

**A MEPA-IEP REVIEW FROM ADOPTION ATTORNEYS’
PERSPECTIVES: CONTINUING TO MAKE PERMISSIBLE
ASSESSMENTS BASED ON RACE FOR THE BEST
INTERESTS OF CHILDREN OF COLOR**

CYNTHIA R. MABRY*

I. INTRODUCTION

The Interethnic Adoption Provisions of 1996 (MEPA-IEP) provide that opportunities to adopt a child may not be denied “on the basis of the race, color, or national origin of the individual, or of the child, involved” and that adoptive placements should not be denied or delayed “on the basis of the race, color, or national origin of the adoptive . . . parent, or the child, involved.”¹ MEPA-IEP amended the Multiethnic Placement Act of 1994 (MEPA).² The purpose of the amendment was to “affirm[] and strengthen[] the prohibition against discrimination in adoption or foster care placements.”³ Sixteen years after MEPA was enacted in 1994 and then amended in 1996, it is still a highly controversial issue whether the federal statute should be amended again.⁴

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* J.D. 1983, Howard University School of Law; 1996, LL.M., New York University School of Law. I am grateful for the invitation to speak at the 5th Annual Wells Conference on Adoption Law on behalf of the American Academy of Adoption Attorneys. Although some of the views that I have expressed are those of the AAAA, unless a thought is specifically attributed to the AAAA through Professor Elizabeth Bartholet’s statement, I am solely responsible for the content of this article. I am grateful for support from Capital University Law School and feedback that I received from participants at the Wells Conference on Adoption Law—Contemporary Approaches for Overcoming Challenges to Permanency, that was held in Columbus, Ohio on March 12, 2009.

¹ 42 U.S.C. § 1996b(1)(A)–(B) (2006). The statute also references foster care placements, *id.*, but this article only focuses on adoptive placements.

² 42 U.S.C. § 5115a (1994), *amended by* 42 U.S.C. § 1996b(1)(A)–(B) (2006).

³ Memorandum from Dennis Hayashi, Dir., Office for Civil Rights, & Olivia Golden, Principal Deputy Assistant Sec’y, Admin. for Children & Families, to Office for Civil Rights Reg’l Managers & Admin. for Children & Families Reg’l Dirs. (June 4, 1997), <http://www.dhhs.gov/ocr/civilrights/resources/specialtopics/adoption/jointguidancewacf.html> [hereinafter Office of Civil Rights Memorandum].

⁴ *Compare, e.g.,* SUSAN LIVINGSTON SMITH ET AL., EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE 44–46 (2008), *available at* <http://www.> (continued)

In May 2008, the Evan B. Donaldson Adoption Institute (The Donaldson Institute) again fanned the flames of the controversy when it issued its report on the role of race and adoption of African American children.⁵ One of The Donaldson Institute's recommendations is for Congress to amend MEPA-IEP so that race could once again be considered as one permissible factor in the adoption process.⁶ This article offers adoption attorneys' perspectives regarding the proposed amendment of MEPA. Part II provides transracial adoption statistics. Part III describes pre- and post-MEPA uses of race in adoption. Part IV discusses changes in the adoption process that MEPA-IEP imposed, and permissible and impermissible considerations of race under the amended statute. Part V describes the effects of a transracial adoption on the adoptee. Part VI explains why caseworkers and other state agents need to be trained to implement MEPA-IEP properly. Part VII calls for more diligent recruitment efforts for identification of a diverse group of prospective parents who reflect the diversity of children who are available for adoption. Finally, Part VIII offers other proposed solutions that will increase adoptions of children of color.

In general, MEPA-IEP should not be amended. More specifically, more diligent efforts should be made to identify a diverse group of suitable parents for African American children and other children of color. Within MEPA-IEP guidelines, caseworkers should be trained to educate prospective parents who are interested in transracial adoption about the unique challenges that they and their children certainly will face after a transracial adoption is finalized. Moreover, all of the experts and interested parties must combine their ideas and resources to find ways to place children of color who are available for adoption into stable, loving, and permanent homes.

adoptioninstitute.org/publications/MEPApaper20080527.pdf (arguing that amending the statute is necessary), *with* discussion *infra* Part **Error! Reference source not found.** (arguing that there are alternatives to amending the statute).

⁵ See SMITH ET AL., *supra* note 4.

⁶ *Id.* at 44 (requesting an amendment so that “race [would be considered as] *one factor*, but not the *sole factor*” in selecting parents for children in foster care).

II. TRANSRACIAL ADOPTION STATISTICS

The exact number of transracial adoptions is unknown.⁷ When the United States Census Bureau conducted its first adoption survey of the United States population in 2000, it reported that there were 2.1 million adopted children.⁸ The portion of transracial adoptions within that group was unclear. The Census report indicated that 18% of the households included family members of different races, but it attributed that high percentage to the fact that most of the adoptees were foreign-born children.⁹

Other studies have revealed, however, as The Donaldson Institute admitted, that the number of transracial adoptions is generally small.¹⁰ However, the number increased between 1996 and 2003 after MEPA initially was enacted and after it was amended.¹¹ On the other hand, the percentages of adoptions of African American children vacillated during that period. In 1996 and 1997, 17.2% and 17.7%, respectively, of African American children were adopted transracially.¹² Then, there was a substantial dip in adoptions of African American children in 1998 to 13.6%, and the number dipped even further to 11.2% in 1999.¹³ In subsequent years, the percentages of transracial adoptions of African American children rose steadily from 14.2% in 2000 to 16.8% in 2001 to 18.6% in 2002.¹⁴

The fluctuation may be due to a combination of factors that include the amendment of MEPA and the National Association of Black Social Workers' (NABSW) revised statement on transracial adoption, which was published in 1996.¹⁵ In 1972, the NABSW had decried transracial

⁷ CYNTHIA R. MABRY & LISA KELLY, *ADOPTION LAW: THEORY, POLICY AND PRACTICE* 411 (2006) (citing estimates reflecting that a small percentage of domestic adoptions are transracial).

⁸ ROSE M. KREIDER, U.S. CENSUS BUREAU, *ADOPTED CHILDREN & STEPCHILDREN: 2000* 1 (2003), <http://www.census.gov/prod/2003pubs/censr-6.pdf>.

⁹ *Id.* at 19.

¹⁰ SMITH ET AL., *supra* note 4, at 33–34.

¹¹ Mary E. Hansen & Daniel Pollack, *Transracial Adoption of Black Children: An Economic Analysis*, BEPRESS, at 26 (2007), Paper 1942, <http://law.bepress.com/expresso/eps/1942> (providing a table of transracial adoption statistics).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ NAT'L ASS'N OF BLACK SOC. WORKERS, *THE CASE FOR THE PRESERVATION OF AFRICAN AMERICAN FAMILIES* (1996).

adoption as a “form of cultural genocide.”¹⁶ The number of transracial adoptions decreased after the NABSW published its first decision.¹⁷

By 1994, the NABSW had modified its position on transracial adoption and announced that transracial adoption could be considered “after documented evidence of unsuccessful same race placements has been reviewed and supported by appropriate representatives of the African American community.”¹⁸

The Donaldson Institute asserted that MEPA-IEP did not significantly increase the number of adoptions of African American children.¹⁹ Some adoption attorneys attribute the increase in transracial adoptions to MEPA-IEP.²⁰ As explained further in the following sections of this article, adoption attorneys believe that even more children will be adopted when MEPA-IEP is properly implemented and enforced.²¹

III. THE ROLE OF RACE IN ADOPTION BEFORE AND AFTER MEPA

A. *Pre-MEPA Use of Race*

Before MEPA was enacted, race was used to delay and deny adoptions.²² Social workers’ judgment ruled.²³ Some workers would not process a prospective family’s application to adopt a child of a different

¹⁶ NAT’L ASS’N OF BLACK SOC. WORKERS, PRESERVING AFRICAN AMERICAN FAMILIES (1972).

¹⁷ MABRY & KELLY, *supra* note 7, at 409.

¹⁸ NAT’L ASS’N OF BLACK SOC. WORKERS, PRESERVING AFRICAN AMERICAN FAMILIES 4 (1994) (continuing to call for aggressive recruitment efforts before transracial adoptions are permitted); *see also* NAT’L ASS’N OF BLACK SOC. WORKERS, THE CASE FOR THE PRESERVATION OF AFRICAN AMERICAN FAMILIES (1996) (taking the position that since “black children are best reared in black homes,” transracial adoption should be a placement of “last resort”).

¹⁹ SMITH ET AL., *supra* note 4, at 33.

²⁰ Elizabeth Bartholet, Professor of Law & Faculty Dir. of the Child Advocacy Program, Harvard Law Sch., Response to Donaldson Institute Call for Amendment of the Multiethnic Placement Act (MEPA) to Reinstate Use of Race as a Placement Factor at Congressional Coalition on Adoption Institute 3 (June 10, 2008) (transcript available at <http://www.law.harvard.edu/programs/about/cap/law-reform/index.html>) (arguing, on behalf of the National Council on Adoption, American Academy of Adoption Attorneys, Center on Adoption Policy, and Harvard Law School’s Child Advocacy Program, that amending MEPA-IEP would render another barrier to adoption of children of color).

²¹ *Id.* at 3.

²² *Id.* at 1.

²³ *See* SMITH ET AL., *supra* note 4, at 12–13.

race.²⁴ Some workers discouraged prospective adoptive parents who expressed an interest in adopting a child of a different race and discouraged prospective parents of color from adopting children with disrespectful and dismissive responses when they expressed an interest in adopting a child.²⁵ Some did not recruit African American prospective parents.²⁶ In sum, at many adoption agencies, transracial adoption was considered an option of “last resort,” if at all, and prospective parents of color were not encouraged to pursue their interest in adoption.²⁷

In addition, varying state standards existed. Some states targeted race and ethnic-matching.²⁸ Others imposed limited timeframes for seeking racial matches before a transracial adoption would be allowed.²⁹ Children of color were transferred from stable placements with foster parents of a different race (often Caucasian ones), who wanted to adopt them, to homes where the foster parents were of the same race.³⁰ Some of these transfers were made after the child had thrived in one foster home for months or years.³¹ All of these practices caused children of color to languish in foster care.³²

B. *Post-MEPA Use of Race*

Originally, MEPA provided that no person could be denied the opportunity to become an adoptive parent on the basis of the person’s race, color, or national origin.³³ It also forbade delays or denials of a child’s

²⁴ See, e.g., *Compos v. McKeithen*, 341 F. Supp. 264, 265 (E.D. La. 1972).

²⁵ See MABRY & KELLY, *supra* note 7, at 410.

²⁶ *Id.*

²⁷ See *id.*

²⁸ Twila Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 80 (1991) (stating many states had statutorily prohibited transracial adoptions).

²⁹ JOAN HEIFETZ HOLLINGER ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996, at ch. 1(C), <http://www.acf.hhs.gov/programs/cb/pubs/mepa94/index.htm>.

³⁰ MABRY & KELLY, *supra* note 7, at 410.

³¹ See, e.g., *Drummond v. Fulton County*, Dep’t of Family & Children’s Servs., 563 F.2d 1200, 1203 (5th Cir. 1977).

³² MABRY & KELLY, *supra* note 7, at 411 (citing HOLLINGER ET AL., *supra* note 29, at ch. 1(C)).

³³ 42 U.S.C. § 5115a(a)(1)(A) (1994), amended by 42 U.S.C. § 1996b(1)(A) (2006).

placement for adoption based on race, color, or national origin.³⁴ At the same time, MEPA permitted limited consideration of race:

An agency or entity [that received federal funding] may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child.³⁵

MEPA also required that states recruit prospective parents who reflect the diversity of the group of children that are available for adoption in that state.³⁶

At the outset, it is important to note that MEPA only applied to states and entities employed by states, such as home-finding agencies.³⁷ Applicable states and entities received federal funding.³⁸ Although MEPA was intended to eradicate rampant and unchecked misuses of race in the adoption process,³⁹ some discriminatory placement policies and practices continued after MEPA was passed.⁴⁰ Some states and state agencies still made generalized, race-based assumptions about the kind of home that children of color need and the type of people who could parent children of color.⁴¹ Department staff in some states had not been properly informed and trained about appropriate application of MEPA.⁴² Some states' staff treated applicants differently,⁴³ and some counties failed to implement

³⁴ § 5115a(a)(1)(B), *amended by* 42 U.S.C. § 1996b(1)(B) (2006).

³⁵ § 5115a(a)(2), *repealed by* 42 U.S.C. § 1996b (2006).

³⁶ 42 U.S.C. § 622(b)(7) (2006).

³⁷ *See* 42 U.S.C. § 5115a(a)(1), *amended by* 42 U.S.C. § 1996b(1) (2006).

³⁸ 42 U.S.C. §§ 670–671 (2006).

³⁹ MABRY & KELLY, *supra* note 7, at 411–12.

⁴⁰ *Id.* at 412.

⁴¹ *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE FOR CIVIL RIGHTS, ADOPTION/FOSTER CARE CASE SUMMARIES, http://www.hhs.gov/ocr/civilrights/activities/examples/Adoption%20Foster%20Care/adoption_case_summaries.html [hereinafter CASE SUMMARIES].

⁴² *See id.*

⁴³ *See id.*

comprehensive recruitment plans.⁴⁴ States also failed to revise their policies, practices, and adoption forms.⁴⁵

In short, too often, systematic denials and delays based on race continued.⁴⁶ Still, some barriers to adoption of African-American children had been removed.⁴⁷ Effectively, some states reported increases in the numbers of adoptions of African American children even as they continued to violate some MEPA provisions.⁴⁸

IV. MEPA-IEP CHANGES IN USE OF RACE

After MEPA became effective, Congress learned that states were continuing to use race to deny or delay placements of children of color.⁴⁹ A few months after Congress promulgated MEPA and in response to the continued misuse of race, it passed MEPA-IEP.⁵⁰ When President Clinton signed MEPA-IEP in 1996, it “clarified [Congress’] intent to completely eliminate delays in placement that were in any way avoidable.”⁵¹ It also is applicable to states and entities affiliated with states that receive federal funding.⁵²

MEPA-IEP retained the provision that prohibited denial of opportunities to adopt, and denials or delays of placement based on race, color, or national origin.⁵³ An added provision of the amended statute made noncompliance with the prohibition a violation of the Civil Rights Act of 1964.⁵⁴ As a result, Congress created a private right of action for individuals and established a penalty for violations of the racial

⁴⁴ *See id.*

⁴⁵ *See id.*; *see also* Office of Civil Rights Memorandum, *supra* note 3, at 1–2 (prohibiting routine consideration of race).

⁴⁶ Bartholet, *supra* note 20, at 4 (stating the continued denials and delays caused Sen. Metzenbaum to come out of retirement to amend the original statute); *Implementation of the Interethnic Adoption Amendments Before the H.Comm. on Ways and Means, Subcomm. on Human Res.*, 105th Cong. 107 (1998) (statement of Olivia A. Golden, Assistant Sec’y, U.S. Admin. for Children & Families).

⁴⁷ *See* Bartholet, *supra* note 20, at 1.

⁴⁸ *See id.* at 3.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

⁵¹ Office of Civil Rights Memorandum, *supra* note 3, at 1.

⁵² *Id.*

⁵³ 42 U.S.C. §§ 671(a)(18), 1996b(1) (2006).

⁵⁴ §§ 1996b(2), 2000d–6(c).

proscriptions.⁵⁵ Courts have recognized this individual right, as well as claims that have been filed in accordance with that right.⁵⁶ But MEPA-IEP repealed the permissible considerations section of MEPA.⁵⁷

Adoption attorneys further assert that, in its current version, MEPA-IEP satisfies the United States constitutional prohibition on use of race.⁵⁸ Attorneys contend, “Federal and state civil rights laws uniformly forbid any use of race as a factor in official decision-making.”⁵⁹ Use of race is restricted in other areas of the law. It is forbidden, “except in an extraordinarily small category of cases.”⁶⁰ Therefore, race should not be a consideration without restriction in the adoption process. Some legal advocates assert that allowing unrestricted consideration of race would be unconstitutional.⁶¹ Under MEPA-IEP, attorneys proclaim that adoption laws became consistent with other civil rights and the United States Constitution.⁶² This section demonstrates how race may be used under MEPA-IEP and when it is not permitted under that Act.

A. Permissible Considerations of Race After MEPA-IEP

The Donaldson Institute stated that race cannot be considered under MEPA-IEP unless there is a compelling governmental interest for considering it.⁶³ The United States Department of Health and Human Services (DHHS) published implementation guidelines that interpret MEPA-IEP provisions.⁶⁴ Adoption attorneys contend that DHHS’ guidelines clearly indicate that a blanket prohibition on race was not intended when the statute was passed.⁶⁵ According to DHHS, race may be

⁵⁵ § 674(d)(3)(A).

⁵⁶ See, e.g., *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 495 (D.N.J. 2000).

⁵⁷ Compare 42 U.S.C. § 5115a (1994) (original MEPA), with 42 U.S.C. § 1996b (2006) (IEP amendments).

⁵⁸ Bartholet, *supra* note 20, at 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* (predicting that courts would find the unrestricted consideration of race unconstitutional).

⁶² *Id.*

⁶³ SMITH ET AL., *supra* note 4, at 39.

⁶⁴ Press Release, Nat’l Council for Adoption, Donaldson Institute Recommendations Threaten Transracial Adoption 2 (May 29, 2008), http://www.adoptioncouncil.org/documents/DonaldsonInstituteRecommendationsThreatenTransracialAdoption_000.pdf (referring to the guidelines as the “most authoritative and detailed guidance” available).

⁶⁵ *Id.* at 1.

considered when “the child has a specific and demonstrable need for a same-race placement.”⁶⁶ For example, when an older child makes an express unwillingness to consent to a transracial adoption because the child would not feel comfortable with parents of a different race, race may be considered when making that individualized placement decision.⁶⁷ DHHS’ interpretation of MEPA-IEP is that race also may be considered whenever it is “necessary . . . to achieve the best interests of the child.”⁶⁸ That is, race may be properly discussed on an “individualized basis where special circumstances indicate that their consideration is warranted.”⁶⁹

DHHS further explained that race may be a topic for discussions with prospective adoptive and foster parents.⁷⁰ According to The Donaldson Institute, many interpret the statute to prohibit assessments of prospective parents.⁷¹ However, applicants may be questioned about “their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity.”⁷²

Prospective parents’ attitudes that “relate to their capacity to nurture a particular child” are relevant.⁷³ Agencies may consider their attitudes in connection with the determination regarding “whether a placement with that family would be in the best interests of the child in question.”⁷⁴ This is an individualized assessment because some prospective parents will not want to adopt transracially.⁷⁵ Others may make decisions that are not in

⁶⁶ HOLLINGER ET AL., *supra* note 29, at ch. 2(A)(2)(c).

⁶⁷ Office of Civil Rights Memorandum, *supra* note 3, at 4 (suggesting that the adoption worker counsel the child about the consequences of his or her decision).

⁶⁸ U.S. DEP’T OF HEALTH & HUMAN SERVS., QUESTIONS & ANSWERS REGARDING THE MULTIETHNIC PLACEMENT ACT OF 1994 AND SECTION 1808 OF THE SMALL BUSINESS & JOB PROTECTION ACT OF 1996, at Question 7, www.hhs.gov/ocr/civilrights/resources/special/topics/adoption/q&a.html [hereinafter QUESTIONS & ANSWERS].

⁶⁹ *Id.* at Question 3.

⁷⁰ *Id.* at Question 2.

⁷¹ SMITH ET AL., *supra* note 4, at 38–39.

⁷² QUESTIONS & ANSWERS, *supra* note 68, at Question 2 (allowing for the non-discriminatory consideration of culture on individualized issues related to a particular child).

⁷³ *Id.* at Question 2.

⁷⁴ *Id.* (considering a prospective parent’s strengths and weaknesses).

⁷⁵ See Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1421 (2006) (concluding that some prospective parents adopt internationally because they have racial preferences for white children or children with lighter skin color like Asian and Latino children).

the child's best interests. For example, it is troubling when a prospective parent of a child of color who looks Caucasian displays no interest in discovering the child's racial identity and intends to identify the child as Caucasian.⁷⁶ At the same time, some adoption attorneys do not believe that prospective parents should be required to pass a "racial attitude test" and be summarily disqualified if they are unable to provide correct answers to questions about addressing a child's racial heritage.⁷⁷

In early 1997, DHHS' Office of Civil Rights (OCR) released its own analysis of MEPA-IEP.⁷⁸ It explained that MEPA-IEP allows consideration of race or ethnicity when consideration "would be necessary to achieve a compelling government interest."⁷⁹ In the child welfare context, the only compelling government interest is "protecting the 'best interests' of the child who is to be placed."⁸⁰ Yet, any consideration of race or ethnicity "must be narrowly tailored to advance the child's interests, and must be made as an individualized determination for each child."⁸¹ The OCR further admonishes that only the most compelling reasons will justify consideration of race and ethnicity.⁸²

The Donaldson Institute asserted that MEPA-IEP promotes an "unyielding colorblindness" approach to placement.⁸³ Adoption attorneys contend that color-blindness is neither advocated nor required under MEPA.⁸⁴ It is not mentioned in the statutory language or in the DHHS guidelines.⁸⁵ Such an approach would not be in the best interests of children of color. Advocates who favor transracial adoption do not promote a "strictly 'color-blind' adoption program."⁸⁶ In adoption attorneys' view:

Nothing in the current law requires that social workers operate on a race-blind or color-blind basis in helping

⁷⁶ See *In re M.F.*, 1 S.W.3d 524, 534–35 (Mo. Ct. App. 1999) (quoting a prospective parent regarding how he planned to treat the biracial child whom he sought to adopt).

⁷⁷ Barholet, *supra* note 20, at 3.

⁷⁸ Office of Civil Rights Memorandum, *supra* note 3.

⁷⁹ *Id.* at 3–4.

⁸⁰ *Id.* at 4.

⁸¹ *Id.*

⁸² *Id.*

⁸³ SMITH ET AL., *supra* note 4, at 7.

⁸⁴ Barholet, *supra* note 20, at 3.

⁸⁵ See Nat'l Council for Adoption, *supra* note 64 at 2.

⁸⁶ *Id.* at 1–2 (noting that the term "color-blind" is not mentioned in the federal statute).

prospective parents understand the challenges involved in transracial parenting, or in preparing prospective parents to meet those challenges, or in enabling prospective parents to decide if they are capable of appropriately parenting other-race children.⁸⁷

In sum, consideration of race is permitted, but any consideration of race, national origin, and ethnicity “must be done on an individualized basis where special circumstances indicate that their consideration is warranted.”⁸⁸ DHHS’ analysis further explained that it is “good practice” to assess:

the capacity of potential . . . parents to accommodate all the needs of a particular child. It is conceivable that in a particular instance race, color or national origin would be a necessary consideration to achieve the best interests of the child. However, any placement decision must take place in a framework that assesses the strengths and weaknesses of prospective parents to meet all of a child’s needs so as to provide for the child’s best interests.⁸⁹

B. Use of Race Under Current State Statutes

Limited use of race is also expressly allowed under some state legislation and regulations that were adopted to implement MEPA-IEP. Many states enacted legislation that simply provide that adoptions may not be denied or delayed based on race.⁹⁰ A few statutes go even further and provide instruction for permissible uses of race. To illustrate, while prohibiting denials or delays based on race, the State of Washington’s statute now provides that “when the department or an agency considers whether a placement option is in a child’s best interests, the department or agency may consider the cultural, ethnic, or racial background of the child and the capacity of prospective adoptive parents to meet the needs of a child of this background.”⁹¹ Washington’s statute reflects MEPA-IEP’s

⁸⁷ Bartholet, *supra* note 20, at 3.

⁸⁸ QUESTIONS & ANSWERS, *supra* note 68, at Question 3.

⁸⁹ *Id.* at Question 12.

⁹⁰ See, e.g., ARIZ. REV. STAT. ANN. § 8-105.01 (2006); MO. ANN. STAT. § 453.005(3) (2003).

⁹¹ WASH. REV. CODE ANN. § 26.33.045(1) (West Supp. 2009). See also CONN. GEN. STAT. ANN. § 45a-727(c)(3) (West 2004) (“The Court of Probate shall not disapprove any adoption under this section solely because of an adopting parent’s marital status or because

(continued)

intent for individualized assessments of a child's needs and particular prospective parents' ability to parent a particular child. Similarly, the current New Jersey statute provides that race "may be considered in determining whether the best interests of a child would be served by a particular placement for adoption."⁹²

Some state regulations provide supplementary guidance for its adoption agencies.⁹³ New York Regulations, for example, provide the following guidance for its Department of Social Services. First, the regulations emphasize the requirement for placement decisions based on the best interests of the child.⁹⁴ Then, the regulations set forth criteria that should be considered in making that determination.⁹⁵ The child's cultural or racial background is one criterion, among several, on the list:

Consideration of the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s). When making placement decisions, an authorized agency may consider the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background as one of a number of factors used to determine best interests. Race, color or national origin of the child or the adoptive parent may be considered only where it can be demonstrated to relate to the specific needs of an individual child⁹⁶

C. Courts' Application of Race Under MEPA-IEP and Implementing State Statutes

There are only a few reported cases that discussed race after Congress enacted MEPA-IEP. Those opinions that have addressed the issue shed some light on the controversy as it plays out in the courtroom. Often, a

of a difference in race, color or religion between a prospective adopting parent and the child to be adopted.").

⁹² N.J. STAT. ANN. § 9:3-40 (West Supp. 2009) (forbidding racial discrimination in the selection process).

⁹³ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(d) (2009); OHIO ADMIN. CODE 5101:2-48-13(D) (2009) (compelling reasons may serve to justify otherwise-disallowed consideration of race, color, or national origin of child or prospective parent).

⁹⁴ See N.Y. COMP. CODES R. & REG. tit. 18, § 421.18 (d).

⁹⁵ *Id.*

⁹⁶ § 421.18 (d)(2).

birth parent or a relative raises the issue. These decisions reveal courts' understanding of appropriate uses of race.

In *In re M.F.*,⁹⁷ a 1999 case, competing adoption petitions were filed for the adoption of M.F., a biracial child whose biological mother is Caucasian and biological father is African American.⁹⁸ M.F.'s African American paternal aunt filed one petition to adopt her.⁹⁹ The child's Caucasian foster parents, with whom she had lived for approximately three years, filed the second petition.¹⁰⁰

The applicants disputed which one of them "matched" the child.¹⁰¹ The court ruled that the Missouri statute that mirrored MEPA-IEP did not require that the adoptive parents and the child "be of the same racial or ethnic composition."¹⁰² The court further ruled that the Missouri statute did require that it consider, in the best interests of the child, the "child's cultural, racial and ethnic background and the capacity of the adoptive parents to meet the needs of a child of a specific background."¹⁰³ The court also recognized that the cultural background factor had to be applied on an individualized basis and not a generalized one.¹⁰⁴

In its "best interests" analysis, the *M.F.* court found that both applicants would expose M.F. to a multicultural environment.¹⁰⁵ The aunt interacted with extended family members who represented several different ethnic and racial groups, including Faroese, Indian, African American, and Irish descendants.¹⁰⁶ She also testified that she intrinsically knew how to deal with racism.¹⁰⁷ Unlike M.F.'s Caucasian foster parents, the aunt testified that she would not need to learn how to react before she could teach M.F. coping skills.¹⁰⁸

⁹⁷ 1 S.W.3d 524 (Mo. Ct. App. 1999).

⁹⁸ *Id.* at 535.

⁹⁹ *Id.* at 527, 534.

¹⁰⁰ *Id.* at 528–30.

¹⁰¹ *See id.* at 534–35.

¹⁰² *Id.* at 534.

¹⁰³ *Id.* (quoting MO. ANN. STAT. § 453.005.3 (West 1999)).

¹⁰⁴ *Id.* at 534 (repeating the prohibition against denying or delaying an adoption based on race).

¹⁰⁵ *See id.* at 534–35.

¹⁰⁶ *Id.* at 534.

¹⁰⁷ *See id.*

¹⁰⁸ *Id.* (testifying that knowing what to do "comes from the inside").

The court decided that M.F.'s Caucasian foster parents also offered a multicultural environment for M.F.¹⁰⁹ They already had adopted another African American child who lived in their home,¹¹⁰ and that child would be a source of comfort and support for M.F.¹¹¹ They lived in a racially diverse community.¹¹² The family had placed M.F. in a multicultural day care center where she could interact with African American, Native American, Latino, and Asian children.¹¹³ Some of her babysitters were African American.¹¹⁴ There was multicultural artwork, pictures, books, toys, and music in the home.¹¹⁵ The prospective parents were members of the Association of Multicultural Counseling, and one of them had a job where she evaluated cultural diversity training packages.¹¹⁶ The court decided that both applicants had equal ability to meet M.F.'s cultural, racial, and ethnic needs.¹¹⁷ After it conducted its analysis of other "best interests" factors, the court ruled that the trial court should grant M.F.'s Caucasian foster parents' petition to adopt M.F.¹¹⁸

In an unreported case, *In re Malik S.*,¹¹⁹ Malik's birth father questioned the wisdom of placing Malik, a biracial child of Caucasian and African-American descent, with a white foster family that wanted to adopt him.¹²⁰ The Superior Court of Connecticut cited MEPA-IEP and ruled that the Department of Children and Families' placement decision was:

Consistent with federal law, which prohibits a person or government agency involved in adoption or foster care from "delay[ing] or deny[ing] the placement of a child for adoption . . . on the basis of the race, color, or national

¹⁰⁹ *Id.* at 535.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (considering other factors and ultimately deciding that the foster parents' petition to adopt M.F. should be granted).

¹¹⁸ *Id.* at 538.

¹¹⁹ 1999 WL 311177 (Conn. Super. Ct. May 5, 1999) (mem.).

¹²⁰ *Id.* at *1, 6.

origin of the adoptive or foster parent, or the child, involved.”¹²¹

The court acknowledged the likelihood that Malik would have some difficulties in school, on the playground, and growing up as a biracial child.¹²² The court also noted that Malik would have the same difficulties if he grew up in a home with “completely” African American parents because he did not share their heritage either.¹²³ Because of the inevitable difficulties that Malik would experience, the court properly concluded that “Malik will need a strong foster family to provide him comfort and guidance” and that his white foster family satisfied those concerns, and if they were willing to adopt Malik, their application should receive “first consideration.”¹²⁴

In another unreported case that the Superior Court of New Jersey decided in 2006, the birth mother requested that the child be placed with an aunt or another relative to foster the child’s racial identity.¹²⁵ The court rejected any argument that the African American child should not be placed with or adopted by Caucasian parents.¹²⁶ The superior court cited MEPA and held, “The race of the foster/adoptive parents is not and cannot be a disqualifying factor.”¹²⁷

The case of *In re Infant Child J*¹²⁸ focuses on whether child J.’s adoption was delayed based on race.¹²⁹ J., an African American child, had been placed with an African American couple.¹³⁰ When there was an incident of domestic violence between the prospective parents, the trial court ordered the couple to undergo counseling for fourteen months before their petition for adoption would be approved.¹³¹ The agency that was responsible for the child’s placement alleged that the court had

¹²¹ *Id.* at *6.

¹²² *Id.* at *6.

¹²³ *Id.*

¹²⁴ *Id.* at *6, 8.

¹²⁵ Div. of Youth & Family Servs. v. J.C., 2006 WL 1071521, at *3 (N.J. Super. Ct. App. Div. April 25, 2006) (per curiam).

¹²⁶ *Id.*

¹²⁷ *Id.* (deciding that MEPA prohibits denials or delays of placement based on race, color, or national origin).

¹²⁸ 994 P.2d 279 (Wash. Ct. App. 2000).

¹²⁹ *Id.* at 283.

¹³⁰ *Id.*

¹³¹ *Id.* at 280.

impermissibly delayed the adoption because it was based on race or ethnicity.¹³²

On appeal, the appellate court did not object to the trial court's consideration of race in its assessment of whether the African American couple was "better suited" to adopt J.¹³³ The court was concerned that J.'s adoption had been delayed impermissibly because the judge had ordered counseling for fourteen months before the application for adoption would be approved.¹³⁴ The court held, however, that the petition to adopt was not delayed based on race.¹³⁵ On the other hand, the extended delay while the parents sought counseling did constitute an impermissible delay.¹³⁶ It was not in the child's best interests to linger in foster care for several months while the prospective parents were treated.¹³⁷ Moreover, the court's order interfered with the agency's mandate that children be placed without delay.¹³⁸

D. Impermissible Considerations of Race After MEPA-IEP

MEPA-IEP does place some restrictions on race as it may be used in adoption. Any action that delays or denies adoption placements based on race is prohibited.¹³⁹ According to DHHS, MEPA-IEP prohibits categorical bans on transracial adoptions¹⁴⁰ and routine considerations of race, national origin, and ethnicity.¹⁴¹

In addition, DHHS has concluded that the following conduct is prohibited under MEPA-IEP:

- a) generalizations regarding children's needs when they are members of a particular race or ethnicity (such as all African Americans need African American parents);
- b) generalized racial or ethnic screenings;

¹³² *Id.* at 283.

¹³³ *Id.*

¹³⁴ *Id.* at 283–84.

¹³⁵ *Id.* at 283 (concluding that although the delay was not based on race, a fourteen-month delay was inappropriate). *See also In re Adoption of A.S.H.*, 674 A.2d 698, 701 (Pa. Super. Ct. 1996) (considering race as one factor under the original MEPA provision).

¹³⁶ *In re Infant Child J*, 994 P.2d at 284.

¹³⁷ *Id.* at 282.

¹³⁸ *Id.* at 282–84.

¹³⁹ Office of Civil Rights Memorandum, *supra* note 3, at 2–3.

¹⁴⁰ Office of Civil Rights Memorandum, *supra* note 3, at 1.

¹⁴¹ QUESTIONS & ANSWERS, *supra* note 68, at Question 2.

- c) requiring a family to prepare a transracial adoption plan;
- d) assessments of all children for their needs with respect to race, national origin and ethnicity;
- e) routine considerations and assessments of children's needs or prospective parents' capacity to parent based on race, ethnicity or national origin;
- f) generalizations about prospective parents' abilities based on race or ethnicity to care for a child of a different race (such as no white parents will be able to parent a child of color effectively);
- g) honoring a birth parent's stated preference for a child's placement with prospective parents of a particular racial, ethnic or cultural group (regardless of whether the birth parent relinquished rights voluntarily or involuntarily);
- h) accepting and using home finding agencies' recommendations only of families that matched the race of a particular child;
- i) dissuading or counseling prospective parents to withdraw an application based strictly on race, color or national origin;
- j) using cultural considerations as a proxy for race;
- k) honoring a birth parent's preference for an adoptive parent of a particular race;
- l) using home finding agencies for same-race matching; and
- m) counseling applicants to withdraw applications when a preference or interest in transracial adoption is expressed.¹⁴²

E. Enforcement Activity Under MEPA-IEP

The Donaldson Institute has advocated for more aggressive enforcement of MEPA-IEP provisions.¹⁴³ Although the enforcement activity was slow shortly after the 1996 amendment, OCR already has investigated alleged misuse of race in the adoption process in at least twelve states,¹⁴⁴ and some hefty fines have been assessed against some state agencies.¹⁴⁵ When violations are detected, violators are fined, but

¹⁴² *Id.* at Questions 2–20.

¹⁴³ See SMITH ET AL., *supra* note 4, at 8, 35–36 (demanding more rigorous enforcement of recruitment requirements).

¹⁴⁴ See CASE SUMMARIES, *supra* note 41. See also Bartholet, *supra* note 20, at 2 (noting that the first major enforcement decisions were not issued until 2003).

¹⁴⁵ See SMITH ET AL., *supra* note 4, at 35 (noting a \$1.8 million fine assessed to Hamilton County, Ohio and the State of Ohio in 2003, and a \$107,000 fine assessed to the South Carolina Department of Social Services in 2005).

they receive an opportunity to correct the problem and submit a corrective action plan before an additional penalty is imposed.¹⁴⁶ Assessed penalties vary in accordance with the state's population, and the frequency and duration of its noncompliance.¹⁴⁷

The OCR is obligated not only to investigate complaints under MEPA-IEP, but also to conduct independent reviews.¹⁴⁸ The Civil Rights Act provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁴⁹ Strict scrutiny is the appropriate standard for evaluating alleged misconduct that violates the Civil Rights Act.¹⁵⁰ Any "rules, policies, or practices that do not meet the constitutional strict scrutiny test [are] illegal."¹⁵¹

The Donaldson Institute opined that, although the State of Ohio reported an increase in adoptions of African American children after MEPA-IEP was passed, the State of Ohio was fined \$1.8 million anyway.¹⁵² The \$1.8 million fine represented only 2% of the state's funding.¹⁵³ Furthermore, although the state reported an increase in adoptions, it still was violating MEPA-IEP provisions.¹⁵⁴ The State of Ohio and Hamilton County, Ohio, had engaged in multiple individual and systemic violations of MEPA-IEP and the Civil Rights Act.¹⁵⁵ Adoption attorneys agree, however, that continued scrutiny of compliance activities is still needed.¹⁵⁶ Aggressive enforcement of MEPA-IEP will result in

¹⁴⁶ 42 U.S.C. § 674(d)(1) (2006) (setting forth a gradual reduction that will not exceed five percent); Ohio Dep't of Job & Family Servs., D.A.B. No. 2023, 2006 WL 1031219, at *1 (Dep't of Health & Human Servs. Mar. 31, 2006).

¹⁴⁷ Office of Civil Rights Memorandum, *supra* note 3, at 2 (explaining that the penalty could range from less than \$1000 to \$10 million).

¹⁴⁸ Office of Civil Rights Memorandum, *supra* note 3, at 2.

¹⁴⁹ 42 U.S.C. § 2000d (2006).

¹⁵⁰ Office of Civil Rights Memorandum, *supra* note 3, at 3.

¹⁵¹ *Id.* (quoting MEPA guidance).

¹⁵² SMITH ET AL., *supra* note 4, at 34–35.

¹⁵³ Ohio Dep't of Job & Family Servs., 2006 WL 1031219, at *1.

¹⁵⁴ SMITH ET AL., *supra* note 4, at 34.

¹⁵⁵ Ohio Dep't of Job & Family Servs., 2006 WL 1031219, at * 3–4.

¹⁵⁶ See, e.g., *Implementation of the Interethnic Adoption Amendments: Hearing Before the H.Comm. on Ways and Means, Subcomm. on Human Res.*, 105th Cong. 107 (1998) [hereinafter *Implementation of Amendments Hearing*] (statement of Elizabeth Bartholet, (continued)

fewer violations of MEPA-IEP and more adoptions.¹⁵⁷ Delay tactics and deterrent conduct will subside as more states and counties realize that OCR will aggressively enforce the statutory requirements.

MEPA-IEP also provides private rights of action for individuals so that prospective parents and representatives of children whose constitutional rights have been violated may file an action.¹⁵⁸ In *Kenny A. ex rel. Winn v. Perdue*,¹⁵⁹ for example, the United States District Court for the Northern District of Georgia recognized a class of foster children's right to bring a due process claim that was protected by MEPA-IEP's procedural guarantees.¹⁶⁰

V. EFFECTS ON THE ADOPTEE IN TRANSRACIAL ADOPTION

The Donaldson Institute asserted that transracial adoptions should be precluded because studies show that children who are transracially adopted have low self-esteem and they "struggle to develop a positive racial/ethnic identity."¹⁶¹ Undoubtedly, transracial adoptions present additional challenges for parents and adoptees. Adoption attorneys and other advocates agree that this conclusion is "hardly a revelation."¹⁶² It is a reality, though, that the "vast majority of transracial adoptive families . . . handle[] it quite well," and "[i]nformed, responsible parents handle these challenges very effectively . . ."¹⁶³

The Donaldson Institute contended that recent research demonstrated that African American children involved in transracial adoptions may be at risk for adjustment problems and that they will have difficulties developing coping skills.¹⁶⁴ On the contrary, adoption attorneys aver that most of the

Professor & Faculty Dir., Child Advocacy Program, Harvard Law Sch.); SMITH ET AL., *supra* note 4, at 44.

¹⁵⁷ See, e.g., *Implementation of Amendments Hearing*, *supra* note 156; SMITH ET AL., *supra* note 4, at 44.

¹⁵⁸ 42 U.S.C. §§ 1996b(1)–(2), 2000d–7(a) (2006).

¹⁵⁹ 218 F.R.D. 277 (N.D. Ga. 2003).

¹⁶⁰ *Id.* at 296.

¹⁶¹ SMITH ET AL., *supra* note 4, at 6.

¹⁶² Nat'l Council for Adoption, *supra* note 64, at 1.

¹⁶³ *Id.* at 1, 3.

¹⁶⁴ SMITH ET AL., *supra* note 4, at 6, 22–26 (opining that the families and the children will encounter challenges). *But see id.* at 29 (concluding that the research does "not provide sufficient basis for reaching conclusions about the level of problems experienced by Black children in foster care who are adopted transracially compared to those adopted by Black families").

research on the effect of transracial adoptions shows that the vast majority of adoptees do not suffer detrimental effects from their adoptive placement, but they do have lasting detrimental effects from extended stays in the child welfare system.¹⁶⁵ Some adoption attorneys believe that “the entire body of good social science still provides no evidence that children suffer in any way by being placed in a transracial rather than a same-race home.”¹⁶⁶

An important consideration in the transracial adoption debate certainly is the effect of the adoption on adoptees. Adoptees themselves report mixed results.¹⁶⁷ Some adoptees report that they suffered great emotional and psychological harm because of a number of circumstances, including living and education arrangements established by their Caucasian parents and their parents’ choice to ignore the racial differences that existed between them.¹⁶⁸ Other adoptees report that they were socially integrated into their adoptive families, their parents made them feel comfortable and wanted, and they were accepted in their community.¹⁶⁹ Adoption attorneys agree, however, that more current research needs to be done that takes into account some of the criticisms of the research that is available, such as small sampling and the age of the child subjects.

VI. THE NECESSITY FOR TRAINING CASEWORKERS AND OTHER STATE AGENTS

The Donaldson Institute and adoption attorneys agree that state representatives and entities working on behalf of states that place children must be trained to implement MEPA-IEP provisions properly.¹⁷⁰ The Donaldson Institute argued that Congress should amend MEPA-IEP so

¹⁶⁵ Barholet, *supra* note 20, at 4.

¹⁶⁶ *Id.*

¹⁶⁷ See generally RITA SIMON & RHONDA ROORDA, IN THEIR OWN VOICES: TRANSRACIAL ADOPTees TELL THEIR STORIES (2000); Gina Miranda Samuels, *Being Raised by White People: Navigating Racial Difference Among Adopted Multiracial Adults*, 71 J. MARRIAGE & FAMILY 80, 80–94 (Feb. 2009); Arnold R. Silverman, *Outcomes in Transracial Adoption*, 3 FUTURE OF CHILDREN 104, 106–15 (1993) (reporting different effects).

¹⁶⁸ See Samuels, *supra* note 167, at 87.

¹⁶⁹ MABRY & KELLY, *supra* note 7, at 451–52 (comparing two transracial adoptees’ experiences).

¹⁷⁰ See *Implementation of Amendments Hearing*, *supra* note 156, at 108–09; SMITH ET AL., *supra* note 4, at 32 (citing Pereta Rodriguez & Alan S. Meyer, *Minority Adoptions and Agency Practices*, 35 SOC. WORK, 528, 531 (1990)).

race may be considered in planning and preparing families who adopt transracially.¹⁷¹ However, as DHHS' interpretations indicate, MEPA-IEP does not prohibit discussions of race during the training process.¹⁷²

Proper training will help ensure more transracial adoptions occur and that they do not cause harm to the adoptees. Caseworkers and other state agents must be taught to make individualized assessments of a prospective parent's ability to act as an adoptive parent for a child of color. Right now, agencies have been apprised that they may inquire about the color of a child with whom the prospective parent "might comfortably form an attachment."¹⁷³ Agencies must also guide prospective parents to make frank considerations about their ability and willingness to parent certain children.¹⁷⁴ But first, the agency workers must know how to apply MEPA-IEP and what is and is not permissible conduct. OCR's compliance reviews have been somewhat helpful by publicizing how other states and agencies have violated MEPA-IEP.¹⁷⁵ Agency workers' assessments are "critical" to minimizing the number of disruptions and dissolutions.¹⁷⁶

However, there still is disagreement and confusion among agencies about how and whether race may be used.¹⁷⁷ Some states have promulgated legislation that requires their departments to create and provide standardized training for their employees who are involved in placements of children.¹⁷⁸ The focus of this training is to ensure the state's employees' conduct complies with MEPA-IEP.¹⁷⁹ The OCR and the Administration on Children, Youth and Families have produced helpful self-assessment tools for states to use.¹⁸⁰ However, those tools do not

¹⁷¹ SMITH ET AL., *supra* note 4, at 8.

¹⁷² QUESTIONS & ANSWERS, *supra* note 68, at Question 2.

¹⁷³ QUESTIONS & ANSWERS, *supra* note 68, at Question 2.

¹⁷⁴ *See id.*

¹⁷⁵ *See* CASE SUMMARIES, *supra* note 41 (showing examples of compliance reviews).

¹⁷⁶ QUESTIONS & ANSWERS, *supra* note 68, at Question 2.

¹⁷⁷ *See* U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: IMPLEMENTATION OF THE MULTIETHNIC PLACEMENT ACT POSES DIFFICULT CHALLENGES 3 (1998).

¹⁷⁸ *E.g.*, N.J. STAT. ANN. § 9:3-40 (West Supp. 2009); WASH. REV. CODE ANN. § 26.33.045(2) (West Supp. 2009).

¹⁷⁹ *See, e.g.*, N.J. STAT. ANN. § 9:3-40; WASH. REV. CODE ANN. § 26.33.045(2).

¹⁸⁰ *See* 45 C.F.R. § 1355.38 (2008); Memorandum from Richard M. Campanelli, Director, Office for Civil Rights, and Wade Horn, Assistant Sec'y, Admin. for Children & Families, to OCR Reg'l Managers & ACF Reg'l Admin'rs, <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/interneval.html> [hereinafter Campanelli Memorandum].

provide specific details about how workers should respond to certain inquiries by prospective parents and how they should train prospective parents. Organizations such as OCR and the Administration on Children, Youth and Families need to increase their efforts to improve training by providing more specific details to solve these unresolved issues.

VII. DILIGENT RECRUITMENT REQUIREMENTS

With respect to recruitment, The Donaldson Institute contended that states' recruitment efforts did not satisfy MEPA-IEP requirements and OCR was not enforcing the recruitment mandate.¹⁸¹ Adoption attorneys argue that both MEPA and the amended federal statute already require "active, diligent, and lawful recruitment" of a diversified group of prospective parents.¹⁸² OCR reported reviews of state recruitment efforts and entered into agreements that at least one California city and another California county must implement comprehensive recruitment plans.¹⁸³

Some state statutes also require diligent recruitment of prospective parents who "reflect the ethnic and racial diversity of children in the state for whom adoptive homes are needed."¹⁸⁴ The goal is to identify a diverse group of prospective parents that reflects the racial makeup of children who are available for adoption in a given region.¹⁸⁵ As a result of recruitment efforts, in many states, some African American applicants have been identified.¹⁸⁶ Moreover, in some regions of the United States, African American adults are adopting African American children at a higher rate than Caucasians adopt,¹⁸⁷ and many of them are single

¹⁸¹ See SMITH ET AL., *supra* note 4, at 8, 35–36, 44.

¹⁸² See 42 U.S.C. § 622(b)(8) (2009); Office of Civil Rights Memorandum, *supra* note 3, at 3–4 (declaring that diligent efforts to recruit a diverse group of prospective families is in children's best interests).

¹⁸³ Office of Civil Rights Memorandum, *supra* note 3, at 3; Memorandum from Ira Pollack, Reg'l Manager, U.S. Dep't of Health & Human Servs., to Chet P. Hewett, Director, Children & Family Servs., (Sept. 26, 2001) (on file with author) (announcing an agreement which was attached to the memorandum.).

¹⁸⁴ MO. ANN. STAT. § 453.005(2) (West 2003).

¹⁸⁵ See Nat'l Council for Adoption, *supra* note 64, at 1.

¹⁸⁶ See SMITH ET AL., *supra* note 4, at 32, 45.

¹⁸⁷ *Id.* at 34–35; see also Bartholet, *supra* note 20, at 5 (concluding that African Americans adopt at the same or a higher rate than whites).

women.¹⁸⁸ In smaller numbers, African Americans also are adopting children of other races, including Caucasian.¹⁸⁹

Notwithstanding MEPA-IEP's mandate, however, many advocates are dissatisfied with recruitment efforts in general.¹⁹⁰ The Donaldson Institute and other adoption advocates assert that agencies must make more diligent efforts, especially when recruiting more prospective parents of color.¹⁹¹ In addition, they contend that recruitment programs are seriously crippled by underfunding and that they need funding at appropriate levels for serious and targeted recruitment of a diverse group of prospective parents.¹⁹²

In January 2000, DHHS issued a press release in which it admitted that its initial MEPA-IEP investigations focused too narrowly on paperwork.¹⁹³ Its revised review process would include a closer look at the quality of recruitment of prospective parents.¹⁹⁴ DHHS' analysis cautioned, however, "Targeted recruitment cannot be the only vehicle used by a State to identify families for children in care, or any subset of children, in care, e.g., older or minority children."¹⁹⁵ Moreover, recruitment events must include prospective parents of all races, even if they target prospective parents of a particular race.¹⁹⁶ Also, any families that respond to recruitment efforts must be considered and included as potential families for children who need a home.¹⁹⁷

¹⁸⁸ John Blake, *Single Black Women Choosing to Adopt*, CNN, July 1, 2009, <http://www.cnn.com/2009/LIVING/07/01/bia.single.black.women.adopt/index.html>.

¹⁸⁹ See, e.g., Tony Dokoupil, *Raising Katie*, NEWSWEEK, Apr. 23, 2009, <http://www.newsweek.com/id/194886> (describing the public's reaction to an African American couple's adoption of a Caucasian child).

¹⁹⁰ See Nat'l Council for Adoption, *supra* note 64, at 1.

¹⁹¹ *Id.*; SMITH ET AL., *supra* note 4, at 44–45.

¹⁹² Nat'l Council for Adoption, *supra* note 64, at 1 (arguing that current funding is inadequate).

¹⁹³ Press Release, U.S. Dep't of Health & Human Servs., *HHS Issues Final Child Welfare Regulations to Improve Services and Outcomes for Children 1* (Jan. 25, 2000), <http://www.hhs.gov/news/press/2000pres/20000125.html> [hereinafter *Final Child Welfare Regs.*].

¹⁹⁴ *Id.* at 1–2.

¹⁹⁵ QUESTIONS & ANSWERS, *supra* note 68, at Question 18.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

VIII. ADDITIONAL SUGGESTIONS TO IMPROVE THE CURRENT STATE OF TRANSRACIAL ADOPTIONS

This section discusses other measures to ensure that more children will be adopted. To find permanent homes for African American children and all children of color, as well as white children who need permanency, less emphasis should be placed on MEPA-IEP, and more emphasis should be placed on identifying other ways of finding homes for children. Adoption attorneys and The Donaldson Institute agree on some of those options.¹⁹⁸

Everyone who has participated in the debate about the efficacy of transracial adoption agrees that more children of color need permanent, nurturing, and secure homes.¹⁹⁹ To attain that goal, MEPA-IEP should be enforced and several different methodologies should be engaged simultaneously. Adoption attorneys have urged Congress not to amend MEPA.²⁰⁰ Amending MEPA-IEP will have negative consequences for children of color. MEPA-IEP is one way of ensuring that more African American children are adopted.²⁰¹ The Donaldson Institute proposal, which suggested that race should be used as “one factor, but not the sole factor,” in selecting parents,²⁰² is a regressive proposal. Without MEPA-IEP in its current form, children of color will continue to remain in foster care for longer periods of time than other children. Delayed placement of any children has “extremely negative consequences for children,”²⁰³ and some children of color will never be adopted.

Many children who are available for adoption are members of sibling groups.²⁰⁴ Sometimes it is difficult to place them because prospective parents tend to want to adopt one child at a time.²⁰⁵ Often, states and

¹⁹⁸ See, e.g., SMITH ET AL., *supra* note 4, at 42 (arguing for the commitment of fiscal resources to recruit families with similar racial and ethnic backgrounds as children in foster care because those families are the most likely to adopt African American children).

¹⁹⁹ Final Child Welfare Regs., *supra* note 193, at 1; Bartholet, *supra* note 20, at 4–5; SMITH ET AL., *supra* note 4, at 8.

²⁰⁰ Bartholet, *supra* note 20, at 1.

²⁰¹ See *id.*

²⁰² SMITH ET AL., *supra* note 4, at 44 (emphasis omitted).

²⁰³ *Id.* at 3; Hansen & Pollack, *supra* note 11, at 18 (stating that African American children stay in the system 2.7 months longer than other children).

²⁰⁴ See, e.g., FLA. DEP'T OF CHILDREN & FAMILIES, ADOPTION (2009), <http://www.dcf.state.fl.us/adoption/faq.shtml> (stating that 4642 children are available for adoption in Florida and that, of that number, there are 376 sibling groups).

²⁰⁵ See KREIDER, *supra* note 8, at 19 (noting that eighty-two percent of families with adopted children had only one adoptee in the home).

agencies want to place siblings in the same home because they can provide support for one another, which promotes the children's best interests.²⁰⁶ Qualified prospective parents should be encouraged and offered incentives to adopt more than one child of color.²⁰⁷

The Donaldson Institute also believes that current and complete research needs to be done on the effects of transracial adoption on children.²⁰⁸ More expansive and objective studies would be helpful, so researchers and agencies must continue to look for ways to place these children in proper homes. However, it will take years to conduct reliable studies and publish their findings. These children cannot wait for years before they are permanently placed.

Prospective parents must be educated and trained. Race matters.²⁰⁹ Racism still exists, and transracial adoptees and their parents will face racism. Even The Donaldson Institute admitted that racial inequality and lack of acceptance still exists.²¹⁰ Along with the usual caseworkers and psychologists, transracial adoptees and adoptive parents must be invited to participate in the education and training process. Because of their first-hand knowledge, they are the only persons who actually can inform others about what it is like to create and sustain these families from personal knowledge. They can help social workers prepare prospective parents to avoid certain common pitfalls and help them to develop realistic expectations about transracial adoption. Proper education also will help adoptive parents to develop a plan of action for addressing racism when it arises, and it surely will arise.

To avoid some of these unsatisfactory outcomes, rigorous self-assessment and training, and appropriate inquiries are needed. Opponents and proponents of MEPA-IEP agree that prospective parents must receive a more realistic view of transracial adoption, the adoptees' needs, and

²⁰⁶ See, e.g., N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(b), (d)(3) (2009) (offering a separate list of criteria to ascertain whether siblings should be placed separately or together).

²⁰⁷ See SMITH ET AL., *supra* note 4, at 23 (arguing the presence of other transracial adoptees within a home has a positive impact on a child's development and recognition of cultural identity).

²⁰⁸ SMITH ET AL., *supra* note 4, at 41.

²⁰⁹ See Cynthia R. Mabry, "Love Alone is Not Enough!" *In Transracial Adoptions—Scrutinizing Recent Statutes, Agency Policies, and Prospective Adoptive Parents*, 42 WAYNE L. REV. 1347, 1385 (1996); Bartholet, *supra* note 20, at 3.

²¹⁰ SMITH ET AL., *supra* note 4, at 18.

expected effects on all members of the adoptive family.²¹¹ Agencies should provide “information sufficient to confirm or broaden their understanding of what types of children they might most appropriately provide a home for.”²¹² Caseworkers and state entities should guide and assist prospective parents to do honest self-assessments regarding their suitability for transracial adoption and to acquire a better understanding of the types of children that they are capable of parenting.²¹³ Workers and other entities also may consider the capacity of a particular adult to parent a specific child—an assessment that is essential to the best interests of the child.²¹⁴ These assessments should be encouraged and completed before the prospective parent’s approval as a candidate for transracial adoption. The assessment must be done without denying or delaying the application to adopt a child.²¹⁵

Adoption attorneys believe that as a result of MEPA-IEP, agencies are beginning to educate and socialize prospective parents regarding racial issues in a manner that is acceptable under the statute.²¹⁶ In short, The Donaldson Institute and other advocates who disagree on some issues with respect to transracial adoption agree that children need a safe, comfortable, nurturing, and secure home with parents who understand the realities of transracial adoption.²¹⁷ The OCR reported that there is some confusion among workers about how they may properly educate prospective parents and which inquiries or statements they are allowed to make during training.²¹⁸ DHHS and OCR must provide clear guidance regarding how this information can be relayed to prospective parents without violating MEPA-IEP.

²¹¹ SMITH ET AL., *supra* note 4, at 22, 28; Nat’l Council for Adoption, *supra* note 64, at 1.

²¹² QUESTIONS & ANSWERS, *supra* note 68, at Question 13.

²¹³ Nat’l Council for Adoption, *supra* note 64, at 1–2.

²¹⁴ QUESTIONS & ANSWERS, *supra* note 68, at Question 5.

²¹⁵ See Office for Civil Rights Memorandum, *supra* note 3, at 1 (stating that agencies may consider prospective parents’ capacity to meet the needs of a child of a different race or culture); Nat’l Council for Adoption, *supra* note 64, at 2 (finding it difficult to imagine how education and training would delay the adoption process since it occurs before the prospective parent’s approval for adoption).

²¹⁶ Bartholet, *supra* note 20, at 3.

²¹⁷ Final Child Welfare Regs., *supra* note 193, at 1; Bartholet, *supra* note 20, at 4–5; SMITH ET AL., *supra* note 4, at 28.

²¹⁸ See U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: IMPLEMENTATION OF THE MULTIETHNIC PLACEMENT ACT POSES DIFFICULT CHALLENGES 3 (1998).

After the initial training and the adoption process are complete, adoptees and their new parents continue to need support from a network of individuals and support groups. Transracial adoptees should be assigned as mentors for recently adopted children. Their parents should be connected with social networking groups in or near their community or on the Internet so that they will have continuous support from other parents, who can counsel them using their own personal knowledge and experience. Appropriate post-adoption services should be made available for transracial families and adoptees, and they should be available twenty-four hours a day. Some parents may not need such services right away because they will adopt infants. However, because children recognize that they are different when they are very young,²¹⁹ they may need services much earlier than they realize.

Generally, MEPA-IEP does not apply to private adoptions.²²⁰ Thus, opponents of MEPA-IEP should advocate for establishing more private, specialized adoption agencies. Those agencies could consider race more freely in making placement decisions. They should be established and funded to focus on the permanency needs of large groups of children in the foster care system. Moreover, the race of applicants and children may be recorded for review and quality control purposes.²²¹ Keeping such records will enable agencies to ensure that they are making good placement decisions that are in the child's best interests.²²²

Costs of adoption should be lowered. Presently, the cost of domestic adoptions ranges from \$5000 to \$40,000.²²³ Some middle class prospective parents who are considered well-off financially cannot afford such costs.²²⁴ Many prospective parents who want to adopt go into debt to

²¹⁹ *See id.* at 22.

²²⁰ SMITH ET AL., *supra* note 4, at 15 (stating the law applies “to any agency that receives federal funds from any source and is involved in some aspect of foster or adoptive placement”).

²²¹ QUESTIONS & ANSWERS, *supra* note 68, at Question 14.

²²² *Id.* (monitoring the effectiveness of decisions and disruptions as well as dissolutions).

²²³ CHILD WELFARE INFORMATION GATEWAY, COSTS OF ADOPTING (2004), http://www.childwelfare.gov/pubs/s_cost/s_cost.cfm.

²²⁴ *See Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down*, U.S. CENSUS BUREAU NEWS, Aug. 26, 2008, http://www.census.gov/Press-Release/www/releases/archives/income_wealth/012528.html (showing in 2008, the median household income in the United States was \$50,233.00, with salaries ranging from \$68,080 in Maryland to \$36,338 in Mississippi).

provide a home for a child.²²⁵ The expense of adoption should be lowered not because children of color are undervalued,²²⁶ but because suitable parents cannot afford to adopt a child.²²⁷ One way of decreasing costs or helping prospective parents is to offer vouchers for some or all of the costs and attorney's fees associated with an adoption. Also, attorneys and agencies should be encouraged to lower their fees, especially at targeted times, such as during National Adoption Month.

The District of Columbia offers a \$5000 credit for attorney's fees for adoption of children from foster care.²²⁸ Some attorneys accept that amount as their total payment even when the actual litigation costs exceed that amount.²²⁹ Other states should provide this and other financial support for prospective parents.

Diligent efforts should be made to identify relatives of a child who can adopt that child. A federal statute provides that states should give a preference to relatives over non-relatives when placing a child.²³⁰ Of course, that relative must meet "all relevant state child protection standards."²³¹ Relative adoptions will ensure that more children will have contact with family members and maintain a connection with people who share their racial, cultural, and ethnic background. As The Donaldson Institute also suggested, if relatives want to be involved in the child's life, and they are fit, but unwilling or unable to adopt, they should be encouraged to act as a kinship foster parent and to maintain continuous contact, including post adoption services.²³² In this regard, joint adoptions

²²⁵ See CHILD INFORMATION GATEWAY—COSTS OF ADOPTING: RESOURCES TO HELP DEFRAY ADOPTION COSTS, http://www.childwelfare.gov/pubs/s_cost/s_costc.cfm (stating the Internet has a large amount of widely available information about loans, grants, mortgages, and other forms of subsidies for adoptions, which shows that families are willing to become indebted in order to adopt).

²²⁶ See SMITH ET AL., *supra* note 4, at 11–12 (describing how African American children "are disproportionately represented in foster care, and are less likely than children of other racial and ethnic groups to move to permanency in a timely manner").

²²⁷ See Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1178–79 (2004) (recognizing high costs as a barrier to adoption).

²²⁸ MABRY & KELLY, *supra* note 7, at 768 (transcript of interview with Deborah Cason Daniel, adoption attorney).

²²⁹ *Id.*

²³⁰ 42 U.S.C. § 671(a)(19) (2006).

²³¹ *Id.*

²³² See SMITH ET AL., *supra* note 4, at 9–10.

between adults who are not involved in an intimate relationship should be allowed to adopt or provide long-term care for children. Two sisters, two friends, or an aunt and a nephew who are qualified to adopt, should be allowed to adopt a child.²³³ Alternatively, guardianship may be presented as another option.²³⁴

It is also important that agencies and other recruiters consider diversity from a broader perspective. Although the largest group of children of color in the child welfare system is African American children,²³⁵ thousands of Latino children²³⁶ and smaller groups of Native American, Asian, and Asian-Pacific children need permanent homes too.²³⁷ The number of Latino residents in the United States already has surpassed the number of African Americans.²³⁸ As a result, more Latino children may be in need of permanent care.²³⁹ Also, children who have identified themselves as gay or lesbian may need special attention when families are sought for them. Adoption advocates must continue aggressive and systematic recruitment efforts and provide adequate funding so that each child who needs a permanent home will be placed with the best family that can meet that child's needs.

²³³ See generally Cynthia R. Mabry, *Joint and Shared Parenting: Valuing All Families and All Children in the Adoption Process with an Expanded Notion of Family*, 17 J. GENDER SOC. POL'Y & L. 659 (2009) (advocating for widespread statutory amendments for who may adopt all children, including children of color); Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African American Adults—Who are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1997).

²³⁴ SMITH ET AL., *supra* note 4, at 45

²³⁵ Mabry, *supra* note 233, at 662 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION & FOSTER CARE & REPORTING SYSTEM REPORT 5 (2006), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ U.S. CENSUS BUREAU, CENSUS 2000 DEMOGRAPHIC PROFILE HIGHLIGHTS, available at <http://factfinder.census.gov> (follow "Fact Sheet for a Race, Ethnic, or Ancestry Group" hyperlink; then search "Black or African American alone"; then search "Hispanic or Latino (of any race)").

²³⁹ See *id.*

IX. CONCLUSION

MEPA-IEP should not be amended. MEPA-IEP is not preventing children from being adopted,²⁴⁰ and it does not cause children to languish in foster care for extended periods of time.²⁴¹ MEPA-IEP offers just one way of ensuring that African American and other children of color are placed in permanent homes. Without MEPA-IEP, states and agencies could revert back to their old policies of race-matching all children, regardless of their individual needs.²⁴²

Child experts and advocates who bicker about which philosophy of MEPA's future is the right one,²⁴³ and everyone who is truly interested in finding families for African American children, should work together to find homes for those children. "The ultimate goal of adoption placement is to find a permanent home for a child in need. That home must have three precious elements: love, care and security. [For many of the children of color who need a permanent home, the p]rospective parents of any race can supply them."²⁴⁴

²⁴⁰ See discussion *supra* Part II.

²⁴¹ See discussion *supra* Part II.

²⁴² See Nat'l Council for Adoption, *supra* note 64, at 2.

²⁴³ Compare SMITH ET AL., *supra* note 4, at 44 (advocating for amendment to IEP to allow consideration of race as a factor), with Bartholet, *supra* note 20, at 1 (arguing that the law should remain in its current form).

²⁴⁴ Editorial, *Transracial Adoptions*, WASH. POST, June 4, 2008, at A18.