

# Commentary: Cultural Stereotypes Can and Do Die: It's Time to Move on With Transracial Adoption

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This commentary argues that the Multiethnic Placement Act, designed to combat common cultural stereotypes, provides clear guidance to state child welfare agencies and the mental health professionals that serve them, eliminating any regular consideration of race in the foster and adoptive placement of children. Given recent enforcement action by the U.S. Department of Health and Human Services, those who ignore this guidance act at peril of subjecting state agencies to the significant financial penalties mandated for any violation of the law.

**J Am Acad Psychiatry Law 34:315–20, 2006**

Ezra Griffith and Rachel Bergeron<sup>1</sup> write in their article, “Cultural Stereotypes Die Hard: the Case of Transracial Adoption,” that the controversy that has long surrounded transracial adoption is ongoing and that the law is significantly ambiguous. Accordingly, they say that psychiatrists and other mental health professionals are faced with a challenge in deciding on the role that race should play in adoption evaluations for purposes of foster and adoptive placement decisions.

I agree that the controversy is ongoing, but think that the law is much clearer than Griffith and Bergeron indicate and that it provides adequate guidance as to the very limited role that race is allowed to play. However, because of the ongoing controversy, many players in the child welfare system are committed to law resistance and law evasion. The challenge for mental health professionals is to decide how to respond to conflicting pressures and whether to use their professional skills to assist in good faith implementation of the law or in efforts to undermine the law. The challenge is a real one, because those committed to undermining the law do so in the name of the ever popular best-interests-of-the-child principle, arguing that best practices require consideration of race in placement decisions. However, in my view

the choice should be clear, not simply because the law exists, but because the law takes the right position—right both for children and for the larger society.

Griffith and Bergeron acknowledge that, after a period in which race-matching was common and court-made law allowed at least some regular use of race in the placement process, the U.S. Congress passed laws governing these matters: the 1994 Multiethnic Placement Act and the 1996 amendments to that Act (here referred to collectively as MEPA and, when it is important to distinguish between the original 1994 Act and the amended Act, referred to as MEPA I and MEPA II, respectively).<sup>2</sup> However they say that these laws “may still leave the door open to continued race-matching. . .” (Ref. 1, p 303). They go on to say:

[E]ven though the statutory attempts were meant to eliminate race as a controlling factor in the adoption process, their implementation has left room for ambiguity regarding the role that race should play in adoption proceedings. Consequently, even though the statutes were intended to eliminate adoption delays and denials because of race-matching, they may have allowed the continued existence of a cultural stereotype—that black children belong with black families—and may have facilitated its continued existence [Ref. 1, p 304].

Griffith and Bergeron accurately describe how MEPA I allowed the use of race as one factor in placement, so long as it was not used categorically to determine placement or to delay or deny placement:

An agency. . .may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or

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adoptive parents to meet the needs of a child of this background as one of a number of factors used to determine the best interests of a child [Ref. 1, p 307].

And they describe how MEPA II removed that section of the law, and made related amendments designed to limit the use of race.<sup>1</sup> They note that the U.S. Department of Health and Human Services (DHHS), the MEPA enforcement agency, interprets the law to require strict scrutiny as the standard by which to judge use of race in placements and quote one of the guidance memoranda issued by DHHS as follows:

The primary message of the strict scrutiny standard in this context is that only the most compelling reasons may serve to justify consideration of race and ethnicity as part of a placement decision. Such reasons are likely to emerge only in unique and individual circumstances. Accordingly, occasions where race or ethnicity lawfully may be considered in a placement decision will be correspondingly rare [Ref. 1, p 309].

But they conclude that the DHHS guidance “seemed to frame the possibility for adoption agencies to continue the practice of race-matching,” and “allows for discussions with prospective adoptive or foster care parents about their feelings, preferences, and capacities regarding caring for a child of a particular race or ethnicity” (Ref. 1, p 309). They go on to cite the positions of the National Association of Black Social Workers, the Child Welfare League of America, the National Association of Social Workers, and some others, all arguing for a systematic preference for race-matching.

While Griffith and Bergeron raise some questions about the wisdom of assumptions made by race-matching proponents that all blacks will be culturally competent to raise black children in a way that no whites will be, they conclude with a message that seems to emphasize the difficulty of the challenge faced by mental health professionals in deciding just how much weight to give race in their placement evaluations. They state that MEPA has not been considered “spectacularly successful” (Ref. 1, p 312), and that DHHS guidance permits some consideration of race in specific cases, and then they give their mental health colleagues the following ambiguous charge:

The pointed objective, therefore, in future evaluations will be to show that a particular black child has such unique and special needs that he or she deserves particular consideration for placement in a black family. It will be interesting to see whether our forensic colleagues, in striving for objectivity, will consider the factor of race in their evaluations only when something unique about that particular adoption context cries out for race to be

considered so that the best-interest-of-the-child standard can be met. It seems clear that forensic professionals must be careful not to state that they routinely consider race in their adoption evaluations unless they intend to argue clinically that race is always relevant. And even then, they should be cautious about not articulating a general preference for inracial over transracial adoptions [Ref. 1, p 312].

In their final two paragraphs Griffith and Bergeron cite the Adoption and Race Work Group, assembled by the Stuart Foundation, as evidence of the ongoing debate within the mental health community, noting its conclusion that “race should not be ignored when making placement decisions and that children’s best interests are served—all else being equal—when they are placed with families of the same racial, ethnic, and cultural background as their own” (Ref. 1, p 313).

There are several problems with the message that this article by Griffith and Bergeron sends to their colleagues. First, the law is much clearer than they indicate. MEPA II did, as they point out, eliminate the provision in MEPA I that had allowed race as a permissible consideration. MEPA II also eliminated related language indicating that some use of race might be permissible—language in MEPA I forbidding agencies to “categorically deny” placement, or delay or deny placement “solely” on the basis of race—and substituted language that tracked the language of other civil rights statutes, simply prohibiting discrimination. As I discuss elsewhere:

The intent to remove race as a factor in placement decisions could hardly have been made more clear. The legislative history showed that the race-as-permissible-factor provision was removed precisely because it had been identified as deeply problematic. The simple antidiscrimination language substituted had been consistently interpreted in the context of other civil rights laws as forbidding *any* consideration of race as a factor in decision-making, with the increasingly limited exception accorded formal affirmative action plans [Ref. 3, p 131].

While it is true that DHHS issued a 1997 Guidance Memorandum allowing consideration of race in some circumstances, that Guidance makes clear that race cannot be used in the normal course but only in exceedingly rare situations. The only example the Guidance gives of such circumstances is as follows:

For example, it is conceivable that an older child or adolescent might express an unwillingness to be placed with a family of a particular race. In some states, older children and adolescents must consent to their adoption by a particular family. In such an individual situation, an agency is not required to dismiss the child’s express unwillingness to consent in evaluating placements. While the adoption worker might wish to counsel the

child, the child's ideas of what would make her or him most comfortable should not be dismissed, and the worker should consider the child's willingness to accept the family as an element that is critical to the success of the adoptive placement. At the same time, the worker should not dismiss as possible placements families of a particular race who are able to meet the needs of the child [quoted in Ref. 3, p 132].

Moreover, when the Guidance states that use of race in placement is governed by the strict scrutiny standard, it invokes a standard known in the legal world as condemning as unconstitutional under the Federal Constitution almost all race-conscious policies.

MEPA's prohibition of racial matching is controversial within the child welfare world, with some arguing for its repeal and others for "interpretations" that would allow for race-matching in blatant disregard for the clear meaning of the law. The positions taken by the Child Welfare League of America, the National Association of Social Workers, and the National Association of Black Social Workers, cited by Griffith and Bergeron, illustrate these organizations' disagreement with the law. The Report issued by the Stuart Foundation's Adoption and Race Work Group, relied on by Griffith and Bergeron in their concluding paragraphs, illustrates the commitment by many who disagree with the law to evade its restrictions. As I wrote when asked for my comments on this Group's preliminary draft report, which became the final report with no significant changes in tone or substance:

From start to finish [the Report] reads like a justification for the present race-matching system, and an argument for continuing to implement essential features of that system in a way designed to satisfy the letter but not the spirit of [MEPA]. . . .

The general thrust of the Report in terms of policy direction, together with its specific Recommendations, read to me like the advice prepared by clever lawyers whose goal it is to help the client avoid the clear spirit of the law. The general idea seems to be to tell those in a position to make and implement policy, that this is a bad law, based on a misunderstanding of the needs of black children, but that since it is less than crystal clear, it will be possible to retool and reshape current policies and practices so that they look quite different but accomplish much the same thing [quoted in Ref. 3, pp 135–6].

The fact that there is ongoing controversy about and resistance to this law matters. Law is not self-enforcing. It relies on people, nonprofit organizations, and government entities to demand enforcement.

However, just as controversy affects law, so law also affects controversy. The fact that federal law now

states that race-matching is equivalent to race discrimination matters in a nation that has committed itself in significant ways to the proposition that race discrimination is wrong. Moreover this particular law mandates powerful penalties, specifying an automatic reduction of a set percentage of the federal funds provided to each state for foster and adoption purposes, for any finding of violation.<sup>4</sup> This changes the risk assessment enterprise for typically risk-averse bureaucrats. Acting illegally can get you into trouble, especially if millions of dollars of financial penalties are at stake. While in the years after MEPA's passage I was one of the most vocal critics of the absence of MEPA enforcement activity, as the years went by I began to get the sense in my travels around the country speaking on these issues that social work practice was adjusting, albeit slowly, to MEPA's demands (Ref. 5, p 223).

The dramatic new development is on the enforcement front. The U.S. Department of Health and Human Services (DHHS), designated as the enforcement agency for MEPA, has finally moved beyond the tough-sounding words that it issued providing interpretive guidance, to take action—action in the form of decisions finding states in violation of the law and imposing the financial penalties mandated by MEPA for such violations. Griffith and Bergeron make no mention of this development, but it seems likely to have a major impact on child welfare agencies nationwide and accordingly seems likely to change the context in which mental health professionals will work in making placement evaluations and the pressures on them with respect to the race factor. The first such enforcement decision involved Hamilton County, Ohio. In 2003, after a four-and-one-half-year investigation, DHHS's Office for Civil Rights (OCR) issued a Letter of Findings, concluding that Hamilton County and Ohio had violated MEPA as well as Title VI of the 1964 Civil Rights Act (42 U.S.C. Sec. 2000(d)), and DHHS's Administration for Children and Families (ACF) issued a Penalty Letter imposing a \$1.8 million penalty.<sup>6</sup> In its extensive Letter of Findings, DHHS confirmed that under MEPA as well as Title VI, strict scrutiny is the standard, and child welfare workers have extremely little discretion to consider race in the placement process. DHHS found that MEPA prohibits any regular consideration of race in the normal course, any regular consideration of race in the context of a transracial placement, and any differential

consideration of transracial as compared with same-race placements. Moreover, the Letter stated that MEPA prohibits the variety of policies and practices used to assess transracial placements with a view toward the prospective parents' apparent ability to appropriately nurture the racial heritage of other-race children. More specifically, DHHS found illegal administrative rules requiring that: (1) home-studies of prospective adoptive parents seeking "transracial/transcultural" placements include a determination of whether a prospective parent is able to "value, respect, appreciate and educate a child regarding a child's racial, ethnic and cultural heritage, background and language and . . . to integrate the child's culture into normal daily living patterns;" (2) assessments be made of the racial composition of the neighborhood in which prospective families live; and (3) prospective parents prepare a plan for meeting a child's "transracial/transcultural needs." DHHS stated that, in enacting MEPA II, Congress "removed the bases for arguments that MEPA permitted the routine consideration of race, color, or national origin in foster or adoptive placement, and that MEPA prohibited only delays or denials that were categorical in nature." In the consideration of particular Hamilton County cases, DHHS regularly faulted child welfare workers for demanding that home-studies reflect a child's cultural needs, asking for additional information on racial issues, and inquiring into and relying on prospective parents' statements about their racial attitudes (e.g., intention to raise the child in a "color-blind" manner), the degree of contact they had with the African-American community, the level of racial integration in their neighborhood or school system, their plans to address a child's cultural heritage, their level of realism about dealing with a transracial placement, the adequacy of their training in areas like hair care, their unrealistic expectations about racial tolerance, their apparent ability to parent a child of another race, their willingness to relocate to a more integrated community, their apparent ability to provide a child with an understanding of his heritage, and their readiness for transracial placement.

In rejecting one of Ohio's defenses, based on allegedly inadequate advice on the operation of MEPA, DHHS found that the guidance issued in the form of various memoranda from 1995 through 1998 was fully adequate in clarifying the prohibition

against any special requirements related to transracial placements.

The subsequent DHHS decision imposing the \$1.8 million penalty took issue additionally with Ohio's apparent attempt to circumvent the law by a new administrative rule providing that an agency determination that race should be considered would trigger a referral for an opinion from an outside licensed professional (psychiatrist, clinical psychologist, social worker, or professional clinical counselor). The professional was to be required to provide an "individual assessment of this child that describes the child's special or distinctive needs based on his/her race, color, or national origin and whether it is in the child's best interest to take these needs into account in placing this child for foster care or adoption." DHHS faulted the process for signaling to the professional that the agency thinks race should be a factor, for the professional's lack of training regarding the legal limitations on considering race and for asking the professional whether race should be considered, while failing to require any finding by the professional: "that there is a compelling need to consider race; that such consideration is strictly required to serve the best interests of the child; and that no race-neutral alternatives exist." DHHS also noted that Ohio had indicated its desire for state approval to obtain opinions from professionals known to be opposed to transracial adoptions. DHHS concluded that the rule was "readily susceptible to being used to foster illegal discrimination."

In 2005, DHHS made a second enforcement decision, involving South Carolina, with OCR issuing a Letter of Findings concluding that the state's Department of Social Services had violated both MEPA and Title VI, and ACF issuing a Penalty Letter imposing a penalty of \$107,481.<sup>7</sup> In its Letter of Findings in this case, DHHS again emphasized that strict scrutiny is the standard and that the law forbids any regular consideration of race, allowing its consideration only on rare occasions and even then only to the degree it can be demonstrated to be absolutely necessary. DHHS found illegal South Carolina's practice of treating prospective parent racial preferences with greater deference than other preferences: "By treating race differently from all other parental preferences. . . [the agency] establishes its own system based on racial preference. . . ." DHHS also found illegal the agency's practice of deferring to birth parents' racial preferences, stating that the law requires



agencies to make placement decisions “independent of the biological parent’s race, color or national origin preference.” Furthermore, DHHS found illegal the agency’s practice of treating transracial adoptions with greater scrutiny, faulting, for example, the inquiries into prospective parents’ ability to adopt transracially, and ability to nurture a child of a different race, as well as inquiries into the racial makeup of such parents’ friends, neighborhoods, and available schools. And finally, DHHS found to be illegal various other ways in which the agency took race into consideration, including use of race as a “tie-breaking” factor, matching for skin tone, and use of young children’s racial preferences—“the routine deference to and wide range of reasons given for. . . following the same-race preferences of young children undermines any claim that these placement decisions are truly individualized.” In addition, DHHS made findings of violations in several individual cases, including that of a black couple interested in adopting a Hispanic child, in which the agency was faulted for inquiry into the couple’s ability to meet the child’s cultural needs. DHHS specified that any acceptable corrective action plan by the state would have to include, *inter alia*, support and encouragement for parents interested in adopting transracially, the creation of progressive disciplinary action, including termination, for staff continuing to use race improperly, the development of whistle-blower protection for staff who reported the use of race by others, and monitoring and reporting requirements designed to ensure future compliance with the law. The ACF Penalty Letter noted that, having reviewed and concurred in the OCR’s Letter of Findings, it was imposing the penalty mandated by MEPA.

While these are the only cases in which Letters of Findings and Penalty Letters have been issued, DHHS’s OCR has engaged in compliance efforts in several other cases, resulting in agreements by various state agencies to modify their practices in accord with OCR’s demands.<sup>8</sup> In addition DHHS’s ACF has through various policy statements reenforced its commitment to rigorous enforcement of MEPA.<sup>9</sup>

DHHS’s recent enforcement action constitutes a shot across the bow for all state agencies involved in foster and adoptive placement throughout the nation. The opinions in the two cases in which financial penalties were imposed are as clear as they can be that, at the highest ranks, DHHS believes that MEPA and the various MEPA-related guidance

memoranda that DHHS has issued mean that race cannot lawfully be taken into account in any routine way in placement decisions, that it is only in the exceptional cases that race can be considered, and even then that authorities will have to be very careful to demonstrate that compelling necessity demands such consideration, consistent with the strict scrutiny standard.

While DHHS guidance had in my view made all this clear previously, the fact that OCR has now taken enforcement action finding MEPA violations, with ACF imposing financial penalties, raises the stakes in a way that agency directors and agency workers will not be able to ignore. Penalties for MEPA violations are mandated under the law, and they are very severe, reducing by set percentages the federal funds on which states are absolutely dependent to run their child welfare systems.<sup>4</sup> A 1997 DHHS Guidance Memorandum noted that in some states MEPA’s penalties could range up to more than \$3.6 million in a given quarter and could increase to the \$7 to \$10 million range for continued noncompliance (Ref. 3, p 132). State agencies act at their peril in ignoring this law. So, too, do agency workers, since their supervisors are not likely to be pleased with action that puts the state’s child welfare budget at risk.

Some will no doubt continue to resist and evade the law, but I predict that such conduct will diminish over time as the law becomes more established in people’s minds as simply part of the nation’s basic civil rights commitment. While some have called for MEPA’s repeal there has been no significant move in this direction.

My hope is that mental health professionals will join ranks with those interested in following the law in good faith, rather than with those interested in evading its mandate. I say this not simply because MEPA is the law, but because I believe it is a good law, one that serves the interests both of children and of the larger society. Griffith and Bergeron note that black children “can” do well in white families,<sup>1</sup> but I believe the social science evidence provides much stronger support for MEPA than that. By now, there is a significant body of studies on transracial adoptees, many of which are good, controlled studies, comparing them to same-race adoptees. My review of these studies and that of others besides me, reveals no evidence that any harm comes to children by virtue of their placement across color lines. By contrast, there is much evidence that harm comes to children in foster or institutional care when they are delayed

in adoptive placement or denied adoption altogether, and there is much evidence that race-matching policies result in such delay and denial.<sup>10</sup> In addition, there is evidence that even when child welfare systems purport to use race as only one factor in decision-making, rather than as a categorical factor justifying delay and/or denial of adoptive placement, race ends up being used in ways that result in just such delay and denial.<sup>3,10,11</sup> This latter was, of course, the main reason Congress amended MEPA I to eliminate race as a permissible consideration—Senator Metzenbaum, the law’s sponsor, became convinced that MEPA I was not succeeding in eliminating the categorical use of race because its permission to use race as one factor was being abused, something that many of us who supported MEPA II had thought was inevitable, based on experience.<sup>3</sup>

So, it seems to me clear that MEPA serves the interests of children, by helping black children in particular to find placements in loving homes of whatever color as promptly as possible. MEPA also seems to me to serve the interests of the larger society, by combating in a small but significant way the notion that race should divide people. Race-matching is the direct descendant of white supremacy and of black separatism.<sup>3,10–12</sup> For the state to promote the formation of same-race families and discourage the formation of interracial families, as it does when it endorses race-matching, is wrong in my view for the same reasons that barriers to interracial marriage were wrong. The U.S. Supreme Court struck down those marriage barriers in 1967 in *Loving v. Virginia*.<sup>13</sup> Congress took an important step in passing MEPA II to bring our nation’s child welfare policies in line with the rest of our civil rights regimen. This law makes the statement that while race, of course, does matter in myriad ways in our society, it does not and should not define people’s capacity to love each other.

**References**

1. Griffith EEH, Bergeron RL: Cultural stereotypes die hard: the case of transracial adoption. *J Am Acad Psychiatry Law* 34:303–14, 2006

2. The Howard M. Metzenbaum Multiethnic Placement Act of 1994, 42 U.S.C. § 622(b)(9), 5115a, Pub. L. No. 103-382, §§ 551-554, 108 Stat. 4056, as amended by the Removal of Barriers to Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, 42 U.S.C. §§ 671, 674, 1996B, Pub. L. No. 104-188, § 1808, 110 Stat. 1903

3. Bartholet E: *Nobody’s Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*. Boston: Beacon Press, 1999

4. See 42 U.S.C. § 674(d)(1) (“If . . . a State’s program . . . is found . . . to have violated [the law] with respect to a person or to have failed to implement a corrective action plan. . . the Secretary shall reduce the amount otherwise payable to the State. . . by (A) 2 percent. . . in the case of the 1st such finding for the fiscal year. . . ; (B) 3 percent. . . in the case of the 2nd such finding for the fiscal year. . . ; or (C) 5 percent. . . in the case of the 3rd or subsequent such finding. . .”) [emphasis added]. See also 45 C.F.R. §§ 1355.38(b), (c)

5. Bartholet E: The challenge of children’s rights advocacy: problems and progress in the area of child abuse and neglect. *Whittier J Child Family Advocacy* 3:215–30, 2004

6. See HHS (OCR) Letter of Findings, Docket No. 05997026 (October 20, 2003), HHS (ACF) Penalty Letter to the Ohio Department of Job and Family Services, imposing a \$1.8 million fine (October 23, 2003) (both available at <http://www.law.harvard.edu/faculty/bartholet/mepa.php>). The Letter of Findings was appealed in part, and affirmed, in HHS Departmental Appeals Board No. 2023 (March 31, 2006). While technically the Letter of Findings and the Penalty Letter are issued by two different entities within HHS, OCR and ACF, hereafter in the text, I refer to HHS as responsible for both decisions.

7. See HHS (OCR) Letter of Findings (October 31, 2005), HHS (ACF) Penalty Letter to South Carolina Department of Social Services (February 24, 2006) (both available at <http://www.law.harvard.edu/faculty/bartholet/mepa.php>)

8. See OCR—MEPA—Summary of Selected OCR Compliance Activities. Available at <http://www.hhs.gov/oct/mepa/complianceact.html>. Accessed July 6, 2006

9. See HHS’s ACF Child Welfare Policy Manual at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy.jsp?idFlag=4](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy.jsp?idFlag=4) at 4.3 (“MEPA/IEAP Guidance for Compliance”), Information Memorandum issued on March 25, 2003 by Wade F. Horn, Asst. Secretary for Children and Families, [http://www.acf.dhhs.gov/programs/cb/laws\\_policies/policy/im/im0301.htm](http://www.acf.dhhs.gov/programs/cb/laws_policies/policy/im/im0301.htm). Both accessed July 17, 2006

10. See Bartholet E: Where do black children belong? The politics of race matching in adoption. *Univ Penn Law Rev* 139:1163–256, 1991

11. Bartholet E: *Family Bonds*. Boston: Beacon Press, 1999, pp 99–106

12. Bartholet E: Race separatism in the family. *Duke J Gender Law Policy* 2:99–105, 1995

13. *Loving v. Virginia*, 388 U.S. 1 (1967)