

The Multiethnic Placement Act

As Amended by the Interethnic Adoption Provision of 1996

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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.

Chapter 2: The Provisions of MEPA-IEP

A. Substantive Provisions

1. What entities are subject to the Act?

MEPA-IEP applies to any state or other entity that receives funds from the federal government and is involved in some aspect of adoptive or foster care placements. All state and county child welfare agencies involved in placements that receive federal title IV-E and title IV-B funds are subject to MEPA-IEP. The Act also applies to other public or private agencies involved in placements that receive federal funds from any source, whether they receive the funds directly or through a subgrant from a state, county, or another agency. This means that a child placement agency that receives no funding from either the federal foster care or child

welfare programs under titles IV-E or IV-B, but does receive financial assistance from other federal programs, including the Adoption Opportunities Act, the Child Abuse Prevention and Treatment Act (CAPTA), and the Title XX, is subject to MEPA-IEP.

2. Placements

a. What is prohibited?

A state or other entity covered by MEPA-IEP may not:

- 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.

b. What is denial?

Under MEPA-IEP, the race, color, or national origin of a child or of a prospective parent cannot be used to make the child ineligible for foster care or adoption, or to deny a particular foster care or adoptive placement. In addition, an agency's failure to pursue reunification efforts, concurrent planning, or a judicial termination of parental rights because of the race or ethnicity of a child or of groups of children, would violate the law. Thus, a significant disparity between the rate at which certain minority children become legally available for adoption as compared to other children, while not itself direct evidence of a MEPA-IEP violation, may justify further inquiry to determine if the disparity was the result of intentional or inadvertent racial or ethnic bias. Moreover, a refusal to place a child with a particular prospective parent followed by a placement with another parent, would be suspect if these decisions appeared to be based on any of the impermissible factors.

While explicitly prohibiting the use of race, color, or national origin to deny a foster care or adoptive placement, MEPA-IEP does not require that these

factors must always be ignored when an agency or caseworker makes an individualized assessment of a particular child to determine the kind of placement that will serve that child's best interests. The 1997 and 1998 HHS Guidances indicate that in exceptional, non-routine, circumstances, a child's best interests may warrant some consideration of needs based on race or ethnicity. The use of these factors in exceptional circumstances as part of an individualized assessment of a child's best interests would not violate the "strict scrutiny" test found in the relevant constitutional and Title VI caselaw.

As stated in the earlier 1995 Guidance, any consideration of race or ethnicity "must be narrowly tailored to advancing the child's interests and must be made as an individualized determination for each child." Although the best interests of some older children may justify limited attention to race or ethnicity, "it is doubtful that infants or young children will have developed such needs." Moreover:

- [a]n adoption agency may not rely on generalizations about the identity needs of children of a particular race or ethnicity, or on generalizations about the abilities of prospective parents of one race or ethnicity to care for, or nurture the sense of identity of a child of another race ... or ethnicity.

The 1997 and 1998 Guidances confirm that any consideration of race or ethnicity is appropriate only when based on specific concerns arising out of the circumstances of an individual case.

HHS gives an example of an older child or adolescent who has the legal right to consent to an adoption and refuses placement with a family of a particular race. Neither the law nor good child welfare practice would require the adoption worker to ignore the child's wishes.

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.

c. What is delay?

The 1996 IEP amendments to MEPA confirm that any delay in placement based on impermissible factors is illegal. As explicitly stated in the earlier 1995 HHS and OCR Guidance, the widespread pre-MEPA policy and practice of "holding periods" in order to make a same-race adoptive placement of a child in agency custody are impermissible and clearly violate the federal law. Similarly, an agency may not require a certain period of time to search for a same race placement if an appropriate transracial placement is available when the child's need for placement arises. Nor may the agency routinely permit same-race placements while requiring caseworkers to specially justify a transracial placement. If no appropriate placement options are immediately available, the agency may conduct a search, but the search cannot be limited to same-race prospective parents except in those rare circumstances where the child has a specific and demonstrable need for a same-race placement.

Although MEPA-IEP prohibits states and agencies from delaying a child's placement for the purpose of finding a racial or ethnic match, many other factors contribute to delays within the child welfare system. Among these are high caseloads that impede the completion of individualized assessments of children's needs, court delays in scheduling mandatory review or termination hearings, the distinctive physical and emotional needs of children who have been abused or neglected which may make it difficult to secure appropriate out-of-home care, misinformation about the availability of medical and other assistance and subsidies for foster care and

adoptive children, and cultural norms that are hostile to formal adoption.

Given the existence of both discriminatory and non-discriminatory barriers to permanency, it is important for states and child welfare agencies to monitor whether minority children as a whole are being disproportionately held back from foster, foster-adopt, or adoptive placements at each stage of the child protection process. Both systemic patterns and the placement histories of particular children should be internally monitored so that marked disparities can be identified, explained, and ultimately reduced or eliminated.

In addition, agencies should monitor whether they are timely in processing transracial or transethnic placements. That is, agencies can check to see whether transracial or interethnic placements and adoptions are taking substantially longer than other cases and, if so, why.

One of the best ways to reduce delays, regardless of their cause, is for agencies to undertake a comprehensive and well-documented assessment of each child's placement needs as promptly as possible once a child is likely to enter out-of-home care. If placement with a relative is an option, the relative should be notified and assisted in completing any requirements for serving as the child's caregiver. If the court determines that reunification efforts are not required for a particular child, a permanency case plan should be prepared and reasonable efforts devoted to its prompt implementation. Active recruitment and retention of appropriate and diverse foster and adoptive families is also essential to any overall policy aimed at achieving permanency.

Senator Coats made it clear that the prohibition on delay does not relieve agencies from making an aggressive effort to identify families that can meet the needs of the waiting children:

- [MEPA] also prohibits any delay in making an adoption placement. While I have expressed

concern about the effect of this prohibition I have determined that it is the best legislative approach we can take at this time. I do however want to reiterate my concern that this not be perceived as an excuse for agencies not to aggressively recruit prospective adoptive parents. Agencies should, on an ongoing basis-consistently, creatively, and vigorously recruit and study families of every race and culture of children needing adoptive families.

3. The opportunity to become an adoptive or foster parent

Entities covered by MEPA-IEP may not:

- deny to any person the opportunity to become an adoptive or a foster parent, on the basis of race, color, or national origin of the person, or of the child involved.

Although the debate surrounding MEPA-IEP has usually focused on discrimination against white parents who wish to adopt African American children, researchers have also pointed out discriminatory practices that keep African American and other minority families from becoming foster and adoptive parents.

The central legal issue in discrimination against white parents is whether same race placement policies unfairly deprive them of the general opportunity to become foster or adoptive parents. However, the controversies usually have arisen in the context of a particular family who wants to adopt or foster a particular child.

The equal protection clause and Title VI prohibit agencies from using race or ethnicity to deprive individuals of the general opportunity to serve as a foster or adoptive parent, assuming they are otherwise qualified to do so. Nonetheless, in individual cases, MEPA-IEP focuses on the specific and distinctive needs of the child and on the capacity and willingness of particular individuals to meet those needs. Because placement decisions are based on the needs of the child,

no one is guaranteed the "right" to foster or adopt a particular child.

Agencies should make sure that they are not systematically and inappropriately filtering out transracial or interethnic placements in the process of selecting foster and adoptive parents. For example, agencies can track what happens to all parents willing to adopt white or African American children, and can determine whether parents from different racial or ethnic groups are being screened out or rejected at a far higher than average rate.

Agencies can also use this information to determine whether certain placements are screened out at specific stages of the foster care or adoption process. For example, are prospective parents willing to accept children of other ethnic groups included in lists of eligible applicants for children of all ethnic groups? Are these prospective parents actually matched with children from different racial and ethnic backgrounds? Do all prospective parents have the opportunity to meet and observe children of different racial and ethnic groups? If a very low proportion of transracial or interethnic foster and adoptive placements survive the various steps of screening and placement, the agency should carefully examine its practices to determine why this is happening and whether it is due to discrimination.

The 1995 Guidance makes clear that the prohibition on discrimination includes not only denials overtly based on race, color, or national origin but also using race-neutral policies that have the effect of excluding groups of prospective parents on the basis of race, color, or national origin, where those standards are arbitrary or unnecessary or where less exclusionary standards are available. Race-neutral policies that may have the effect of discriminating on the basis of race, color, or national origin may include those related to income, age, education, family structure, and size or ownership of housing, where such policies are not shown to be necessary to the program's objectives or there are no less discriminatory alternatives available that will achieve those objectives. Restrictive criteria such as these have been cited as barriers to the inclusion of

African American and other minority families in the pool of prospective foster and adoptive parents who can provide homes for children. Other barriers to participation include lack of minority staff and management in placement agencies, lack of recruitment in appropriate communities, lack of communication about the need for families in appropriate communities, fees and costs that make adoption difficult or impossible for low income families, negative perceptions about child welfare agencies in minority communities, and the traditional use of informal rather than formal adoption in certain cultures. Barriers to participation can be addressed in an appropriate recruitment plan.

4. Diligent Recruitment

MEPA-IEP requires states to develop plans that:

- 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.

Experience demonstrates that minority communities respond when they are given information about the need for homes and when they are treated with respect. There are many models for successful recruiting. The 1995 Guidance explains that the recruitment plan must focus on developing a pool of potential foster and adoptive parents willing and able to foster or adopt the children needing placement. Recruitment must seek to provide all children with the opportunity for placement and to provide all qualified members of the community with an opportunity to adopt or foster a child.

The Guidance specifies that an appropriate comprehensive recruitment plan includes:

1. A description of the characteristics of waiting children.
2. Specific strategies to reach all parts of the community.
3. Diverse methods of disseminating both general and child specific information.

4. Strategies for assuring that all prospective parents have timely access to the home study process, including location and hours of services that facilitate access by all members of the community.
5. Strategies for training staff to work with diverse cultural, racial and economic communities.
6. Strategies for dealing with linguistic barriers.
7. Non-discriminatory fee structures.
8. Procedures for a timely search for prospective parents for a waiting child, including the use of exchanges and other interagency efforts, provided that such procedures must ensure that placement of a child in an appropriate household is not delayed by the search for a same race or ethnic placement.

The Guidance recognizes that both general and targeted recruitment activities are important. These include use of the general media (radio, television and print), dissemination of information to targeted community organizations, such as religious groups and neighborhood centers, and the development of partnerships with community groups to make waiting children more visible and to identify and support prospective adoptive and foster parents. Recruitment activities should provide potential foster and adoptive parents with information about the characteristics and needs of the available children, the nature of the foster care and adoption process, and the financial, medical, counseling and other assistance and support available to foster and adoptive families.

5. Interaction with Indian Child Welfare Act

MEPA-IEP specifically provides that it has no effect on the Indian Child Welfare Act (ICWA). ICWA was enacted in 1978 in response to concerns about the large number of Native American children who were being removed from their families and their tribes and the failure of states to recognize the tribal relations of Indian people and the cultural and social standards of Indian communities. ICWA establishes standards and procedures for certain "custody proceedings" that affect Indian children, including voluntary and involuntary terminations of parental rights and foster care, pre-

adoptive, and adoptive placements. An "Indian child" for purposes of ICWA is an unmarried individual under the age of 18 who is either a member of a federally recognized Indian tribe or is eligible for membership and is the biological child of a tribal member. ICWA gives tribal courts exclusive jurisdiction over proceedings concerning Indian children whose "domicile" (permanent home) is on a reservation and allows tribes to intervene in state court proceedings concerning non-reservation Indian children. MEPA-IEP does not alter ICWA's recognition of tribal rights, nor does it affect ICWA's preferences for placing Indian children with members of their extended families or other tribal members. Because MEPA-IEP does apply, however, to placement activities not covered by ICWA, Indian adults are protected by MEPA-IEP against discrimination if they want to become foster or adoptive parents of non-Indian children.

The exemption of ICWA from the provisions of MEPA-IEP underscores the importance of early and comprehensive assessments of a child's history and needs upon entering out-of-home care. If a caseworker has reason to know that a child may have some Indian heritage, it is essential to determine whether the child is a member of a federally recognized Indian tribe, or may be eligible for membership by virtue of being the biological child of a member. Delays in determining a child's status as an "Indian child" can have the unfortunate consequence, years later, of disrupting stable placements with non-Indian foster or adoptive parents to rectify an earlier failure to abide by ICWA. If it turns out that a child is of mixed ancestry, including some Indian heritage, but is not an "Indian child" under ICWA, then the child's placement is not subject to ICWA and the child is entitled to the MEPA-IEP protections against discriminatory placement decisions.

6. Implementation

Compliance with the original provisions of MEPA was required by October 21, 1995, and compliance with the 1996 IV-E provisions was required by January 1, 1997. States had to submit their recruitment plans to HHS by October 31, 1995. They had the option of doing so as part of a consolidated state plan that includes the plans

submitted under title IV-B subparts 1 and 2 or, for states submitting a separate title IV-B subpart 1 plan, as a separate plan amendment.

The Administration for Children and Families (ACF) and the Office for Civil Rights (OCR) in the Department of Health and Human Services (HHS) joined together to provide legal and social work expertise to assist the states and agencies in implementing MEPA. HHS issued its first MEPA Guidance on April 20, 1995. It issued basic information about the Interethnic Adoption Provisions on November 14, 1996, its Guidance on the Interethnic Adoption Provisions on June 5, 1997, and further Guidance in the form of questions and answers on May 11, 1998. These documents are available from HHS or any HHS Regional Office. They are also available on the Internet along with OCR regulations and information about how to file an OCR complaint. The Internet address of the OCR Home Page is <http://www.hhs.gov/ocr>.

In 1995, HHS conducted a systematic review of States' statutes, regulations, and published policies in the area of adoption and foster care to assess their compliance with MEPA's nondiscrimination provisions. At that time, the Interethnic Placement provisions had not been enacted; thus HHS' review focused only on MEPA. Since the passage of the Interethnic Placement provisions, HHS continues to review issues, statutes, regulations and policies that come to its attention and provides technical assistance when needed. However, because such statutes, regulations, and policies may not always come immediately to the attention of HHS, the Department encourages States to review their own statutes and policies to ensure compliance with the Interethnic Placement provisions. As discussed below, HHS will be including compliance with the title IV-E provisions of MEPA-IEP provisions in the child welfare review process.

Staff from ACF and the Office for Civil Rights (OCR), in addition to conducting Compliance Reviews, are available for technical assistance, and teams from ACF and OCR have gone to at least one state in each region to provide technical assistance. They are also available

to respond to requests from other states. In addition, states may request the assistance of groups like the American Bar Association Center on Children and the Law and the National Resource Center on Special Needs Adoption and the National Resource Center on Permanency Planning through a request to their regional Administration on Children and Families (ACF) office. For more information on this, please contact the ACF Regional Offices or the Resource Centers listed in the Appendices.

7. Enforcement

MEPA-IEP can be enforced through administrative action by HHS or through litigation by individuals or the Justice Department. Noncompliance may result in loss of federal funds, in injunctive relief, and, in certain cases, in an award of money damages.

. Administrative enforcement

1. Title VI

Failure to comply with MEPA-IEP's prohibitions against discrimination is a violation of Title VI of the Civil Rights Act. The 1995 Guidance suggests that failure to engage in appropriate recruitment efforts could also constitute a violation of Title VI. Title VI prohibits discrimination on the basis of race, color, or national origin in programs receiving federal assistance. Anyone who believes he or she has been subjected to discrimination in a program funded by HHS may file a complaint with the Office for Civil Rights (OCR). Information about how to file a complaint is available from HHS or any of its regional offices.

OCR must investigate promptly whenever it receives a complaint or other information indicating that a violation of Title VI has occurred. OCR can also initiate its own compliance reviews to determine whether any Title VI violations have occurred. OCR staff review the policies and practices of the

entity receiving federal funds, the circumstances that led to the complaint, and other information about a possible violation.

If OCR determines that a violation of Title VI has occurred, it will notify the entity involved and seek voluntary compliance. If voluntary compliance is not forthcoming, HHS may bring administrative proceedings to terminate federal assistance. These proceedings provide the state or the agency with a formal due process hearing to determine whether a violation has occurred and whether fiscal sanctions should be imposed. In the alternative, OCR may refer the matter to the Justice Department with a recommendation to initiate judicial proceedings.

HHS is required to seek the cooperation of recipients of federal funds in obtaining compliance with Title VI, and HHS is committed to working closely with covered agencies to promote voluntary compliance. An agency may agree to come into voluntary compliance at any point during the investigation or any action to terminate funding.

2. Title IV-B

In order to receive title IV-B funds for child welfare services, promoting safe and stable families, and family preservation and support services, States and Tribes must develop a plan that meets the requirements of IV-B including the requirements for a recruitment plan. States and Tribes are required periodically to submit new plans under title IV-B. Failure to develop a recruitment plan could result in the loss of title IV-B funding. Before granting federal assistance, HHS must determine whether a state plan complies with federal statutes, regulations and guidelines. This determination must be

completed within ninety days of the date the state submits the plan. After the initial plan is approved, HHS may withhold future payment of federal funds if the plan no longer complies with federal law, either because of changes in federal requirements or because of plan amendments submitted by the state. Federal funds also may be withheld if the state fails to administer the plan in substantial compliance with federal law. However, HHS is working jointly with States and Tribes to achieve voluntary compliance, and could afford States and Tribes an opportunity for corrective action before withholding funds.

3. Title IV-E

The 1996 Interethnic Placement Provisions added MEPA-IEP provisions to title IV-E. States found to be in violation of these provisions are subject to graduated financial penalties that will vary depending on the amount of title IV-E funding the state receives and the frequency and duration of violations. States will have the opportunity to avoid a financial penalty through a corrective action process if the violation is cured within six months. HHS estimates that penalties will range from under \$1,000 to over \$10 million. Other covered entities that violate MEPA-IEP will have to repay the amount of money they received from the state during each quarter in which a violation occurs.

ACF will start screening for indications of MEPA-IEP compliance as part of the child welfare review process starting in 1999. OCR will continue to address compliance by investigating complaints and conducting independent reviews. ACF and OCR are working together to develop common protocols and review standards along with

policies and procedures for monitoring compliance, developing corrective action plans, and imposing penalties. The formal review standards and protocols will be published in the Federal Register.

a. Private law suits

MEPA-IEP expressly provides a federal cause of action for any individual who is aggrieved by a violation of the title IV-E provisions of MEPA-IEP. This gives anyone who is adversely affected by a violation the right to file a lawsuit within two years after the violation occurs. Another provision removes an obstacle to bringing an action for failure to comply with the recruitment plan requirements under title IV-B. In addition, the 1995 Guidance suggests that the failure to implement an appropriate recruitment plan could give rise to a discrimination claim under Title VI. Other violations of MEPA-IEP that constitute discrimination may also give rise to civil rights claims based on the Constitution and Title VI.

Litigation can result in court orders requiring the defendant state or agency to comply with the law and an award of attorneys fees if the person bringing the lawsuit is successful. Monetary compensation, known as "damages", may also be available in certain circumstances to individuals who are harmed by discriminatory policies and practices.

8. Barriers to Implementation

Agency administrators should anticipate barriers to implementation of MEPA-IEP and make plans for reducing those barriers. Some of the potential barriers are discussed below.

. Confusion

Confusion about the requirements of MEPA-IEP is likely to exist among child welfare workers and the general public as a result of the public debate about transracial adoption and same race

placement policies. Confusion is also likely to result from the changes MEPA-IEP will require in law and policy in some states. It is important that administrators act quickly to say what is and what is not required by the law and to specify which current policies and practices must change and which are not affected. Administrators should develop clear written guidelines that detail mandatory requirements and areas where professional judgment is appropriate.

Agency staff must be given an opportunity to clarify issues and to discuss and understand how the law applies to their daily practice. Training sessions and meetings in which the law and policies are applied to facts of real or simulated cases can be helpful in translating the provisions of MEPA-IEP into actual practice. Supervisory staff should encourage review and discussion by all staff members of placement practices and decisions.

Administrators should also develop ways of informing the general public and prospective foster and adoptive parents about the law and the policy and practices of the agency. Recruitment materials, communications between workers and individual parents, and information distributed to the general public should provide a consistent message about what the law requires and what the agency is doing. Information about the reasons for the law and the way that the agency plans to meet the best interest of the children will help the public and prospective parents understand the agencies' policies and practices.

a. Lack of resources

Child welfare agencies have faced increased responsibilities and decreasing resources in recent years. Implementation of MEPA-IEP may be viewed as another unfunded mandate that will take time away from other issues that affect the lives of children.

Since MEPA-IEP incorporates good social work practice, much of the implementation should be

consistent with the work administrators, supervisors, and caseworkers are doing on a regular basis. Administrators should look for ways to incorporate MEPA-IEP implementation into ongoing activities, such as supervision, training, and case reviews.

It is clear however, that some additional resources will be needed for implementation. Administrators should identify all potential sources of support and make use of them. In addition to title IV-E administrative funds and Adoption Opportunities Grants, administrators should make use of HHS technical assistance and the services available from the federal resource centers listed in the appendix.

They should also explore the resources available from nongovernmental sources, such as private foundations. Permanence, the problems of children in foster care, and the effects of discrimination are among the priorities of many foundations, and agencies should be able to develop fundable projects that include MEPA-IEP implementation. Agencies should also be creative in using free community resources, such as churches and community groups in collaborative implementation activities.

b. Resistance

Agencies may also encounter resistance from individual workers either because of their personal views or a perception that the federal law is dictating decisions in individual cases where professional discretion should be exercised. Administrators can overcome this resistance by discussing with workers the basic goals and underlying values of the law in addition to its specific provisions. Staff meetings or discussion groups can provide an opportunity for value clarification that will promote consistent decision making in individual cases. Open discussion is particularly important because implementation of MEPA-IEP can raise explosive and emotional issues

concerning the needs of children and the meaning of racism and discrimination.

c. Fear of litigation

Fear of litigation can create a climate in which social workers or supervisors are fearful of exercising their discretion in the best interest of the children. Administrators should provide their staff with competent legal advice about what is and what is not legal, and agencies should be prepared to back up appropriate worker decisions when they create difficulties or result in litigation. Workers must clearly understand what the law requires of them, but must be free to exercise their professional judgment within the requirements of the law. Workers will want to maintain the necessary documentation to describe the bases for child placement decisions.

Chapter 3: Common Questions About MEPA-IEP

1. Since the Constitution and Title VI already prohibit discrimination, what difference will MEPA-IEP make?

Although the Constitution and Title VI bar discriminatory practices by states and publicly funded entities, many states and child welfare agencies nonetheless assumed that it was lawful to prefer racially and ethnically-matched foster care and adoptive placements for children. MEPA-IEP has made it clear that such preferences are illegal.

In enacting MEPA-IEP, Congress was concerned about widespread reports that children were being harmed by being removed from stable foster placements simply in order to be placed with someone else of the same race or national origin whom they had never met.

Reports also suggested that growing numbers of children were being denied a permanent adoptive placement because of efforts, often futile, to find a racially or ethnically matching adoptive home. For example, some agencies required specific waiting periods to search for a same race placement or required social workers to justify a transracial placement.

Minority children, particularly African-American children, were the most likely to experience lengthy delays in placement and to have fewer opportunities to be adopted as they grew older. Despite differences of opinion about whether these delays were caused primarily by unfair exclusion of minority individuals from being considered as foster or adoptive parents, or by unfair exclusion of whites who sought transracial placements, or by some combination of these and other factors, child welfare experts agreed that something had to be done to prevent the adverse effects on minority children of placement delays and "foster care drift."

MEPA-IEP can assist states and agencies to remove the vestiges of unlawful discriminatory practices by providing technical assistance through OCR and ACF staff. This assistance will continue to be available to help states review their statutes and administrative codes and to help agencies develop procedures that reflect good social work principles and promote the best interests of children in out-of-home care.

By requiring diligent recruitment of foster and adoptive parents who reflect the ethnic and racial diversity of children in state care, MEPA-IEP also aims to expand the pool of qualified parents who can meet the needs of children awaiting homes, including those whose specific and well-documented needs may justify an effort to achieve a same-race placement.

2. What are the differences between MEPA, as originally enacted, and the 1996 Interethnic Adoption Provisions?

The Interethnic Adoption Provisions (IEP) make several important changes to MEPA which clarify the kinds of discriminatory placement activities that are prohibited and, as explained in Chapter 2(7)(a)(3), add sanctions under title IV-E for violations of MEPA-IEP.

To clarify that the routine consideration of a child's or prospective parents's race color, or national origin is impermissible, the IEP amends the basic MEPA prohibitions as follows:

...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 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. [language deleted from original MEPA is indicated with strikeouts]

In addition, the IEP repeals a section of MEPA that permitted agencies to determine a child's best interests by considering, as one of a number of factors, "the child's cultural, ethnic, and racial background and the capacity of the prospective foster or adoptive parents to meet the needs of a child from this background." The deletion of the words "categorically" and "solely" from the Act's prohibitions and the repeal of the permissible considerations make it clear that the standard for the use of race, color, national origin in foster care and adoptive placements is strict scrutiny. Even where a placement decision is not based on a prohibited categorical consideration, other actions that delay or deny placements on the basis of race, color, or national origin are prohibited. According to the 1997 and 1998 Guidance, agencies may not routinely assume that children have needs related to their race, color, or national origin. Nor may agencies routinely evaluate the ability of prospective foster and adoptive parents to meet such needs.

As amended by IEP, MEPA does not prohibit agencies from the nondiscriminatory consideration of a child's cultural background and experience in making an individualized placement decision. However, the 1998 Guidance warns against the use of "culture as a proxy for race, color, or national origin." Any routine use of "cultural assessments" of children's needs or prospective parent's capacities would be suspect if it had the effect of circumventing the law's prohibition against the routine consideration of race, color, national origin.

3. Can race ever be taken into consideration in making placements? When?

On rare occasions, the distinctive needs of an individual child may warrant consideration of the child's race, color, or national origin. Any consideration of these factors must pass the strict scrutiny test: Is it necessary to take into account the

child's needs related to race, color, or national origin in order to make a placement that serves this particular child's best interest? If it appears that the child does have these distinctive needs, caseworkers should document their response to the following questions:

- What are the child's special or distinctive needs based on race, color, or national origin? Why is it in the child's best interests to take these needs into account?
- Can the child's needs related to race, color, or national origin be taken into account without delaying placement and placing the child at risk of other harms?
- Can these needs be met by a prospective foster or adoptive parent who does not share the child's racial or ethnic background?
- Can these needs be met only by a same race/ethnic placement? If so, is some delay justified in order to search for a parent of the same race or ethnicity, if an appropriate person is not available in the agency's current files?
- In a foster care placement, can the child's special needs be taken into account without denying the child an opportunity to be cared for in a readily available foster home?
- What are the child's other important needs?

Even when the facts of the particular case allow some consideration related to race, color, or national origin, this consideration should not predominate. Among other needs to be considered and typically to be given the most weight are: the child's age, ties to siblings and other relatives, health or physical condition, educational, cognitive, and psychological needs, and cultural needs, including religious, linguistic, dietary, musical, or athletic needs. In addition, the child may have personal preferences that he or she can articulate and discuss.

MEPA-IEP encourages child welfare workers to make decisions on the basis of the individualized needs of each child, and renders suspect any placement decision based on stereotypical thinking or untested generalizations about what children need. From now on, it should be clear that any use of race, color, or

ethnicity is subject to the strict scrutiny standard of review, and that the use of racial or ethnic factors is permitted, only in exceptional circumstances where the special or distinctive needs of a child require it and where those needs can be documented or substantiated.

Consider the following example: A six year old girl in foster care has been attending a school where she is regularly teased because of her race. She is deeply distressed about this and cries inconsolably whenever the teasing occurs. This child needs a foster parent who can enroll her in another school where the teasing is less likely to occur or can work with staff and other parents at her current school to improve the situation there. The foster parent has to help the child understand that the teasing is inappropriate and not a reaction to anything she did that was objectionable.

While this child has a specific race-based need, the caseworker cannot assume that the only way to meet this need is through a same-race placement. It is an issue to discuss with the foster parent (or a prospective foster parent), regardless of their race. Simply being from the same racial background does not ensure that a particular individual will do any better in helping the child cope with the atmosphere in school than an individual from a different racial background.

Consider another example: A three year old boy born in Honduras and present in this country for less than six months is suddenly removed from his parents who have allegedly beaten him. His verbal skills are age appropriate but he only speaks and understands Spanish. He needs immediate foster care, preferably in a home where Spanish is spoken. He should not be further traumatized by placing him with caregivers who cannot speak Spanish. Although this child will eventually need to learn English, his immediate needs call for finding a foster parent who speaks Spanish. It would not be appropriate to limit the search to someone from Honduras or some other Latin American country. The placement should be made on the basis of the child's demonstrable cultural needs, and not on the basis of the child's national origin.

4. **Can state law or policy include a preference for racial or ethnic matching so long as no child or prospective parent is precluded from being considered for**

placement on the basis of their race, color, or national origin?

MEPA-IEP does not allow state laws or policies to be based on blanket preferences for racial or ethnic matching. General or categorical policies that do not derive from the needs of a specific child are not consistent with the kinds of individualized decisions required by MEPA-IEP. Statutes or policies that establish orders of preference based on race, color, or ethnicity or that require caseworkers to justify departures from these preferences violate MEPA-IEP and Title VI.

5. Can agencies honor the preferences of a birth parent based on race, color, or national origin?

Because agencies subject to MEPA-IEP may not deny or delay placements on the basis of race, color, or national origin, they cannot honor a biological parent's preferences for placing the child in a family with a similar racial or ethnic background.

6. Does MEPA-IEP prevent States from having a preference for placing a child with a relative?

MEPA-IEP does not prohibit a preference for placing a child with relatives, if the placement is in the best interest of the child and not in conflict with the requirement that the child's health and safety be the paramount concern in child placement decisions.

In 1996, Congress added a section to the title IV-E State Plan requirements that States are to consider giving preference to an adult relative over a non-related foster or adoptive parent, provided that the relative meets all relevant state child protection standards. Many states include preferences for relatives in their foster care or adoptive placement statutes or administrative regulations. Nonetheless, caseworkers should not use general preferences for placing children with relatives as a device for evading MEPA-IEP. All placement decisions should be specific to the needs of the individual child.

Generalizations about the wisdom of placing with a relative, even when a relative has not yet been located or evaluated should not necessarily result in removing a child from the child's current placement. For example, caseworkers should exercise caution before removing a child from a stable, long-term, transracial foster-adopt home in order to make a racially-

matched placement with a relative the child may have never met. To avoid this situation, caseworkers should attempt to locate all relatives who might serve as a child's caregiver as promptly as possible whenever a child is likely to require out-of-home care.

7. Does MEPA-IEP apply to white children?

MEPA-IEP applies to all children regardless of race or ethnicity. For example, if a worker determines an African American family can best meet the needs of a white child, denying the child that placement on account of race would be illegal.

8. How does MEPA-IEP apply to infants?

MEPA-IEP applies regardless of the age of the child. The 1995 and 1997 Guidances suggest that the age of the child may be a factor in determining the effect of race or ethnicity on the best interest of the child. For example, an older child may have a strong sense of identity with a particular racial or ethnic community; an infant may not have developed such needs. However, the Guidances emphasize that each decision must be individualized. Further, the 1998 Guidance notes that, regardless of age, racial or ethnic factors can seldom determine where a child will be placed.

9. How should biracial/bicultural and multiracial/multicultural children be treated?

MEPA-IEP requires that all children be treated equally, without regard to their racial or ethnic characteristics. If a child has a mixed racial ethnic heritage, that heritage does not have to be ignored when assessing the child's needs, but it cannot become the basis for a placement decision except in those exceptional or distinctive circumstances that would apply to making a placement decision for any other child based on race, color, or national origin.

Nevertheless, in order to comply with the Indian Child Welfare Act (ICWA), children entering the child welfare system who may have some Native American heritage should have their existing or potential tribal affiliations ascertained immediately so that ICWA notice, jurisdictional, and placement requirements can be followed. Because ICWA is not based on a child's race as such, but on the child's cultural and political ties to a quasi-sovereign federally recognized Indian tribe, ICWA is

not affected by MEPA-IEP. This means that a child with a certain quantum of "Indian blood" may or may not be subject to ICWA. Caseworkers generally have to rely on tribal determinations whether or not the child is a tribal member or eligible for membership.

10. Does MEPA-IEP apply to private agencies and independent adoptions?

MEPA-IEP applies to all agencies and entities receiving federal assistance directly or as a subrecipient from another entity. Agencies or entities that do not receive federal assistance are not covered by MEPA-IEP unless a federally assisted agency is also involved in their placement decisions. However, these entities may be covered by other statutes or policies prohibiting discrimination.

11. Can agencies conduct targeted recruitment?

MEPA-IEP requires diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of the children who need homes. Therefore, states must develop strategies that reach the communities of these families. At the same time, states and other entities must ensure that they do not deny anyone the opportunity to adopt or foster a child on the basis of race, color or national origin.

The 1995 federal Guidance discussed targeted recruitment efforts as part of a comprehensive strategy aimed at reaching all segments of the community. The 1995 Guidance provides that information should be disseminated to targeted communities through organizations such as churches and neighborhood centers. It further suggests agencies develop partnerships with community groups that can help spread the word about waiting children and identify and support prospective adoptive and foster parents.

In addition, the 1998 Guidance states that targeted recruiting cannot be the exclusive means for a state to identify families for particular categories of children. For example, while a state may contract with a private agency to make public announcements in Spanish to recruit Hispanic foster and adoptive parents, the state may not rely exclusively on that private agency to place Hispanic children. Rather, in identifying a potential pool of foster or adoptive parents for a

child, the state must consider individuals listed with agencies that recruit parents from all ethnic groups.

12. Do prospective adoptive parents have the right to adopt a particular child?

Under MEPA-IEP, individuals cannot be denied an opportunity to be considered as a potential adoptive parent. They have a right to an assessment of their suitability as adoptive parents which is not based on discriminatory criteria. If accepted into the pool of qualified applicants for an agency, a state, or an interstate exchange, they have a right to be considered as a possible adoptive parent for children for whom they have expressed an interest, and whose needs they believe they can meet. However, neither they nor anyone else has an absolute right to adopt a particular child.

When foster parents seek to adopt a child who has been in their care for a significant period of time, the child's attachment to them and the child's need for permanence may suggest that they are the most appropriate parents for the child. Nonetheless, this decision must be based on the agency's and the court's assessment of the child's best interests and not on an alleged "right" of the foster parents to adopt this child.

13. What funds are available to implement MEPA-IEP?

Implementation of MEPA-IEP is an administrative cost of implementing federal foster care mandates. States are entitled to claim MEPA-IEP implementation expenses as part of their administrative costs under title IV-E. Discretionary funds for innovative projects, such as recruitment programs, are also available under the Adoption Opportunities Program authorized by the Child Abuse Prevention and Treatment Act.

Chapter 4: Checklists for Implementation of MEPA-IEP

A. What Agencies Can Do

1. Promote good child welfare practice

MEPA-IEP is consistent with good child welfare practice. Both MEPA-IEP and good practice require: individual decision making; consideration of all of the child's needs from the time the child first comes into contact with the child welfare system; consistent attention to all those

needs throughout the child's relationship with the agency and in each placement decision; active recruitment of potential foster and adoptive parents from all segments of the community; development of a pool of foster and adoptive parents that respond to the needs of the children in care; eligibility criteria for foster and adoptive parents that are related to their ability to care for a child; and support and respectful treatment of all prospective parents. Good practice will improve permanence for children and decrease the chances that MEPA-IEP will be violated.

2. Decrease delays in permanence caused by other factors

A number of the controversies concerning transracial placements arise because the child has been in foster care for too long. Frequently the delay in obtaining a permanent placement for the child is due to other factors such as inadequate reunification efforts, failure to search for relatives who are willing and able to care for the child, high social worker caseloads, bureaucratic inertia, and court delays. Decreasing these delays in permanence will serve the best interests of children and will decrease the chances that the agency will be accused of delaying a child's placement for any reason including racial discrimination.

3. Review current state law and agency policies for compliance with MEPA-IEP

HHS has reviewed the statutes and policies that are readily available, but state agencies should conduct their own review of all state laws and written policies as well as informal policies and practices to ensure violations of MEPA-IEP do not occur in written policy or in practice.

Other public and private agencies are also required to comply with MEPA-IEP. All covered agencies should thoroughly review policies and practices to ensure compliance. When state statutes or policies appear to be in conflict with MEPA-IEP, agencies should seek clarification from the state child welfare agency or HHS or both.

4. Monitor agency compliance with MEPA-IEP.

To assess whether their practices comply with MEPA-IEP, agencies should consider systematically monitoring their own practices regarding all foster care and adoptive placements. Specifically, agencies should make sure that children are not moved from one foster placement to another simply in order to achieve a racial or ethnic match, that adoptive placements of minority children are not processed at much slower rates than placements of Caucasian children, and that transracial or interethnic placements are not arbitrarily filtered out at different stages of the placement process.

A successful outcome measure for MEPA-IEP compliance is a reduction in current disparities between rates of placement of minority and non-minority children, and an increase in permanency for all children as the pool of suitable and diverse parents expands. By contrast, evidence that transracial or interethnic placements are not occurring, or are being "filtered" out of agency practice, could raise concerns about the persistence of at least inadvertent discrimination against children as well as against prospective parents when the pool of waiting children is predominately of one race.

Except for purposes of reviewing their own compliance with MEPA-IEP, agencies should no longer follow any procedures that routinely classify or divide children awaiting placement by racial or ethnic groups. Similarly, individuals seeking approval, or already approved, as foster or prospective adoptive parents should not be routinely classified by race or ethnicity, but can be classified according to the general characteristics of the kinds of children they prefer or are willing to consider. Any "matching" of a child to a prospective parent should be responsive to the particular needs of a child and the capacities of the parent, without regard to general assumptions about the risks or benefits of same-race or transracial adoption.

To evaluate their compliance with MEPA-IEP, as well as the effects of non-discriminatory practices on the number, rate, and permanency of placements for all children, agencies should keep internal records of the racial and ethnic backgrounds of the children and foster and adoptive parents in their case files. Agencies should

track the experience of children under their supervision from the time of entry into out-of-home care through the time the cases are closed. Significant differences in the experience of minority children should be recorded and efforts made to account for these differences. Was there a reluctance to seek termination of parental rights because of concerns that a same-race adoptive placement would be difficult to justify? Are children being held in long-term foster care in order to keep them in a racially-matched custodial environment, even though potential transracial adoptive placements are available? How are decisions about "adoptability" being made? Are the criteria for minority children different than the criteria used for white children? Which lists and exchanges within and outside the state were used to locate an adoptive parent? How much time elapsed until each child's permanency goals were met?

Because the central goal of MEPA-IEP is to reduce placement delays and denials based on discriminatory factors, it is important for agencies to monitor and document the rates at which minority children leave care and the kinds of placements they experience. Are minority children's rates of adoption becoming comparable to the rates of white children? Are minority children waiting about the same time as white children?

5. Implement a comprehensive recruitment plan.

States were required to submit an appropriate comprehensive recruitment plan to HHS no later than October 31, 1995. States should take into consideration both the mechanisms they will use to reach all segments of the community and the protections they will implement to ensure compliance with the nondiscrimination provisions of MEPA-IEP. For example, the state may choose to use targeted efforts to reach minority communities, but these efforts may not exclude whites who wish to become foster or adoptive parents.

Public and private agencies should assist the state in developing an appropriate recruitment plan that meets the needs of the children they serve. Agencies should ensure state plans include creative and affirmative efforts to reach communities that reflect the ethnic and

racial diversity of children who need homes. The diversity and cultural competency of the recruitment staff should be reviewed as should any written or audiovisual materials used. Recruitment efforts should also address how parents are treated in the home study and placement process. Recruitment is wasted if the system does not make appropriate use of interested parents who respond, or if such efforts are not timely.

Agencies should also collaborate in developing comprehensive community services to ensure that prospective parents are not denied the opportunity to become foster or adoptive parents. Cooperation among different organizations is necessary to ensure that all individuals who are interested in foster care and adoption are encouraged and supported.

Submission of the plan does not end the responsibility of the state or the other agencies involved in recruitment. Implementation, evaluation, and appropriate adjustment are necessary to serve the best interests of children and families and to avoid violations of law. HHS has made clear that the failure to conduct adequate recruitment may be a violation of Title VI as well as a violation of the IV-B state plan requirements.

6. Issue clear policies and standards for placement.

All agencies should develop clear written policies and standards that implement MEPA-IEP. These policies and standards should define prohibited practices to the extent possible making it clear that such a list is not all inclusive. These policies and standards also should identify the areas where professional judgment is appropriate. Vague or ambiguous policies invite confusion and create barriers to implementation. Agencies can use the federal Guidance in formulating these policies. Additional assistance is available from the resource centers listed in the appendix.

7. Provide training for workers.

Training on the provisions of MEPA-IEP and discussion of how those provisions apply in individual situations is important to ensure that workers understand and implement the law properly. Appropriate training will

also help protect agencies from claims they have engaged in discriminatory practices.

Training should also include practice issues that increase the competency of staff to make individualized assessments of children's needs.

8. Develop a system for supervision and technical assistance for workers to promote compliance that meets the best interests of the children.

Ongoing attention will be necessary not only to ensure that MEPA-IEP is followed but also to ensure that misunderstandings about what MEPA-IEP requires do not interfere with fulfilling the best interests of children. As with adequate training, appropriate supervision will help protect agencies from claims they have engaged in discriminatory patterns of practice.

9. Provide opportunities for discussion and value clarification.

Discussing the goals of the agency, of MEPA-IEP, and of child welfare services will be helpful in reducing misunderstanding of MEPA-IEP requirements and resistance to implementing them. It will also promote more child-centered decision making. Workers who understand the reasons for policies are more likely to implement them correctly and will be more confident in exercising their professional judgement.

Agencies should encourage caseworkers to meet with each other to review hypothetical and actual cases in order to improve their ability to distinguish between general or untested assumptions about children's needs and specific, distinctive needs related to race or ethnicity. Hypothetical and actual cases should also be used to illustrate the difference between having a need related to race and ethnicity and requiring a same race/ethnic placement to address that need. Even children who have documented racial or ethnically related needs may have those needs met in a transracial as well as in a same-race placement.

10. Get good legal advice.

Given the controversial nature of these issues, agencies can anticipate litigation if difficult cases arise. However, the fear of litigation should not prevent workers from making appropriate decisions. Workers can best exercise their professional judgment if agency policies and practices have been reviewed for compliance with the law. A good review will also prepare the agency to defend their practices if litigation should occur. If the attorneys who usually work with the agency are not familiar with civil rights issues, they may wish to arrange for a consultation with experts.

11. Get help.

Assistance is available from ACF, OCR, HHS Regional Offices, and the Resource Centers. States should take advantage of the resources listed in the Appendix.

B. What Workers Should Do

1. Make individual decisions based on sound child welfare practice and the best interest of the child.

MEPA-IEP makes it clear that concerns about race, color, or national origin are not to be the predominant or sole basis of child placement decisions. Indeed, they are not to be taken into account in any foster care or adoptive placement decision except in those rare circumstances where the caseworker can document a specific, distinctive need of a particular child arising from the child's race or ethnicity. This does not require caseworkers to be "colorblind," but to understand the difference between acknowledging a child's race, color, or national origin as an element of that child's whole being and using general assumptions about those factors as a shortcut for preferring certain placement options over others. Caseworkers should understand that in every case, the available prospective parents should be considered, regardless of their race or ethnicity, as eligible to adopt waiting children.

Same-race placements are not required, nor are they prohibited. Similarly, transracial placements are not required, nor are they prohibited. What *is* required are decisions based on careful individualized assessments of the characteristics and needs of each child and non-

stereotypical assessments of individuals who are potential parents of the child.

Agencies should give caseworkers the opportunity to read and discuss the social science research findings that substantiate the claims that children are not harmed by transracial adoption, and indeed, are significantly better off than being left in foster care or returned to dysfunctional biological parents.

The focus of MEPA-IEP is the best interests of children. Workers should keep in mind that the primary concern of child welfare services, including adoption, is the well-being of children. MEPA-IEP emphasizes the use of professional judgment in making individualized decisions in the best interest of each child. Workers who base their decisions on sound child welfare practice and the needs of the individual child will be unlikely to run afoul of the law.

2. If a child has specific or distinctive needs related to race or ethnicity that require consideration, address them as soon as the child comes into the child protective system.

In the great majority of cases, agencies can assume that a child has no special needs based on race, color, or national origin which should be taken into account in selecting a foster or adoptive parent. However, where such needs exist, they should be identified and assessed early in the case. These needs should then be considered in providing services and in making every placement decision. All too often these needs are not addressed until a decision has to be made about adoption or another permanent plan. Waiting this long is problematic for two reasons. First, it means the child's needs are not met for a significant period of time. Second, it creates difficulties in balancing interests at the time of adoption or other permanent placement if the child's current caregivers cannot meet the child's identified needs.

3. Consider permanence from the first contact with the child.

Early attention to permanence is especially important. All too often emergency placements or other temporary arrangements become long term. Even when race or ethnicity is not an issue, these placements can create difficulties if the foster parents are not willing to make a long term commitment to the child or are not appropriate adoptive parents. Appropriate planning and action can ensure that children do not remain in foster care drift and can reduce the controversies that arise when children are moved from one placement to another. Early identification of relatives, including absent parents, comprehensive reunification efforts, attention to all of the child's needs in making placement decisions, and other good child welfare practices will reduce the time a child waits for permanence and the chance that problems will arise in making an appropriate permanent placement for children who cannot return home.

4. Read the statute and the federal guidance.

A lot of questions can be resolved by referring to the 1995, 1997, and 1998 Guidances or the language of the Act itself. Workers should read the federal law and policy for themselves and not rely on written or oral summaries provided by others. When in doubt, workers and their supervisors should review the language of the federal law, the Guidances, and state laws and policies before making a decision. If questions remain, staff should get legal advice.

5. Review state law and agency policy and ask for clarification.

Where state law or agency policies are unclear or appear to conflict with the federal law, workers should ask for clarification. It may take some time for the states and agencies to resolve all of the issues that MEPA-IEP presents. However, workers need to be able to make decisions for children while this process is going on. Workers should insist upon clarification to the extent possible. Questions from workers can also assist the states and the agencies in identifying issues that need to be resolved.

6. Document the reasons for decisions.

MEPA-IEP emphasizes individualized decision making based on the needs of the child. Workers should document the basis for their decisions including all the factors they considered in reaching that decision. Documentation will help workers clarify for themselves the factors taken into consideration and the reasons for the decision. It will provide a record a supervisor or another worker can refer to in understanding the case, and it will provide evidence of appropriate action in the event the worker is charged with violation of the law.

7. Be honest with prospective adoption and foster parents and treat them with respect.

Good communication and respectful treatment will decrease misunderstandings and improve recruitment and retention of prospective parents. Open discussion can also help the agency learn about potential problems and ways to address them.