

## OVERVIEW OF THE MULTIETHNIC PLACEMENT ACT (MEPA)

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I. The Multiethnic Placement Act of 1994, as amended by the Interethnic Provisions of 1996 (MEPA) 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, and especially, for the African-American and other minority children who are disproportionately represented in out-of-home care, and who wait longer than others for permanent homes.

The specific intentions of MEPA 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 foster or adoptive parent.

II. To achieve its specific goals, MEPA imposes two basic prohibitions and one affirmative obligation on all state agencies and other entities that are involved in foster care or adoptive placements and that receive federal financial assistance under Titles IV-E or IV-B of the Social Security Act or from any federal program:

(1) MEPA prohibits these agencies and entities 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) IMEPA prohibits these agencies 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) MEPA 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.

NOTE: As originally enacted in 1994, MEPA prohibited federally funded agencies or entities from "categorically" denying placement opportunities and from delaying or denying a child's foster care or adoptive placement "solely" on the basis of race, color, or national origin. The Act also provided that it was "permissible" to consider a child's "cultural, ethnic, or racial background" and a prospective parent's capacity to meet these needs as among the factors relevant to determining the child's best interests. Prompted by testimony that these provisions harmed African-American and other minority children by implicitly condoning systemic avoidance of transracial placements, Congress amended MEPA in 1996. The Interethnic Provisions repealed some of MEPA's original provisions, including the "permissible considerations," and replaced them with the explicit and broad prohibitions that are now central

to MEPA. It is now clear that any actions—not just categorical decisions-- that delay or deny placements or opportunities to be a parent on the basis of race, color, or national origin are unlawful. While retaining the affirmative recruitment mandate, the 1996 amendments clarify that children who are in state care are not immune from constitutional protections against racial or ethnic discrimination and that all child welfare agencies receiving funds from any federal source are subject to the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964.

### III. What Kinds of Agency Policies or Practices Violate MEPA?

The following policies or practices are NOT permitted under MEPA:

- setting a specific time period during which only searches for a racially or ethnically matching placement will occur;
- establishing a list of placement preferences based on racial or ethnic factors;
- requiring caseworkers to justify transracial placements but not requiring the same kind of justification for same race placements;
- other procedures that directly or indirectly delay placements before or after termination of parental rights in order to find a racially or ethnically matched family.

NOTE, however, that because MEPA does not apply to placements subject to the Indian Child Welfare Act (ICWA), agencies must follow ICWA's placement preferences for children who meet ICWA's definition of "Indian child," unless there is "good cause" for making a different placement.

### IV. Can Race, Color, or National Origin ever be Considered in Making Placement Decisions?

- Race, color, or national origin of child or foster or adoptive parent may not be routinely considered.

- Any consideration of these factors must pass the "strict scrutiny": Does a particular child's distinctive needs require that these factors be considered? Is it necessary to consider these factors in order to achieve a "compelling state interest"? In specific cases, the "best interests of the child" test may permit consideration of race, color, or national origin, and, if narrowly tailored to the needs of the particular child, these factors may be so compelling that they satisfy the strict scrutiny test.

- Child welfare workers can work within the strict scrutiny legal standard by asking: What are the distinctive needs of this particular child? Are any of them based on racial or ethnic factors? Can these needs be documented?

- If the child has distinctive and documented needs related to race, color, or national origin, how can they be met?

- Can these needs be met by a foster or adoptive parent who does not share the child's racial or ethnic background? Can these needs be met only by someone from a similar background?

NOTE: MEPA does not require transracial placements and does not prohibit same-race placements. MEPA requires case-specific decisions that promote the best interest of each individual child. For example, in a case involving an older child whose consent to a proposed adoption is required and who has lived exclusively with caregivers who share his racial background, it is not unlawful for an agency to attempt to comply with the child's request for a same-race placement. By contrast, in a case involving a younger child who has been emotionally harmed by ethnic slurs and bullying at her school, the agency should not assume that only a caregiver from the same ethnic background could help her deal with this situation. Although this child has a specific need based on her ethnicity, it is a need that can be taken care of by many different prospective parents, not just by someone with the same ethnic background.

#### V. What Factors May be Considered in Making Placement Decisions for a Child?

Federal and most states' laws allow preferences to be given to a child's adult relatives, provided they are suitable caregivers and meet all relevant child protection standards.

Other factors to consider include:

- Length of time with current caregiver and depth of child's attachment to this caregiver;
- Child's age, sex, cognitive capacities, special talents, educational needs;
- Child's religious preferences, if any, and linguistic or other cultural needs;
- Child's physical condition, health and dental needs;
- Child's emotional and psychological condition, specific developmental needs as related to personal experience of abuse, neglect, or other maltreatment;
- Geographical proximity to parents if reunification services are being provided;
- Caregiver's ability to maintain contact between child and siblings.

#### VI. What About Culture?

- MEPA, as well as the federal Constitution and Civil Rights laws, do not treat culture as a suspect category and do not prohibit consideration of a child's cultural background and experience in making placement decisions.

- However, "culture" needs to be defined carefully and cannot be used simply as a proxy for unlawful consideration of race, color, or national origin.

- Agencies should not rely on standard assumptions or stereotypes about a person's cultural needs based on the color of the person's skin or the person's ethnic heritage.
- Agencies should not assume that foster or adoptive parents have to share a child's cultural experience in order to develop the child's awareness and appreciation of that culture.
- See USDHHS\ACF May 1998 Questions & Answers and, especially, Nos. 3, 7, and 19.

#### VII. Can Agencies Honor a Birth Parent's Placement Preferences?

- Role of birth parent's preferences in voluntary relinquishments? What are the relevant best practices standards?
- Role of birth parent's preferences in involuntary terminations? What are the relevant best practices standards?
- Can an agency honor birth parent's preferences if based on racial or ethnic factors? NO, agency cannot facilitate unlawful discrimination, but can honor preferences based on other factors.
- Can an agency honor parent's request for placement of child with a relative? What about placement of child with someone of same religion as parent or child? YES, agency may honor these preferences, if individuals are otherwise appropriate and suitable.

NOTE: Some agencies are uncertain about the legal line between efforts to accommodate a child's cultural needs and an impermissible use of culture as a proxy for racial or ethnic factors. Agencies are even more perplexed about how much deference they can give to a biological parent's preferences for where her child should be placed. Tensions have arisen between practices that favor more open placements that take parental preferences into account and HHS's admonition that federally funded agencies can comply with some parental preferences but cannot be bound by a request for either a same-race or a transracial placement. At least one state has been faulted in an HHS-Office of Civil Rights investigation for using parental preferences as an unlawful excuse for making race-based selections of foster parents.

#### VIII. Do Prospective Adoptive Parents Have a "Right" to Adopt a Particular Child?

- It is important to distinguish the opportunity to be considered as a prospective adoptive parent from a "right" to adopt a particular child.
- The opportunity to be considered cannot be denied on basis of individual's race, color, or national origin; but no one has right to adopt particular child, regardless of whether child is of same or different racial or ethnic background.
- Agencies must evaluate ALL applicants' capacities to raise children, including

children with special needs, and cannot limit this evaluation to applicants of certain racial or ethnic backgrounds.

- If agencies offer training to prospective foster and adoptive parents, the training must be available to all applicants without regard to race, color, or national origin.

- See USDHHS\ACF May 1998 Questions & Answers and, especially, Nos. 1-2 and 5-7

#### IX. Meeting MEPA-IEP Requirements for Diligent Recruitment of Foster and Adoptive Parents

- Develop comprehensive recruitment plan based on characteristics of waiting children;
- Target recruitment strategies to meet needs of underserved children and train staff, including interpreters and counselors, to work with applicants from diverse backgrounds;
- Design procedures to welcome applicants and ensure them timely access to home study process, hold meetings in different community facilities, accommodate applicants' work schedules, return phone calls;
- Use non-discriminatory fee structure;
- Consistent with ASFA as well as MEPA-IEP, make use of adoption exchanges, interagency recruitment programs, internet placement services.
- Targeted recruitment is appropriate, but agencies must allow individuals outside the targeted communities to participate.

#### X. MEPA-IEP Presents Opportunity to Improve Child Welfare Practices and Create Permanent Families for More Children

- MEPA-IEP enables caseworkers and agency administrators to get beyond stereotypical thinking about the needs of children in out-of-home care and to focus on the distinctive needs of individual children;
- MEPA-IEP alerts caseworkers to the risks of serious harm to children whose placements are delayed because of generalized assumptions about race or ethnicity that may have no bearing on the children's actual needs ;
- MEPA-IEP encourages sensitivity to serving the needs of children based on their actual life experiences and particular behavioral, physical, emotional, and cultural needs;
- MEPA-IEP enlists agencies in a welcome effort to expand the pool of suitable

foster and adoptive parents for children who might otherwise never have a secure and loving family to call their own.

## XI. OCR Investigation and Enforcement

- Individual adults or children who believe they have been discriminated against may file a complaint with the Office of Civil Rights (OCR) within the US Dep't Health and Human Services..

- Even without a complaint from a specific individual or a group of people, OCR may initiate an independent review of any private or public agency or entity that receives federal funds and that is involved in foster or adoptive placement activities.

- If HHS-ACF learns of a possible violation of MEPA § 471(a)(18). It will refer the case to OCR for investigation.

- If OCR finds a violation by a State agency or other entity after appropriate notice and investigation, it will seek voluntary compliance.

- If the agency or entity does not comply voluntarily, OCR may bring administrative proceedings to terminate federal funds or may refer the matter to the Justice Department for initiation of judicial proceedings.

## XII. Other Enforcement Options and Remedies

- Any individual who is aggrieved by a violation of MEPA's prohibitions under Title IV-E of the Social Security Act or under Title VI of the Civil Rights Act may bring a private action in federal district court seeking injunctive or monetary relief from the State or other entity.

- HHS-ACF is screening for compliance with MEPA's IV-E and IV-B provisions as part of the ongoing child and family services review process; see 65 Fed. Reg. 4020 et seq. (Jan. 25, 2000) and for updates: <http://www.acf.hhs.gov/programs/cb/cwmonitoring/index.htm>

- States found to be in violation of MEPA's Title IV-E provisions by discriminating against an individual, or by maintaining "any statute, regulation, policy, procedure, or practice that, on its face is a violation," are subject to graduated and potentially substantial financial penalties, unless they cure the violation within a specified time; see 45 C.F.R. 1355.38 and 1355.39.

- States found not to be in "substantial conformity" with the IV-B State Plan requirements, including the § 422 (b)(9) requirement for diligent recruitment of foster and adoptive parents, will be subject to loss of some Title IV-B funds if they fail to complete a program improvement plan; see 45 C.F.R. 1355.31 through 1355.37.

NOTE: Failure by a federally funded foster care or adoption agency to comply with MEPA's anti-discrimination provisions is an express violation of Title VI of the Civil Rights

Act. A state's failure to engage in diligent recruitment efforts may also violate Title VI. Any individual or group of children or adults who can prove that they have been harmed by a violation of MEPA is entitled to bring a private action in federal district court seeking injunctive relief from the offending state or other entity.

The primary means for enforcing MEPA has not been, however, through private litigation but through administrative actions responding either to individual complaints or to violations found by the Office of Civil Rights (OCR) in its own reviews of state child welfare programs. HHS provides technical assistance and encourages voluntary compliance. Nonetheless, if violations are not corrected within an agreed upon time, HHS can seek to have federal funds withheld from the offending agency. Since 1995, HHS has conducted a number of compliance reviews and required some states to undertake corrective actions after OCR found systemic practices that impermissibly denied or delayed placements of minority children by imposing different and stricter criteria for transracial than for same-race placements. These unlawful practices include "cultural competency" requirements that were applied only to prospective parents interested in a transracial placement, evaluations that attached more significance to race than to the specific physical and emotional needs of individual children, and placements of medically fragile young children with same-race foster parents who were not trained to care for these children's medical needs instead of with specially trained foster parents of a different race.

### **Suggestions for further reading:**

Joan Heifetz Hollinger, A Guide to the Multiethnic Placement Act of 1994 as amended by the Interethnic Provisions of 1996 (ABA Center on Children and the Law, 1998)

USDHHS-ACYF, Information Memorandum: Guidance for Federal P.L. 104-188 Section 1808, Removal of Barriers to Interethnic Adoption, ACYF-IM-CB-97-04 (June 1997)

USDHHS-ACYF, Information Memorandum: Questions and Answers that Clarify the Practice and Implementation of Section 471(a)(18) of Title IV-E of the Social Security Act, ACYF-IM-CB-98-03 (May 1998)

Naomi Cahn and Joan Heifetz Hollinger, Families By Law: An Adoption Reader Part VI (NYU 2004)

Elizabeth Bartholet, *Commentary: Cultural Stereotypes Can and Do Die: It's Time to Move on With Transracial Adoption*, 34 J Am Acad Psych & Law 315 (2006)

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