

Appendix P- A Guide to The Multiethnic Placement Act of 1994

A Guide to The Multiethnic Placement Act of 1994 As Amended by the Interethnic Adoption Provisions of 1996

Chapter 1: Introduction

The Multiethnic Placement Act (MEPA) was enacted in 1994 amid spirited and sometimes contentious debate about transracial adoption and same-race placement policies. At the heart of this debate is a desire to promote the best interests of children by ensuring that they have permanent, safe, stable, and loving homes that will meet their individual needs. This desire is thwarted by the persistent increases in the number of children within the child protective system waiting for, but often not being placed in, adoptive families. Of particular concern are the African American and other minority children who are dramatically over-represented at all stages of this system, wait far longer than Caucasian children for adoption, and are at far greater risk of never experiencing a permanent home. Among the many factors that contribute to placement delays and denials, Congress found that the most salient are racial and ethnic matching policies and the practices of public agencies which have historically discouraged individuals from minority communities from becoming foster or adoptive parents. MEPA addressed these concerns by prohibiting 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 by requiring diligent efforts to expand the number of racially and ethnically diverse foster and adoptive parents.

MEPA was signed into law in 1994 as part of the Improving America's Schools Act. In April 1995, the Department of Health and Human Services (HHS) issued a detailed Guidance to assist states and agencies in implementing MEPA and understanding its relationship to the equal protection and anti-discrimination principles of the United States Constitution and Title VI of the Civil Rights Act. In 1996, MEPA was amended by the provisions for Removal of Barriers to Interethnic Adoption (IEP) included in the Small Business Job Protection Act. As explained in the Information Memoranda on IEP issued by HHS in June 1997, and May 1998, the amendments remove potentially misleading language in MEPA's original provisions and clarify that "discrimination is not to be tolerated," whether directed at children in need of appropriate, safe homes, at prospective parents, or at previously "underutilized" communities who could be resources for placing children. The IEP also strengthens compliance and enforcement procedures, including the withholding of federal funds and the right of any aggrieved individual to seek relief in federal court against a state or other entity alleged to be in violation of the Act.

This Guide will not resolve the ongoing controversies about the role of race and ethnicity in child welfare policies. However, it will assist states and child welfare agencies in their efforts to comply with the new federal mandates concerning the role of race, color, and national origin in foster care and adoptive placements, hereinafter referred to as MEPA-IEP. States and agencies are encouraged to take full advantage of the opportunities the law creates for improving policies and practices and, as a consequence, improving the quality of children's lives. In addition to providing advice for determining precisely what the law does and does not require, the Guide contains practical suggestions for child welfare administrators and social workers who must implement MEPA-IEP in the best interests of the children they serve.

A. Overview of MEPA-IEP

MEPA-IEP is one of several recent federal initiatives and laws aimed at removing the barriers to permanency for the hundreds of thousands of children who are in the child protective system. The specific intentions of MEPA-IEP are to:

decrease the length of time that children wait to be adopted, facilitate the recruitment and retention of foster and adoptive parents who can meet the distinctive needs of children awaiting placement, and eliminate discrimination on the basis of the race, color, or national origin of the child or the prospective parent.

To achieve these goals, MEPA-IEP has three basic mandates:

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.

Although MEPA-IEP does not explicitly incorporate a "best interests" standard for making placements, the 1997 and 1998 HHS Guidances note that "the best interests of the child remains the operative standard in foster care and adoptive placements."

Nonetheless, to be consistent with constitutional "strict scrutiny" standards for any racial or ethnic classifications, as well as with MEPA-IEP, a child's race, color, or national origin cannot be routinely considered as a relevant factor in assessing the child's best interests. Only in narrow and exceptional circumstances arising out of the specific needs of an individual child can these factors lawfully be taken into account.

Even when the best interests of an individual child appear to compel consideration of these factors, caseworkers cannot assume that needs based on race, color, or national origin can be met only by a racially or ethnically matched parent. Much will depend on the nature of the child's specific needs and on the capacity of individual prospective parents to respond to these needs.

MEPA-IEP is fully consistent with the Adoption 2002 Initiative and its goal of doubling by the year 2002 the number of adoptions of children who cannot return to their biological parents. MEPA-IEP also complements the emphasis of the 1997 Adoption and Safe Families Act (ASFA) on a child's health and safety as the paramount concern in child welfare decisions. This emphasis implies that no factors, including racial or ethnic factors, should be taken into account in placement decisions unless they have a specific and demonstrable bearing on the child's health and safety.

In conjunction with these and other federal policies, MEPA-IEP offers child welfare agencies an unprecedented opportunity to make early and individualized assessments of a child's needs, expand the pool of qualified foster and adoptive parents, and make prompt placements based on the distinctive characteristics of each child.

B. Children in Out-of-Home Care:

In enacting MEPA, Congress found that there are nearly 500,000 children in out-of-home care, of whom many tens of thousands are waiting for adoption, and that children who are eventually adopted wait an average of 2.67 years after they are legally available for permanent placement. More recent data shows that compared to white children, African-American and American Indian/Alaskan Native children typically spend considerably more time in foster care before being adopted.

African American children are vastly over represented within the child welfare system compared to their proportion within the population as a whole. They also constitute more than half of the children legally free for adoption, and wait significantly longer than other children for an adoptive placement.

According to HHS-VCIS data, nearly 60,000 children in out-of-home care at the end of 1994 had a goal of adoption, of whom around 16,000 were legally free. Of these children, 54% were African American, 42% were white, and 1.3% were Hispanic.

Most of these children were over six years of age, but nearly a third were between one and five years of age. Of the total number of children in out-of-home care at the end of fiscal year 1995, estimates are that more than 45% were African American, 36.5% white, 11.3% Hispanic, 1.6% American Indian\Alaskan Native, 1.0% Asian\Pacific Islander and around 4% of unknown racial or ethnic origin. The annual number of finalized adoptions in the 1990s has not exceeded 18,000-19,000, or not quite 4% of the total number of children in out-of-home care.

The striking 72% increase since 1986 in the number of children in the child protective system is not necessarily attributable to the larger numbers of infants under age one who are entering care, but to declines in the rate of children who leave care. In California, for example, 1/4 of all children under age six entering non-kinship foster care are likely to be there six years later, without having been reunified with their birth parents and without being adopted by foster parents or other non-related individuals.

Although very few studies track children's experience within the child protective system from the time they enter care until their cases are closed, Richard Barth and his colleagues now have a thorough account of the experiences over a six year period for the nearly 3,900 children under the age of six who entered non-kinship out-of-home care in California during the first half of 1988. The most significant and independent predictors of how long these children wait for a permanent placement are their age at the time they enter care and their race or ethnicity. Infants who entered care before their first birthday were more likely than older children, regardless of their race or ethnicity, to be returned to their birth parents or adopted within a few years. By contrast, African American children, and to a much lesser extent, Hispanic children, regardless of their age at entry, wait dramatically longer than white children. Six years after entering care, African American children's likelihood of being adopted was only 1/5 of that of white children.

Another way to summarize this sobering data is that, after six years, African American children were more than twice as likely to be in care than to have been adopted. For white children, the ratios are reversed: they were twice as likely to be adopted as to remain in care. Hispanic children were about as likely to remain in care as to be adopted.

What accounts for these extraordinary differences in outcomes between African American and all other children? No doubt, some of these differences are attributable to the initially large numbers of African Americans who are subject to the child protective system, as well as to factors that cause delay for all children, including bottlenecks in court proceedings, low rates of reunification, and the challenge of providing appropriate care givers for children who have suffered serious neglect or abuse. Nonetheless, much of the difference is probably due to same race matching policies that preclude others from adopting these children

and recruitment practices that, however well intended, discourage African American and other minority families from pursuing adoption.

C. Standard Practice Before MEPA-IEP.

Before MEPA-IEP became the law, adoption practice throughout the country had for several decades generally favored placing children in racially or ethnically matched families. Transracial placements, which nearly always refer to placements of children of Color, especially African-American children, with Caucasian parents, were considered as a "last resort," acceptable only under unusual circumstances. The states generally required foster care and adoptive placements to meet a best interests standard. Many differences existed, however, in how much discretion caseworkers could exercise in making a best interests assessment and in determining whether and to what extent to consider race, culture, and ethnicity. Some states required that children be placed with families of the same racial, ethnic, or cultural background if consistent with the best interests test; others specified that such matching was preferred or created an order of preference that typically began with relatives and then favored other matched families. Several states prescribed the time period within which agencies had to search for a matched family before widening the search for an unmatched family.

Racial and ethnic matching policies were based on the widely accepted belief that children have significant needs generated by their immutable racial or ethnic characteristics, as well as by their actual cultural experiences, and further, that children have a right to placements that meet these needs. Just as it was assumed that most prospective parents want children who resemble them, it was assumed that children would be uncomfortable in an adoptive family that did not have a similar racial or ethnic heritage. It was alleged that children raised in racially or ethnically matched families would more easily develop self esteem and a strong racial identity, and that minority children would have the best opportunity to learn the skills needed to cope with the racism they were likely to encounter as they grew up in American society.

Unfortunately, during the same decades when racial matching policies became standard practice, efforts to expand the pool of minority foster and adoptive parents faltered. Even when successful, these recruitment efforts did not keep up with the growing demand for appropriate homes for minority children who could not be reunified with their parents or placed with relatives. The unintended consequence of these developments, as well as of other and often inadvertently discriminatory practices throughout the child welfare system, has been the prolonged delays in securing permanent placements for African American, Hispanic, and other minority children.

Both proponents and critics of matching policies became concerned about these delays and about allegations that some children were being removed from stable

transracial foster-adopt homes solely in order to prevent a permanent transracial placements. No one doubts the adverse effects on children's emotional and cognitive development if they spend considerable time in their early years in institutional care or in a succession of foster placements. Research conducted from a variety of theoretical perspectives indicates that children who are deprived of an early, continuing, stable relationship with at least one psychological parent may lack the capacity to form deep emotional attachments or close social relationships. This risk is exacerbated if children are subject to additional neglect or abuse while in out-of-home care. Claims about the harms attributable to delays in achieving permanency gain support from studies that show how much better adopted children do on most outcome measures than do children who remain in foster care. Moreover, being placed at an early age is positively correlated with generally more positive adoption outcomes for all kinds of children.

Proponents of racial and ethnic matching insist that the key to eliminating delays is to do a better job recruiting racially and ethnically diverse foster and adoptive parents and ferreting out traditional screening procedures that have historically discriminated against minority applicants and discouraged them from pursuing adoption. Critics of matching policies fully acknowledge the need for non-discriminatory yet targeted and flexible efforts aimed at screening minority applicants into, rather than out of, the pool of prospective parents. However, many critics also believe that racial and ethnic matching policies are independently harmful to children, even if more successful recruitment of minority parents would eventually reduce delays. These policies are said to be harmful because they are based on unsubstantiated assumptions that children have racial or ethnic needs that outweigh their other needs and that only racially or ethnically matched families can adequately serve these needs.

The critics of racial matching note that no credible evidence supports the claim that transracial adoption is harmful to children's self-esteem, sense of racial identity, or ability to cope with racism. There are consistent positive findings, they assert, regardless of sample size and methodology, concerning the children adopted transracially before the practice was discouraged in the mid-1970s, as well as the smaller numbers of transracially adopted children since then. Whether compared to African American or white adoptees raised in same race adoptive homes, or to African American or white children raised by their biological families, transracial adoptees do as well as other children on standard measures of self-esteem, cognitive development and educational achievement, behavioral difficulties, and relations to peers and other family members. When compared to children who remain in foster care, or are returned to dysfunctional biological parents, both same-race and transracial adoptees do significantly better.

Studies that focus on adolescence, when most children experience doubts about their identity and capacity for autonomy and independence, do not find unusual difficulties among transracial adoptees. The few studies that track children into

their twenties indicate that transracial adoptees are doing well, maintain solid relationships with their adoptive families, and may have higher educational attainments than same-race adoptees.

Transracial adoptees develop a positive sense of racial identity. Studies of transracial adoptees conclude that African American children raised by white or mixed race parents are as comfortable with their racial identities as children raised in same-race families. Although some public agencies report adoption disruption rates as high as 10-15%, these rates are no higher for transracial adoptions than for other adoptions. There are some differences that manifest themselves over time between same-race and transracial adoptive families. Among these is that transracial adoptees have a more positive attitude about relations with whites, are more comfortable in integrated and multiethnic settings, and do not consider race as basic to their self-understanding as do most same-race adoptees.

MEPA-IEP addresses the desire of both the proponents and the critics of racial matching to expand the pool of racially and ethnically diverse prospective parents. It also addresses the concerns of the critics of racial matching who claim that the policy is based on unsubstantiated claims about the needs of children and denies minority children an equal opportunity to have a permanent home.

D. The Law Before MEPA-IEP

Discrimination within the child welfare system based on race, color, or national origin was illegal before MEPA or the 1996 amendments were enacted. Under the Constitution's Equal Protection Clause, racial classifications are generally invalidated unless they meet the "strict scrutiny" test. To survive this test, racial and other "suspect classifications" must be justified by a compelling governmental interest and must be necessary to achieve this interest. If the state's interest can be served through a less restrictive, non-discriminatory means, the non-discriminatory means must be used.

The strict scrutiny test similarly applies to cases arising under Title VI of the Civil Rights Act which prohibits discrimination based on race, color, or national origin in all federally funded programs.

In the past, some racial classifications were evaluated with less than strict scrutiny if they were intended, along with other factors, to promote diversity or remedy the deleterious effects of historic discrimination. Recently, however, the United States Supreme Court has applied the strict scrutiny standard to all racial classifications, even those that are allegedly benign. Strict scrutiny is warranted "precisely because it is necessary to determine whether [the classifications] are benign ... or whether they misuse race and foster harmful and divisive stereotypes without a compelling justification."

Applying anti-discrimination principles to child welfare decisions demands care. Unlike decisions in other areas, such as housing or credit loans, where general qualifications determine an individual's entitlement to certain goods and services, a child welfare decision requires an individualized determination of whether a specific placement is in the child's best interest. In making these determinations, broad or general assumptions about children's needs or parental suitability are supposed to be put aside in order to place a child with individuals who can love and respond to the child's distinctive characteristics.

Can the "best interests of the child" standard, which is a fundamental principle in child welfare practice, ever be a "compelling reason" to consider the race, color, or national origin of a child or a prospective parent in making a placement decision? In *Palmore v. Sidoti*, the United States Supreme Court did not say that the state has a "compelling reason" to use a best interests test to resolve custody disputes between parents, but acknowledged that the test "indisputably" serves "a substantial governmental interest." The Court then went on to conclude that it was not in a child's best interests to allow private racial biases to justify removing her from the home of her white mother and her Black stepfather.

In foster care and adoption cases, as contrasted with custody disputes between two parents, some lower appeals courts have indicated that a commitment to a child's best interests may be a compelling reason to consider race, color, or national origin, but only if these factors are not used categorically to preclude the possibility of transracial placements. Many courts have allowed race to be one among a number of factors that may appropriately be considered in making placement decisions, especially if sensitivity to the development of the child's racial identity and self-esteem is determined to be important for the well-being of a specific child. Nonetheless, blanket policies favoring same-race placements have generally been disfavored, and in individual cases, courts have held that a child's need for a permanent home may outweigh any considerations based on race or color.