated into the average family (McRoy, 1989). At that time White families were typically adopting the many White infants which were placed for adoption. However, in the 60’s due to liberalized abortion laws, growing use of contraceptives, and increased social acceptance of unwed parenthood, there was a smaller supply of healthy White infants available for adoption (McRoy, 1989). Some agencies responded by establishing waiting lists and often establishing very stringent criteria for families seeking to adopt a healthy White infant, which was considered the “ideal adoptable child.” During this time also, some private agencies which had previously discouraged the relinquishment of black infants, began to accept them for adoption placement planning (Day, 1979).

In many cases, if White families could not qualify for a “White healthy infant” due to parental age or number of children already in the home, some agencies were open to considering the family for a “child with special needs,” typically a child who was black, mixed race, older, or with special emotional or behavioral needs. Concurrently, the growing number of children in the public foster care system led many White families to become foster parents with the hope that they eventually might be able to adopt.

By 1968, the Child Welfare League of America changed its Adoption Standards on matching and suggested that “In most communities there are families who have the capacity to adopt a child whose racial background is different from their own. Such couples should be encouraged to consider such a child (Child Welfare League of America, 1968, p. 34). By 1971, the number of transracially adopted African American children reportedly reached 2,574 (Simon & Altstein, 1987).

Concern about the growing number of African American children being placed with White families, led the National Association of Black Social Workers to issue a position statement

in 1972 which stipulated that Black children “belong physically and psychologically and culturally in black families where they receive the total sense of themselves and develop a sound projection of their future (National Association of Black Social Workers, 1971, pp. 2-3). Concurrently, concerns were also raised about the limited success agencies were having in finding African American adoptive families. Although African American families had historically informally adopted and provided kinship care, many agencies had failed to recruit from the African American community and many White workers “knew little about stable African American families or their potential as resources for the children” (Duncan, 2005, p. 2).

Based upon the large numbers of approved waiting Caucasian families and limited numbers of approved waiting African American prospective adoptive families, many agencies believed that African American families were either not available or uninterested in adopting (Sullivan, 1994). However, many studies (Hill, 1993; Mason & Williams, 1985, Rodriguez and Meyer, 1991) suggested that African American families are not only interested but have applied to adopt, but disproportionately high numbers are screened out of the process. Rodriguez and Myer found that agency policies and lack of sufficient minority and trained staff members were among the barriers to successful recruitment of families for older minority children. In 1991, the North American Council on Adoptable Children (1991) similarly reported the following barriers to African American families adopting: agency fees, inflexible standards, institutional/systemic racism and lack of minority staff. Some agencies responded by seeking more African American families through establishing satellite offices in African American communities and eliminating rigid eligibility criteria which served to screen out African American families. Also new minority specializing agencies were established such as Homes for Black Children in Detroit in the late 60’s and Black Adoption Program and Services in Kansas City, Kansas in the early 1970’s (Duncan, 2005)

Over the years, there continued to be significant increases in the number of children in foster care and disproportionately high numbers of children awaiting adoption were African American (McRoy, 2003). By 1994, there were nearly 500,000 children in foster care. Children were waiting a median of two years and eight months to be adopted and African American children were waiting the longest (Brooks, Barth, Bussiere, & Patterson, 1999). However, instead of focusing on factors leading to the growing numbers of children being removed from African American birth families and placement in foster care, the disparate outcomes for African American children in the foster care system, the need to overcome barriers to African American families adopting, or the need to increase funding for more family preservation services for African American birth families, Congress turned its attention in 1994 to reducing the barriers to transracial adoption of African American children.

These developments provided the basis in the 1990s for a broad policy effort to prohibit “racial matching” policies and practices in foster and adoptive placements. Among others, Harvard law professors Elizabeth Bartholet (1991, 1993) and Randall Kennedy (1995) contended that matching children with adoptive families on the basis of race was unconstitutional, and they championed the removal of all barriers to transracial adoption as the means to move African American children from foster care to adoption more quickly.



They argued that "race matching" policies represented race-based state action, were discriminatory, and, consequently, violated the Fourteenth Amendment equal protection guarantee and antidiscrimination legislation such as Title VI of the Civil Rights Act of 1964. Bartholet and Banks (1998) asserted that the state could not permissibly make decisions about adoptive placements based on race; they disagreed, however, on whether prospective adoptive parents could express race-based preferences. Bartholet, on the one hand, contended that prospective adoptive parents were entitled to express racial preferences regarding the child they would adopt and create a multiracial family only if they so chose; Banks, on the other hand, argued that allowing prospective adoptive parents to state racial preferences for a child and accommodating their preferences was "facilitative accommodation" and promoted racism (Bartholet, 1991, 1993; Banks; 1998).

In 1994, Congress passed the Multiethnic Placement Act (MEPA, PL 103-382). Introduced by Senators Howard Metzenbaum and Carol Moseley-Braun, MEPA was designed to address concerns related to African American children's long stays in foster care by (1) prohibiting the delay or denial of a child's foster care or adoptive placement solely on the basis of race, color, or national origin; and (2) requiring that state agencies make diligent efforts to expand the pool of foster and adoptive parents who represented the racial and ethnic backgrounds of children in foster care. Congress believed that through the implementation of these two approaches, the number of minority adopters would increase and barriers would be removed to children's placement with any available qualified adoptive families. MEPA's mandates apply to any agency that receives federal funds from any source and is involved in some aspect of foster or adoptive placements.

The enactment of MEPA was strongly influenced by two factors. First, a much publicized *60 Minutes* program aired shortly before the bill was introduced decrying "race matching" policies and linking these policies to the overrepresentation of African American children in foster care. Second, during hearings on MEPA, White families seeking to adopt children in their care passionately argued that race matching policies discriminated against them by limiting their ability to adopt African American infants. Interestingly, no attention was given at the hearings to the fact that White children were typically placed with White adoptive families, generating no claims of discrimination, and under the Indian Child Welfare Act, preference was given for Indian children to be placed with Indian families (McRoy, et al., 2007).

Almost immediately upon enactment of MEPA, there were calls that the Act did not go far enough in removing barriers to transracial adoption. Regulations to implement MEPA were still pending with the US Department of Health and Human Services when, in the course of debates on Title IV-E that were taking place on the floor of the House of Representatives, it was asserted that MEPA had failed and was not being appropriately implemented (Congressional Record, March 25, 1995). The following month, two very different opinions about MEPA were published in the *American Bar Association Journal* (p. 44):

- Senator Carol Moseley-Braun, co-sponsor of MEPA, wrote that "race, culture and heritage of the child and the family are considerations in an adoption" but should never be the determining factor. She stated that changing the law to incorporate language that would eliminate any consideration of race in determining the best

interests of a child “will only further frustrate efforts to increase adoption by ethnic or minority families” and “would have the effect of reinforcing the status quo.”

- Randall Kennedy wrote that racial matching “undoubtedly prevents a substantial number of children from ever reaching adoptive homes.” He stated that there was no justification for racial matching and that, at best, those who advocate for the consideration of race in adoption decision in any way “resort to vague, unsubstantiated intuitions such as the dubious notion that, all things equal, adults of the same race as a child will be better able to raise that child than adults of a different race,” a claim which he labeled as no more valid than “a hunch.”

### **The Interethnic Placement Act Amendments (IEP)**

In 1996, consistent with the Kennedy opinion piece, MEPA was amended by the Removal of Barriers to Interethnic Adoption Provisions (IEP) (as attached to PL 104-88). IEP removed the word “solely” from MEPA’s prohibition against delaying or denying an adoptive placement “solely on the basis of race...” IEP prohibited agencies receiving federal child welfare funding from considering race in decisions regarding foster care or adoption placements. It substituted, instead, language of other civil rights statutes through its prohibition on any consideration of race as a factor in decision-making (Bartholet, 1999).

Subsequent federal guidance made clear that agencies were not to consider race or ethnicity, except when a “compelling government interest” was at stake, language drawn directly from Title VI of the Civil Rights Act. The guidance states the “best interest of the child” allowed consideration of race in narrow and exceptional circumstances, such as when an older child who had the right to consent to adoption refused to be placed with a family of a particular race (Hollinger, 1998).

IEP added provisions addressing the rights of prospective adoptive parents. It prohibits states from denying to any individual the opportunity to become a foster or adoptive parent on the basis of the parent or child’s race. IEP provides that neither a state nor any other entity in the state that receives funds from the federal government and is involved in adoption or foster care placements may:

- deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or
- delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

**Assumptions underlying MEPA-IEP.** The rationale upon which MEPA/IEP is based includes four primary assumptions: 1) there are large numbers of White families seeking to adopt minority children in foster care; 2) there is an insufficient number of African American families able to or interested in adopting; 3) a large number of minority children will not achieve permanency unless race-matching policies are prohibited and transracial adoptions are promoted broadly; and 4) children fare just as well or better when adopted transracially.

Proponents of MEPA predicted that when race matching policies were banned and transracial adoption was broadly promoted, thousands of African American children waiting in foster care would leave care to adoptive families (Simon, Alstein, & Melli, 1994). Bartholet (1993, p. 99) stated that “very large numbers of black children in need of homes are spending significant amounts of their childhoods in foster and institutional care rather than permanent adoptive homes because of policies against transracial placement.” These assumptions were not based on evidence that showed either that minority children’s longer stays in foster care were caused by policies that promoted same race adoptive placements or on evidence that showed that transracial adoption would shorten their stays in foster care.

**1. Has the enactment of MEPA removed barriers to permanency facing children involved in the child protective system?**

**Transracial adoption has not proven to be the “answer” to the long waits of African American children in foster care.** According to the federal Adoption and Foster Care Analysis and Reporting System (AFCARS) for FY 2005 (US Department of Health and Human Services, 2007) there were 513,000 children in foster care who were an average of ten years old. Thirty-two percent of these children or 166,482 were African American. Also in 2005, 114,000 children were awaiting adoption and 36% or 40,840 children are African American. The children awaiting adoption were an average of five years when they were removed from their parents and an average of 27 months have passed since parental rights were terminated. These children are now an average of 8.6 years old. According to HHS adoption data, “over the last five years, African American children as well as Native American children have consistently experienced lower rates of adoption than children of other races and ethnicities” (GAO,2007, p. 56).

A look at the number of transracial adoptions reveals that although there have been small increases in transracial placements of African American children, there are thousands remaining who need permanency. Pollack and Hansen (2007) recently reported their economic analysis of transracial adoptions. They found that between 1996 and 2003, transracial adoptions of African American children with state agency involvement rose from 17.2% in 1996 to 20.1% in 2003. This rate fluctuated annually from a low of 11.2% in 1999 to a high of 20.1% in 2003, and averaged 16% across these years.

Although it appears that there has been a small increase nationally in the number of transracial adoptions of African American children, the pattern varies considerably from one state to another. One pattern, seen in a number of states, is a significant increase in the number of adoptions of African American children from foster care with only a very small percentage of these adoptions being transracial. A number of states with substantial African American populations (such as IL, CA, GA, KY, NC, PA, DC, CO) have had the largest increases in the number of adoptions of African American children from foster care during years when the number of transracial adoptions has been low. In FY 2000, for example, California had the highest number of adoptions of African American children from foster care and only 9 percent of those adoptions were transracial; in other years, when California’s total number of adoptions of African American children from foster care was lower, the percentage for African Americans adopted transracially was higher (ranging from 13 to 15 percent). In 1999, Illinois finalized adoptions for 5,408 African American children in foster

care, of which only 4 percent were transracial (Hansen & Simon, 2004). The converse pattern was found in 6 states where increases in the adoptions of African American children in foster care was accompanied by increases in the numbers of transracial adoptions (IA, MN, NJ, OH, OK, and TN). Interestingly, Ohio was one of these states, and yet, it was assessed the most severe financial penalty for violation of MEPA-IEP (Hansen & Simon, 2004).

The Local Agency Survey (LAS), an extension of the National Study of Child and Adolescent Well-being, sought to assess the impact of both MEPA-IEP and the Adoption and Safe Families Act (ASFA) on child welfare practice and outcomes. In the survey of agency administrators, most agencies (77 percent) reported that there had been no increase in the proportion of transracial foster or adoptive placements following the enactment of MEPA-IEP (Mitchell, Barth, Green, Wall, Biemer, Berrick, Webb, and NSCAW workgroup, 2005).

Moreover, the recent GAO (2007) report on African American disproportionality in the child welfare system found that “only 15 states reported that encouraging race-neutral adoptions would help reduce disproportionality and 18 states responded that the policy had no effect while 12 indicated that they were unable to tell” (p. 58). In fact in some cases, workers were reported to misunderstand MEPA and believe that it prohibits or discourages same race adoptions. As a result, workers may be less likely to place African American children with relatives or in same race adoptions.

## **2. Has the enactment of MEPA reduced the amount of time minority children spend in foster care or wait to be adopted?**

**The small reductions in time to adoption for African American children have little to do with the enactment of MEPA.** Since the passage of ASFA, the time to adoption has declined, on average, for all racial and ethnic groups of children in foster care. One study (Hansen & Pollack, 2007) found that African American children who were adopted transracially spent one less month in foster care between termination of parental rights (TPR) and adoption finalization compared to children adopted by same race families (14.3 months compared to 15.6 months). The researchers hypothesized that this difference was most likely related to the higher percentage of African American children, when compared to other racial groups, who are adopted by relatives; ASFA’s exemption of children in stable placements with kin from time requirements for moving to TPR; and caseworkers’ lower sense of urgency regarding the legal status of children in kinship care. Other studies indicate that children adopted by relatives generally wait longer for adoption finalization, although they are placed with permanent families more quickly than children adopted by unrelated families and they experience fewer moves while in foster care (GAO, 2007; Howard, 2006; Magruder, 1994).

Other benefits of relative adoptions have been documented. An Illinois study of over 1300 adoptive families found that 60 percent of the African American children adopted from foster care were adopted by relatives, compared to 16 percent of Caucasian children. Although time in foster care was longer when kin adopted, these adoptive families reported the most positive child outcomes when compared to the outcomes for children adopted by unrelated foster families and children adopted by unrelated families who were recruited and matched with them. Children adopted by relatives had fewer school problems, fewer behavior

problems, greater closeness in the parent-child relationship, and a higher rate of satisfaction with their adoption experience (Howard, 2006; Rosenthal & Groze, 1992).

**African American children who are adopted transracially are generally very young children.** Federal data show that in FY 2002, the majority of African American children adopted transracially were age 4 and younger (Maza, 2004). Similarly Hansen and Pollack (2007) noted that children adopted transracially are an average of a year younger than children placed in same race placements and that the proportion of infants and toddlers transracially placed doubled between 1996 and 2003. They also found that transracial adoptions are only half as likely to occur with teenagers.

In FY 2002, the median age of all 124,000 children waiting for adoptive families was 8.5 years. These data make clear that it is younger African American children who are adopted transracially from foster care and not the older African American children who states almost uniformly consider to have “special needs,” that is, characteristics or conditions that make their adoptive placements more challenging. These data also make clear that predictions that transracial adoption would significantly increase adoption opportunities for older African American children in foster care have not proven to be correct. In fact, according to Maza (2000), in fiscal year 2000 older African American children “were more than three times as likely to be adopted by a single female than were older White children” (p. 6). She found that half of the adoptive mothers of African American children adopted from foster care are 50 years or older.

### **3. How effectively is HHS enforcing MEPA/IEPA?**

The U.S. Department of Health and Human Services (DHHS) Office for Civil Rights is charged with enforcing MEPA. The enforcement has focused only on one of the two requirements, removal of barriers to transracial adoptions, with no enforcement efforts directed to the law’s requirement of diligent recruitment of families who represent the racial and ethnic backgrounds of children in foster care.

DHHS has conducted over 130 investigations across the country, and in the majority, either no violation was found or the agency was asked to, and agreed to make changes as recommended by DHHS. In 2003, DHHS for the first time documented a violation of MEPA-IEP and assessed a fine against a child welfare agency. Hamilton County, Ohio and the state of Ohio, were fined \$1.8 million. Subsequently, in 2006, DHHS found the South Carolina Department of Social Services to be in violation of MEPA-IEP and assessed a fine of \$107,000. DHHS findings of MEPA-IEP violations have been based, among other issues, on the following state/county activities:

- Requiring parents who adopt transracially to prepare a plan for addressing the child’s cultural identity. DHHS held that this practice discriminated against parents by requiring them to undertake efforts not required of other adoptive families. (Cited legal basis: Title VI of the Civil Rights Act which prohibits providing services to an individual in a different manner on the basis of race.)
- Requiring families who seek to adopt transracially to evaluate the racial composition of the neighborhood in which they resided. (Cited legal basis: Title VI of the Civil

Rights Act which prohibits treating an individual differently on the basis of race in satisfying any requirements to be provided a service.)

- Making “generalized assumptions,” as evidenced by the above activities that families interested in adopting transracially must take additional steps to ensure that they can appropriately parent a child of color.
- Making placement matches which appear to consider race. In one case, the agency had chosen a single White parent over a White couple because she lived in an “integrated neighborhood and had bi-racial brothers.” DHHS stated:

“HCDHS sought out information about how much contact the Lamms had with the African American community and whether there were African American teachers or students in the local school system. In this context, HCDHS’ concerns and statements about the Lamms’ ability to meet Leah’s ‘cultural’ needs were, in actuality, concerns and statements based on HCDHS’ view that Leah, as an African American child, had needs, based on her race, that the Lamms could not meet, simply because they were Caucasian.” (p. 20)

- Considering the racial preferences of children in foster care who are below the legal age to give consent to the adoption.
- Using a computerized matching system based on preferences of prospective adoptive parents and the characteristics of the child. South Carolina’s use of such a system was found to over-emphasize race because the agency would, at times, change certain characteristics of the child, such as age, to identify a broader pool of prospective adoptive parents, but did not change the child’s race to do so. This practice was deemed to “overemphasize” the race preference of the parents.

The interpretations of MEPA-IEP that have served as the basis for its enforcement run directly counter to proven best practice in adoption. Of greatest concern are interpretations of MEPA-IEP that prohibit agencies from assessing families regarding their readiness to adopt a child of another race/ethnicity; preparing families for transracial adoption in any way that is not provided to families who adopt in-race; considering families’ existing or planned connections with the child’s racial/ethnic heritage/culture; and considering children’s expressed preferences related to race unless the child has the right to consent to his/her adoption. Understandable fears of enforcement actions and fiscal penalties have led states to step away from best practices that serve children’s and families’ interests and are consistent with social work ethics.

As mentioned earlier, in the U.S. three different policies direct practice regarding the role of race, ethnicity, and culture in adoption, and they conflict in substantial ways. ICWA and MEPA-IEP represent almost polar opposites in their treatment of race as a factor in foster care and adoption placement decision-making. MEPA-IEP prohibits an agency receiving federal funding from considering race and ethnicity in the foster or adoptive placement of a child except, as has been interpreted by DHHS, when a compelling government interest is at stake. ICWA places strong value on racial/ethnic heritage by giving statutory preference to the placement of Native American children with members of their own tribes or other Indian tribes. Similarly, the Hague Convention and the Intercountry Adoption Act of 2000 require that attention be paid to children’s cultural, racial, religious, ethnic, and linguistic

background needs and the preparation of parents to meet those needs. MEPA-IEP has created a different status for African American children who are adopted from the foster care system with regard to racial/ethnic/cultural identity—a status that diverges significantly from that recognized in law for American Indian/Alaskan Native children, children adopted internationally, and children who are adopted through private adoption agencies that do not receive federal funds.

The radically different approaches in federal laws and policies about race and adoption reflect the deep societal divide in the U.S. regarding the role of race in adoptive family formation. The result is a disturbing inconsistency in policy that, as research has demonstrated and transracial adoptees and their families have consistently reported, harms children, families, and the very agencies charged with serving them. For some children (internationally adopted children and Native American children), the law holds that race and culture matter, and the law protects their racial and cultural interests; for African American children, however, the law holds that race does not matter, and the law not only does not protect their racial and cultural interests, it punishes those who work to respect and protect those interests.

The divergent legal mandates create impossible demands on adoption agencies that are committed to serving children of color and their adoptive families in accordance with recognized standards of best practice. A private agency, for example, may have both an international adoption program and a program that provides adoption services for children in foster care through a contract with the state public child welfare agency (and partially funded with federal dollars). That agency could be found to have violated MEPA-IEP and could be fined because in its international adoption program, it uses a home study format that addresses race/cultural issues in a way that complies with the Hague Convention but yet appears to violate MEPA-IEP for adoptions of children in foster care. An agency may provide educational opportunities to provide prospective adoptive parents with opportunities to learn about the racial/ethnic/cultural identity needs of a child whom they may adopt and their plans for meeting that child's needs, a practice entirely consistent with the Hague Convention. This program, however, may be found to violate MEPA-IEP if prospective adoptive parents of children in foster care also are required to attend this program.

#### **4. What is the impact HHS' enforcement of MEPA has had on the efforts of prospective foster care or adoptive parents to adopt or provide foster care for minority children?**

An important question regarding the impact of MEPA-IEP is the extent to which it has strengthened agencies' efforts to diligently recruit families who represent the racial and ethnic backgrounds of children in foster care. Data indicate that it has not. In the Local Agency Survey (Mitchell, et al, 2005), only 8 percent of agencies of the 97 responding agencies (generally, agencies in large urban areas) reported that they created new recruitment resources following the enactment of MEPA-IEP. Among other possible reasons, agencies' lingering confusion about allowable actions under MEPA-IEP, including the permissible scope of adoptive family recruitment efforts, appears to have stifled diligent recruitment efforts (Mitchell, et. al., 2005). Similar findings emerged from the Child and Family Service Reviews which found that although 22 states reported having plans for diligent recruitment

of families who reflect the racial and cultural backgrounds of children in foster care, the majority of states had not met this MEPA requirement.

Although the proportion of children in foster care who are African American has declined somewhat, these children continue to be disproportionately represented among children in foster care and underrepresented among children who are adopted from foster care. The goals of reducing the length of time that African American children remain in foster care, waiting for adoptive families, and increasing their opportunities for adoption must be met in other ways—such as contracting with minority-based adoption agencies. It is critical that policy makers assess and address the unintended, negative consequences of MEPA-IEP that are working against achieving the very goals that the law sought to achieve—the lack of resources devoted to specialized recruitment of families who represent the racial/ethnic backgrounds of children in foster care; the paralyzing effects of interpreting MEPA-IEP as prohibiting the use of established best practices in recruiting, preparing, and support prospective adoptive parents; and the use of punitive approaches in the form of significant fiscal penalties that have caused agencies to retreat from what they know children and families need.

##### **5. Does transracial adoption serve the children's best interest or does it have negative consequences for minority children, families, and communities?**

Just like children born into birth families, children enter adoptive families with their own unique combination of risk and potential. Likewise, parents bring to the formation of families their own constellation of strengths and limitations. Adoption itself brings challenges to children and families in addressing issues such as loss, identity, and others. Transracial adoption adds another layer of issues that children and families must address. Research suggests that African Americans adopted transracially have more adjustment problems than other subgroups of transracially adopted children. Feigelman (2000) found that black transracially adopted young adults exhibited three or more adjustment problems at twice the rate of other transracially adopted persons. Brooks and Barth (1999) reported that African-American transracially adopted males were more likely than other groups to adjustment problems. The contributions of empirical research to our understanding of the particular challenges posed by transracial adoption are discussed below.

Researchers in the fields of sociology, psychology, and social work began to focus on transracial adoption in the 1970s and 1980s, studying children placed in infancy or at very young ages. They looked at overall ratings of adjustment, including self-esteem, achievement, and level of adjustment problems. Most used very small sample sizes, and some did not have comparison groups of children placed in same-race families. Overall, these studies found that children adopted transracially in the U.S. or from other countries had overall adjustment outcomes similar to children placed in same-race families, particularly when they are adopted early in life (Grow & Shapiro, 1974; Kim, 1977; McRoy, Zurcher, Lauderdale, & Anderson, 1982, 1984; McRoy & Zurcher, 1983; Simon & Altstein, 1987; Feigelman & Silverman, 1983; Shireman & Johnson, 1986).

Recent studies of transracial adoption have used more rigorous research methods such as multivariate analyses to determine the contribution of various factors in child outcomes.



They have refined the specific constructs that are measured (racial/ethnic identity, reference group orientation, aspects of cultural socialization, and others) and have tested hypotheses about the relationship between different variables. To date, however, most studies of outcomes of transracial adoption have examined children adopted in infancy or at young ages. Few have focused on children adopted from foster care. In general, studies show that the younger children are at adoption and the less serious and less extensive the maltreatment they have experienced, the lower the level of adjustment difficulties. It is clear that more attention needs to be given in future research to the impact of transracial adoption on children adopted at older ages and with more extensive histories of abuse or neglect. There is, however, much to be learned from the current body of empirical research.

A group of studies have examined racial/ethnic identity in transracially adopted persons, but again, most do not address the relationship between the racial and ethnic experiences of adoptees and their adjustment. Lee (2003) reviewed more recent cultural socialization outcome studies that serve as a bridge between outcome studies and racial/ethnic identity studies. His review focused on studies that have examined how adoptees and families address the challenges of transracial adoption and how these differences are associated with different adjustment outcomes.

Based on the current body of research, three conclusions are firmly supported:

1. Transracial adoption in itself does not produce psychological or social maladjustment problems in children.
2. There is a range of challenges that transracially adopted children and their families face, and the manner in which parents handle them facilitates or hinders a child's development.
3. Children adopted from foster care come to adoption with many risk factors that pose challenges for healthy development. For these children, it is particularly important that they be placed with adoptive families who can address their particular needs, including racial/ethnic identity needs, so as to maximize their opportunity to develop to their fullest potential.

### **Studies Addressing Challenges in Transracial Adoption**

Several studies have found that transracially adopted children struggle more with acceptance and comfort with their physical appearance compared with children placed in-race (Andujo, 1988; Kim, 1995). Although some children may leave this feeling behind, the sense of difference continues into adulthood for many transracial adoptees. Brooks and Barth (1999) studied 25 year-old adoptees and reported that about half of Black and Asian transracial adoptees had expressed discomfort about their ethnoracial appearance. The exception was black females: only 21 percent expressed such discomfort.

An African American man growing up with White parents in a small Minnesota town described his pervasive feelings of difference while growing up: "I always felt like I had this 'A' on my forehead, this adoptee, that people could see from a far distance that I was different" (Clemetson & Nixon, 2006, p.A18). Research and reports from transracially

adopted adults indicate that this struggle is more intense for children of color growing up in homogeneous White communities. Feigelman (2000), for example, found that transracial adoptees from White-only communities were more likely than adoptees living in racially mixed communities to have discomfort with their racial appearance (51% vs. 25%). In summarizing his findings, Feigelman wrote:

One of the study's most striking findings showed that transracial adoptive parents' decisions on where to live had a substantial impact upon their children's adjustments. Transracial adoptive parents residing in predominately White communities tended to have adoptees who experienced more discomfort about their appearance than those who lived in integrated settings. Adoptees feeling more discomfort, in turn, were more likely to have adjustment difficulties (p. 180).

***“Fitting In”: The Family, Neighborhood, School, and Community.*** In addition to the internal struggle with a sense of difference, transracially adopted persons often find challenges in overcoming the sense of difference in all areas of their lives. One of the childhood struggles described by many transracially adopted young adults was the difficulty fitting in with peers, the community in general, and sometimes, with their own families. The following responses from transracially adopted persons illustrate these challenges:

I don't think that there should ever be just one transracially adopted child in the family. Children need to know that there is support at home and to be able to look at another brown kid. It's not enough for the parents to love the child. They need to be able to look at others of the same race in the family. It's unfair to the child if there isn't (Haymes & Simon, 2003, p. 264).

If we lived in a different neighborhood, I'd feel more comfortable. People wouldn't ask so many questions or call me names. I feel a little more comfortable around people who are my color because I know they won't call me names (Haymes & Simon, 2003, p. 261).

The social world of very young children is centered largely in their family, but as children develop, their social world becomes increasingly influenced by experiences outside their families. A child may have a strong sense of belonging within his or her family but struggle significantly to fit in outside the family. When family members are not able to understand a child's experience outside the family or to adequately support the child in addressing racial issues, feelings of competing allegiances, isolation, and alienation can result.

***Fitting in with those of the child's own race/ethnicity.*** A transracially adopted African American man interviewed for a *New York Times* story reported that he always felt awkward around other blacks because he did not understand their culture: trends in fashion or music, or little things like playing the dozens or the black oral tradition of dueling insults (Clemetson & Nixon, 2006). Having grown up in a small town in Minnesota, there were few other African Americans who could help develop an understanding of the culture. Others who grew up in similar situations report that it was not until they went to college that they began to cultivate relationships with persons of their own race. This process involved acculturation and a struggle with conflicting feelings. John Raible (1990), a transracial adoptee, describes this experience:

I got to know other middle class black students as real people who were not that different from me. I began to appreciate the variety of ways of being black...Yet all was not smooth sailing, by any means. I felt nervous and anxious around my new black friends and peers. I was self-conscious about sounding or acting 'too White.' I felt scrutinized for having White girlfriends, and continued to fret over being rejected and not being taken seriously as an equal...when my parents would come to visit, I was self-conscious about being seen with them. I worried about being seen too often, or in the 'wrong' places, with my White friends. I was very aware of feeling caught between two cultures, of having to tread the line between two worlds.

The "marginal man" phenomenon experienced by those who are, to a large extent, "caught between two cultures" and do not fit in with either group is a theme of Raible's experience. There has been very limited research focus on transracial adoptees' feelings of marginality in society and lack of belongingness in the family. A study of 88 African American transracial adoptees found that those who were low in identification with both African American and White reference group orientations were more maladjusted (DeBerry, et al., 1996), that is, they did not feel that they belonged with either group.

***Developing a Positive Racial/Ethnic Identity.*** Racial/ethnic identity, a component of personal identity, develops over the course of childhood, adolescence, and early adulthood. Generally, by age 4, children are aware of physical racial differences and by age 9, they can see themselves through the eyes of others and understand the consequences of a particular racial group membership, including prejudice (Lee & Quintana, 2005). This process has particularly important implications for African American children for whom racial/ethnic identity is salient and closely tied to self-esteem (Phinney, 1991). There are various constructs related to ethnic/racial identity, including self-identification, attitudes toward one's own group, sense of belonging to a given group, reference group orientation, and racial preferences. The research on transracial adoption has focused in different ways on these constructs.

McRoy and colleagues conducted one of the only early studies that included measures of both self-esteem and racial identity for same-race and transracially adopted children (McRoy, Zurcher, Lauderdale, & Anderson, 1982). Although they found no significant differences between transracially and in-racially adopted children on self-esteem, they found that transracially adopted children scored lower on racial identity measures than in-race adoptees. They also found that the manner in which White parents addressed race was linked with the extent to which their children acknowledged racial differences. African American children whose parents acknowledged their children's racial identity, moved to integrated neighborhoods, and provided their children with African American role models had a greater sense of racial pride; African American children with White parents who minimized the importance of racial identity were reluctant to identify themselves racially. Eighty percent of the transracially adopted African American children had been told that "they were not like other blacks" (McRoy et al., 1984, p. 38). Andujo (1988) found similar results in her study of 60 Mexican American children placed with same-race and with White families.

Over the past 15 years, researchers have begun to examine racial/ethnic identity issues in more sophisticated ways and to explore the relationship between different adaptations to racial/ethnic identity and aspects of overall adjustment. Research indicates that transracial

adoptees demonstrate considerable differences in how they incorporate race/ethnicity into their identity over the course of their childhood and beyond.

Early studies on domestic transracial adoption found that parents were most likely to minimize racial differences and emphasize a color-blind approach (Lee; 2003; Andujo, 1988; DeBerry et al., 1996; McRoy & Zurcher, 1983). These families acculturated their children into the majority culture, but often, they did not help their children integrate their African American or Latino racial status into their identity. These children were reluctant to identify with those of their own racial group or avoided African American peers (McRoy et al., 1982, 1984). According to one scholar on racial adaptations, assimilated individuals can fare well when the environment is supportive. When navigating conflicts between two racial memberships, the most poorly adjusted individuals are marginal in that they never develop a strong identity with either group (Phinney, 1991 & 1992).

Scholars studying racial adaptations of minority children view those children with a bicultural or multicultural identification as the most highly adjusted (Phinney, 1991 & 1992, DeBerry, et al, 1996). Likewise, standards of professional adoption practice have increasingly focused on preparing parents to assist children adopted transracially to integrate their heritage in a positive manner into their sense of self. They encourage parents to acknowledge racial differences, communicate openly with their children about race and culture, and offer their children opportunities to gain knowledge and experience related to their birth group (Vonk & Angaran, 2003).

More recent research has focused on parents' approaches to cultural and racial socialization and how these relate to different aspects of ethno-racial identity as well as to adjustment. Most studies assessing the extent to which transracial adoptive parents provide cultural socialization opportunities to their children indicate that there is a low level of focus on these opportunities (primarily through books or cultural events) in childhood but that even this low level of activity drops away as the child grows into adolescence (Mohanty, et al., 2006; DeBerry, et al., 1996).

Kimberly DeBerry and colleagues (1996) have conducted the most sophisticated and extensive research on patterns of family racial socialization and racial identity in African American children adopted transracially. Assessing 88 transracially adopted African American adoptees at ages 7 and 17 and their families, they found that that family racial socialization predicted the adoptees' racial orientation, which, in turn, predicted adjustment. Most transracially adopted adolescents experienced difficulty becoming ecologically competent in both Africentric and Eurocentric orientations. The study also found that youth who experienced more transracial adoptive stressors (such as perceived racial stress and perceived transracial adoptive stress) were more maladjusted. DeBerry and colleagues suggested five potential explanations for their findings that relatively few adoptees had both high Eurocentric and Africentric reference group orientations and were well adjusted: multiple forms of loss and grief, converse acculturation stress, unresolved belongingness issues, uncertainty and difficulty emotionally regulating and cognitively negotiating shifts between Africentric and Eurocentric reference group orientations, and/or differential trust

patterns (such as a generalized distrust of European-Americans and relative mistrust of African-Americans).

When a child's race is different from both adoptive parents, it is especially important for the child to receive support and understanding in learning to cope with discrimination. If parents minimize the difficulty of discriminatory experiences or are unable to support and understand their child, barriers can develop in the parent-child relationship. Raible (1990), for example, described how he gave up trying to talk to his family because he was told that he was being too sensitive. He resigned himself to expecting less support and understanding from his parents. He stated that his parents worried that he was rejecting them in seeking knowledge of his black heritage, which created feelings of guilt and disloyalty as he explored issues of race.

The only recent study examining transracial adoption of children adopted from foster care is an Illinois study assessing the adjustment of 1340 children, ages 6–18 and receiving adoption subsidies (Howard & Smith, 2003). The study used, as a measure of overall adjustment, the Behavior Problem Index (BPI), a standardized behavior problem measure utilized in the National Longitudinal Survey of Youth. The BPI lists 28 behavior problems. The National Longitudinal Survey of Youth found for the more than 11,500 children studied, that the mean number of behavior problems was 6.4. In the Howard and Smith study (2003), the mean number of behavior problems for children adopted from foster care was 11.9. African American children had the lowest rates of behavior problems (mean of 10.4 problem behaviors) of all racial/ethnic groups. Important differences were noted, however, between African American children who were adopted transracially and those who were adopted by same-race families. The 73 African American children adopted transracially had a mean of 14.4 behavior problems compared to a mean of 9.9 behavior problems for the 407 African American children adopted by same-race families. On most other outcomes such as the parent's closeness to the child or their satisfaction with the adoption, transracially placed children were not significantly different. However, parents were more likely to rate their transracially placed children as more difficult to raise than the parents of children placed in same-race families.

Although these findings do not provide a basis for reaching conclusions about the level of problems among African American children placed transracially compared to African American children adopted by black families, they indicate the need for further research in this area. Most children adopted from foster care have experienced a constellation of experiences that present challenges to their development. The Howard and Smith study (2003) found that these children had experienced a range of adverse experiences: serious neglect (63%), prenatal alcohol or drug exposure (60%), physical abuse (33%), sexual abuse (17%), and two or more foster placements (37%). Most children had experienced more than one of these risk factors. Children in foster care who have experienced assaults on their developmental status and well-being require environments that mitigate rather than heighten their vulnerability. They need opportunities to develop nurturing attachments to parents and siblings, succeed in school, establish friendships with other children, and find acceptance and support in all areas of their lives.

## Conclusion

The assumptions underlying the development of MEPA-IEP were not accurate, and the anticipated outcomes of the law — to expedite adoptions of children of color in foster care by promoting transracial adoption-- have not come to pass. As adoption professionals with expertise in the adoption of children in foster care explained when MEPA and then IEP were enacted, relatively small numbers of White families express an interest in adopting older children and youth of color in foster care. As these professionals urged Congress to understand, MEPA-IEP's promotion of transracial adoption could not—and has not—resulted in large numbers of African American children and youth leaving foster care for adoption by White families. The removal of barriers to transracial adoption, IEP's relegation of race to a non-issue, and the levying of significant penalties for MEPA-IEP violations have not substantially increased the number of transracial adoptions of African American children in care, particularly not for the older children and youth for whom adoption is a more challenging goal.

## Recommendations

### **Provide funding for family support and preservation of birth families.**

Although the incidence of child abuse and neglect does not vary significantly by race or ethnic group, African American children are represented in the foster care system at a rate that is 2.26 times greater than the proportion they comprise of the total U.S. population (GAO, 2007). African American children are more likely to be removed from their families, and they are less likely to be adopted once their parents' rights have been terminated (GAO, 2007). Barth (1997) found that White children have a five times greater chance to be adopted than any child from a minority group and that the adoption process proceeds more slowly for African American children than for White children.

A number of interrelated factors have been identified which may influence these disproportionate outcomes for African American children. According to the recent GAO report (2007), such factors include “African American families' higher rates of poverty, difficulties in accessing support services to provide a safe environment and prevent removal, and racial bias and cultural misunderstandings among child welfare decision makers (p. 16). The report also attributed longer lengths of stay for African American children to the “lack of appropriate adoptive homes for children, greater likelihood of using kinship care, and parents' lack of access to supportive services needed for reunification with their children” (p. 16). If states could offer these services to birthfamilies, many child removals could be prevented and more birthfamilies could be preserved. This study as well as previous studies (the Pew Commission (2004) and earlier GAO studies (GAO-06-787T; GAO 07-75) have concluded that since the majority of federal funding through Title IV-E funding is for foster care maintenance payments, states do not have the flexibility to use these funds for support and prevention services for birth families.

### **Promote positive adoption outcomes for African American children who cannot be safely reunified with parents or extended family members.**

When African American children in foster care cannot be safely reunited with their parents or extended family members, they need the security, stability and love of adoptive families. To

ensure that African American children in foster care are timely placed with adoptive families who can meet their needs, including their racial/ethnic needs, we make the following recommendations:

**Repeal IEP and reinstate the MEPA standard. Good, ethical adoption practice requires consideration of race and ethnicity.**

Policy and law should be consistent with established best adoption practice and explicitly state that the racial/ethnic identity needs of children should be addressed throughout the adoption process and after adoption. Federal and state law should state that race is one factor that can be taken into consideration in matching prospective adoptive families and children in foster care. Law should accord with practice that directs that the matching process address whether specific families are able to meet all needs of the child, including racial/ethnic identity issues. It should be consistent with practice that directs that all foster and adoptive families receive some level of training in parenting children of culturally diverse backgrounds and with practice that requires that when families adopt transracially or transculturally, they receive additional training and other supportive services to ensure that they are prepared to meet their children's racial, ethnic, cultural, and linguistic needs.

A child's best interests should always be paramount in decisions regarding children's foster care and adoption placements. The choice of a foster or adoptive family should be based on an assessment of which family can best meet the child's individual needs, including the child's racial/ethnic identity, cultural, and linguistic needs. This choice must be driven by the child's needs and not by prospective adoptive parents' needs or presumed "rights". By focusing on Title VI and protections for prospective adoptive parents, DHHS has placed too little emphasis on the "best interest of the child." There is broad practice and legal support for assessments of prospective adoptive families to ensure the safety and well-being of children. Just as these assessments take into account families' abilities to meet children's physical, emotional, social, and developmental needs, they must take into account families' ability to meet children's racial/ethnic identity needs.

**Prepare families for transracial adoptions.**

According to CWLA adoption standards (2000), all children deserve to be raised in a family that respects their cultural heritage. The standard states, "in any adoption plan, the best interests of the child should be paramount. All decisions should be based on the needs of the individual child. Assessing and preparing a child for a transracial/transcultural adoption should recognize the importance of culture and race to the child and his or her experiences and identification. The adoptive family selected should demonstrate an awareness of and sensitivity to the cultural resources that may be needed after placement."

When families who adopt transracially do not receive preparation and training that promote racial awareness and assist them with multicultural planning and the development of survival skills, they and their children are not well served. Families lose critical opportunities to assess their own preparedness to adopt transracially and to develop the awareness and skills that are essential to meeting their children's racial/ethnic identity and socialization needs. Failing to provide families with this preparation and training is contrary to sound and ethical social work practice with its emphasis on recognition of and support of each individual's

racial/ethnic identity and socialization needs. The current interpretation of MEPA-IEP allows such preparation and training, but only if it is offered to all prospective adoptive families, irrespective of whether they are adopting transracially. This requirement creates unrealistic expectations for prospective adoptive families by mandating that all families participate in training regarding transracial adoption irrespective of their adoption plans or that no families receive this preparation. It also creates unrealistic demands on adoption agencies as they work to appropriately serve prospective adoptive families based on their adoption interests and plans. To “legally” provide preparation and training regarding transracial parenting, agencies must design programs that generally appeal to all families, inevitably resulting in “watered down” training and preparation. Just as an agency would provide a family who plans to adopt a child who is HIV-affected with special training and preparation to address the child’s needs, families who adopt transracially need training and support to meet their child’s needs.

**Address barriers to inracial adoptions.**

Barriers to adoption for African American families have been documented by a number of authors and research studies. Hill (2004) reported that African-American-run organizations have been highly successful in placing African American children in foster care with adoptive families, but many state agencies do not contract with them or only call them for help in placing the oldest children and those who are the most difficult to place for adoption. Casey Family Programs (2005, p. 17), reporting on a project involving 22 public child welfare agencies, found that a “history of negative interactions between communities of color and child welfare agencies” contributed to a lack of success in finding adoptive families of color. As the participating public child welfare agencies developed and implemented new strategies, including developing partnerships with faith-based organizations in the black community, they achieved significant increases in the number of families of color applying to adopt.

**Enforce the MEPA requirement to recruit and retain families which reflect the children needing placement.**

The majority of children in foster care are minority children. As MEPA-IEP recognizes, meeting those children’s needs for adoptive families requires diligent recruitment of more families that reflect the ethnic, racial, and linguistic diversity of the children served. A broader pool of minority foster families would provide a critical needed solution to ensuring that these children have the benefit of adoptive families as soon as adoption becomes the plan. This requirement of MEPA should be supported with financial resources and fully enforced. Agencies should work closely with minority specializing agencies that have proven success in recruiting and retaining minority foster and adoptive families.

Full implementation of MEPA’s requirement for specialized recruitment of families that reflect the ethnic and racial diversity of children in the state would go a long way in expanding the pool of adoptive families for waiting children in foster care. These families, because they are members of the same communities as waiting children, are most likely to adopt African American children in foster care. It is through developing this pool of families that there is the greatest opportunity to reduce the time that African American children remain in foster care waiting to be adopted, the very goal of MEPA-IEP.



Many child welfare professionals view the recruitment and retention of minority families as an essential step in increasing the number of minority children who leave foster care to adoption. Yet, according to the recent GAO report (2007) more than half of states are not meeting HHS performance goals for recruitment. Interviewees for this study called for more parents who want to adopt older African American children and for resources to implement recruitment and training initiatives.

As Hill (2004) noted that African American-controlled organizations have a very good track record of successful recruitment of African American families, many state agencies either do not contract with them or contract only for older children and not the younger African American children. In 2005, NACAC published a list of 24 such agencies located throughout the United States which can help states become compliant with the MEPA recruitment requirement (McRoy, Mica, Freundlich, & Kroll, 2007).

### **Recruitment of inracial foster families.**

As another strategy to increase the likelihood of adoption for African American children from foster care, emphasis should be placed on recruiting more African American foster families as 60% of all adoptions from care are by foster families. By placing initially in same race families who are willing to adopt if termination occurs, it is possible to avoid the tension that develops between the importance of supporting children's attachments to White foster families and the importance of providing children with opportunities to be with same race families.

### **Provide funding for subsidized guardianship.**

As relatives are another significant resource for the placement of older African American youth, Congress should consider amending federal law to allow federal reimbursement for legal guardianship similar to the subsidies provided for adoption. States that have implemented subsidized guardianship programs have found that this is both cost effective and serves to reduce the number of African American children in the system and provides permanency for children (GAO, 2007, p. 65).

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**Elizabeth Bartholet****Professor of Law and Director of Child Advocacy Program, Harvard Law School**

My name is Elizabeth Bartholet. I am on Faculty at HLS and have specialized for over 20 years in child welfare & adoption. Have in recent years founded at HLS new program, CAP, committed to advancing children's interests.

I have focused a huge amount of my professional time over these last decades on TRA & MEPA. Was one of those who fought for passage of MEPA in the form took by virtue of the amendments in 96, form it now takes. I have written two books and many articles addressing TRA and MEPA issues all of which can be accessed on my website, [www.law.harvard.edu/faculty/bartholet](http://www.law.harvard.edu/faculty/bartholet).

I am also a civil rights lawyer and have worked as such for a dozen years after graduation from HLS. Have taught civil rights in employment field my entire time at HLS.

I believe that MEPA is a very important law, and a very important part of the panoply of civil rights laws in the U.S. I believe this for two different kinds of reasons:

1. because it knocks down barriers to the placement of children in foster care, and thus helps expedite placement—something that is terribly important for children, since early placement in adoption has been shown to be the central factor in predicting successful adjustment.
2. because it sends the message that the State should not be in the business of insisting on same-race families—that was the message of the race-matching era that MEPA ended, and I think that message was as deeply wrong as was the message that interracial couples should not be allowed to marry, a message that was of course outlawed in *Loving v. VA*.

I think also that *this Briefing* is important, because we must ensure that this law is being appropriately enforced—that it's not just a law on paper, but is a law that actually makes the difference that Congress intended it to make.

Initially there were very significant enforcement problems: HHS just did not do the job needed to get word out appropriately about the meaning and significance of this law, a law which was after all designed to change the systematic race matching practices which existed in powerful form in all 50 states.

However I think you should take comfort in fact that HHS has finally done some important investigations of MEPA violations and issued some important enforcement decisions. I write in some detail about these decisions in the short article I submitted to the Commission which is in your Briefing book, *Cultural Stereotypes Can and Do Die*. These are quite terrific decisions and will I think make a real difference for the following key reasons:

1. They spell out in unmistakable language the meaning of MEPA, eliminating any possible doubt. This is important not because MEPA's language or the MEPA regulations were ambiguous—they were not. But MEPA has many enemies, and those enemies have done their best to create confusion as to MEPA's mandate. The HHS decisions make clear that MEPA prohibits *any* systematic reliance on race as a factor in placement, and that it prohibits all forms of special screening of prospective transracial adoptive parents. Experience has shown that these aspects of MEPA are crucial to its actually making a real-world difference in practice.
2. These decisions also impose the very significant financial penalties mandated by MEPA—a \$1.8 million penalty in the Ohio case. This kind of financial penalty is the kind of message that financially strapped child welfare agencies *cannot* ignore.

However....I am still concerned that not enough is being done. HHS has done little to publicize these decisions. Indeed I have found it necessary to post the decisions on my own website in order to help get the word out. Also, neither HHS nor any other government agency has produced any serious accounting of what difference in fact MEPA has made and the degree to which MEPA may continue to be systematically violated.

### Conclusion

In conclusion, I applaud you for holding this hearing. Hope that it will help both in encouraging HHS to do its enforcement job, and in getting the word out to the child welfare world that MEPA is the law of the day.

I also want to alert you to a MEPA-related problem that the federal government has created in connection with its implementation of the new Hague Convention on Intercountry Adoption. We now have federal regulations that require, in connection with U.S. agencies sending kids from this country to other countries for adoption, that the children be held for two months after birth prior to placement abroad in an effort to match the children with in-country parents, in direct violation of MEPA's prohibition against matching based on "race, color, *or national origin*." I urge you to look into this and to encourage reconsideration of these recently issued federal regulations.

More generally, this Commission should know that U.S. and other countries' policies in the world of international adoption replicate what were our own domestic racial matching policies in the pre-MEPA world. In the international adoption context there are now very powerful preferences for keeping children within their racial, ethnic and national group of origin, even when this means that the children will live out their childhoods, or die, in orphanages characterized by horrendous conditions. Our State Department has shown great sympathy with these kinds of preferences. The underlying principles that inspired MEPA are being entirely ignored in the world of international adoption.

So in conclusion, while I applaud you for holding this hearing, I want to emphasize that there is much work still to do both to enforce MEPA, and to implement the principles inherent in MEPA, principles that are very important to child welfare and to our society as a whole.

## ***Elizabeth Bartholet Commentary***

### **Cultural Stereotypes Can and Do Die: It's Time to Move on With Transracial Adoption**

This commentary argues that the Multiethnic Placement Act, designed to combat common cultural stereotypes, provides clear guidance to state child welfare agencies and the mental health professionals that serve them, eliminating any regular consideration of race in the foster and adoptive placement of children. Given recent enforcement action by the U.S. Department of Health and Human Services, those who ignore this guidance act at peril of subjecting state agencies to the significant financial penalties mandated for any violation of the law.

**J Am Acad Psychiatry Law 34: 315–20, 2006**

Ezra Griffith and Rachel Bergeron<sup>1</sup> write in their article, “Cultural Stereotypes Die Hard: the Case of Transracial Adoption,” that the controversy that has long surrounded transracial adoption is ongoing and that the law is significantly ambiguous. Accordingly, they say that psychiatrists and other mental health professionals are faced with a challenge in deciding on the role that race should play in adoption evaluations for purposes of foster and adoptive placement decisions.

I agree that the controversy is ongoing, but think that the law is much clearer than Griffith and Bergeron indicate and that it provides adequate guidance as to the very limited role that race is allowed to play. However, because of the ongoing controversy, many players in the child welfare system are committed to law resistance and law evasion. The challenge for mental health professionals is to decide how to respond to conflicting pressures and whether to use their professional skills to assist in good faith implementation of the law or in efforts to undermine the law. The challenge is a real one, because those committed to undermining the law do so in the name of the ever popular best-interests-of-the-child principle, arguing that best practices require consideration of race in placement decisions. However, in my view the choice should be clear, not simply because the law exists, but because the law takes the right position—right both for children and for the larger society.

Griffith and Bergeron acknowledge that, after a period in which race-matching was common and court-made law allowed at least some regular use of race in the placement process, the U.S. Congress passed laws governing these matters: the 1994 Multiethnic Placement Act and the 1996 amendments to that Act (here referred to collectively as MEPA and, when it is important to distinguish between the original 1994 Act and the amended Act, referred to as MEPA I and MEPA II, respectively).<sup>2</sup> However they say that these laws “may still leave the door open to continued race-matching. . .” (Ref. 1, p 303). They go on to say:

[E]ven though the statutory attempts were meant to eliminate race as a controlling factor in the adoption process, their implementation has left room for ambiguity regarding the role that race should play in adoption proceedings. Consequently, even though the statutes were intended to eliminate adoption delays and denials because of race-matching, they may have allowed the continued existence of a cultural stereotype—that black children belong with black families—and may have facilitated its continued existence [Ref. 1, p 304].



Griffith and Bergeron accurately describe how MEPA I allowed the use of race as one factor in placement, so long as it was not used categorically to determine placement or to delay or deny placement:

An agency. . .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 [Ref. 1, p 307].

And they describe how MEPA II removed that section of the law, and made related amendments designed to limit the use of race.<sup>1</sup> They note that the U.S. Department of Health and Human Services (DHHS), the MEPA enforcement agency, interprets the law to require strict scrutiny as the standard by which to judge use of race in placements and quote one of the guidance memoranda issued by DHHS as follows:

The primary message of the strict scrutiny standard in this context is that only the most compelling reasons may serve to justify consideration of race and ethnicity as part of a placement decision. Such reasons are likely to emerge only in unique and individual circumstances. Accordingly, occasions where race or ethnicity lawfully may be considered in a placement decision will be correspondingly rare [Ref. 1, p 309].

But they conclude that the DHHS guidance “seemed to frame the possibility for adoption agencies to continue the practice of race-matching,” and “allows for discussions with prospective adoptive or foster care parents about their feelings, preferences, and capacities regarding caring for a child of a particular race or ethnicity” (Ref. 1, p 309). They go on to cite the positions of the National Association of Black Social Workers, the Child Welfare League of America, the National Association of Social Workers, and some others, all arguing for a systematic preference for race-matching.

While Griffith and Bergeron raise some questions about the wisdom of assumptions made by racematching proponents that all blacks will be culturally competent to raise black children in a way that no whites will be, they conclude with a message that seems to emphasize the difficulty of the challenge faced by mental health professionals in deciding just how much weight to give race in their placement evaluations. They state that MEPA has not been considered “spectacularly successful” (Ref. 1, p 312), and that DHHS guidance permits some consideration of race in specific cases, and then they give their mental health colleagues the following ambiguous charge:

The pointed objective, therefore, in future evaluations will be to show that a particular black child has such unique and special needs that he or she deserves particular consideration for placement in a black family. It will be interesting to see whether our forensic colleagues, in striving for objectivity, will consider the factor of race in their evaluations only when something unique about that particular adoption context cries out for race to be considered so that the best-interest-of-the-child standard can be met. It seems clear that forensic professionals must be careful not to state that they routinely consider race in their adoption evaluations unless they intend to argue clinically that race is always relevant. And even then, they should be cautious about not articulating a general preference for inracial over transracial adoptions [Ref. 1, p 312].

In their final two paragraphs Griffith and Bergeron cite the Adoption and Race Work Group, assembled by the Stuart Foundation, as evidence of the ongoing debate within the mental health community, noting its conclusion that “race should not be ignored when making placement decisions and that children’s best interests are served—all else being equal—when they are placed with families of the same racial, ethnic, and cultural background as their own” (Ref. 1, p 313).

There are several problems with the message that this article by Griffith and Bergeron sends to their colleagues. First, the law is much clearer than they indicate. MEPA II did, as they point out, eliminate the provision in MEPA I that had allowed race as a permissible consideration. MEPA II also eliminated related language indicating that some use of race might be permissible—language in MEPA I forbidding agencies to “categorically deny” placement, or delay or deny placement “solely” on the basis of race—and substituted language that tracked the language of other civil rights statutes, simply prohibiting discrimination. As I discuss elsewhere:

The intent to remove race as a factor in placement decisions could hardly have been made more clear. The legislative history showed that the race-as-permissible-factor provision was removed precisely because it had been identified as deeply problematic. The simple antidiscrimination language substituted had been consistently interpreted in the context of other civil rights laws as forbidding any consideration of race as a factor in decision-making, with the increasingly limited exception accorded formal affirmative action plans [Ref. 3, p 131].

While it is true that DHHS issued a 1997 Guidance Memorandum allowing consideration of race in some circumstances, that Guidance makes clear that race cannot be used in the normal course but only in exceedingly rare situations. The only example the Guidance gives of such circumstances is as follows:

For example, it is conceivable that an older child or adolescent might express an unwillingness to be placed with a family of a particular race. In some states, older children and adolescents must consent to their adoption by a particular family. In such an individual situation, an agency is not required to dismiss the child’s express unwillingness to consent in evaluating placements. While the adoption worker might wish to counsel the child, the child’s ideas of what would make her or him most comfortable should not be dismissed, and the worker should consider the child’s willingness to accept the family as an element that is critical to the success of the adoptive placement. At the same time, the worker should not dismiss as possible placements families of a particular race who are able to meet the needs of the child [quoted in Ref. 3, p 132].

Moreover, when the Guidance states that use of race in placement is governed by the strict scrutiny standard, it invokes a standard known in the legal world as condemning as unconstitutional under the Federal Constitution almost all race-conscious policies.

MEPA’s prohibition of racial matching is controversial within the child welfare world, with some arguing for its repeal and others for “interpretations” that would allow for race-matching in blatant disregard for the clear meaning of the law. The positions taken by the Child Welfare League of America, the National Association of Social Workers, and the National Association of Black Social Workers, cited by Griffith and Bergeron, illustrate these

organizations' disagreement with the law. The Report issued by the Stuart Foundation's Adoption and Race Work Group, relied on by Griffith and Bergeron in their concluding paragraphs, illustrates the commitment by many who disagree with the law to evade its restrictions. As I wrote when asked for my comments on this Group's preliminary draft report, which became the final report with no significant changes in tone or substance:

From start to finish [the Report] reads like a justification for the present race-matching system, and an argument for continuing to implement essential features of that system in a way designed to satisfy the letter but not the spirit of [MEPA]. . . . The general thrust of the Report in terms of policy direction, together with its specific Recommendations, read to me like the advice prepared by clever lawyers whose goal it is to help the client avoid the clear spirit of the law. The general idea seems to be to tell those in a position to make and implement policy, that this is a bad law, based on a misunderstanding of the needs of black children, but that since it is less than crystal clear, it will be possible to retool and reshape current policies and practices so that they look quite different but accomplish much the same thing [quoted in Ref. 3, pp 135–6].

The fact that there is ongoing controversy about and resistance to this law matters. Law is not self-enforcing. It relies on people, nonprofit organizations, and government entities to demand enforcement.

However, just as controversy affects law, so law also affects controversy. The fact that federal law now states that race-matching is equivalent to race discrimination matters in a nation that has committed itself in significant ways to the proposition that race discrimination is wrong. Moreover this particular law mandates powerful penalties, specifying an automatic reduction of a set percentage of the federal funds provided to each state for foster and adoption purposes, for any finding of violation.<sup>4</sup> This changes the risk assessment enterprise for typically risk-averse bureaucrats. Acting illegally can get you into trouble, especially if millions of dollars of financial penalties are at stake. While in the years after MEPA's passage I was one of the most vocal critics of the absence of MEPA enforcement activity, as the years went by I began to get the sense in my travels around the country speaking on these issues that social work practice was adjusting, albeit slowly, to MEPA's demands (Ref. 5, p 223).

The dramatic new development is on the enforcement front. The U.S. Department of Health and Human Services (DHHS), designated as the enforcement agency for MEPA, has finally moved beyond the tough-sounding words that it issued providing interpretive guidance, to take action—action in the form of decisions finding states in violation of the law and imposing the financial penalties mandated by MEPA for such violations. Griffith and Bergeron make no mention of this development, but it seems likely to have a major impact on child welfare agencies nationwide and accordingly seems likely to change the context in which mental health professionals will work in making placement evaluations and the pressures on them with respect to the race factor. The first such enforcement decision involved Hamilton County, Ohio. In 2003, after a four-and one-half-year investigation, DHHS's Office for Civil Rights (OCR) issued a Letter of Findings, concluding that Hamilton County and Ohio had violated MEPA as well as Title VI of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000(d)), and DHHS's Administration for Children and Families (ACF) issued a Penalty Letter imposing a \$1.8 million penalty.<sup>6</sup> In its extensive Letter of Findings, DHHS confirmed that under MEPA as well as Title VI, strict scrutiny is the standard, and child

welfare workers have extremely little discretion to consider race in the placement process. DHHS found that MEPA prohibits any regular consideration of race in the normal course, any regular consideration of race in the context of a transracial placement, and any differential consideration of transracial as compared with same-race placements. Moreover, the Letter stated that MEPA prohibits the variety of policies and practices used to assess transracial placements with a view toward the prospective parents' apparent ability to appropriately nurture the racial heritage of other-race children. More specifically, DHHS found illegal administrative rules requiring that: (1) home-studies of prospective adoptive parents seeking "transracial/transcultural" placements include a determination of whether a prospective parent is able to "value, respect, appreciate and educate a child regarding a child's racial, ethnic and cultural heritage, background and language and . . . to integrate the child's culture into normal daily living patterns;" (2) assessments be made of the racial composition of the neighborhood in which prospective families live; and (3) prospective parents prepare a plan for meeting a child's "transracial/transcultural needs." DHHS stated that, in enacting MEPA II, Congress "removed the bases for arguments that MEPA permitted the routine consideration of race, color, or national origin in foster or adoptive placement, and that MEPA prohibited only delays or denials that were categorical in nature." In the consideration of particular Hamilton County cases, DHHS regularly faulted child welfare workers for demanding that home-studies reflect a child's cultural needs, asking for additional information on racial issues, and inquiring into and relying on prospective parents' statements about their racial attitudes (e.g., intention to raise the child in a "color-blind" manner), the degree of contact they had with the African-American community, the level of racial integration in their neighborhood or school system, their plans to address a child's cultural heritage, their level of realism about dealing with a transracial placement, the adequacy of their training in areas like hair care, their unrealistic expectations about racial tolerance, their apparent ability to parent a child of another race, their willingness to relocate to a more integrated community, their apparent ability to provide a child with an understanding of his heritage, and their readiness for transracial placement.

In rejecting one of Ohio's defenses, based on allegedly inadequate advice on the operation of MEPA, DHHS found that the guidance issued in the form of various memoranda from 1995 through 1998 was fully adequate in clarifying the prohibition against any special requirements related to transracial placements.

The subsequent DHHS decision imposing the \$1.8 million penalty took issue additionally with Ohio's apparent attempt to circumvent the law by a new administrative rule providing that an agency determination that race should be considered would trigger a referral for an opinion from an outside licensed professional (psychiatrist, clinical psychologist, social worker, or professional clinical counselor). The professional was to be required to provide an "individual assessment of this child that describes the child's special or distinctive needs based on his/her race, color, or national origin and whether it is in the child's best interest to take these needs into account in placing this child for foster care or adoption." DHHS faulted the process for signaling to the professional that the agency thinks race should be a factor, for the professional's lack of training regarding the legal limitations on considering race and for asking the professional whether race should be considered, while failing to require any finding by the professional: "that there is a compelling need to consider race; that such

consideration is strictly required to serve the best interests of the child; and that no race-neutral alternatives exist.” DHHS also noted that Ohio had indicated its desire for state approval to obtain opinions from professionals known to be opposed to transracial adoptions. DHHS concluded that the rule was “readily susceptible to being used to foster illegal discrimination.”

In 2005, DHHS made a second enforcement decision, involving South Carolina, with OCR issuing a Letter of Findings concluding that the state’s Department of Social Services had violated both MEPA and Title VI, and ACF issuing a Penalty Letter imposing a penalty of \$107,481.<sup>7</sup> In its Letter of Findings in this case, DHHS again emphasized that strict scrutiny is the standard and that the law forbids any regular consideration of race, allowing its consideration only on rare occasions and even then only to the degree it can be demonstrated to be absolutely necessary. DHHS found illegal South Carolina’s practice of treating prospective parent racial preferences with greater deference than other preferences: “By treating race differently from all other parental preferences. . . [the agency] establishes its own system based on racial preference. . . .” DHHS also found illegal the agency’s practice of deferring to birth parents’ racial preferences, stating that the law requires agencies to make placement decisions “independent of the biological parent’s race, color or national origin preference.” Furthermore, DHHS found illegal the agency’s practice of treating transracial adoptions with greater scrutiny, faulting, for example, the inquiries into prospective parents’ ability to adopt transracially, and ability to nurture a child of a different race, as well as inquiries into the racial makeup of such parents’ friends, neighborhoods, and available schools. And finally, DHHS found to be illegal various other ways in which the agency took race into consideration, including use of race as a “tie-breaking” factor, matching for skin tone, and use of young children’s racial preferences—“the routine deference to and wide range of reasons given for. . . following the same-race preferences of young children undermines any claim that these placement decisions are truly individualized.” In addition, DHHS made findings of violations in several individual cases, including that of a black couple interested in adopting a Hispanic child, in which the agency was faulted for inquiry into the couple’s ability to meet the child’s cultural needs. DHHS specified that any acceptable corrective action plan by the state would have to include, *inter alia*, support and encouragement for parents interested in adopting transracially, the creation of progressive disciplinary action, including termination, for staff continuing to use race improperly, the development of whistle-blower protection for staff who reported the use of race by others, and monitoring and reporting requirements designed to ensure future compliance with the law. The ACF Penalty Letter noted that, having reviewed and concurred in the OCR’s Letter of Findings, it was imposing the penalty mandated by MEPA.

While these are the only cases in which Letters of Findings and Penalty Letters have been issued, DHHS’s OCR has engaged in compliance efforts in several other cases, resulting in agreements by various state agencies to modify their practices in accord with OCR’s demands.<sup>8</sup> In addition DHHS’s ACF has through various policy statements reenforced its commitment to rigorous enforcement of MEPA.<sup>9</sup>

DHHS’s recent enforcement action constitutes a shot across the bow for all state agencies involved in foster and adoptive placement throughout the nation. The opinions in the two

cases in which financial penalties were imposed are as clear as they can be that, at the highest ranks, DHHS believes that MEPA and the various MEPA-related guidance memoranda that DHHS has issued mean that race cannot lawfully be taken into account in any routine way in placement decisions, that it is only in the exceptional cases that race can be considered, and even then that authorities will have to be very careful to demonstrate that compelling necessity demands such consideration, consistent with the strict scrutiny standard.

While DHHS guidance had in my view made all this clear previously, the fact that OCR has now taken enforcement action finding MEPA violations, with ACF imposing financial penalties, raises the stakes in a way that agency directors and agency workers will not be able to ignore. Penalties for MEPA violations are mandated under the law, and they are very severe, reducing by set percentages the federal funds on which states are absolutely dependent to run their child welfare systems.<sup>4</sup> A 1997 DHHS Guidance Memorandum noted that in some states MEPA's penalties could range up to more than \$3.6 million in a given quarter and could increase to the \$7 to \$10 million range for continued noncompliance (Ref. 3, p 132). State agencies act at their peril in ignoring this law. So, too, do agency workers, since their supervisors are not likely to be pleased with action that puts the state's child welfare budget at risk.

Some will no doubt continue to resist and evade the law, but I predict that such conduct will diminish over time as the law becomes more established in people's minds as simply part of the nation's basic civil rights commitment. While some have called for MEPA's repeal there has been no significant move in this direction.

My hope is that mental health professionals will join ranks with those interested in following the law in good faith, rather than with those interested in evading its mandate. I say this not simply because MEPA is the law, but because I believe it is a good law, one that serves the interests both of children and of the larger society. Griffith and Bergeron note that black children "can" do well in white families,<sup>1</sup> but I believe the social science evidence provides much stronger support for MEPA than that. By now, there is a significant body of studies on transracial adoptees, many of which are good, controlled studies, comparing them to same-race adoptees. My review of these studies and that of others besides me, reveals no evidence that any harm comes to children by virtue of their placement across color lines. By contrast, there is much evidence that harm comes to children in foster or institutional care when they are delayed in adoptive placement or denied adoption altogether, and there is much evidence that race-matching policies result in such delay and denial.<sup>10</sup> In addition, there is evidence that even when child welfare systems purport to use race as only one factor in decision-making, rather than as a categorical factor justifying delay and/or denial of adoptive placement, race ends up being used in ways that result in just such delay and denial.<sup>3, 10, 11</sup> This latter was, of course, the main reason Congress amended MEPAI to eliminate race as a permissible consideration—Senator Metzenbaum, the law's sponsor, became convinced that MEPA I was not succeeding in eliminating the categorical use of race because its permission to use race as one factor was being abused, something that many of us who supported MEPA II had thought was inevitable, based on experience.<sup>3</sup>

So, it seems to me clear that MEPA serves the interests of children, by helping black children in particular to find placements in loving homes of whatever color as promptly as possible. MEPA also seems to me to serve the interests of the larger society, by combating in a small but significant way the notion that race should divide people. Race-matching is the direct descendant of white supremacy and of black separatism.<sup>3, 10-12</sup> For the state to promote the formation of same-race families and discourage the formation of interracial families, as it does when it endorses race-matching, is wrong in my view for the same reasons that barriers to interracial marriage were wrong. The U.S. Supreme Court struck down those marriage barriers in 1967 in *Loving v. Virginia*.<sup>13</sup> Congress took an important step in passing MEPA II to bring our nation's child welfare policies in line with the rest of our civil rights regimen. This law makes the statement that while race, of course, does matter in myriad ways in our society, it does not and should not define people's capacity to love each other.

## References

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4. See 42 U.S.C. § 674(d)(1) ("If . . . a State's program . . . is found . . . to have violated [the law] with respect to a person or to have failed to implement a corrective action plan. . . the Secretary shall reduce the amount otherwise payable to the State. . . by (A) 2 percent. . . in the case of the 1st such finding for the fiscal year. . . ; (B) 3 percent. . . in the case of the 2nd such finding for the fiscal year. . . ; or (C) 5 percent. . . in the case of the 3rd or subsequent such finding. . .") [emphasis added]. See also 45 C.F.R. §§1355.38(b), (c)
5. Bartholet E: The challenge of children's rights advocacy: problems and progress in the area of child abuse and neglect. *Whittier J Child Family Advocacy* 3:215-30, 2004
6. See HHS (OCR) Letter of Findings, Docket No. 05997026 (October 20, 2003), HHS (ACF) Penalty Letter to the Ohio Department of Job and Family Services, imposing a \$1.8 million fine (October 23, 2003) (both available at <http://www.law.harvard.edu/faculty/bartholet/mepa.php>). The Letter of Findings was appealed in part, and affirmed, in HHS Departmental Appeals Board No. 2023 (March 31, 2006). While technically the Letter of Findings and the Penalty Letter are issued by two different entities within HHS, OCR and ACF, hereafter in the text, I refer to HHS as responsible for both decisions.
7. See HHS (OCR) Letter of Findings (October 31, 2005), HHS (ACF) Penalty Letter to South Carolina Department of Social Services (February 24, 2006) (both available at <http://www.law.harvard.edu/faculty/bartholet/mepa.php>)
8. See OCR—MEPA—Summary of Selected OCR Compliance Activities. Available at <http://www.hhs.gov/ocr/mepa/complianceact.html>. Accessed July 6, 2006
9. See HHS's ACF Child Welfare Policy Manual at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy.jsp?idFlag=4](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy.jsp?idFlag=4) at 4.3 ("MEPA/IEAP Guidance for Compliance"), Information Memorandum issued on March 25, 2003 by Wade F. Horn, Asst. Secretary for Children and Families, [http://www.acf.dhhs.gov/programs/cb/laws\\_policies/policy/im/im0301.htm](http://www.acf.dhhs.gov/programs/cb/laws_policies/policy/im/im0301.htm). Both accessed July 17, 2006
10. See Bartholet E: Where do black children belong? The politics of race matching in adoption. *Univ Penn Law Rev* 139:1163-256, 1991
11. Bartholet E: *Family Bonds*. Boston: Beacon Press, 1999, pp 99-106
12. Bartholet E: Race separatism in the family. *Duke J Gender Law Policy* 2:99-105, 1995
13. *Loving v. Virginia*, 388 U.S. 1 (1967)

**Linda Spears****Acting Senior Vice President, Child Welfare League of America**

The Child Welfare League of America (CWLA), representing public and private nonprofit, child-serving member agencies across the country, is pleased to participate in the briefing before the U.S. Commission on Civil Rights.

CWLA is an association with approximately 700 public and private nonprofit agencies drawn from all fifty states. These agencies assist more than 3.5 million abused, neglected, and vulnerable children and their families each year with a range of services. Our highest mission is to ensure the safety and well-being of children and families. We advocate for the advancement of public policy, we set and promote the standards for best practice, and we deliver superior membership services.

The CWLA vision is that every child will grow up in a safe, loving, and stable family. CWLA will lead the nation in building public will to realize this vision. We are committed to excellence in all we undertake, with an emphasis on providing services that are highly valued and that enhance the capacity and promote the success of those we serve.

As part of our mission we have developed a series of standards for the range of services and programs that make up our nation's child welfare system. It is our goal that these standards along with our other work and services will help to improve the practice in the child welfare field and ultimately will improve the lives of the millions of children and families that are touched by the child welfare system.

**Challenge for The Multiethnic Placement Act**

The Multiethnic Placement Act (MEPA) was enacted in 1994 with a goal to promote the best interests of children by ensuring that they have permanent, safe, stable, family and home. This has been a great challenge in a system that includes more than 509,662<sup>1</sup> children in foster care on a given day and when approximately 117,436<sup>2</sup> are awaiting adoption.

Of particular concern are the African American and other minority children who are dramatically over-represented at all stages of this system. The debate and concern in 1994 was that children were being denied placements due to an over reliance on policies that emphasized placements that take into account the racial and ethnic makeup of the prospective adoptive family. MEPA prohibited the use of a child's or a prospective parent's race, color, or national origin to delay or deny the child's placement and required diligent efforts to expand the number of racially and ethnically diverse foster and adoptive parents. MEPA was signed into law in 1994 and later amended to clarify its intent.

As summarized by the American Bar Association<sup>3</sup> MEPA requires three basic actions by states:

1. It prohibits states and other entities that are involved in foster care or adoption placements, and that receive federal financial assistance under title IV-E, title IV-B, or any other federal program, from delaying or denying a child's foster care or adoptive



placement on the basis of the child's or the prospective parent's race, color, or national origin;

2. It prohibits these states and entities from denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent's or the child's race, color, or national origin; and
3. It requires that, to remain eligible for federal assistance for their child welfare programs, states must diligently recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state who need foster and adoptive homes.

Since the 1970s, the number of Caucasian infants available for adoption has sharply declined in the U.S. Although U.S. agencies continue to provide adoption services for infants, this group now constitutes but a small part of the population of children in need of adoption planning and services. By contrast, the number of children in the nation's out-of-home care who need adoption has grown tremendously. As a result of a range of social conditions and policy changes, an increasing proportion of children in care have the goal of adoption. At the same time, these children typically have a range of challenging needs, including prenatal exposure to alcohol and other drugs, medical fragility, a history of physical or sexual abuse, or membership in a sibling group. Thousands of older children, for whom agencies traditionally have had difficulty finding placements, also await adoptive families. Children of color continue to be disproportionately represented in out-of-home care as well as among the children waiting for adoptive families.

You have asked us here today to address a number of important issues in regard to the multiethnic Placement Act (MEPA). Specifically you have asked:

1. Whether the enactment of MEPA has removed barriers to permanency facing children involved in the child protective system;
2. Whether transracial adoption serves the children's best interest or does it have negative consequences for minority children, families, and communities;
3. How effectively the Department of Health and Human Services (HHS) is enforcing MEPA;
4. The impact HHS' enforcement of MEPA has had on the efforts of prospective foster care or adoptive parents to adopt or provide foster care for minority children; and
5. Whether the enactment of MEPA has reduced the amount of time minority children spend in foster care or wait to be adopted.

### **Framework for Addressing Placement Issues**

A recent analysis by the Government Accountability Office (GAO) found that while African American children made up less than 15 percent of the overall child population based on 2000 census data, they represented 27 percent of the children who entered foster care in 2004. The GAO also found that in that same year African American children represented 34 percent of the children remaining in care at year's end.<sup>4</sup>

Perhaps more startling is the GAO finding that African American children not only were more likely to be placed in out of home care but that each decision point in the child welfare process this disproportionality or over representation grew. In some areas of the country this overrepresentation could also be found among Native American children and Hispanic populations depending on the county or state.<sup>5</sup>

In this light it is important to review not just that part of the child welfare system that deals with placements but to examine the entire child welfare system and services from the initial assessment provided through the protective services process, the provision of prevention services, intervention services, the placement process as well as the follow up and provision of post placement services.

**Has the MEPA removed barriers to permanency? Has MEPA reduced the time minority children spend in foster care or wait to be adopted?**

In recent years we have made progress in reducing the number of children in out of home care. Nationally the number of children in care has been reduced from 562,712 in 1999 to 509,662 in 2004.<sup>6</sup> Despite this decline, barriers to permanency remain and can be quite extensive. This is true for African American children and in particular parts of the country or parts of a state this barrier to permanency extends to some Hispanic and tribal populations.

An examination of the data shows that on September 30, 2004 there were 509,662 children in out-of-home care. Of these children approximately 34 percent were African American and 40 percent were white.<sup>7</sup> Overall, children were in care for an average of 30 months with a median of 17 months.<sup>8</sup> African American children were in foster care significantly longer than all children of other races. Specifically, African American children spent on average, about three years in foster care, while white children spent, on average about two years in foster care (Table 1).

*Table 1. Length of Time in Out-of-Home Care, 2004<sup>4</sup>*

Race/Ethnicity of Children in Care	Mean (months)	Median (months)
African American	39.4	22.8
American Indian/Alaska Native	26.1	15.0
Asian	26.0	15.2
Hispanic	28.7	16.4
Native Hawaiian/Pacific Islander	21.9	14.0
White	23.5	13.6
Two or More Races	23.4	14.6

**Due transracial adoptions serve the children’s best interest, or does it have negative consequences?**

The Child Welfare League of America firmly believes that the best interest of the child must be paramount in any decisions that surround placement and the provision of services. The CWLA

Standards of Excellence for Adoption Services in section 5.2 Role of Ethnicity and Culture in Selecting an Adoptive Family for a Child states,<sup>9</sup>

When consistent with the child's best interest, the agency providing adoption services should honor the birth parents' request that a family of the same race or ethnic background adopt the child. The child's adoption, however, should not be denied or delayed if the agency is unable to recruit adoptive parents of the child's race or culture and adoptive parents of other cultural or racial groups are available.

All children deserve to be raised in a family that respects their cultural heritage. [1.15]

In any adoption plan, the best interests of the child should be paramount. All decisions should be based on the needs of the individual child. [1.11]

If aggressive, ongoing recruitment efforts are unsuccessful in finding families of the same race or culture as the child, other families should be considered to ensure that the child's adoptive placement is not delayed.

Assessment and preparation of a child for a transracial/transcultural adoption should recognize the importance of culture and race to the child and his or her experiences and identifications. The adoptive family selected should demonstrate an awareness of and sensitivity to the cultural resources that may be needed after placement.

We cannot make a general judgment that applies to all families and to all children. Determining what is in the best interest of an individual child and matching those needs with the capacities of prospective families involves a complex array of factors which are best guided by what we know through research and outcome evaluation. Since MEPA legislation was adopted limited research has been published on the outcomes of transracial adoptions. Within this limited body, the findings have been mixed and sometimes contradictory. In addition, the research focuses on children and young adults; thus little can be concluded about the long term effects of transracial adoption. Overall, the studies have failed to yield significant differences in the short-term outcomes for transracial versus in racial adoptees.

A review of the research does find positive outcomes for transracial adoptees. Transracial adoptees of color were no more likely to engage in negative social behaviors than white in racial adoptees. For example, they are no more likely to run away or use drugs. Studies also show that transracial adoptees have exhibited academic competence, another sign of positive well-being. Attributes other than race of the adoptive parents need to be examined as well. For example, when African American transracial adoptees live in integrated neighborhoods, attend integrated schools, and have parents who accept and address the race of their child, they have stronger racial identity than adoptees that live in predominately white neighborhoods and attend primarily white schools. Finally adoptive families who encourage and support the culture and heritage of the child as well as that of the adoptive family, and the child feels part of both cultures and heritages, show no significant differences compared to their white, in racial adopted peers.<sup>10, 11, 12, 13, 14</sup>

Having cited these studies there is also some evidence of negative outcomes. Studies have shown that transracial adoptees developed their racial identity differently from in racial adoptees. When transracial; adoptees fail to identify with the culture if their adoptive parents, they experience greater psychological distress. Transracial adoptees, particularly African American adoptees, developed adjustment problems when they experienced discrimination and discomfort with their

appearance. Finally if the adoptive parents fail to address the issues regarding the differences in race and culture of the adoptee and the adoptive family, the adoptee experienced appearance anxiety lasting through adulthood.<sup>15, 16, 17, 18</sup>

### **How effective is HHS in enforcing MEPA?**

We understand that HHS is responding to reports of MEPA violations, and that it is working with the National Child Welfare Resource Center on Adoption to prepare additional training for States regarding MEPA. It also our understanding that violations in MEPA policy and practice are noted during their reviews of State programs through the Child and Family Service Reviews (CFSR's) and Title IV-E reviews.

### **What is the impact HHS' enforcement on the efforts of foster and adoptive parents to adopt or provide care for minority children?**

It is difficult to ascertain the impact of the HHS role in the enforcement of MEPA and in turn that laws impact on children and families in the child welfare system. In large part that is because the challenges are much greater than the policies around adoption and placement.

In seeking to address this issue several elements are involved. A recent analysis by the Congressional Research Services (CRS) found that overrepresentation of children of color was found at several points of the child welfare system from entry to exit.<sup>19</sup> As CRS noted:

Research and other data suggest that investigations of alleged child maltreatment are more likely to involve Black children as potential maltreatment victims and that, compared to their presence in the general population, black children are disproportionately represented among the children who are found to be victims of child maltreatment. The rate of White victims of child abuse or neglect was 11.0 per 1,000 White children in the general population while the comparable rate for Black children (as well as American Indian/Alaska Native children) were significantly more likely to be among the foster care cases reviewed than to be among the in-home cases reviewed. In sum, the disproportionate representation of Black children at several entry decision points is consistent with their disproportionate representation among the population entering foster care.

At the same time, at least one large five-state study has shown that the race/ethnicity of victims is largely in proportion to the population of children investigated. This suggests that the community of reporters, (e.g., family, friends, and neighbors, and social service, medical and school personnel) tends to over-report Black children but that once the decision to investigate is made, race/ethnicity is not an important factor in the determination of maltreatment. Nonetheless, because Black children are over-represented in the population of children investigated, a proportionate victim determination means Black children will make up a larger share of child maltreatment victims than their share of the general child population.

The Congressional study also found that decisions to provide services or to provide services in home as opposed to out of home care was also disproportionate. The CRS also found:<sup>20</sup>

Separate analysis of NCANDS data that looked at race/ethnicity, area poverty rate, and age in relation to removals, found that the risk of removal was highest for all income groups and race/ethnicities for children under age one. At the same time, Black infants living in counties with high poverty rates had a removal rate of 50 per 1000 black children in the population. This appears to leave them extraordinarily vulnerable compared to their Hispanic and White counterparts who had removal rates of 13 and 10 per 1000 children of their respective race/ethnic groups. Finally, race/ethnicity was found to vary significantly as a function of the type of case (in-home versus foster care) included in the aggregate sample of cases drawn for the initial round of Child and

Family Services Reviews (CFSRs). Black children (as well as American Indian/Alaska Native children) were significantly more likely to be among the foster care cases reviewed than to be among the in-home cases reviewed. In sum, the disproportionate representation of Black children at several entry decision points is consistent with their disproportionate representation among the population entering foster care.

The CRS has also determined that some of the same barriers and problems exist at the exit point as well as the entry point as outlined here. In short the challenge of improving permanency rates cannot be address with a change in law but requires a comprehensive effort at reform of the system. That reform must examine access to services at every step of the way.

CWLA has cited on many occasions a statistic drawn from the National Child Abuse and Neglect Data Systems (NCANS) that has been consistent for several years. Of the children substantiated as abused or neglected nearly 40 percent do not receive post-investigative services.<sup>21</sup> There are several factors that have an impact on this figure but it is clear, far too many children and the families they are a part of are not receiving the help that might prevent a future removal.

### **Conclusion**

The challenges that the Multiethnic Placement Act seeks to address cannot be met without a comprehensive approach to the challenges we face in the child welfare system. The issues laid bare by the MEPA laws really reflect broader concern about disproportionality across the child welfare system, and the issue of disproportionality is really the issue of a lack of national priority for the children in the child welfare system. The problems we face in our nation's child welfare system will not be solved merely with the change of a single law or a new edict. The Child Welfare League of America may be accused again of repeating what we have said in settings similar to this. So be it.

We once again argue for a more comprehensive approach to reforming and addressing the problems found in our nation's child welfare system. That must involve a greater partnership between the federal, state and local governments. That involves more federal dollars not simply the same dollars spent differently. It means an investment from the front end of prevention services when a family comes into contact with protective or other services; it means an investment in treatment services including greater access to Medicaid, substance abuse services and mental health services; it means greater investment in out of home care from more foster, adoptive and kinship families; and it means greater financial and technical support for these families before and after permanency is obtained. It also mean investing in the development of a stronger knowledge base that guides practice and policy, and that is applied through a skilled and well-supported workforce. It means making children a national priority.

### **Footnotes:**

- 1 Child Welfare League of America (CWLA). (2006). Special tabulation of the Adoption and Foster Care Analysis Reporting System (AFCARS). Washington, DC: Author. back.
- 2 Ibid. back
- 3 A Guide to The Multiethnic Placement Act of 1994 as amended by the Interethnic Placement Act of 1996
- 4 Government Accountability Office (GAO). (2007) African American Children in Foster Care. Washington, DC, 2007 Author.
- 5 Ibid

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## Commissioner Statements

### *Statement of Vice-Chair Thernstrom*

One of the great tragedies of the child welfare system in the United States has been the disproportionate number of black and other minority children who languish for long periods of time in temporary care while awaiting placement with a loving, caring family of the same race. The older the child becomes the more difficult finding a permanent home becomes. This is doubly tragic because there are many adoptive parents of all races who would love to provide a permanent and loving home to these children regardless of the child's racial or ethnic origins.

According to testimony we received, possible explanations for this delay include:

- (1) A disproportionate number of black children placed in state care due at least in part to the high rate of impoverished, single parent households in the black community.
- (2) The relative shortage of qualified, adoptive black and minority families.
- (3) Federal, state, and local policies and regulations that have had the effect of discouraging transracial adoption.

Regarding the latter point, the Multiethnic Placement Act of 1994 and the 1996 amendments known as the "Removal of Barriers to Interethnic Adoption Act" (collectively the "Act" or "MEPA") have made progress toward resolving this situation. In particular, MEPA has reduced some of the regulatory and policy barriers to transracial adoption. The Act rendered child welfare policies and law consistent with the principle of non-discrimination by race. At the time of the Commission's briefing on this subject in 2007 we were presented with evidence that MEPA had begun to significantly shorten the length of time that black children in particular were forced to wait for placement.

In spite of these gains, today there remain a number of special interest groups and organizations who want to stop or restrict transracial adoption. These groups seem to believe that a black child will "lose his [or her] cultural identity or heritage" if adopted by parents of a different race or ethnicity. They also worry that white parents will be unable to properly raise a child whose skin color differs from their own.

However, as we stated in our formal findings and recommendations to this report, research has shown that transracial adoption does not produce psychological or other social problems in adopted children, especially if parents are properly selected and prepared for raising children of a different race. Also, according to experts, transracial adoption does not seem to affect children's sense of their own racial and ethnic identity.



### **Support for Findings and Recommendations**

I join the majority of my fellow commissioners in supporting the formal findings and recommendations enumerated elsewhere in this report.

In particular, while the law encourages active recruitment efforts of same race and minority adoptive parents by the applicable agencies, I emphasize my agreement with my fellow commissioners (and with the law itself) that such efforts must not impede the ability of non-minority parents to adopt children of color.

I would also like to add two of my own recommendations based upon the thought-provoking testimony we received during our 2007 briefing.

### **Reconsider the Allocation of Child Welfare Resources**

We received testimony that under the current system greater resources and support are given to foster parents than to the birth families from which the child has been removed, and that child welfare resources should be reallocated to provide front-end support services to at-risk families. The purpose would be to help improve the family situation and either (1) avoid the need to remove the child into the child welfare system in the first place, or (2) reunite the child with the family.

Testimony we received suggested that this might be more cost effective and less traumatic to children. This might also help alleviate the special challenges that disadvantaged groups face in dealing with the child welfare system. Given the resources and support to demonstrate their capabilities to state child welfare agencies, at-risk families might be more likely to win their children back.

### **Reconsider Kinship Care**

The U.S. Department of Health and Human Services (HHS), which is charged with enforcing MEPA, and the child welfare authorities in general, should consider more aggressively promoting kinship care as an alternative to foster care where appropriate. Under this scenario, relatives of the birth family would provide child rearing assistance and support. One witness noted that there is far less abuse in kinship care than in foster care.

### **Conclusion**

As is to be expected when examining a subject with such complex legal, social and political overtones, our briefing raised many excellent questions that may point toward worthwhile future work in continuing to improve our child welfare system. I have listed a few of these questions below.

- Is the disproportionate entry of minority children into the child welfare system linked to intentional or unintentional discrimination? Is it due to economic, educational and income disparities?
- Do case workers consciously or unconsciously base the decision to bring children into the system upon racial stereotypes, especially regarding low-income families of color?
- As one of my colleagues asked during the briefing, why are there so few Asian Americans in the child welfare system?
- Why do so many adoptive parents in the U.S. find it easier to adopt a child from other countries such as Russia, Korea and Guatemala rather than from among the large number of children in the U.S. who need adoptive homes?

The Multiethnic Placement Act of 1994 and the 1996 amendments have improved the ability of different race parents to provide a loving home for minority children and have reduced the length of time that children are trapped in the child welfare system. In that regard, MEPA was a very good start at reforming the system.

However, there remain many difficulties for the children, their former families, and their adoptive families. Much work remains to be done, and it is my hope that this is a process that will continue to improve the lives of the children in the child welfare system.

***Statement of Commissioner Yaki***

While I concur in the recommendations of the Report, I cannot help but be bothered by the fact that the intent of MEPA – to do away with notions of “race appropriate” preferences in favor of broadening of the pool of available caring and loving caregivers for adoptees, regardless of race or color or national origin – falls short in one important measure. To the extent that there is a federal interest in state child welfare agencies, that federal interest should include ensuring that non-discrimination in potential adoptive parents covers and encourages the participation of all qualified and eligible Americans.

## **Statement of Commissioner Heriot**

The policy underlying the original Howard Metzenbaum Multi-Ethnic Placement Act of 1994 (“MEPA”) was both sound and laudable: Children should not languish in foster care when qualified parents are ready and willing to adopt them. Neither the race of those parents nor that of the child should be a significant issue. Instead, the focus of attention should be on promptly placing the child in a safe, stable and loving home.<sup>1</sup>

A majority of members of Congress apparently agreed, since they voted for the statute. President Clinton agreed, since he signed it into law. I’ve little doubt that most Americans wholeheartedly agree. But not everyone does. Indeed, many professional social workers and adoption and foster-care placement agency employees--the very persons charged with carrying out the policy--vocally dissent. And therein lies the problem. When those charged with carrying out a policy personally oppose it, the statute that embodies that policy had better be clear and unequivocal. Otherwise, whether in good faith or not, they will likely apply the statute in a manner that diminishes its potency. The original MEPA was anything but clear and unequivocal, and as a result it had to be and was replaced with the stronger language of the Inter-Ethnic Placement Provisions of the Small Business Job Protection act of 1996 (“IEP”).

Part of the issue before the Commission is whether the IEP effectively promotes the policy Congress had in mind. My belief is that, although the language could and perhaps should be improved, it is adequate to the task. I write separately, however, to offer my thoughts on its interpretation and to discuss what I believe to be misunderstandings surrounding it.

### **Background to the Passage of the Original MEPA**

It is always a tragedy when a child is alone in the world. And the reality is that this tragedy is more likely to afflict an African American or American Indian<sup>2</sup> child than it is a Hispanic or white child.<sup>3</sup> Partly as a result, African-American children must ordinarily wait longer for an adoption than white children. Another contributing factor to the problem is the fact that proportionately more white families seek to adopt than African-American families, and white families are more likely to seek a white child.

Nonetheless, in a widely-publicized position paper issued in 1972, the National Association of Black Social Workers (“NABSW”) argued that African American children should be not be reared in white homes unless there is no alternative--hardly a position that is designed to increase the number of adoptions of African American children or to shorten the wait to adoption. The report stated:

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<sup>1</sup> P.L. 103-383, 108 Stat. 3518 (1994). The Act lists as its first purpose “decreasing the length of time children wait to be adopted.” See Section 552 (b)(1).

<sup>2</sup> The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, makes the case of the adoption of an American Indian child special and beyond the scope of this briefing.

<sup>3</sup> See Statement of Kay Brown, Acting Director of the Education, Workforce and Income Security Team, Government Accountability Office, Figure 1. According to GAO’s analysis of the 2004 Census and 2004 AFCARS data, Asian American children are the least likely to be in the foster care system.

“Black children belong, physically, psychologically, and culturally, in Black families in order that they receive the total sense of themselves and develop a sound projection of their future.... Black children in white homes are cut off from the healthy development of themselves as Black people.”<sup>4</sup>

Sometimes the NABSW’s rhetoric has been inflammatory. In 1985, the NABSW president declared at a Senate hearing, “We view the placement of Black children in white homes as a hostile act against our community. It’s a blatant form of racial and cultural genocide.”<sup>5</sup> This was not an isolated instance of the NABSW using the term “genocide” to apply to transracial adoption.<sup>6</sup>

Even when the heat had been turned down, the NABSW message was essentially the same.<sup>7</sup> Its April 1994 position paper states, “Transracial adoption should only be considered after documented evidence of unsuccessful same-race placements [has] been reviewed and supported by appropriate representatives of the African-American community.”<sup>8</sup> Essentially they are choosing long waits for African-American children over adoption by white parents. By creating bureaucratic obstacles to transracial adoptions, the NABSW could ensure that such adoption would be rare and that the number of African-American children left to the foster care system would be higher than it otherwise would have been.

The NABSW’s opposition to transracial adoption was by no means unusual among social workers.<sup>9</sup> Prior to the passage of MEPA, it was not just common for white parents wishing to adopt African-American children to be turned away. It was the rule. A *New York Times* article published shortly after MEPA’s passage related one such story:

<sup>4</sup> Position paper issued by the National Association of Black Social Workers, April 1972, reprinted in Rita J. Simon & Howard Alstein, *Transracial Adoption* 50 (1977). See also C. Gerald Fraser, *Disease Programs Scored By Black: Social Workers Dubious on White Interest in Anemia* (April 9, 1972) (“Adoption of black children by white families, called transracial adoptions, were termed ‘a diabolical trick’ by Audrey Russell [president of Philadelphia’s NABSW chapter]. She said ‘black children belong with black folk. This is a lethal incursion on the black family, just weakening us. It needs to be stopped.’”).

<sup>5</sup> *Barriers to Adoption 1985*, Hearings on S. 99-288 Before the Senate Committee on Labor and Human Resources, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess. 271-18 (1985) (testimony of NABSW President William Merritt).

<sup>6</sup> Joe Maxwell, *Cultural Genocide?: Walking the Talk—For Pro-Life Christians, Is Every Child a Wanted Child Even If It Means Adopting Transracially?* *World Magazine* (April 2, 1994) (quoting NABSW executive director Leora Neal). See also Peter Hayes, *The Ideological Attack on Transracial Adoption in the USA and Britain*, 9 *Int’l J. Law, Pol’y & Family* 1 (1995).

<sup>7</sup> Professor Randall Kennedy had stated that this “softening of stance and language” is “mainly tactical” and “part of a public relations strategy aimed at improving NABSW’s public image.” See Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity and Adoption* 394 (2003). As evidence for his point, he stated: “The predicate for this statement is my own personal experience with representatives of the NABSW in various public and private settings. Convinced that I, as a black man, could not possibly be wholly antagonistic to their point of view, several NABSW activists and supporters have explicitly told me that while they continue to believe that interracial adoption of black children is “cultural genocide,” they realize that such talk is off-putting and that it is politic to repackage their message in a less provocative wrapping.”

<sup>8</sup> See Rebecca Varan, Comment: *Desegregating the Adoptive Family: In Support of the Adoptive Antidiscrimination Act of 1995*, 30 *J. Marshall L. Rev* 593 n. 94 (1997).

<sup>9</sup> See Bechetta A. Jackson, *Should White Families Adopt Black Children?*, *Jet* (May 8, 1995).

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

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

“I was told, Don’t even think about it,” Ms. Mullens [sic] said on Tuesday in a telephone interview at her home in Lexington, Tex. “He’s a baby; he’s black; he’s going into a black home.”<sup>10</sup>

The damage done by an “African-American parents only” policy is not simply that Lou Ann and Scott Mullen will be unable to adopt the child of their choice. Nor is it simply that African-American children will have to wait longer for adoption. Such a policy also creates a structural problem that works to the disadvantage of African-American children in foster-care placement. Foster parents come in two varieties: Those who see it as a first step toward adoption and those who don’t. Although many fine people act as foster parents without any thought towards adoption, the latter group includes some who consider foster parenthood as a way to help make ends meet. Those seeking to adopt are in it for the long haul; those who are not may or may not be.

When potential foster parents who hope to adopt are told that a potential foster child will not be available to them for adoption, they are less likely to want to foster that child. That makes it more likely the child will be sent to live with foster parents who have no intention of adopting him and who see the role merely as a way to supplement their income. Thus, foster placements of African-American children may be more likely to be short term and less likely to result in a deep commitment to that child above all others.

The case that spurred Senator Howard Metzenbaum to pass MEPA was similar in its initial stages to the Mullen case, but unlike the Mullen case, it ended in an unusual tragedy. Maurice West, a two-year old African-American child, had been raised by his white foster parents since he was two months old in Sharonville, Ohio. They wanted to adopt him, but had been told that only a black family could do so. After a family that was thought to be qualified was finally located, Maurice was shipped off to Rochester, New York. Eight weeks later he was dead—beaten to death by his new parents.

The problem that Senator Metzenbaum sought to remedy was not precisely that of the Maurice West case, since that case took an unusual and likely unpredictable turn. Metzenbaum did hope, however, that his proposal would counteract the misguided policies and practices against

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<sup>10</sup> Steven A. Holmes, “Bitter Racial Dispute Rages Over Adoption,” *The New York Times* (April 13, 1995). See also *Reisman v. Tennessee Dept. of Human Services*, 843 F. Supp. 356 (W.D. Tenn. 1993) (another such story in which the Tennessee authorities insisted, until the court ordered otherwise, that a bi-racial infant must be brought up in the home of an African-American family).

transracial adoptions that were preventing some children from being placed in a safe, stable loving home as quickly as possible.

But the legislation he shepherded through Congress was weak. It stated only:

(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 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) deny or delay the placement of a child for adoption or for 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 racial, ethnic or cultural background of the child and the capacity of the prospective foster 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 the child.

P.L. 103-383, 108 Stat. 3518.

The use of words like “categorically” and “solely” robbed the original MEPA of its ability to remedy the problem it was intended to cover. Any social worker or other adoption or foster-care placement agency employee could always find a second, third, or fourth “make weight” reason if he or she wished to. And anyone who regarded transracial adoptions as “racial and cultural genocide” would certainly be inclined to make the effort. Under the original MEPA, it didn’t matter if race was the obvious and overwhelming reason for the decision, so long as some other consideration that didn’t flunk the laugh test could be added alongside it.<sup>11</sup>

As a result, it is entirely possible that the original MEPA was actually counterproductive. It allowed adoption agencies to give whatever weight they wished to race so long they were careful not to concede that the only reason for rejecting an adoption request was race. Consequently, it may only have added additional bureaucratic procedures to the process. The length of time children had to wait for adoption may thus have been increased.

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<sup>11</sup> A hypothetical may be helpful here. Suppose a white family who lives 15 miles outside of the metropolitan area wishes to adopt an African-American toddler who has second cousins who live within the metropolitan area. An adoption agency administrator who was in fact primarily motivated by her opposition to cross-racial adoption could admit that the primary reason for refusing to allow the adoption to take place was the adopting parents’ race, so long as she could state in good faith that she was also concerned about placing the child with a family located within the metropolitan area in order to facilitate contact with the child’s second cousins. Under the original MEPA, it wouldn’t matter if race discrimination was the primary reason for the decision as long as it wasn’t the only reason.

Metzenbaum himself was deeply disappointed in the impact of his legislation. He retired from the Senate the same year MEPA passed, but he later urged Congress to repeal MEPA and replace it with something stronger.<sup>12</sup>

### The 1996 Amendments to MEPA

The Inter-Ethnic Placement Provisions of the Small Business Job Protection Act of 1996 (“IEP”) was much tougher.<sup>13</sup> It amended the prohibitions of MEPA to read:

(1) Prohibited Conduct.— A person or government that is involved in adoption or foster care placements may not —

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

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

Most importantly, while MEPA did not allow decisions to be made “solely” on the basis of race, IEP doesn’t allow race to be considered at all.

Perhaps a reasonable person could take the position that IEP is too strong—that a gentle thumb on the scale in favor of same-race adoption or foster-care placement does no harm and might even be beneficial for children who are particularly sensitive about fitting in with their new families. A child who does not look like his adoptive parents or to a lesser degree his foster parents may worry (almost always unnecessarily) about whether he is really wanted. Why not allow race to be taken into account as a tie-breaker in otherwise close cases—cases in which more than one set of qualified parents is ready and willing to step in at the same time?

I suspect that some members of Congress would have agreed in the abstract.<sup>14</sup> But the real world is anything but abstract. Congress faced a special problem that it had to overcome. The original MEPA had little or no beneficial effect, because it was so easy to thwart its spirit. A law that gives the relevant actors the discretion to do just a little of something that they are motivated to do a lot of will almost always be an ineffective law. Congress chose instead to be effective.

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<sup>12</sup> See Statement of the Honorable Howard Metzenbaum, Hearing Before the Subcommittee on Natural Resources of the Committee on Ways and Means, U.S. House of Representatives, 105<sup>th</sup> Congress, 2d Sess. 34-38 (September 15, 1998).

<sup>13</sup> According to a Senate Report on an earlier version of IEP, “The Committee is concerned that [MEPA] was not having the intended effect of facilitating the adoption of minority children.” See Senate Report 104-279 on H.R. 3286 (Adoption Promotion and Stability Act of 1996) (June 13, 1996). IEP specifically states that it was not intended to supersede the Indian Child Welfare Act of 1978.

<sup>14</sup> But see Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity and Adoption* 402-446 (2003) (arguing that race matching in adoption “is a destructive practice in all its various guises, from moderate to extreme” and that color-blind adoption policies would “greatly benefit vulnerable children” and “also benefit American race relations”).



## Interpreting IEP

The Department of Health and Human Services has taken the position that IEP prohibits race discrimination in child placement unless an adoption agency administrator can demonstrate a compelling purpose for such discrimination. I believe that this is an erroneous interpretation of the statute—although because the Department has been careful to limit what qualified as a compelling purpose, its actual implementation of this standard has largely been commendable and within the law.

The “compelling purpose” requirement in the law is properly used to judge whether racially-discriminatory statutes, regulations and government practices are constitutional under the Fourteenth Amendment’s Equal Protection Clause (for state action) or the Fifth Amendment’s Due Process Clause (for federal action). As every law student learns in school, under the strict scrutiny standard, the state or federal government must have a compelling purpose before it may discriminate on the basis of race. Even if it can demonstrate such a purpose, its discriminatory actions must be narrowly tailored to fit that purpose.<sup>15</sup>

Not everyone agrees on what should constitute a compelling purpose. Constitutional law scholar Gerald Gunther stated a generation ago that the strict scrutiny standard is “‘strict’ in theory and fatal in fact”—suggesting that in practice a compelling purpose sufficient to justify race discrimination is never or almost never found to exist.<sup>16</sup> Since that time, however, the Supreme Court has upheld discriminatory practices in which the existence of a “compelling” need was quite controversial.<sup>17</sup> I believe that it is fair to say that the standard has been degraded since Gunther’s famous dictum.

None of this has anything to do with IEP, which is not a racially-discriminatory statute that must be justified by a compelling purpose. It is a statute banning race discrimination, which needs no justification at all.<sup>18</sup> And there is no suggestion in the language that any exception should apply at all—compelling or otherwise.<sup>19</sup>

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<sup>15</sup> This is hornbook law. See John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 639 (West 6<sup>th</sup> ed. 2000).

<sup>16</sup> Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 8 (1972). Even when Gunther wrote, most constitutional law scholars would have agreed that occasionally state and federal authorities do have a compelling need to discriminate on the basis of race. For example, if a race riot were to break out in a prison yard, hardly anyone is foolish enough to argue that prison guards are forbidden to break the riot up by immediately segregating the rioters into two racial groups until such time as order can be restored. Such an act would be so commonsensical, however, that it is almost certain never to be litigated. Decades after Gunther’s statement, the Supreme Court distanced itself from it. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact’”).

<sup>17</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003). See Gail Heriot, *Strict Scrutiny, Public Opinion and Racial Preferences on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 *Harv. J. Legis.* 219 (2003).

<sup>18</sup> Part of the reason for the Department’s adoption of a “compelling purpose” exception may be confusion over the current state of case law in connection with Title VI of the Civil Rights Act of 1964. Among other things, Title VI forbids race discrimination in the administration of federally-funded programs by both state and private actors. It covers, for example, both state and private colleges, universities, hospitals, clinics, and placement agencies like those covered by the original MEPA and IEP. Despite the plain language of Title VI, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the Court held that it prohibited only race discrimination that would be prohibited by the Fourteenth Amendment’s Equal Protection Clause. In other words, the Court interpreted Title VI

Indeed, given that it was designed to remove as much discretion as possible from social workers and other adoption or foster care placement agency employees as possible, this is not surprising. As supporters of this legislation would have well understood, reading a “compelling purpose” exception into the rule invites trouble. One person’s “compelling purpose” may be another’s clear effort to evade the law.

### **Not All Race Discrimination is Prohibited by IEP**

Nevertheless, it seems to me that IEP does not prohibit all race discrimination that might occur in connection with an adoption or foster care placement agency. It prohibits only that committed by a “person or government that is involved in adoption or foster care placements” from discriminating on the basis of race. Neither the child nor the adopting parents can properly be classified as such a person.

A useful, though imperfect, analogy is to a marriage. Ever since the historic case of *Loving v. Virginia*, 388 U.S. 1 (1967), state officials have understood that they are under a constitutional

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to prohibit race discrimination only in the absence of a compelling purpose for race discrimination—much as the Department of Department of Health and Human Services has interpreted IEP to prohibit race discrimination only in the absence of a compelling purpose.

I believe that *Bakke* was wrongly decided on this point and that, as Justice Stevens (joined by three other justices) wrote in his opinion concurring in the judgment and dissenting in part, Title VI is a flat ban on race discrimination in federally funded programs. But my view is beside the point. Even if *Bakke* is correctly decided, it is decided on a ground wholly unrelated to this case. In *Bakke*, a bare majority concluded that because the legislative history for Title VI shows that some members of Congress believed that Title VI simply imposed upon private institutions the same duty of non-discrimination already imposed on public institutions by the Fourteenth and Fifth Amendments, Title VI must simply impose the same qualified duty of non-discrimination as the Fourteenth and Fifth Amendments. This was an interpretive leap. Unlike the ambiguously-worded Fourteenth and Fifth Amendments, in which neither the word “race” nor the word “discrimination” appear at all, Title VI affirmatively states that “[n]o person ... shall, on the ground of race ... be subjected to discrimination under any program or activity receiving Federal financial assistance.” There is nothing in there about “unless a compelling purpose exists.” The only reason that members of Congress suggested otherwise during the debates over Title VI is that they, like Gerald Gunther, believed that strict scrutiny was indeed strict in theory, but fatal in fact. And case law in this pre-*Bakke*, pre-*Grutter* world seemed to bear their view out.

Unlike Title VI, there is nothing in the legislative history for the original MEPA or for IEP that suggests that members of Congress believed that the bill before them simply applied the Fourteenth and Fifth Amendment standards of non-discrimination to private actors. Indeed, it is clear that they did not think so. There would have been no need to pass MEPA at all if it had been intended to simply apply to constitutional standards to private adoption and foster care placement agencies. Title VI, as interpreted by *Bakke*, already does that.

<sup>19</sup> That does not necessarily mean that the courts or the Department of Health and Human Services should take the position of “Let Congress’s will be done though the heavens fall!” and refuse to consider any possible exception. That would probably not do justice to IEP or to Congress’s intent either. But especially given how much the Supreme Court’s interpretation of “compelling” has been watered down as a result of cases like *Bakke* and *Grutter*, any exception would have to be for more than simply a purpose that someone believes to be compelling. It would have to be for circumstances that are both urgent and unanticipated. Anything less would place precisely the kind of discretion over racial issues in the hands of adoption agency employees that IEP was designed to prevent. Such circumstances are very rare—more commonly encountered in a law school hypothetical than in real life. Suppose, for example, a child’s biological uncle says that he will kill his niece and her adoptive parents if he finds out that she has been adopted by an Asian family. And his psychiatrist is convinced both that he is telling the truth and that it will be impossible to institutionalize the uncle on a permanent basis. Discretion may be the better part of valor. It is unlikely that Congress intended to jeopardize a child’s life under such circumstances. Short of such an unusual situation, IEP should be taken at face value.

obligation not to discriminate on the basis of race when a couple comes to them seeking to be married. But that doesn't mean that the bride and groom themselves must be color-blind (or gender-blind, ethnicity-blind or faith-blind).

Take the case of Richard and Mildred Loving themselves—the interracial couple made famous in *Loving*. Why did Mildred want to marry Richard? Was it his blue eyes? Or his sense of humor? Why was Mildred the girl for Richard? Why not that nice blonde girl he took to the movies back before he started dating Mildred? Does he have something against blonde women? Surely Mildred was a lovely woman both outside and in, but there are other such women, aren't there? Why Mildred? The answer is obvious: Shut up and don't ask why. Love has its reasons. The job of the Justice of the Peace is to smile, perform the ceremony and convey his best wishes to the happy couple.

An adoption differs from a marriage in many respects. The role of the state or private placement agency is more active. It must to some degree play the role of the matchmaker and it must act in the best interests of the child. In a sense, an adoption is an agreement among the adopting parents, the adoption placement agency acting on the child's behalf and to some degree the child himself. In many important ways, however, the marriage analogy holds. Like marriage, adoption is an intimate, long-term relationship that must be built on a foundation of love if it is to be successful. Once the relationship is created, the role of the state or of any other outsiders to the relationship will be very limited. Such a relationship cannot be forced.

#### *a. Preferences of a Child*

Many and presumably most children will have no preference as to the race of their adopting parents. It is hard to have much of an opinion about anything when one is not yet potty trained. And preferences based on race would be uncommon in a child who is well beyond diapers. Occasionally, however, an older child will care about such matters. Should, for example, a thirteen-year-old girl's preference for a family of her own race be honored?

What seems obvious to me is that no child should be dragged kicking and screaming into an adoption. All or nearly all clearly articulated preferences should be honored—whether the motivations behind them are honorable, dishonorable or neither.<sup>20</sup> If a child develops an unreasonable dislike for his prospective parents because he does not like the color their kitchen is painted, forcing him into a relationship he does not want is likely to be counterproductive. I see no reason that a racial preference, whether that preference is considered reasonable or unreasonable, should be uniquely disfavored.

Certainly nothing in IEP's statutory language that requires that the child's clearly articulated preference for parents of his own race be ignored. The prohibition is on "a person or government that is involved in adoption or foster care placements," not on the child who is being placed.

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<sup>20</sup> This is not to say that every whim of a child can or should be indulged. There are no perfect parents, just as there are no perfect children. Sometimes children must be gently guided into embracing realistic opportunities over unrealistic ones. But here a distinction between adoption and foster care can be drawn. Unlike the role of the foster parent, the role of the adoptive parent is for the long term. It is difficult to imagine a situation in which it would be wise for a placement agency to allow an adoption over the older child's objections, no matter what the basis for those objections.

Attempts to exercise influence over a child's judgment as to race are an entirely different matter. IEP states that a "person or government that is involved in adoption or foster care placements" is prohibited from "deny[ing] to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved." If a social worker successfully influences a child such that he rejects parents of another race, her conduct has intentionally and foreseeably caused the rejected parents to be denied "the opportunity to become an adoptive or foster parent" on the basis of race. She is thus in violation of the statute.

My inclination is that this must include even inquiring about the child's preferences. Nothing should be done to signal to a child that he somehow should have a preference on these matters. If that preference exists, it must come from the child.

### *b. Preferences of the Adopting Parents*

Some have argued that prospective parents should not be permitted to specify the race of the child they would like to adopt. This view is to the other extreme of the NABSW's. Presumably, under it, neither African-American nor white prospective parents would be permitted to specify a preference for a black child or a white child or for any race. When it comes to race, all would have to simply roll the dice.

Professor R. Richard Banks, for example, argues that allowing parents to specify a preference for a child of a particular race is a form of "facilitative accommodation" that promotes racism. As Banks notes, there are more white parents than black parents seeking children for adoption at any given time, and more black children available for adoption than white children. If the state honors all private racial preferences, then that means white children will have significantly higher chances of being adopted. White parents' racial preferences thus "produce inequality just as surely as race matching, even if they produce it differently."<sup>21</sup>

I share Banks' concern over the large number of African-American children in need of stable homes. But I disagree that a state adoption agency that allows prospective parents to adopt a child of their own race is somehow itself committing a wrong. To the contrary, it would be a wrong for the state to insert itself into such an intimate decision or to turn away prospective parents because they want to adopt a white child and not a black child, or a Hispanic and not an Asian child.

Indeed, I suspect that any rule prohibiting such choice would ultimately work to the disadvantage of all children, including African-American children. Some African Americans volunteer to adopt precisely because they feel a special responsibility to adopt African-American children. If they were forced to be race-blind, they might not feel the need to adopt at all. Moreover, they would probably not be the only prospective parents to be less inclined to adopt if their preferences, however arbitrary, were ignored.

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<sup>21</sup> R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 *Yale L.J.* 875, 894 (1998).

It is worth pointing that there may be many reasons well short of racism that might cause prospective parents to prefer a child of their own race:

\* Some prospective parents may prefer outsiders to assume that their child is not just legally, but biologically, their own. Adopting a child who resembles his adoptive parents protects the parents' privacy as well as the child's. Sometimes the desire for privacy won't be on the part of the parents at all, but on the part of the prospective grandparents or siblings.

\* Some prospective parents may have accepted the views on transracial adoptions of organizations like the NBSW and believe that, particularly if the child is African American or American Indian, adoption by parents of a different race will somehow wrongfully deprive the child of his cultural inheritance. Other prospective parents may be disinclined to incur the disapproval of those who oppose transracial adoptions even if they believe that such disapproval is misguided.

Some prospective parents may have reasons that are hard to explain. One couple may want a black girl, because they are proud of their own heritage and it just seems right. Another may want a curly headed blonde boy, because that's who they'd always imagined they would have. No matter what the reasons prospective parents have for preferring a child of any particular race, there is nothing wrongful when an employee of an adoption or foster care placement agency takes that preference into account. What they cannot do is attempt to cultivate that preference.<sup>22</sup>

### *c. Preferences of the Relinquishing Parents and Other Third Parties*

The only way for the preferences of third parties, such as the relinquishing parents, to have an effect upon a child placement is for the adoption or foster-care placement agency to give effect to their wishes. They are not parties to the adoption or foster care placement themselves. Consequently, I believe IEP would forbid their preferences from being taken into account.

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<sup>22</sup> Randall Kennedy, an outspoken advocate against race matching policies, has written on this subject and agrees that the state may take prospective adoptive parents' or older adoptees' racial preferences into account. For Kennedy, honoring these preferences is permissible because in neither of these cases is the state "permitted to privilege the creation of monoracial families over that of multiracial families, or to credentialize race by making it a proxy for either desirable or undesirable traits." Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity and Adoption* 416 (2003). Kennedy has also expressed anxiety about the tremendous expansion of state power that such lack of deference to parents' preferences would present:

Such a prohibition on [parents' racial choices] would be a grotesque incursion on personal privacy, and it would require endowing officials with a frightening amount of power. Similarly grotesque is the idea of tossing a person or a couple out of the adoption market on the ground that racial consideration played a part in his/her/their decision regarding which child to adopt. In other venues in which antidiscrimination norms have been imposed—for example, employment, housing, and public accommodations—lawmakers have been careful to leave some breathing room for private racial discrimination. They have thus avoided authoritarian comprehensiveness. In deference to personal privacy and with a well-considered hesitance to avoid unduly empowering officials, lawmakers should show similar restraint with respect to foster care and adoption. *Id.* at 436.

**Conclusion**

I believe that Congress made clear its intent in passing IEP. All that remains is to ensure that the law is properly executed.

## **Statement of Commissioner Yaki (Rebuttal)**

The findings and recommendations in the body of this Briefing Report are basic stepping stones for the advancement and refinement of tools to promote the placement of our national human backlog of children into adoptive homes. However, the Commission majority, by its actions to date, has consistently refused to act in accordance with our mandate to ensure justice and equal treatment for all Americans. By that I am explicitly discussing the need for this Commission to recognize continued discrimination against Americans who are gay, lesbian, bisexual or transgender. This void in our mandate is evident by this report's refusal/inability to explore or to encourage facilitation of adoption by one important sector of the American population: gay men and lesbians. By doing so, the Commission misses a critical opportunity to nurture a policy shift that would appreciably shorten many children's stay in foster care limbo and provide them with an expanded pool of the loving, capable, and permanent families which they indisputably deserve.

I strongly believe that, in the interests of children who need adoptive families, and in recognition of the across-the-board equality due to lesbian and gay Americans, this prospect must be examined. Therefore, this statement addresses the Commission's overall failure to acknowledge the reality that gay men and lesbians can, do, and should provide appropriate, permanent families for children, and its failure to acknowledge that state welfare agencies should be looking to, rather than prevented from, considering qualified and caring lesbians and gay men in providing such homes in greater numbers. I therefore go beyond the majority's recommendations and make the following recommendation of my own.

### **Recommendation**

The U.S. Department of Health and Human Services should, in addition to the adoptive resource recruitment efforts required by the Multiethnic Placement Act and the Removal of Barriers to Interethnic Adoption Act, educate and assist willing child welfare agencies in developing and implementing strategies for recruiting prospective adoptive families headed by gay men and/or lesbian women.

### **Introduction**

#### **Justification for Inclusion**

It is beyond dispute that members of the lesbian and gay community, because of their sexual orientation, are the frequent victims of focused and targeted discrimination. As immutable as the characteristic of sexual orientation may be, government has only slowly, and hesitantly, granted to gay men and lesbians the protections due any other minority and oppressed community under the laws of this land.

The United States Commission on Civil Rights' mission statement provides that the duties of the Commission are "[t]o study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability,

or national origin, *or in the administration of justice*... and [t]o appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, *or in the administration of justice*.”

It is my firm belief that the treatment of lesbians and gays with regard to the administration of justice warrants their inclusion within the jurisdiction of the Commission on Civil Rights. State initiatives, referendums, and legislature-passed laws<sup>23</sup> have all targeted lesbians and gays for unequal or disparate treatment under the law. Several of the more high-profile laws aimed at discriminating against the gay and lesbian community have been thrown out, and even the

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<sup>23</sup> Recent examples of such proposals, both successful and unsuccessful, are found at both the state and federal levels. At the state level, particularly egregious attempts to create discrimination via the political process are found in California and Colorado. California voters defeated Proposition 6, alternatively known as “The Briggs Initiative,” in November, 1978. The measure sought to codify anti-gay discrimination by banning gay men and lesbians from employment in California’s public schools. (Mixner, David, “A Public Lecture: It Is Time to Tell the Truth,” 32 NOVALR 541, Summer, 2008). In 1992, Colorado voters passed Amendment 2 to their State Constitution which prohibited all legislative, executive, and judicial action designed to protect gay men and lesbians from discrimination in any and all arenas. The U.S. Supreme Court found that this law, which would have both repealed existing anti-discrimination laws and prevented access to any remedy to discrimination, did not pass rational basis scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. (Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855, 1996.) New attempts to legislate discrimination still occur. In 2005, eleven bills in eight state legislatures sought to prevent access to adoptive parenthood by lesbians and gay men. (Suffredini, Kara S., “Promote Permanency: Resist the Trend to Restrict LGBT Parenting,” Adoptalk, North American Council on Adoptable Children, Winter 2006.) Even as this statement is being filed, Florida is set to remove access to a tax credit available to companies making films or television programs within the state which feature gay or lesbian characters or contain other elements of so-called “non-traditional family elements.” The pending legislation, buried in a \$75 million financial incentive bill, seeks to raise the tax credit from two percent to five percent for productions which meet Florida’s criteria for “family-friendliness,” defined as being appropriate for a five year-old child, and to eliminate it entirely for productions which do not meet that standard. (Ivry, Benjamin, “Filming in Florida: So Wholesome, Only A Five-Year-Old Could Enjoy It,” Daily Finance, March 12, 2010, retrieved March 14, 2010 from <http://www.dailyfinance.com/story/media/filming-in-florida-so-wholesome-only-a-5-year-old-could-enjoy/19397043/>. Also Bender, Michael C., “Florida Bill to Reward ‘Family-Friendly’ Films is Derided as 1950s-Style Moral Censorship,” The Palm Beach Post, March 8, 2010, retrieved March 14, 2010 from [http://www.palmbeachpost.com/news/state/nontraditional-family-values-films-may-be-excluded-from-327836.html?cxttype=rss\\_state](http://www.palmbeachpost.com/news/state/nontraditional-family-values-films-may-be-excluded-from-327836.html?cxttype=rss_state)). There has been progress against discrimination at the federal level, but serious issues remain. At the start of 2010, the federal government finally removed its 1987 bar to entry of the United States by non-citizens with the Human Immunodeficiency Virus. (Dwyer, Devin, U.S. Ban on HIV-Positive Visitors, Immigrants Expires, ABC News, January 5, 2010, retrieved March 1, 2010 from <http://abcnews.go.com/Politics/united-states-ends-22-year-hiv-travel-ban/story?id=9482817>). The federal government continues to permit anti-gay discrimination via the so-called “Don’t Ask, Don’t Tell” law, enacted in 1993, which prohibits gay men and lesbians from serving openly in our military forces (Pub.L. 103-160, 10 U.S.C. Sec. 654). President Obama has indicated on numerous occasions his support for the repeal of this ban, which would allow lesbian and gay Americans to serve openly in our military. During his January, 2010 State of the Union Address, President Obama stated a desire to “repeal the law that denies gay and lesbian Americans the right to serve the country they love because of who they are. It’s the right thing to do,” (Hornick, Ed, “Activists Praise Obama’s ‘Don’t Ask, Don’t Tell Repeal Pledge,’” CNN Politics, January 28, 2010, retrieved March 14, 2010 from <http://www.cnn.com/2010/POLITICS/01/28/obama.dadt.react/index.html>). Also, by enacting the Defense of Marriage Act (“DOMA”) in 1996, the federal government enshrined marriage discrimination against lesbians and gay men at the federal level and sanctioned it within the states. DOMA defines “marriage” as being between one man and one woman and allows the states to deny the validity of same-sex marriages validly performed in other state. (Public Law No. 104-199, 110 Stat. 2419., codified at [1 U.S.C. § 7](#) and [28 U.S.C. § 1738C](#) ).



United States Supreme Court could not turn a blind eye to laws with explicit homophobic hostility.

In the context of adoption, anti-gay discrimination still remains. A Florida law which prohibits adoption of children by “homosexuals” was thrown out recently by multiple trial courts; it remains on appeal today. Many other states bar gay couples, but not single gays, from adopting children, which is a clever strategy given the reluctance of most state in the union from allowing LGTB couples to marry or be joined in a civil ceremony.<sup>24</sup> Therefore, as we discuss the importance of application of laws designed to increase the number and success rate of adoptions, we should also look at how we increase the supply side of those caring, loving adults who also want to adopt children – in this case, members of the gay and lesbian community.

### **Application of MEPA in the Context of Adoption by Gay and Lesbian Parents**

By minimizing a preference for in-race placements for children in need of adoptive families, the Multiethnic Placement Act and the Removal of Barriers to Interethnic Adoption Act (hereinafter “MEPA” and “IEP” respectively) push child welfare systems across the country to make great strides in cultivating permanent, adoptive homes for children who would otherwise grow up in foster care. That too many of our nation's children languish in foster care is not disputed, but the nature of family and permanency arrangements that are appropriate for those children is often the subject of debate. I support the principle embodied by MEPA and IEP that transracial adoption can well be in the best interests of children who need and deserve permanent, stable families to call their own.

In particular, I wish to highlight Recommendation number 1, which states an oft-cited general maxim in child welfare: “[i]t is in the best interests of the child to be placed in a safe and stable home,” and Recommendation number 4, which encourages the U.S. Department of Health and Human Services to make additional efforts to support efforts in recruiting adoptive families for children in need of homes.

Too many American children are available for adoption, and too many children hover in this untenable status for too long. Among these children, a disproportionate number are members of racial minorities. Many children who are in need of adoptive homes are never permanently placed. Those young Americans age out of foster care into early adulthood without meaningful, supportive family ties to help them bridge the gap to true and sustainable independence.

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<sup>24</sup>The question of whether lesbians and gay men should be empowered to marry, or enter into other legal forms of couplehood such as domestic partnerships or civil unions, has been fiercely debated, and frequently voted upon, in this country both before and after the 1996 passage of the Defense of Marriage Act.. Currently, over half of the states overtly refuse to permit same-sex marriages, and only five states and the District of Columbia permit them. The 2008 ballot-box success of California's Proposition 8, which eliminated the short-lived, court-generated recognition of same-sex marriages in California, is currently the subject of ongoing court challenges. (“Legal Groups File Lawsuit Challenging Proposition 8,” Nov. 5, 2008, American Civil Liberties Union of Southern California, retrieved March 1, 2010 from <http://www.aclu-sc.org/releases/view/102912>.) The intensity with which sectors of the American population fights to impose barriers to same-sex marriage, and with which those sectors oppose the dismantling of such barriers, raises the question of whether the “administration of justice” which is under this Commission's watch is indeed being carried out with an unacceptable discriminatory animus.

MEPA and IEP recognize and promote the increasing diversity of American family structures. A very significant unmet need for adoptive homes remains, even in the age of MEPA and IEP. Simultaneously, American families are ever more varied in nature and composition. A wealth of data demonstrates that children raised in families headed by gay men or lesbian women flourish and thrive. A wide spectrum of relevant professional associations endorses the facilitation of adoption by lesbian women and by gay men. Therefore, I believe that the U.S. Department of Health and Human Services should assist state child welfare agencies in facilitating the adoption of children by same-sex couples, as well as gay and lesbian singles, via promotion of targeted recruitment of these adoptive resources.

## Rationale

### **A Large Number of Children Need Permanent Families, and Growing Expertise Across Professional Domains Counsels in Favor of Facilitating Foster Care and Adoption by Lesbians and Gay Men.**

According to the U.S. Children's Bureau, in 2003 there were 119,000 American children awaiting adoptive families to lift them out of child welfare systems, while a mere 20,000 of those children were placed with pre-adoptive families. Racial minority children made up disproportionate numbers of this population, with forty percent being African-American, fourteen percent Hispanic, three percent of multiple races, and two percent Native American. The average continuous stay in foster care for these children was almost four years.<sup>25</sup> By 2006, the number of American children in need of permanent families had risen to 129,000.<sup>26</sup>

The question of whether gay men and lesbians should be allowed to provide adoptive homes for some of these children in foster care was initially controversial for some.<sup>27</sup> As expressed by the Evan B. Donaldson Adoption Institute,

[o]ne fundamental barrier to homosexual adoption and parenting stems from some Americans' personal and religious beliefs, as well as homophobic attitudes within our culture – often rooted in conservative religious doctrine teaching that homosexuality is deviant and sinful. These beliefs and attitudes, as well as the myths, stereotypes, and misconceptions that derive from social prejudice and institutionalized discrimination against lesbians and gays, influence state legislators, the judiciary, social casework professionals, and others who are

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<sup>25</sup> Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?*, March 2006, p. 4, [http://www.adoptioninstitute.org/publications/2006\\_Expanding\\_Resources\\_for\\_Children%20\\_March\\_.pdf](http://www.adoptioninstitute.org/publications/2006_Expanding_Resources_for_Children%20_March_.pdf).

<sup>26</sup> Evan B. Donaldson Adoption Institute, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, September 2008, p. 11, [http://www.adoptioninstitute.org/publications/2008\\_09\\_Expanding\\_Resources\\_Legal\\_Executive\\_Summary.pdf](http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal_Executive_Summary.pdf).

<sup>27</sup> One opponent of adoption by gay and lesbian people is The Marriage Law Project at the Catholic University of America. This Project commissioned the 2001 book *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*. This book deconstructs the methodology of forty-nine social science studies whose results counsel in favor of facilitating adoption by same-sex couples, and concludes that all studies examined were performed by biased researchers, are fatally flawed, and should not be used to shape public policy. (Lerner, Robert and Nagai, Althea, *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting*, Marriage Law Project, Ethics and Public Policy Center, Washington, D.C., 2001).

involved in the adoption process.... Barriers to homosexual parenting and adoption also reflect a number of assumptions about the mental health and parenting capacity of lesbian and gay adults, as well as the outcomes for children raised by them.<sup>28</sup>

But as prejudice has slowly given way to tolerance, the subject of children being raised in a family headed by one or two openly homosexual parents has been the subject of social science research for over thirty years. The Evan B. Donaldson Adoption Institute reviewed available literature in 2003, and concluded that “there are some limitations in the general area of research on gay and lesbian parenting.”<sup>29</sup> Proponents of access to adoption by appropriate gay- and lesbian-headed families understand that the pool of sociological studies in this area cannot be ideal, given the difficulty in finding representative samples, samples of sufficient size, complicated comparisons due to subject pool heterogeneity, measurement concerns, statistical controls, and the relative paucity of data on children parented by gay fathers.<sup>30</sup> Nonetheless, “acknowledging research limitations does not diminish the general findings of every methodologically sound, peer-reviewed study to date. As noted by Stacey & Billarz (2001),... to dismiss this body of evidence due to these limitations is to 'dismiss virtually the entire discipline of psychology.’”<sup>31</sup>

Despite the relative newness of the research field, the comparative rareness of available subjects in the American population as a whole, and practical and methodological limitations on studies, the Institute concluded in 2003 that

overall the empirical literature shows that children parented by homosexuals typically show normal patterns of development and do not appear to be at greater risk for psychological problems than their peers raise[d] in heterosexual households. These findings suggest there is no reason, from a mental health perspective, for adoption agencies to prohibit or discourage lesbians and gays from becoming adoptive parents.<sup>32</sup>

By 2006, based upon additional research, the Institute was able to conclude further that

“while there are many limitations in studies, to date, many of them have been conducted and the valid ones appear to universally come to the same conclusions: that children raised by gay and lesbian parents adjust positively, and their families function well. More pointedly, there is not credible social science evidence to support that gay parenting (and, by extension, gay adoptive parenting) negatively

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<sup>28</sup> Evan B. Donaldson Adoption Institute, *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, 2003, pp. 7-8,

<http://www.adoptioninstitute.org/whowe/Gay%20and%20Lesbian%20Adoption1.html>.

<sup>29</sup> *Ibid.*, p. 9.

<sup>30</sup> Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?*, March 2006, Appendix A, “Research on Gay and Lesbian Parenting.”

<sup>31</sup> *Ibid.*

<sup>32</sup> Evan B. Donaldson Adoption Institute, *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, 2003, p. 10.

affects the well-being of children. Sociologist Judith Stacey (New York Times, 2005), who conducted an often-cited critical review of extant studies of gay and lesbian parenting, notes that even with the limitations in studies to date, “there is not a single legitimate scholar who argues that growing up with gay parents is somehow bad for children.”<sup>33</sup>

A broad array of American professional associations and non-governmental organizations in the realms of mental health, child welfare, and medicine have voiced support for the adoptive placements of children in homes headed by singled or coupled lesbians and gay men. Among those who have spoken out in decisive terms are the American Psychological Association,<sup>34</sup> the American Psychoanalytic Association,<sup>35</sup> the American Psychiatric Association,<sup>36</sup> the American Medical Association,<sup>37</sup> the American Academy of Family Physicians,<sup>38</sup> the Academy of Child & Adolescent Psychiatry,<sup>39</sup> the American Academy of Pediatrics,<sup>40</sup> the North American Council on

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<sup>33</sup> Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?*, March, 2006, p. 9.

<sup>34</sup> The Association American Psychological Association's 2004 Resolution states that it “opposes any discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services.” The Association further believes that, because “children reared by a same-sex couple benefit from legal ties to each parent,” it supports “the legalization of joint adoptions and second parent adoptions of children being reared by same-sex couples.” (American Psychological Association, *Resolution on Sexual Orientation, Parents, & Children*, July 2004, as retrieved from [www.apa.org/about/governance/council.policy/parenting.aspx](http://www.apa.org/about/governance/council.policy/parenting.aspx)).

<sup>35</sup> The American Psychoanalytic Association issued a Position Statement on Gay and Lesbian Parenting in May, 2002 which recognizes that “[a]ccumulated evidence suggests that best interest of the child requires attachment to committed, nurturing and competent parents. Evaluation of an individual or couple for these parental qualities should be determined without prejudice regarding sexual orientation. Gay and lesbian individuals and couples are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents.” (American Psychoanalytic Association, *Position Statement on Gay and Lesbian Parenting*, adopted May 16, 2002).

<sup>36</sup> The American Psychiatric Association “supports initiatives which allow same-sex couples to adopt and co-parent children and supports all the associated legal rights, benefits, and responsibilities which arise from such initiatives.” (American Psychiatric Association, *Position Statement on Adoption and Co-parenting of Children by Same-sex Couples*, approved November 2002).

<sup>37</sup> The American Medical Association Policy Regarding Sexual Orientation commits the organization to “support[ing] legislative and other efforts to allow the adoption a child by the same-sex partner, or opposite sex non-married partner, who functions as a second or co-parent to that child.” (American Medical Association, *AMA Policy Regarding Sexual Orientation*, no. H-60.940, Res. 204, A-04), as retrieved from [www.ama-assn.org/ama/pub/about-ama-/our-people/member-groups-sections/glb](http://www.ama-assn.org/ama/pub/about-ama-/our-people/member-groups-sections/glb)).

<sup>38</sup> The American Academy of Family Physicians has resolved to “establish policy and be supportive of legislation which promotes a safe and nurturing environment or children of adoptive parents, regardless of the parent's ... sexual orientation,” that “the children and parents of such unions [should] enjoy equal legal rights and benefits established under the law.” The Academy goes further in “support[ing] the rights of the child [being raised by a couple] to the psychological and legal security of having those parents possess the same rights, responsibilities and privileges, regardless of whether that couple is same sex or heterosexual.” Additionally, the Academy is resolved to “establish policy and be supportive of legislation which promotes a safe and nurturing environment, including psychological and legal security, for all children, including those of adoptive parents, regardless of the parents' sexual orientation.” (American Academy of Family Physicians, *Substitute Resolution No. 505, 1995-2006 Index to Transactions*).

<sup>39</sup> The American Academy of Child & Adolescent Psychiatry believes that “children with gay and lesbian parents do not differ from children with heterosexual parents in their emotional development or in their relationships with peers and adults.” Further, it finds that children of lesbian or gay parents do not evidence higher rates of homosexuality than those raised by heterosexual parents, are not at greater risk of sexual abuse, and do not show increased rates of

Adoptable Children,<sup>41</sup> the National Adoption Center,<sup>42</sup> and the Child Welfare League of America.<sup>43</sup>

### **Legal Barriers to Provision of Foster Care or Adoption by Gay Men and Lesbians Continue to Exist and Impede Children's Access to Permanency.**

As have the child welfare, mental health, and medical professional communities, the legal community has weighed in affirmatively in favor of facilitating adoptions by lesbians and gay men. The American Bar Association first voiced its support in February, 1999 for “the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child.”<sup>44</sup> More recently, the ABA has stated that it “supports state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and second-parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interest of the child.”<sup>45</sup>

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gender identity issues. (American Academy of Child & Adolescent Psychiatry, Facts for Families, updated August 2006).

<sup>40</sup>The American Academy of Pediatrics examined relevant research literature in 2002 and found that “[t]he small and nonrepresentative samples studied and the relatively young age of most of the children suggest some reserve. However, the weight of evidence gathered during several decades using diverse samples and methodologies is persuasive in demonstrating that there is no systematic difference between gay and non-gay parents in emotional health, parenting skills, and attitudes toward parenting. No data have pointed to any risk to children as a result of growing up in a family with 1 [sic] or more gay parents. (Perrin, Ellen C. and committee on Psychosocial Aspects of Child and Family Health, American Academy of Pediatrics, Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, Pediatrics, Vol. 109, No. 2, February 2002, pp. 341, 343).

<sup>41</sup>The North American Council on Adoptable Children believes that “[c]hildren should not be denied a permanent family because of the sexual orientation of potential parents” and that “[a]ll prospective foster and adoptive parents, regardless of sexual orientation, should be given fair and equal consideration.” (North American Council on Adoptable Children, Philosophy Statement, Gay and Lesbian Adoptions and Foster Care, as retrieved from [www.nacac.org/policy/lgbtq.html](http://www.nacac.org/policy/lgbtq.html)).

<sup>42</sup>The National Adoption Center “opposes any federal or state legislation as well as foster care and adoption agency policies that restrict or dismiss the consideration of current or prospective foster and adoptive parents based on their sexual orientation or gender identity.” (National Adoption Center, “The Facts About LGBT Adoption,” retrieved from [www.adopt.org/assemble/LGBT\\_parents.html](http://www.adopt.org/assemble/LGBT_parents.html)).

<sup>43</sup> The Child Welfare League of America found the social science studies of the last thirty years convincing when it issued its opinion that “[a]ny attempt to preclude or prevent gay, lesbian, and bisexual individuals or couples from parenting, based solely on their sexual orientation, is not in the best interest of children.” The League believes that “[g]ay, lesbian, and bisexual parents are as well suited to raise children as their heterosexual counterparts.” (Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults, (1988), retrieved from [www.cwla.org/programs/culture/glbtposition.htm](http://www.cwla.org/programs/culture/glbtposition.htm)). The League builds upon these beliefs in its practice recommendations. Its 1995 Standards of Excellence for Family Foster Care Services recommends that “[t]he family foster care agency should not reject foster parent applicants solely due to their... sexual orientation...” (Child Welfare League of America, Standards of Excellence for Family Foster Care Services, section 3.18, 1995). More recently, its Standards of Excellence for Adoption Services guides practitioners that prospective adoptive parents “should be assessed on the basis of their abilities to successfully parent a child needing family membership and not on their... sexual orientation. (Child Welfare League of America, Standards of Excellence for Adoption Services, section 4.7, 2000).

<sup>44</sup> American Bar Association House of Delegates Resolution, February, 1999, <http://new.abanet.org/child/Pages/foster-adopt.aspx>.

<sup>45</sup> American Bar Association House of Delegates Resolution and Report, August, 2003, <http://www.abanet.org/leadership/2003/journal/112.pdf>.

Despite the ample social science research and concurrence by respected institutions, discrimination still remains. There are still many places in our nation where legal barriers which legitimize, and even mandate, discrimination are still found.

### **Barriers Rooted in Statute or Policy**

A number of states ban or limit provision of foster care or adoption by gay men and lesbians. Florida permits lesbians and gay men to provide foster care, but has banned them adopting children since 1977.<sup>46</sup> This law has survived multiple challenges in the federal Eleventh Circuit and is currently under appellate review yet again.<sup>47</sup>

Other states have legal proscriptions and barriers in place as well. Connecticut allows the sexual orientation of prospective foster or adoptive parents to be considered in placement decisions.<sup>48</sup> Similarly, North Dakota allows child placing agencies to discriminate against prospective adoptive parents due to a “religious or moral objection.”<sup>49</sup> Mississippi has forbidden adoption “by couples of the same gender” by statute since 2000.<sup>50</sup> Utah law has precluded since 2000 adoptions by individuals who live with a partner to whom they are not married,<sup>51</sup> and has enshrined a regulatory preference for adoptive parents who are legally married over those who are not since 2007.<sup>52</sup> Arkansas voters more recently banned placement of children for foster care or adoption with anyone who is “cohabiting with a sexual partner outside of a marriage” by passing a referendum which became law on January 1, 2009.<sup>53</sup>

At least two states have directives on relevant issues from their State Attorneys General. Michigan's Attorney General stated opinion is that same-sex couples who are validly married elsewhere may not adopt children jointly within Michigan.<sup>54</sup> Of even greater concern is the opinion of Oklahoma's Attorney General that Oklahoma need not recognize the validity of adoptions by same-sex couples validly granted elsewhere.<sup>55</sup> On February 18, 2010, over opposition by the State Attorney General, the federal Fifth Circuit ordered the State of Louisiana to issue a birth certificate naming two fathers to a child who was born in Louisiana and validly adopted by a male couple in New York State.<sup>56</sup>

This is exactly where the leadership of the Commission is most needed, and where it is most lacking. These are not isolated instances of discrimination, and only cover facially obvious statutes and administrative guidance. I would not be surprised, given the history and practice of

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<sup>46</sup> FL Stat. 63.042(3), 1977.

<sup>47</sup> Miller, Carol Marbin, Miami Herald, Ruling a Third Strike Against Florida's Gay Adoption Ban, January 27, 2010, retrieved on February 1, 2010 from [www.miamiherald.com/news/miami-dade/story/1447922.html](http://www.miamiherald.com/news/miami-dade/story/1447922.html).

<sup>48</sup> CT Gen. Stat. 45a-726a (1991).

<sup>49</sup> ND Code sec. 50-12-07.1 (2003).

<sup>50</sup> MS Code Annotated 93-17-3(5) (2000).

<sup>51</sup> UT Code Annotated 1953 sec. 78B-6-117(3) 92000).

<sup>52</sup> UT Administrative Regulation 512-41, Department of Human Services, 2007.

<sup>53</sup> AR Code sec. 9-8-302 (2009).

<sup>54</sup> MI Attorney General Opinion No. 7160 (Sept. 14, 2004).

<sup>55</sup> OK Attorney General Opinion No. 04-8.

<sup>56</sup> *Adar v. Smith*, 2010 WL 550420 (February 18, 2010, federal cite pending).

discrimination against gays and lesbians, to find that even where overt discrimination is not stated, that instances of de facto are present and, indeed, pervasive.

**Adoption agencies would benefit from federal assistance in strengthening efforts in recruitment of gay and lesbian adoptive families.**

Some, but by no means all, child-placing agencies are willing to facilitate adoptions by lesbians and gay men. In 2003, based upon a rigorous survey of public and private adoption agencies across the nation, the Evan B. Donaldson Institute found that only sixty-three percent of adoption agencies accepted applications from gay prospective parents<sup>57</sup> and only one-third of agencies have placed children with gay or lesbian adoptive parents.<sup>58</sup>

Recruitment of prospective adoptive homes is at the heart of any adoption agency's mission. Yet, despite the multidisciplinary support for the fact that lesbians and gay men should be allowed to serve as adoptive parents, outreach efforts for the cultivation of this valuable resource are still lacking in the child welfare realm. According to the Evan B. Donaldson Adoption Institute, only sixteen percent of adoption agencies overall had made parental recruitment efforts directed at the gay and lesbian communities. Only forty percent of public agencies had made such overtures, and private agencies (whether or not religiously-affiliated) made efforts at rates between zero and nineteen percent.<sup>59</sup> Of those agencies that do make such efforts, the vast majority rely on the relatively-ineffective modality of "word of mouth" rather than on more visible options such as communication with community organizations, targeted seminars, advertisements in community publications, and website postings and emails.<sup>60</sup>

Effective strategies for the recruitment of adoptive families headed by lesbians and gay men already exist, and adoption agencies can be trained in implementing them. First, a layer of preparation for training development, in the form of internal review and reflection in preparation for outreach, is critical. According to the Evan B. Donaldson Adoption Institute, "agencies should develop and make clear their commitment to inclusiveness. Agencies should systematically assess their efforts to combat homophobia ... as evidence of their commitment to reaching out to prospective gay and lesbian adoptive parents."<sup>61</sup> Further, "[a]gencies should identify cultural and practice barriers to the recruitment of gay and lesbian parents, and, in consultation with members of the targeted community, implement effective outreach, retention and training strategies."<sup>62</sup> Also in preparation for targeted outreach, "agencies should use culturally sensitive practices"<sup>63</sup> and "evaluate their training curricula for foster and adoptive parents ... to determine if they need to be amended to be welcoming for gays and lesbians."<sup>64</sup>

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<sup>57</sup> Evan B. Donaldson Adoption Institute, *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, 2003.

<sup>58</sup> *Ibid.*, p. 11.

<sup>59</sup> Evan B. Donaldson Adoption Institute, *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, 2003, p. 11.

<sup>60</sup> *Ibid.*, p. 27.

<sup>61</sup> Evan B. Donaldson Adoption Institute, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, September 2008, pp. 23 – 24.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, p. 25.

<sup>64</sup> *Ibid.*, p. 26.

Agencies in this realm also need to “build diverse staffs of social workers and supervisors, including employees with expertise in serving gay and lesbian families”<sup>65</sup> and should train current staff in developing such expertise.<sup>66</sup>

Research already exists to serve as a foundation for our understanding of the efficacy of specific outreach tools used for recruiting lesbians and gay men as prospective adoptive resources. Of the small minority of adoption agencies that have made outreach efforts, the Evan B. Donaldson Adoption Institute found that direct work with gay and lesbian organizations, targeted adoption workshops, advertisements in community media, inclusive information on agency websites, and targeted emails and mails could be effective strategies.<sup>67</sup>

Future work by the U.S. Department of Health and Human Services could build upon this preliminary work and vastly increase the knowledge, skills, and resources available to adoption agencies as they embark or expand upon these important and sensitive recruitment efforts.

### **Conclusion**

Looking beyond the instant need for our government to undertake all appropriate efforts to secure permanent families for all children in need of them, it is also well past the time that the United States Commission on Civil Rights should take up the cause of widespread discrimination against the gay and lesbian community. Today, rather than being in the vanguard of civil rights, a role for which it was created and in which it built a considerable body of critical work, it has retreated into its own closet and refused to take a stand on the important civil rights questions and issues that confront gay and lesbian Americans.

My colleague, Commissioner Heriot, summed up the statute at issue in this briefing in her statement: “None of this has anything to do with IEP, which is not a racially-discriminatory statute that must be justified by a compelling purpose. It is a statute banning race discrimination, which needs no justification at all. And there is no suggestion in the language that any exception should apply at all—compelling or otherwise.”

I agree. IEP bans race discrimination. But in banning discrimination, consistent with the purposes of the statute, it should be extended to gays and lesbians as well.

Because of the lack of Commission leadership, we are unable and unwilling to tackle the implications of issues such as the adoption crisis in America, where statutes have sought to dispel old notions of race and adoption, as it affects caring and capable gay and lesbian individuals and couples who face similar stereotyped barriers to becoming adoptive parents.

A large number of children are in foster care and in need of permanent, adoptive families. Potentially safe and appropriate homes for some of those children are available in a sector of our population which is being largely overlooked by public and private adoption placement agencies.

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<sup>65</sup> Ibid., p. 28.

<sup>66</sup> Ibid.

<sup>67</sup> Evan B. Donaldson Adoption Institute, *Adoption by Lesbians and Gays: A National Survey of Adoption Agency Policies, Practices, and Attitudes*, 2003, p. 27.



Time does not stand still for children, and we have a duty to recruit and explore all appropriate alternatives for these children. The United States Department of Health and Human Services should assist in this effort by developing education and outreach programs targeted at helping adoption agencies which want to recruit prospective families headed by lesbians and gay men. Politicians and bureaucrats may have the luxury of time in which to dither and waffle. For children whose development is benefited by having caring, supportive, and permanent families, time is not a luxury they can afford.

## Speaker Biographies

### **Thomas Atwood**

Mr. Atwood served as President and Chief Executive Officer of the National Council For Adoption (NCFA). Founded in 1980, NCFA is an adoption research, education, and advocacy nonprofit organization, whose mission is to promote the well-being of children, birthparents, and adoptive families by advocating for the positive option of adoption. NCFA addresses all aspects of the adoption issue, devoting its efforts roughly equally among the areas of infant, foster care, and intercountry adoptions.

Mr. Atwood has directed national research, education, and advocacy nonprofits for 20 years as chief executive, director of government and media relations, research director, editor, publisher, coalition builder, fundraiser, and strategic planner. During his eleven-year tenure at The Heritage Foundation, he served as Director of Coalition Relations and Executive Editor of *Policy Review*. He was Vice President, Policy and Programs for Family Research Council.

Mr. Atwood has appeared frequently in the news media; testified on adoption, foster care, and child welfare issues before Congress and state legislatures; and advocated adoption and child welfare issues in capitals around the world. He is Executive Editor of *Adoption Factbook IV*, NCFA's comprehensive reference on adoption policy and practice.

Mr. Atwood graduated from Roxbury Latin School in 1969 and from Brandeis University in 1973 with a Bachelors degree in Psychology. He earned his Masters in Public Policy and Masters in Business Administration from Regent University in 1986, both *summa cum laude*. An adoptive father himself, Mr. Atwood resides in Virginia.

### **Elizabeth Bartholet**

Ms. Bartholet is the Morris Wasserstein Public Interest Professor of Law at Harvard Law School, and Faculty Director of the Child Advocacy Program (CAP), which she founded in the fall of 2004. She teaches civil rights and family law, specializing in child welfare, adoption and reproductive technology. Before joining the Harvard Faculty, she was engaged in civil rights and public interest work, first with the NAACP Legal Defense Fund, and later as founder and director of the Legal Action Center, a nonprofit organization in New York City focused on criminal justice and substance abuse issues.

Professor Bartholet graduated *cum laude* from Radcliffe College in 1962, and *magna cum laude* from Harvard Law School in 1965. Professor Bartholet's publications include *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (Beacon Press, 1999); *Family Bonds: Adoption, Infertility, and the New World of Child Production* (Beacon Press, 1999); "Where Do Black Children Belong? The Politics of Race Matching in Adoption," 139 *Penn L. Rev.* 1163 (1991); "Beyond Biology: The Politics of Adoption &

Reproduction,” 2 *Duke J. Gender L. & Pol’y* 5 (Spring 1995); and “Application of Title VII to Jobs in High Places,” 95 *Harv. L. Rev.* 945 (1982).

Professor Bartholet has won several awards for her writing and her related advocacy work in the area of adoption and child welfare.

### **Kay Brown**

Ms. Brown has more than 20 years of experience at the Government Accountability Office (GAO). She is currently the agency’s Acting Director of Education, Workforce, and Income Security team, where she is responsible for leading projects related to child welfare, child support, domestic nutrition assistance, and other income security programs.

In addition, Ms. Brown has led teams evaluating foreign food assistance, refugee aid, and disaster assistance. She has received numerous awards during her career at GAO, including two honor awards for meritorious service and several others for outstanding achievement, leadership, and teamwork.

Prior to her work at GAO, Ms. Brown worked for a county child welfare program, where she first provided casework services and then managed a countywide child development program. Ms. Brown has an M.P.A. from the University of Pittsburgh’s Graduate School of Public and International Affairs.

### **Joseph Kroll**

Mr. Kroll, an adoptive and birth father, became involved with NACAC in 1975 and has served as NACAC’s executive director since 1985. As executive director, Mr. Kroll has taken NACAC from a small grassroots organization to an acclaimed nonprofit that serves thousands of adoptive parents each year and strives to improve the child welfare system for foster children and the families who care for them.

A passionate advocate for children, Mr. Kroll is committed to achieving NACAC’s mission that every child deserves a permanent, loving, and culturally sensitive family. His work ranges from talking with individual families about how to obtain post-adoption support, to training parent group leaders and other foster and adoptive parents, to testifying before Congress and speaking at the White House to achieve needed system reforms to better serve vulnerable children and families.

### **Ruth G. McRoy**

Ms. McRoy is a Research Professor and the Ruby Lee Piester Centennial Professor Emerita at the University of Texas at Austin School of Social Work. During her 25 years on the UT faculty, she served for 12 years as the Director of the Center for Social Work Research, Director of the Diversity Institute at the UT School of Social Work, and Associate Dean for Research. A practitioner, researcher, and lecturer in the field for over 30 years, her interests include transracial adoptions, disproportionality, family preservation, open adoptions, older child adoptions, and post adoption services. As part of the Collaboration to AdoptUsKids,

she is currently leading a team at the University of Texas at Austin School of Social Work that is conducting research on barriers to adoption and factors associated with successful special needs adoptions.

She has written eight books, including *Transracial and Inracial Adoptees: The Adolescent Years* (with L. Zurcher), *Special Needs Adoptions: Practice Issues*, and *Openness in Adoption: Family Connections* (with H. Grotevant), and numerous articles and book chapters on transracial adoption issues. She is a Senior Fellow and a Board Member of the Evan B. Donaldson Adoption Institute, a Board Member of the North American Council on Adoptable Children, and is a member of the Child Welfare League of America's National Advisory Committee on Adoption.

### **Joan E. Ohl**

Mrs. Ohl served as a commissioner in the Administration for Children and Families, U.S. Department of Health and Human Services, from 2002 to 2009. Prior to joining the Bush administration, she was West Virginia's Secretary of Health and Human Services from 1997 to 2001. Her previous work in the health care field included serving as a board member of the West Virginia Health Care Cost Review Authority. She also worked as a consultant on medical, nutrition and children's issues in the state between 1984 and 1993. In addition, Mrs. Ohl held a number of positions in higher education.

Originally from Pennsylvania and Delaware, Mrs. Ohl received an undergraduate degree from the University of Delaware, and a Master of Education degree from the University of Buffalo, New York, and did advanced graduate work at Pennsylvania State University. She is married to Dr. Ronald E. Ohl, recently retired president of Salem International University.

### **J. Toni Oliver**

Ms. Oliver is President and CEO of ROOTS, INC., the first adoption agency in Georgia to focus solely on improving adoption opportunities for African American children. In addition, Ms. Oliver is President of J.T. Oliver & Associates, a child welfare training and consultation firm based in Atlanta, Georgia.

Ms. Oliver incorporated ROOTS on April 21, 1992, to address what she felt was a largely unmet, un-addressed social problem—the growing number of African American children drifting aimlessly in foster care. Currently, ROOTS serves more than 100 families per month who are actively engaged in the adoption process, and has placed nearly 400 children with permanent adoptive families.

Ms. Oliver served as Director of Consultation and Training Services for the Child Welfare Institute (CWI) in Atlanta. Prior to CWI, she was the Associate Director of Training & Consultation for the National Adoption Center in Philadelphia, Pennsylvania. She has been a member of boards and advisory councils for numerous national and local organizations, including One Church, One Child; North American Council on Adoptable Children; University of Georgia's Federal Child Welfare Training Grant; and the NABSW National Foster Care & Adoption Task Force.

**Rita J. Simon**

Ms. Simon is a Sociologist who earned her doctorate at the University of Chicago in 1957. Before coming to American University in 1983 to serve as Dean of the School of Justice, she was a faculty member at the University of Illinois, the Hebrew University in Jerusalem, and the University of Chicago. She is currently a “University Professor” in the School of Public Affairs and the Washington College of Law at American University.

Professor Simon has authored 45 books and edited 19 including *Adoption Across Borders* with Howard Altstein, Rowman and Littlefield, 2000; *Adoption, Race and Identity* (with Howard Alstein), Praeger, 1992; *The Case for Transracial Adoption* (with Howard Alstein and Marygold Melli), American University Press, 1994. She is currently editor of *Gender Issues*. From 1978 to 1981 she served as editor of the *American Sociological Review* and from 1983 to 1986 as editor of *Justice Quarterly*.

**Linda Spears**

Ms. Spears brings 27 years of child welfare practice and senior management experience to her role as Vice President of the Child Welfare League of America (CWLA). She previously served as CWLA’s Associate Vice President for Programs, Director of Child Protection, and Senior Consultant assisting public and private agencies with program and practice improvement, agency management and accountability.

Prior to joining CWLA in 1992, Linda served as the Director of Field Support with the Massachusetts Department of Social Services, overseeing agency-wide services including placement, family preservation, child protection, domestic violence, housing, permanency planning and adoption, child care, cultural competence, health care, and Indian child welfare.

She is treasurer for The Family Violence Prevention Fund, a national organization concerned with violence in the lives of women and children. Linda has published several works on domestic violence and child welfare, and was awarded the Pioneer Award for her innovative work integrating services to women and children who are victims of violence. She has testified before Congress and been interviewed multiple times on national television, including CNN, Fox News, WRC-TV, and KSTP-TV.

## APPENDIX

### Questions and Answers Regarding the Multiethnic Placement Act of 1994 and Section 1808 of the Small Business and Job Protection Act of 1996

**1 . May public agencies allow foster parents to specify the race, color, national origin, ethnicity or culture of children for whom they are willing to provide care?**

**2. May public agencies allow adoptive parents to specify the race, color, national origin, ethnicity or culture of children of whom they are willing to adopt?**

A: In making decisions about placing a child, whether in an adoptive or foster setting, a public agency must be guided by considerations of what is in the best interests of the child in question. The public agency must also ensure that its decisions comply with statutory requirements. Where it comes to the attention of a public agency that particular prospective parents have attitudes that relate to their capacity to nurture a particular child, the agency may take those attitudes into consideration in determining whether a placement with that family would be in the best interests of the child in question.

The consideration of the ability of prospective parents to meet the needs of a particular child should take place in the framework of the general placement decision, in which the strengths and weaknesses of prospective parents to meet all of a child's needs are weighed so as to provide for the child's best interests, and prospective parents are provided the information they need realistically to assess their capacity to parent a particular child.

An important element of good social work practice in this process is the individualized assessment of a prospective parent's ability to serve as a foster or adoptive parent. This assessment can include an exploration of the kind of child with whom a prospective parent might comfortably form an attachment. It is appropriate in the context of good practice to allow a family to explore its limitations and consider frankly what conditions (for example, disabilities in children, the number of children in a sibling group, or children of certain ages) family members would be able or willing to accept. The function of assessing the needs and limitations of specific prospective foster or adoptive parents in order to determine the most appropriate placement considering the various individual needs of a particular child is an essential element of social work practice, and critical to an agency's ability to achieve the best interests of that child. The assessment function is also critical, especially in adoptive placements, to minimizing the risk that placements might later disrupt or dissolve.

The assessment function must not be misused as a generalized racial or ethnic screen; the assessment function cannot routinely include considerations of race or ethnicity.

The Department generally does not distinguish between foster and adoptive settings in terms of an agency's consideration of the attitudes of prospective parents. However, it is possible that a public agency may attach different significance in assessing the best interests of a child in need of short term or emergency placement.

As noted in the Department's original guidance on MEPA, agencies are not prohibited from discussing with prospective adoptive and foster parents their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity, just as they discuss other individualized issues related to the child. However, as the Department has emphasized, any consideration of race or ethnicity must be done in the context of individualized placement decisions. An agency may not rely on generalizations about the needs of children of a particular race or ethnicity, or on generalizations about the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity.

**3. May public agencies assess the racial, national origin, ethnic and/or cultural needs of all children in foster care, either by assessing those needs directly or as part of another assessment such as an assessment of special needs?**

A: Public agencies may not routinely consider race, national origin and ethnicity in making placement decisions. Any consideration of these factors must be done on an individualized basis where special circumstances indicate that their consideration is warranted. A practice of assessing all children for their needs in this area would be inconsistent with an approach of individually considering these factors only when specific circumstances indicate that it is warranted.

Assessment of the needs of children in foster care, and of any special needs they may have that could help to determine the most appropriate placement for a child, is an essential element of social work practice for children in out-of-home care, and critical to an agency's ability to achieve the best interests of the child. Section 1808 of Public Law 104-188 by its terms addresses only race, color, or national origin, and does not address the consideration of culture in placement decisions. There are situations where cultural needs may be important in placement decisions, such as where a child has specific language needs. However, a public agency's consideration of culture would raise Section 1808 issues if the agency used culture as a proxy for race, color or national origin. Thus, while nothing in Section 1808 directly prohibits a public agency from assessing the cultural needs of all children in foster care, Section 1808 would prohibit an agency from using routine cultural assessments in a manner that would circumvent the law's prohibition against the routine consideration of race, color or national origin.

**4. If no to question 3, may they do this for a subset of all children in foster care?**

A: As noted above, Section 1808 prohibits the routine consideration of race. It permits the consideration of race on an individualized basis where circumstances indicate that it is warranted. The question suggests that assessment of race, color, or national origin needs would not be done for all children in foster care, but for a subset. If the subset is derived by

some routine means other than where specific individual circumstances suggest that it is warranted, the same considerations discussed above would apply.

**5. May public agencies assess the racial, national origin, ethnic and/or cultural capacity of all foster parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?**

A: No. Race, color and national origin may not routinely be considered in assessing the capacity of particular prospective foster parents to care for specific children. However, assessment by an agency of the capacity of particular adults to serve as foster parents for specific children is at the heart of the placement process, and essential to determining what would be in the best interests of a particular child.

**6. If yes to question 5, may public agencies decline to transracially place any child with a foster parent who has unsatisfactory cultural competency skills?**

A: Not applicable; the answer to question 5 is no.

**7. If no to question 5, may public agencies decline to transracially place a child who has documented racial, national origin, ethnic and/or cultural needs with a foster parent who has unsatisfactory cultural competency skills?**

A: As noted in the answer to questions No. 1 and 2 above, good practice requires an assessment of the capacity of potential foster parents to accommodate all the needs of a particular child. It is conceivable that in a particular instance race, color or national origin would be a necessary consideration to achieve the best interests of the child. However, any placement decision must take place in a framework that assesses the strengths and weaknesses of prospective parents to meet all of a child's needs so as to provide for the child's best interests. As noted in the answer to Questions 1 and 2, prospective parents should be offered, typically through training provided by an agency, information sufficient to confirm or broaden their understanding of what types of children they might most appropriately provide a home for.

**8. May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with foster parents of a specific racial, national origin, ethnic and/or cultural group?**

A: No.

**9. Would the response to question 8 be different if the child was voluntarily removed?**

A: No.

**10. If an action by a public agency will not delay or deny the placement of a child, may that agency use race to differentiate between otherwise acceptable foster placements?**



A: No.

**11. May public agencies assess the racial, national origin, ethnic and/or cultural capacity of all adoptive parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?**

A: No. The factors discussed above concerning the routine assessment of race, color, or national origin needs of children would also apply to the routine assessment of the racial, national origin or ethnic capacity of all foster or adoptive parents.

**12. If yes to question 11 , may public agencies decline to transracially place any child with an adoptive parent who has unsatisfactory cultural competency skills?**

A: As noted in the answer to questions No. 1 and 2 above, good practice requires an assessment of the capacity of potential foster parents to accommodate all the needs of a particular child. It is conceivable that in a particular instance race, color or national origin would be a necessary consideration to achieve the best interests of the child. However, any placement decision must take place in a framework that assesses the strengths and weaknesses of prospective parents to meet all of a child's needs so as to provide for the child's best interests.

**13. If no to question 11 , may public agencies decline to transracially place a child who has documented racial, national origin, ethnic and/or cultural needs with an adoptive parent who has unsatisfactory cultural competency skills?**

A: As noted in the answer to questions No. 1 and 2 above, good practice requires an assessment of the capacity of potential foster parents to accommodate all the needs of a particular child. It is conceivable that in a particular instance race, color or national origin would be a necessary consideration to achieve the best interests of the child. However, any placement decision must take place in a framework that assesses the strengths and weaknesses of prospective parents to meet all of a child's needs so as to provide for the child's best interests. As noted in the answer to Questions 1 and 2, prospective parents should be offered, typically through training provided by an agency, information sufficient to confirm or broaden their understanding of what types of children they might most appropriately provide a home for.

**14. If no to question 11, how can public agencies assure themselves that they have identified an appropriate placement for a child for whom racial, national origin, ethnic and/or cultural needs have been documented?**

A: Adoption agencies must consider all factors that may contribute to a good placement decision for a child, and that may affect whether a particular placement is in the best interests of the child. Such agencies may assure themselves of the fitness of their work in a number of ways, including case review conferences with supervisors, peer reviews, judicial oversight, and quality control measures employed by State agencies and licensing authorities. In some instances it is conceivable that, for a particular child, race, color or national origin would be

such a factor. Permanency being the sine qua non of adoptive placements, monitoring the rates of disruption or dissolution of adoptions would also be appropriate. Where it has been established that considerations of race, color or national origin are necessary to achieve the best interests of a child, such factor(s) should be included in the agency's decision-making, and would appropriately be included in reviews and quality control measures such as those described above.

**15. May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with adoptive parents of a specific racial, ethnic and/or cultural group?**

A: No.

**16. Would the response to question 15 be different if the child was voluntarily removed?**

A: No.

**17. If an action by a public agency will not delay or deny the placement of a child, may that agency use race to differentiate between otherwise acceptable adoptive parents?**

A: No.

**18. May a home finding agency that contracts with a public agency, but that does not place children, recommend only homes that match the race of the foster or adoptive parent to that of a child in need of placement?**

A: No. A public agency may contract with a home finding agency to assist with overall recruitment efforts. Some home finding agencies may be used because of their special knowledge and/or understanding of a specific community and may even be included in a public agency's targeted recruitment efforts. Targeted recruitment cannot be the only vehicle used by a State to identify families for children in care, or any subset of children in care, e.g., older or minority children. Additionally, a home finding agency must consider and include any interested person who responds to its recruitment efforts.

**19. May a home finding agency that contracts with a public agency, but that does not place children, dissuade or otherwise counsel a potential foster or adoptive parent who has unsatisfactory cultural competency skills to withdraw an application or not pursue foster parenting or adoption?**

A: No. No adoptive or foster placement may be denied or delayed based on the race of the prospective foster or adoptive parent or based on the race of the child.

Dissuading or otherwise counseling a potential foster or adoptive parent to withdraw an application or not pursue foster parenting or adoption strictly on the basis of race, color or national origin would be a prohibited delay or denial.

The term "cultural competency," as we understand it, is not one that would fit in a discussion of adoption and foster placement. However, agencies should, as a matter of good social work practice, examine all the factors that may bear on determining whether a particular placement is in the best interests of a particular child. That may in rare instances involve consideration of the abilities of prospective parents of one race or ethnicity to care for a child of another race or ethnicity.

**20. May a home finding agency that contracts with a public agency, but that does not place children, assess the racial, national origin, ethnic and/or cultural capacity of all adoptive parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?**

A: No. There should be no routine consideration of race, color or national origin in any part of the adoption process. Any assessment of an individual's capacity to be a good parent for any child should be made on an individualized basis by the child's caseworker and not by a home finding agency. Placement decisions should be guided by the child's best interest. That requires an individualized assessment of the child's total needs and an assessment of a potential adoptive parent's ability to meet the child's needs.

**21. If no to question 20 , may they do this for a subset of adoptive parents, such as white parents?**

A: No.

**22. If a black child is placed with a couple, one of whom is white and one of whom is black, is this placement classified as inracial or transracial?**

**23. If a biracial black/white child is placed with a white couple, is this placement classified as inracial or transracial?**

**24. Would the response to question 22 be different if the couple were black?**

A: The statute applies to considerations of race, color or national origin in placements for adoption and foster care.

The Department's Adoption and Foster Care Analysis and Reporting System (AFCARS) collects data on the race of the child and the race of adoptive and foster parents, as required by regulation at 45 CFR 1355, Appendix A. AFCARS uses racial categories defined by the United States Department of Commerce, Bureau of the Census. The Department of Commerce does not include "biracial" among its race categories; therefore no child would be so classified for AFCARS purposes. The Department of Health and Human Services does not classify placements as being "inracial" or "transracial."

**25. How does HHS define "culture" in the context of MEPA guidance?**

A: HHS does not define culture. Section 1808 addresses only race, color, or national origin, and does not directly address the consideration of culture in placement decisions. A public agency is not prohibited from the nondiscriminatory consideration of culture in making placement decisions. However, a public agency's consideration of culture must comply with Section 1808 in that it may not use culture as a replacement for the prohibited consideration of race, color or national origin.

**26. Provide examples of what is meant by delay and denial of placement in foster care, excluding situations involving adoption.**

A: Following are some examples of delay or denial in foster care placements:

1. A white newborn baby's foster placement is delayed because the social worker is unable to find a white foster home; the infant is kept in the hospital longer than would otherwise be necessary and is ultimately placed in a group home rather than being placed in a foster home with a minority family.
2. A minority relative with guardianship over four black children expressly requests that the children be allowed to remain in the care of a white neighbor in whose care the children are left. The state agency denies the white neighbor a restricted foster care license which will enable her to care for the children. The agency's license denial is based on its decision that the best interests of the children require a same-race placement, which will delay the permanent foster care placement. There was no individualized assessment or evaluation indicating that a same-race placement is actually in the best interests of the children.
3. Six minority children require foster placement, preferably in a family foster home. Only one minority foster home is available; it is only licensed to care for two children. The children remain in emergency shelter until the agency can recertify and license the home to care for the six children. The children remain in an emergency shelter even though a white foster home with capacity and a license to care for six children is available.
4. Different standards may be applied in licensing white versus minority households resulting in delay or denial of the opportunity to be foster parents.
5. Foster parent applicants are discouraged from applying because they are informed that waiting children are of a different race.
6. There are placement delays and denials when states or agencies expend time seeking to honor the requests of biological parents that foster parents be of the same race as the child.