CHAPTER 11
RELEVANT FEDERAL LAWS AND NORTH CAROLINA STATUTES CODIFYING FEDERAL LAWS

There are a number of federal laws that are relevant to the representation of abused, neglected and dependent children. Some of them have been codified into North Carolina Law and some have not. This section of the manual attempts to provide some of the most relevant information on these laws. **The reader is encouraged, however, to consult the applicable statutes themselves for more detail when the statute is not set out verbatim in this manual, being aware that the following materials are not comprehensive.**

Table of Contents

I. LAWS INVOLVING THE PLACEMENT OF CHILDREN WHEN MORE THAN ONE STATE IS INVOLVED

II. ACCESS TO SUBSTANCE ABUSE RECORDS [42 C.F.R. PART 2]

III. ACCESS TO EDUCATION RECORDS: THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) [20 U.S.C. § 1232g]

EXCERPTS FROM "SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS"

IV. THE MULTIETHNIC PLACEMENT ACT AND INTERETHNIC ADOPTION PROVISIONS

V. THE INDIAN CHILD WELFARE ACT (ICWA) [25 U.S.C. § 1901 - 1963]

VI. THE FOSTER CARE INDEPENDENCE ACT OF 1999 AND THE NORTH CAROLINA LINKS PROGRAM

VII. THE ADOPTION AND SAFE FAMILIES ACT OF 1997 [P.L. 105-89]

I. LAWS INVOLVING PLACEMENT OF CHILDREN WHEN MORE THAN ONE STATE IS INVOLVED

§ 11.1 Introduction

Anytime a child custody/placement matter involves or could involve more than one state, it is important to examine the applicability of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Parental Kidnapping Prevention Act (PKPA), and the Interstate Compact on the Placement of Children (ICPC). The PKPA is the only one of the three that has not been codified into North Carolina Law but is applicable in many situations.

The following outlines give descriptions of each of these three sets of laws. The reader is encouraged to read about *all three* sets of laws in order to have a better understanding of the differences in the laws and how to apply them to custody/placement matters involving more than one state. There are situations in which *all three* sets of laws apply to a child custody proceeding.

§ 11.2 Relationship Among UCCJEA, PKPA, ICPC

A. Jurisdiction Under the UCCJEA and PKPA as Precedent to ICPC Issues

Jurisdictional issues generally (application of the UCCJEA and PKPA) will always precede the question of whether the ICPC applies to a case. When another state is or may become involved in a case, the first issue is whether or not the court and/or child welfare agency have ongoing jurisdiction over a child's custody under the UCCJEA and PKPA. Such jurisdiction is a condition precedent to having the authority to "send, bring, or cause a child to be brought or sent" to another party state under the ICPC.[1] "Although the immediate presence of a child within the court's jurisdiction may be satisfactory for a court to act on an *emergency* basis, if the question pertains to the child's custody, the court must establish that no other court has jurisdiction over the matter of the child's custody before determining that it will maintain ongoing involvement in the matter."[2]

The UCCJA was originally drafted in response to the growing public concern that thousands of children were being shifted from state to state and from one family to another every year while their divorcing parents or other persons battled over their custody in various state courts.[3] "The UCCJEA amends the UCCJA to bring it into conformity with two federal statutes, the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA), and to clarify various sections that have been interpreted inconsistently across the country. The new Act also provides new uniform methods for expedited interstate enforcement of custody and visitation orders. In harmonizing the UCCJA and PKPA, much of what the UCCJEA does in regard to initial, modification, and emergency jurisdiction is to codify what has emerged as good practice under these statutes."[4]

---

[1] The Interstate Compact on the Placement of Children: a Manual and Instructional guide for Juvenile and Family Court Judges, a Collaboration of the National Council of Juvenile and Family Court Judges and the American Public Human Services Association, final draft, June 2001, page 47.
[2] *Id*.
[3] Melissa Crawford, "In the Best Interests of the Child? The Misapplication of the UCCJA and the PKPA to Interstate Adoption Custody Issues," 19 Vt. L. Rev. 99 (1994).
[4] Patricia M. Hoff, "The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act," Family Law Quarterly, Vol. 32, No. 2, Summer 1998.

The UCCJEA and the PKPA involve cases in which there are custody disputes and in which the courts of more than one state are involved or may have jurisdictional claims. The UCCJEA and the PKPA provide the means of determining which court will hear the case on the merits.[5] Most of the placements to which the ICPC applies do not involve lawsuits but involve a sending agency's proposal to place a child with a relative, prospective adoptive parent, residential treatment center, etc., sending a notice of intention to place the child to the receiving state compact administrator. That administrator makes determinations called for by the ICPC, and if there are problems or disagreements, they are worked out administratively by the sending agency, the receiving state, the placement recipient, and perhaps the compact administrator.[6] The UCCJEA has no bearing unless someone files a suit claiming custody of a child and a party or the court asserts that the courts of another state may have a basis for exercising jurisdiction over the case.[7]

B. Differences Between UCCJEA and PKPA

With the UCCJEA, there are four jurisdictional bases that inclue: home state, significant connection, emergency, and no other state having jurisdiction. The jurisdictional analysis is made at the date of filing of a proceeding.[8] Among other things, the PKPA generally requires states to enforce, without modifying, the custody and visitation orders of other states.[9] Some of the significant differences between the PKPA and the UCCJEA are as follows:

1. The UCCJEA is much more extensive, addressing a number of issues not addressed in the PKPA.

2. "[T]o the extent a state custody statute conflicts with the PKPA, the federal statute controls." *In re Bean*, 132 N.C. App. 363 (1999). Because the UCCJA was replaced by the UCCJEA, however, a number of conflicts between the two have been resolved.

3. While the UCCJEA does not apply to adoption cases, the PKPA has been interpreted to apply to cover adoption proceedings.[10]

4. The PKPA does not specifically address applicability to Indian tribes, and the UCCJEA does.

5. "The class of people who must remain in the state for extended home state jurisdiction purposes under the UCCJEA is a subset of the class allowed by the PKPA, which recognizes extended home state jurisdiction so long as a contestant continues to live in the state. The term 'contestant' is defined in the PKPA to mean a person, including a parent, who claims a right to custody or visitation of a child."[11] The UCCJEA substituted "person acting as a parent" where "contestant" appeared in the UCCJA, narrowing the class of persons whose presence may form a basis for jurisdiction.[12]

---

[5] The Interstate Compact on the Placement of Children: a Manual and Instructional guide for Juvenile and Family Court Judges, a Collaboration of the National Council of Juvenile and Family Court Judges and the American Public Human Services Association, final draft, June 2001, Appendix J: Comparison of ICPC, UCCJA, UCCJEA and PKPA, by Mitchell Wendell, LL.B.Ph.D., March 26, 2001, page 247.
[6] *Id.*at 249.
[7] *Id*.
[8] The Interstate Compact on the Placement of Children: a Manual and Instructional guide for Juvenile and Family Court Judges, a Collaboration of the National Council of Juvenile and Family Court Judges and the American Public Human Services Association, final draft, June 2001, page 48.
[9] *Id.*
[10] Patricia Hoff, "The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act," Family Law Quarterly, Vol. 32, No. 2, Summer 1998.
[11] *Id.*
[12] *Id*.

§ 11.3 The Uniform Child-Custody Jurisdiction and Enforcement Act [UCCJEA: N.C.G.S. 50A-101 to 50A-317]

A. Recent Changes in the Law

In 1999, the North Carolina General Assembly enacted the Uniform Child-Custody Jurisdiction and Enforcement Act to replace the Uniform Child-Custody Jurisdiction Act. The former UCCJA was a model act promulgated by the National Conference of Commissioners on Uniform State Laws in 1968 (19 Vt. L. Rev. 99, 101) and was contained in G.S. 50A-1 to 50A-25 of the North Carolina General Statutes. The UCCJEA is contained in G.S. 50A-101 to 50A-317.

B. Purpose of the Act

The purposes of the Act are to:

1. Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which has in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
2. Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
3. Discourage the use of the interstate system for continuing controversies over child custody;
4. Deter abductions of children;
5. Avoid relitigation of custody decisions of other States in this State;
6. Facilitate the enforcement of custody decrees of other States.

-- Official Comments, N.C.G.S. 50A-101 (1999)

The former UCCJA was intended to prevent parents from forum shopping their child custody disputes and to assure that these disputes were litigated in the state with which the child and the child's family had the closest connection. *See In re Van Kooten*, 126 N.C. App. 764 (1997), *appeal dismissed*, 347 N.C. 576 (1998); *Holland v. Holland*, 56 N.C. App. 96 (1982).

C. Applicability of the Act

1. The UCCJEA does not govern an **adoption proceeding** or a proceeding pertaining to the authorization of **emergency medical care** for a child. **[G.S. 50A-103]**

2. G.S. 50A-104 addresses the application of the act to Indian tribes stating, among other things, that custody proceedings pertaining to an Indian child are not subject to the UCCJEA to the extent that they are governed by the **Indian Child Welfare Act**.

3. G.S. 50A-105 addresses **foreign countries**, stating that they shall be dealt with as though they were a state of the U.S. for the purposes of the act except for enforcement provisions – making an exception for laws that violate human rights.

4. **Initial and modification actions are covered by the UCCJEA,** but different rules govern initial jurisdiction and jurisdiction to modify an existing order.

D. Communication and Cooperation Between Courts; Preservation of Records; Testimony in Another State

1. G.S. 50A-110 addresses permissible communication between courts of different states. Unless the subject matter is scheduling, court records, or similar matters, a record must be made of the communication, and the parties must be given the opportunity to participate or to present facts and arguments.

2. Testimony of witnesses located in another state may be permissible under certain circumstances. G.S. 50A-111.

3. G.S. 50A-112 addresses the types of requests that one court can make of another, as well as the necessity of preserving records until the child is 18.

E. Requirements for Initial Child Custody Jurisdiction [G.S. 50A-201]

The following requirements are the exclusive jurisdictional basis for making a child custody determination by a court of this State. **[G.S. 50A-201(b)]** Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination. **[G.S. 50A-201(c)]** Note that the UCCJEA brings the UCCJA in conformity with the PKPA by prioritizing home state jurisdiction. Other than for purposes of emergency temporary jurisdiction, a court of this state has jurisdiction to make an initial child-custody determination only if one of the following four criteria are met:

1. This state is the home state of the child on the date of commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

> "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period. **[G.S. 50A-102(7)]**

2. A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum due to convenience (under G.S. 50A-207) or unjustifiable conduct (G.S. 50A-208), and:

> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships;

3. All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 (convenience) or G.S. 50A-208 (unjustifiable conduct); or

4. No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

F. Exclusive, Continuing Jurisdiction* [G.S. 50A-202]

[G.S. 50A-202(a) paraphrased]: Except as provided for temporary emergency jurisdiction (G.S. 50A-04), a court of this state that has made a child-custody determination consistent with G.S. 50A-201 or 50A-203 has exclusive, continuing jurisdiction over the determination until

> "(1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of this State or a court of another state determines that the child, the child's parent, and any person acting as a parent do not presently reside in this State.

(b) A court of this State which has made a child-custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under G.S. 50A-201."

*Note: This section was not contained in the UCCJA

G. Jurisdiction to Modify Determination [G.S. 50A-203]

"Except as otherwise provided in G.S. 50A-204 (temporary emergency jurisdiction), a court of this State may not modify a child-custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) [home state] or G.S. 50A-201(a)(2) and:

> (1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under G.S. 50A-202 or that a court of this State would be a more convenient forum under G.S. 50A-207; or
>
> (2) A court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state."

H. Temporary Emergency Jurisdiction [G.S. 50A-204]

This provision allows a court to exercise temporary emergency jurisdiction if a child has been abandoned or it is necessary to protect the child (or sibling or parent) from mistreatment or abuse. The provision sets out the details and requirements for assuming temporary emergency jurisdiction. [see statute]

I. Notice and Opportunity to Be Heard [G.S. 50A-205]

Prior to making a child-custody determination, notice and an opportunity to be heard must be given to anyone who would typically be entitled to notice in child-custody proceedings in this state, and to any parent whose rights have not been terminated and anyone having physical custody of the child.

J. Simultaneous Proceedings [G.S. 50A-206]

A court of this state must make sure that a court in another state has not commenced proceedings involving child custody issues before hearing a child custody proceeding. [See statute for much greater detail.]

K. Declining Jurisdiction

A court that would have jurisdiction can decline to exercise it if it can define itself as an inconvenient forum under G.S. 50A-207 or if a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct under G.S. 50A-208. See these provisions for details.

L. Case Law and the UCCJA (now UCCJEA)

1. Most cases decided under the UCCJA are likely to be good law under the UCCJEA. The major difference between them is the inclusion of enforcement provisions in the UCCJEA. While there were other changes as well, most of the cases relating to the UCCJA were decided according to provisions of the UCCJA that are the same or substantially the same as the UCCJEA and thus are applicable to cases falling under the new UCCJEA. However, it is still always important to verify applicability by carefully examining the language of the case and both old and new statutes.

2. The UCCJA and UCCJEA do apply to abuse, neglect, and dependency proceedings and must not be overlooked by the trial court. In G.S. 50A-102 of the UCCJEA, the phrase "child-custody proceeding" is defined to include a proceeding for neglect, abuse, dependency, termination of parental rights, and other proceedings. *In re Bean* and *In re Van Kooten* (discussed below) further clarify the applicability of the UCCJA (and therefore UCCJEA) to these cases. **Note, however, that several of these cases preceded the replacement of the UCCJA with the UCCJEA and that some of the conflicts between the UCCJA and the PKPA that are discussed in these cases have been resolved by the UCCJEA.**

a. *In re Bean*, 132 N.C. App. 363 (l999)

In l989, a Florida court adjudicated a child dependent and placed the child in the custody of the Florida Department of Social Services, which placed the child in the custody of nonrelatives, the petitioners in this case. The child's mother's rights were terminated in l992. In l994 the petitioners moved with the child to North Carolina with the consent of the court and DSS. In l996, the Florida court continued placement of the child in the long-term custody of petitioners and retained jurisdiction. In l997, the petitioners filed an action in North Carolina to terminate the parental rights of the child's father, who continued to reside in Florida. The trial court granted the father's motion to dismiss for lack of jurisdiction because the Florida court retained jurisdiction over the child.

The court of appeals rejected the petitioner's contention that G.S. 7A-289.23 [now 7B-1101] grants NC exclusive jurisdiction to terminate the parental rights of the parent to any child residing in the state without regard to the Uniform Child Custody Jurisdiction Act (UCCJA). The court held that the specific language of the North Carolina statute requires that the provisions of the UCCJA be satisfied in order to apply the other jurisdictional provision of the termination statute. In addition, this state's jurisdiction is governed by the Parental Kidnapping Prevention Act (PKPA).

The UCCJA establishes four routes by which a trial court may assert jurisdiction and requires the court to decline to exercise jurisdiction only when it is notified that a custody proceeding is ongoing in another jurisdiction. The PKPA, however, imposes a stricter requirement, and where the PKPA and the UCCJA conflict, the PKPA prevails since it is a federal law. Under the PKPA, the jurisdiction of a court that has made a child custody determination consistent with the PKPA continues as long as that court had proper jurisdiction under its state's laws and that state remains the residence of the child or any party. Because Florida was still the father's residence, Florida retained jurisdiction and the dismissal of the petition was affirmed.

b. *In re Van Kooten*, 126 N.C. App. 764 (1997)

A father appealed from an order adjudicating his children abused, neglected, and dependent and awarding custody of his children to DSS and argued lack of jurisdiction. In this case, the parents lived in Colorado up until their divorce when the father, who had custody of the children, movedwith the children to Iowa. The mother remarried and was living in North Carolina, having little contact with her children after the divorce.

While visiting their mother in North Carolina, allegations of abuse and neglect on the part of the father arose. The trial court in North Carolina issued a nonsecure custody order placing the children in DSS custody. Later, the trial court adjudicated the children abused, neglected, and dependent, noting that "Colorado is not the appropriate forum for additional proceedings . . . and the Iowa Courts have previously refused to exercise jurisdiction." *Id*. at 767.

In resolving this issue, the Court of Appeals examined the UCCJA, the PKPA, and the Juvenile Code. The court first confirmed the applicability of both the UCCJA and the PKPA to this proceeding. Concluding that Colorado was not the appropriate jurisdiction, because neither parents nor children had lived there in years, it then went on to address whether the trial court was precluded from adjudicating the children as abused, neglected, and dependent because Iowa was the "home state" of the children under the UCCJA. The Court of Appeals concluded that while Iowa was the home state, the North Carolina court had emergency jurisdiction pursuant to the UCCJA, which therefore gave it the authority to enter a temporary nonsecure custody order but not the authority to go further with the case without contacting Iowa. After nonsecure was granted, the trial court "was required to defer any further proceedings in the matter pending a response from Iowa as to whether that state was willing to assume jurisdiction to resolve issue of abuse, neglect, or dependency." Since the trial court did not do this, the adjudication order was vacated and the case was remanded to allow contact with Iowa. The order of nonsecure custody was affirmed. The court stated that upon remand, the North Carolina court could not assume jurisdiction unless Iowa declined to exercise it.

c. *In re Malone*, 129 N.C. App. 338 (1998)

In this case, as in *Van Kooten*, the Court of Appeals stated that the trial court should have determined the jurisdiction of another state court prior to assuming jurisdiction over a case. Here the court had properly assumed emergency jurisdiction for temporary custody, but the court of appeals stated that the trial court should have contacted the court that had original jurisdiction over the child as to whether it was willing to assume jurisdiction to resolve the issue of abuse.

d. *Potter v. Potter*, 131 N.C. App. 1 (1998)

In *Potte*r, the parents lived in Tennessee with their two children until their separation. At that timethe plaintiff, Mr. Potter, moved to North Carolina and filed for divorce and custody of the children.

Defendant mother appealed the trial court's order denying her motion to dismiss for lack of subject-matter jurisdiction. The mother asserted that the court did not have jurisdiction because the children had lived in Tennessee all their lives and were registered in the Tennessee school system. She conceded that the children spent weekends in North Carolina with their father. The trial court ruled that the children and the plaintiff had a significant connection to the state of North Carolina. The mother challenged the trial court's decision based on the requirements of the Uniform Child Custody Jurisdiction Act (UCCJA).

The North Carolina Court of Appeals held that a trial court may assume significant connection jurisdiction under UCCJA in initial child-custody matters only where the court has properly determined that the child has no home state as defined by Parental Kidnapping Prevention Act (PKPA) at the time the pending custody action begins. The PKPA allows significant connection jurisdiction only in the absence of a home state. In this case, Tennessee qualifies under PKPA as the children's home state. North Carolina did not have jurisdiction, and the trial court's refusal to dismiss the action was reversed.

e. *In re Poole*, 151 N.C. App. 472 (2002), *rev'd*, 357 N.C. 151 (2003).

In *Poole*, the Court of Appeals reversed an order of adjudication in which the father's address was listed as "unknown" and failed to issue a summons to him. On appeal the father argued lack of service of summons resulting in no personal jurisdiction. The Supreme Court reversed the decision of the Court of Appeals, and reinstated the adjudication order holding that the requirements set forth in the UCCJEA do not divest a court of jurisdiction where no other court has claim to jurisdiction over the action. Under the UCCJEA, the trial court need not have personal jurisdiction over a party in order to make a child custody determination.

M. Pleading Requirements and Confidentiality [G.S. 50A-209]

In child-custody proceedings, information must be submitted by each party in the first pleading or in an attached affidavit as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must also state information regarding any possibility that a court in another state has been involved in a child custody or visitation proceeding involving this child. [The statute is very specific regarding this type of information and should be consulted for detail.]

However, the Supreme Court has held that the absence of certain information (such as the child's current and past addresses) on a petition alleging that the child was neglected and dependent as required by G.S. 7B-402 and G.S. 50A-209 did not prevent the court from exercising subject matter jurisdiction. The trial court could easily determine whether it had subject matter jurisdiction from the facts in the petition, and holding to the contrary would "elevate form over substance" and impose limitations never intended by the General Assembly. *In re A.R.G.*, --- N.C. ---, 2007 N.C. LEXIS 597 (June 28, 2007).

Failure to provide such information would simply delay the proceedings (by way of a motion to stay by a party or the court itself) until such information is provided.

If the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed except by court order after a hearing on the matter.

N. Enforcement Provisions of the UCCJEA[13]

1. Generally, the UCCJEA requires recognition and enforcement of child-custody determinations made in substantial conformity with the Act or made under factual circumstances meeting the jurisdictional standards of the Act. It adds many enforcement procedures for custody and visitation orders that were not present in the UCCJA.

2. Registration of custody determinations is provided for by the new UCCJEA in G.S. 50A-305 and 306. "The purpose of registration is to secure an order confirming another state's custody order, which substantially limits possible defenses available in an enforcement proceeding. A request for registration may be accompanied by a request for enforcement. . . . A request for registration is sent to the court with copies of the custody order and other required information. The court then files the order as a foreign judgment and serves notice on any parent or person acting as a parent who has been awarded custody or visitation. Those persons have twenty days from service to request a hearing to contest the registration. If no such request is made, the order is confirmed as a matter of law."[14] A hearing may be requested to challenge the validity of the registration on certain grounds. A custody order may be registered to put the courts of another state on notice of the existing order and of the court's continuing jurisdiction and to obtain assurance of continued enforceability.

3. Expedited enforcement of child-custody determination is provided for by G.S. 50A-308. These provisions provide for an enforcement hearing, typically on the first court day after servicethat will result in an order authorizing the petitioner to take immediate physical custody of the child unless the respondent establishes one of the few defenses specified in the statute.

4. A warrant to take physical custody of child is permitted under G.S. 50A-311 if the child is likely to immediately suffer serious physical harm or be removed from this state. This provision sets out specific requirements for an application for such a warrant and for a hearing on the application.

5. Prosecutors or other public officials are entitled, under G.S. 50A-315, to take any lawful action to locate a child, obtain return of a child, or enforce a child-custody determination if there is:

- An existing child-custody determination;
- A request to do so from a court in a pending child-custody proceeding;
- A reasonable belief that a criminal statute has been violated; or
- A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

§ 11.4 The Parental Kidnapping Prevention Act (PKPA)

[13] Information for this subsection was originally taken, in part, from Patricia Hoff, "The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act," Family Law Quarterly, Vol. 32, No. 2, Summer 1998.
[14] *Id*.

[28 U.S.C. § 1738A]

A. Purpose of the PKPA[15]

Congressional findings and declaration of purposes indicate that the purpose of the PKPA is to:

1. Promote cooperation between state courts so that a determination of custody and visitation is rendered in the state which can best decide the case in the interest of the child;
2. Promote and expand the exchange of information and mutual assistance between states;
3. Facilitate the enforcement of custody and visitation decrees of sister States;
4. Discourage continuing interstate controversies over child custody
5. Avoid jurisdictional competition and conflict between state courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and
6. Deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

B. The Statute: § 1738A. Full faith and credit given to child custody determinations

The PKPA is not a lengthy statute and is set out verbatim as follows:

The Parental Kidnapping Prevention Act (PKPA)

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

[15] 42 U.S.C.S. § 13951 note.

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

Added Pub.L. 96-611, § 8(a), Dec. 28, 1980, 94 Stat. 3569, and amended Pub.L. 105-374, § 1, Nov. 12, 1998, 112 Stat. 3383; Pub.L. 106-386, Div. B, Title III, § 1303(d), Oct. 28, 2000, 114 Stat. 1512.

C. Relevant Case Law

For North Carolina cases, see § 11.3.L. above in the outline on the UCCJEA.

§ 11.5 Interstate Placement and the Interstate Compact on the Placement of Children (ICPC)

A. The Juvenile Code on Interstate Placement

N.C.G.S. 7B-3700 – 3806, Articles 37 and 38 of the Juvenile Code, relate to interstate placement of children. Under these statutes, "[n]o person, agency, association, institution, or corporation shall bring or send into the State any child for the purpose of giving custody of the child to some person in the State or procuring adoption by some person in the State without first obtaining the written consent of the Department of Health and Human Services." **[7B-3700(a)]** In addition, "[n]o child shall be taken or sent out of the State for the purpose of placing the child in a foster home or in a child-caring institution without first obtaining the written consent of the Department of Health and Human Services." **[7B-3702]** These statutes also discuss the rights of the Department of Health and Human Services and its agents to oversee and monitor the case. The ICPC does not apply when a child is brought into or sent into, or taken out of or sent out of the state, by the guardian of the person of such child, or by a parent, stepparent, grandparent, uncle or aunt, or brother, sister, half brother or half sister of such child if 18 or older.[16] **[7B-3705]**

B. The Interstate Compact on the Placement of Children (ICPC), contained in 7B-3800

1. Background on the ICPC

[16] Determining which situations are exempt from application of the ICPC can be complicated – please read the rest of this section for further clarification.

The ICPC was created prior to the UCCJA and the PKPA to deal with interstate placements of children and consists of ten articles, contained in 7B-3800. The purpose of the ICPC is to ensure appropriate interstate placement of children with appropriate persons or institutions, allowing for the best opportunity to exchange information and evaluate the child's circumstances. (See Article I.) The ICPC has been adopted by all states, each having a state Compact Administrator Office. There is also a National Association of Compact Administrators in Washington, D.C. North Carolina's ICPC office has a director (Compact Administrator) and two consultants who can be reached by calling 919-733-9464. This office is part of the Division of Social Services, Department of Human Resources of the State of North Carolina.

The Compact Administrator and his/her deputies serve as the central clearing point for all referrals for interstate placements. They are authorized to conduct the necessary investigation of the proposed placement and to determine whether or not the placement is contrary to the child's best interests. After the placement is approved and the child is moved into the state, they are responsible for overseeing the placement as long as it continues.[17]

2. Applicability of the ICPC

a. The ICPC does *not* apply to the sending or bringing of a child into a receiving state by any of the following individuals related to the child who leave the child with any such relative or nonagency guardian in the receiving state. [Article VIII.]

- parent
- stepparent
- grandparent
- adult brother or sister
- adult uncle or aunt
- guardian

Note that exclusion from application of the ICPC occurs only when both the placer and the placement recipient belong to the above classes of individuals.[18]

The ICPC also does not apply to placement in an institution caring for the mentally ill, epileptic, or mentallydefective or in any institution primarily educational in character or to placement in a hospital or other medical facility. [Article II(d)]

b. The ICPC *does* apply to the interstate placement of a child:

- for adoption by a child placing agency or county DSS
- for adoption by a private citizen
  (This includes the situation where natural parents send a child into another state for adoption. *See Stancil v. Brock*, 108 N.C. App. 745 (1993)).
- in a foster care home by a county DSS
- in a child caring institution by a county DSS or parent
- by juvenile court of a child in DSS custody with a relative

[17] Guide to the Interstate Compact on the Placement of Children, a publication of the American Public Human Services Association, revised 2002 page 3. This document can be accessed on line at: http://icpc.aphsa.org/Home/Doc/Guidebook_2002.pdf.
[18] Guide to the Interstate Compact on the Placement of Children, supra, page 2.

- by a parent with a relative not listed in Article VIII

Note that the ICPC applies when the child is placed with a parent or relative in another state when a parent or relative is not making the placement.[19]

3. What the ICPC requires, in a nutshell:

Prior to sending or bringing a child from one state to another (into the applicable situations named above), the sending agency must furnish the receiving state with written notice of its intention to send, bring, or place the child. [Article III. (b)](see article for content of notice). The receiving state may then request any supporting or additional information as it deems necessary. [Article III(c)] The sending agency may not send or bring the child into the receiving state until the receiving state notifies the sending agency in writing that the proposed placement does not appear to be contrary to the interests of the child. [Article III(d)]. There are specific forms available for these purposes.

The sending agency must prepare and forward a social history of the child and a case plan to the prospective receiving state's Compact Administrator. The receiving state Compact Administrator will forward the documents to whatever local agency or facility is being asked to accept the child.[20] "The 'action' needed on any particular request will vary depending upon the nature of the proposed placement, and may include a study of a prospective adoptive or foster family, or relative home, or review by the facility to determine whether or not its program will meet the child's needs."[21]

"After the local agency has completed the necessary work, it prepares a report that includes a recommendation on whether the placement should be made. This information is returned to the Compact Administrator in the receiving state for review. If the local agency's recommendation is favorable and the Compact Administrator determines that all requirements of the receiving state's laws have been met, the placement will be approved. If, however, the local agency recommends against the placement or the Compact Administrator determines that the placement cannot lawfully be completed, the placement will be denied unless the problems can be remedied. In either case, the Compact Administrator notifies the sending state's Compact office and forwards copies for the sending agency."[22]

4. Jurisdiction and responsibility for child under the ICPC [Article V]

The sending agency retains jurisdiction over the child sufficient to determine all matters relating to the custody, supervision, care, treatment, and disposition of the child until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the receiving state. This jurisdiction also includes the power to return the child or transfer the child to another location. The sending agency also continues to have financial responsibility for the support and maintenance of the child during the period of placement. However, public agencies may enter into agreements with agencies in the receiving state to provide for services as an agent for the sending agency. [Article V] Financial responsibility and agreements between agencies are also addressed in 7B-3801, -3802, and -3803.

---

[19] See opinion of Attorney General Dr. Sarah T. Morrow, Secretary, North Carolina Department of Human Resources, 52 N.C.A.G. 22 (1982); Also see Guide to the Interstate Compact on the Placement of Children, supra, page 2.
[20] Guide to the Interstate Compact on the Placement of Children, supra, page 4.
[21] *Id.*
[22] *Id*. at page 5.

5. Regulation 7 and priority placement procedures

One of the problems with the ICPC is the length of time it can take for states to process cases and approve interstate placements. Six weeks or 30 working days is the recommended processing time from the date of notice until approval or denial.[23] ICPC Regulation 7 was adopted by Compact Administrators to alleviate the fact that processing can take so long, allowing for expedited ICPC procedures when a judge finds a child meets the criteria for priority ICPC status. DSS offices have forms and sample orders relating to regulation 7.

6. Illegal Placements

Article IV of the Interstate Compact addresses placements made in violation of the Compact, stating the penalties violators will be subject to.

C. ICPC Regulations & Information

These regulations govern many of the ICPC procedures, helping to define and clarify the language of the Compact. Information on ICPC regulations can be obtained from the Compact Administrator's Office at 919-733-9464.

D. ICPC and GAL Advocacy

The best way that a GAL can advocate for a child when the ICPC is impacted is to ensure that the paperwork is promptly done at the local level and sent to the Compact Administrator's Office. The GAL may want to literally follow the paperwork from the local agency to the state office. From that point, the GAL can contact the receiving state's Compact Administrator's Office and follow the paperwork to that state's local agency.[24] Most of the time the reason that ICPC home studies are so time consuming is the fact the paperwork must cross several desks and also must be properly completed. Staying on top of the paperwork and being the "squeaky wheel" is the best advocacy for a child when the GAL believe an out-of-state relative placement will ultimately service the child's best interest.

II. ACCESS TO SUBSTANCE ABUSE RECORDS [42 C.F.R. PART 2]

§ 11.6 Introduction

It is common for substance abuse records of a party or individual involved in child protection proceedings to become relevant to the proceedings. However, anyone who seeks those records or holds those records must be aware that such records are protected by federal law. The records are not necessarily inaccessible, but can only be released under certain circumstances and by following very specific procedures set out in 42 C.F.R. Part 2.

The following outline, by Mark Botts of the Institute of Government, is intended to provide the reader with information regarding 42 C.F.R. Part 2 that is most relevant to Guardians ad Litem and Guardian ad Litem Attorney Advocates. For more detailed information, contact the legal staff in the Guardian ad Litem state office who can refer you to other resources.

---

[23] *Id.*

[24] The following link gives contact information for each state's Compact Administrator: http://icpc.aphsa.org/Home/states.asp

Please see the appendix in this manual for sample forms, motions, and orders related to accessing substance abuse records.

§ 11.7 Federal Confidentiality Law Governing Substance Abuse Patient Records*

I. The Duty of Confidentiality

A. State Law. North Carolina law restricts the disclosure of information relating to clients of mental health, developmental disabilities, and substance abuse facilities.[25]

1. Unauthorized disclosure is a Class 3 misdemeanor punishable by a fine up to $500.[26]

2. Employees of "area facilities" face suspension, dismissal, or other disciplinary action if they disclose information in violation of G.S. 122C.[27]

B. Federal law (42 U.S.C. 290dd-2; 42 C.F.R. § 2) restricts the use and disclosure of patient information received or acquired by a federally assisted alcohol or drug abuse program. [28]

Anyone who violates the law is subject to a criminal penalty in the form of a fine (up to $500 for first offense, up to $5,000 for each subsequent offense).

C. Professional Codes of Conduct. Codes of ethics and standards of practice governing mental health and substance abuse professionals generally require them to protect client information and adhere to confidentiality laws.[29]

Violations of these standards may jeopardize a mental health professional's license or certification.

D. Civil Liability. The unauthorized disclosure of confidential information could result in civil liability for the treatment facility or the employee who disclosed the records.[30]

---

* This outline was originally prepared for a Guardian ad Litem Legal/Staff Training in October, 2000 and was reprinted with permission from the author, Mark Botts, Institute of Government, The University of North Carolina at Chapel Hill.

[25] *See* G.S. 122C-52.

[26] *See* G.S. 122C-52(e). State law also contains several privileges that may shield information maintained by mental health facilities. *See* G.S. 8-53 (doctor-patient privilege), -53.3 (psychologist-client privilege), -53.7 (social worker privilege), -53.8 (counselor privilege).

[27] *See* 10A NCAC26 B.0104. An "area facility" is a facility operated by, or under contract with, an area mental health, developmental disabilities, and substance abuse authority (area authority or area program)[G.S. 122C-3].

[28] The regulations in 42 C.F.R. § 2, apply to federally-assisted organizations and individual practitioners that specialize in providing, in whole or in part, individualized alcohol or drug abuse diagnosis, treatment, or referral for treatment. The regulations govern any information that reveals that a person is receiving, has received, or has applied for such services. *See* 42 C.F.R. § 2.11.

[29] *See, e.g.*, Ethical Standards of the N.C. Substance Abuse Professional Certification Board, Inc., Ethical Standard No. 8 (1994); Code of Ethics of the National Association of Social Workers, Ethical Standard 1.07; Code of Ethics of the Clinical Social Work Federation, Ethical Principles III and VI; and 21 NCAC 63.0507 (ethical guidelines for the practice of social work).

[30] The unauthorized disclosure of a patient's confidences by a physician, psychiatrist, psychologist, marital and family therapist, or other health care provider constitutes medical malpractice. *See Watts v. Cumberland County Hosp. System, Inc*., 75 N.C. App. 1, 9-11, 330 S.E.2d 242, 248-250 (1985) (holding that malpractice consists of any professional

II. State Confidentiality Law – GS 122C

A. Covered providers: Any "facility," which means any individual, firm, partnership, corporation, association, company, or agency at one location whose primary purpose is to provide services for the care, treatment, habilitation, or rehabilitation of persons who are mentally ill, developmentally disabled, or substance abusers. "Facility" includes an "area facility," which is a facility operated by or under contract with an area authority, a "state facility," which is a facility operated by the Dep't of Health and Human Services (regional psychiatric facilities, mental retardation centers, alcohol and drug abuse treatment centers, special care centers, schools for emotionally disturbed children), a "licensable facility" which provides services for one or more minors or two or more adults, a "private facility," a psychiatric service of UNC, a "residential facility," a "24-hour facility," and a "VA facility."[31]

B. Confidential information: Any information, whether recorded or not, relating to an individual served by a facility and received in connection with the performance of any function of the facility is confidential and may not be disclosed except as authorized by G.S. 122C-51 through 122C- 56 and implementing regulations at 10 NCAC 18D.[32]

III. Federal Law Governing Alcohol and Drug Abuse Patient Records – 42 CFR 2

A. Covered programs: The federal law applies to any person or organization that, in whole or in part, holds itself out as providing and does provide alcohol or drug abuse diagnosis, treatment, or referral for treatment with direct or indirect federal financial assistance.

1. Only programs that specialize in, and hold themselves out as providing, substance services.

    a. any free-standing substance abuse facility or independent substance abuse program, including
        - an outpatient substance abuse clinic
        - a residential drug or alcohol treatment facility
        - an independent physician or other therapist with a specialty in substance abuse treatment or diagnosis
    b. any part of a broader organization that is identified as providing substance abuse services, for example
        - a school-based program, but not an entire school or school system;
        - the substance abuse program of an area authority, but not mental health programs outside of the substance abuse program;
        - a detox unit or substance abuse program of a general hospital, but not the entire hospital.[33]

---

misconduct or lack of fidelity in professional or fiduciary duties, including breach of duty to maintain confidentiality of patient information), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986).

[31] For further explanation, *see* G.S. § 122C-3.

[32] These regulations also appear in a publication of the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, entitled "Confidentiality Rules" (APSM 45-1). Local hospitals that contract with an area facility or provide services for a state facility and are JCAHO accredited are excluded from the rules in 10 NCAC 18D. Instead, the confidentiality policies of the accredited hospital apply.

[33] A general medical care facility (general hospital) is not a "program" unless it has an identified unit that provides alcohol or drug abuse diagnosis, treatment, or referral for treatment, or has staff whose primary function is to provide substance abuse services and who are identified as such providers.

2. Not only treatment programs, but also programs providing just diagnosis or referral, including an employee assistance program that provides no treatment but evaluates whether a person has a substance abuse problem and then refers the person to treatment at an independent program.

3. Only programs that receive, directly or indirectly, federal financial assistance, including programs that
   a. receive federal grants or Medicare or Medicaid reimbursement;
   b. through federal revenue sharing or other forms of assistance, receive federal funds which could be (but are not necessarily) spent for an alcohol or drug abuse program (e.g., programs operated or funded by state or local government);
   c. are licensed or certified by the federal government (e.g., certification of provider status under the Medicare program, authorization to conduct methadone treatment, or registration to dispense a controlled substance for substance abuse treatment); or
   d. organizations exempt from federal taxation. [*see* 42 C.F.R. § 2.12]

B. Covered information: The federal prohibition against disclosure applies to any information, whether recorded or not, that:

- would ***identify*** a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment at a federally assisted program—as a substance abuser or recipient of substance abuse services, and
- is information obtained by a federally assisted alcohol or drug abuse program for the purpose of treating substance abuse, making a diagnosis for that treatment, or making a referral for that treatment.

1. "Identify" means a communication, either written or oral, of information that identifies someone as a substance abuser, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified.

2. "Diagnosis" means any reference to an individual's alcohol or drug abuse, or to a condition that is identified as having been caused by that abuse, which is made for the purpose of treatment or referral for treatment.[34]

3. "Treatment" means the management and care of a patient suffering from alcohol or drug abuse, a condition that is identified as having been caused by that abuse, or both, in order to reduce or eliminate the adverse effects upon the patient.[35]

C. "Patient-identifying information": Restrictions on disclosure apply only to information that would identify a "patient"—one who has applied for or been given substance abuse treatment, diagnosis, or referral for treatment—as a substance abuser or a recipient of substance abuse services.

1. Example: Child mental health record contains information that a parent or family member abuses alcohol or other drugs, but that person is not a substance abuse patient. The identity of the parent or family member and the information about substance abuse is not covered by the federal rules because the parent or family member is not a "patient" and the reference to his or her substance abuse is not made for the purpose of treatment or referral for treatment, i.e., is not a "diagnosis."

[34] See 42 C.F.R. § 2.11.
[35] *Id*.

2. Example: Child mental health record contains information that a parent abuses alcohol or other drugs and this parent is a client or former client of substance abuse services provided by the facility. The federal rules would apply to restrict the disclosure of any information that would identify the parent as a drug or alcohol abuser or a recipient of alcohol or drug services.

IV. Relationship of Federal Law to State Law

A. Federal law controls where it is more restrictive: No state law may authorize or compel any disclosure prohibited by the federal drug and alcohol confidentiality law. Where state law authorizes or compels disclosure that the federal law prohibits, the federal law must be obeyed. [42 C.F.R. § 2.20]

B. State law controls where it is more restrictive: The federal drug and alcohol confidentiality law does not require disclosure under any circumstances. If the federal law permits a particular disclosure, but state law prohibits it, the state law must be obeyed. [42 C.F.R. § 2.20]

V. Disclosures Without Consent

A. General principles:

1. The legal requirement of confidentiality is subject to numerous exceptions. Client consent to disclosure is the primary exception to maintaining the confidentiality of client information, but the federal law recognizes exceptions to confidentiality that do not depend on client consent. [42 C.F.R. § 2.31]

2. Because confidentiality is the rule and disclosure is the exception, disclosure must be limited to exceptions recognized by the applicable confidentiality law. If the person in possession of confidential information cannot point to a particular exception expressed in the law, then the information should not be disclosed.

B. Court order: A federal, state, or local court may authorize a program to make a disclosure that would otherwise be prohibited. [42 C.F.R. § 2.61]

1. A subpoena, alone, does not permit disclosure, even when signed by a judge.

2. A court is not entitled to a patient's treatment information merely because the court ordered the patient into treatment.

3. When the information is sought for non-criminal purposes, the patient and program must be notified and given an opportunity to file a written response or appear in person.[36] [42 C.F.R. § 2.64]

4. Judge must review records *in camera* ("in chambers," rather than in open court). [42 C.F.R. § 2.64-65]

5. Court must find "good cause" for disclosure.[37]

[36] When the records are sought for the purpose of criminally investigating or prosecuting a patient, only the holder of records is entitled to notice and an opportunity to appear and be heard. [42 C.F.R. § 2.65]

6. Any order authorizing disclosure must (i) limit disclosure to parts of record essential to fulfill the purpose of the order (ii) limit disclosure to persons who need the information, and (iii) protect the information from disclosure to others by sealing portions of the public record in the case. [42 C.F.R. § 2.64]

C. Child protective services:

1. Reporting: Program staff must comply with state law (G.S. 7B-301) requiring the reporting of suspected child abuse, neglect, dependency, or death by maltreatment to the county social services department.

2. Investigation: State law, G.S. 7B-302, authorizes a DSS director (or the director's representative), when carrying out his or her investigative duties in response to a report, to make a written demand for any information or reports that the director believes to be relevant to the investigation of, or the provision for, protective services, *unless* the disclosure is prohibited by federal law or regulation. Program staff must *not* provide information pursuant to 7B-302 alone. The federal rules do not permit disclosure of information beyond the initial report (subsection a., above) for purposes of investigating a report or for court proceedings that may result from the report, absent the patient's written consent or a court order issued pursuant to the federal regulations.[38]

3. Guardian ad litem: State law, G.S. 7B-601, provides for the court appointment of guardians ad litem to represent children alleged to be abused, neglected, or dependent in Juvenile Court proceedings. This statute gives the GAL the authority to obtain "any information or reports, whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case." No state law, however, may compel or authorize a disclosure prohibited by the federal regulations. Because the federal rules do not permit disclosure under these circumstances, substance abuse programs must not disclose confidential information to a guardian ad litem unless presented with a court order issued according to the special procedures and criteria set forth at 42 C.F.R. 2.61-2.67, or unless some other federally-recognized exception to confidentiality applies (e.g., patient consent).

4. Multiagency sharing—G.S. 7B-3100 and 28 NCAC 01A.0302 that designate agencies authorized to share information do not allow or compel the disclosure of information protected by the federal drug and alcohol confidentiality law, and the federal law does not permit the disclosure of patient-identifying information pursuant to these state laws and regulations.

- Unless a provision in the federal law applies that would permit disclosure, substance abuse programs should not, in response to a request for information under the OJJ rules, disclose information protected by the federal drug and alcohol confidentiality law.

- At the request of the agency soliciting information protected by the federal law, the agency refusing the request must inform "that agency of the specific law or regulation that is the basis for the refusal." 28 NCAC 01A.0302(b).

---

[37] The court must determine that there is no other effective way to obtain the information and that the public interest and need for disclosure outweigh the potential injury to the patient, the patient's relationship to the program, and the program's ongoing treatment services. [42 C.F.R. § 2.64]

[38] 42 C.F.R. 2.12(c)(6).

- Any answer to a request for disclosure that is not permissible under 42 CFR 2 must be made in a way "that will not affirmatively reveal that an identified individual has been, or is being diagnosed or treated for alcohol or drug abuse." An inquiring party may be given a copy of the federal regulations and advised that they restrict the disclosure of substance abuse patient records, but may not be told affirmatively that the regulations restrict the disclosure of the records of an identified patient. [42 CFR 2.13(c)(2)]

VI. Disclosures of 42 CFR 2 Information With Consent

The content of any record may be disclosed in accordance with the prior written consent of the patient, but only to the extent, under such circumstances, and for such purposes as permitted by the written consent.

A. Effect: Consent to disclose operates to remove the prohibition on disclosure but does not compel disclosure.

B. Consent form:

1. Consent must be voluntary and informed.

2. Consent must be in writing and must include[39]:
   a. patient's name;
   b. name of facility or person disclosing the information;
   c. name of individual or individuals, agency or agencies, to whom information is being disclosed;
   d. information to be released (how much and what kind);
   e. the purpose of the disclosure;
   f. the date, event, or condition upon which the consent will expire if not revoked before;
   g. statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance on the consent;
   h. signature of the patient and, when required for a patient who is a minor, signature of the patient's legally responsible person; and
   i. date consent is signed.

C. Who May Consent:

1. Minor patients: Even if the patient is a minor, he or she must sign the consent form.

a. When a minor is admitted to substance abuse treatment that requires the consent of the minor's legally responsible person (LRP) (defined below), any written consent for disclosure must be signed by both the minor and his or her LRP.

b. When the minor consents to substance abuse treatment pursuant to GS 90-21.5, only the minor may consent to disclose confidential information. The LRP and others have access to information only upon written consent of the minor.

c. If a minor applies for treatment that requires parental consent under state law, the fact of the minor's application for treatment may be communicated to the LRP only if:
   - the minor gives written consent to the disclosure, or
   - the minor, due to extreme youth or mental or physical condition, lacks the capacity to make a rational decision whether to consent to a disclosure to his or her LRP and the applicant's

[39] See 42 C.F.R. 2.31 for form of written consent required by federal regulations.

situation poses a substantial threat to the life or physical well-being of the applicant or other individual which may be reduced by communicating relevant facts to the LRP. [42 C.F.R. § 2.14]

2. Incompetent patients [42 C.F.R. § 2.15]

a. If the patient is adjudicated incompetent, the individual appointed by the court as guardian-for-the-person or general guardian may sign the consent for release.

b. When a patient has not been adjudicated incompetent, but suffers from a medical condition that prevents knowing or effective action on his or her behalf, the program director may exercise the right of the patient to consent to a disclosure for the sole purpose of obtaining payment for services from a third-party payer.

D. Redisclosure. Each disclosure made with the patient's written consent must be accompanied by a written notice prohibiting any further disclosure unless disclosure is expressly permitted by the written consent of the patient or is otherwise permitted by the federal regulations.[40]

E. "Legally responsible person" means: (i) when applied to an adult, who has been adjudicated incompetent, a guardian; or (ii) when applied to a minor, a parent, a guardian, a person standing in loco parentis, or a legal custodian other than a parent who has been granted specific authority by law or in a custody order to consent for medical care, including psychiatric treatment; [41] or (iii) when applied to an adult who is incapable as defined by G.S. 122C-72(c) and who has not been adjudicated incompetent, a healthcare agent named pursuant to a valid health care power of attorney as prescribed in Article 3 Chapter 32. [10A NCAC 26B.0103].

1. "**Parent**" means the biological or adoptive mother or father of a minor.

2. Guardian: a person appointed as a guardian of the person or general guardian by the court under Chapters 7A or 35A or former Chapters 33 or 35 of the General Statutes. [G.S. § 122C-3(15)]

3. Person Standing in Loco Parentis means one who has put himself in the place of a lawful parent by assuming the rights and obligations of a parent without formal adoption.[42]

a. Whether such a relationship exists depends upon the facts of the particular case, and all of the facts and surrounding circumstances must be considered.

b. Intent is a significant factor: The "relationship of *in loco parentis* . . . is established only when the person with whom the child is placed ***intends*** to assume the status of a parent--by taking on the obligations incidental to the parental relationship, particularly that of support and maintenance."[43] The intent to assume parental status can be inferred from parties' acts and declarations.[44] Because the relationship exists at the will of the party assuming the obligations of parent, it may be abrogated by such party at any time.

---

[40] See 42 C.F.R. 2.32 for specific notice statement required by the federal regulations.
[41] G.S. 122C-3(20).
[42] 10A NCAC 26B.0103.
[43] *State v. Pittard*, 45 N.C. App. 701, 703, 263 S.E.2d 809 (1980).
[44] See *Hush v. Devilbiss Co.*, 77 Mich. App. 639, 259 N.W.2d 170, 174 (Mich. App. 1977).

c. Factors that have been considered relevant in other cases include "the age of the child; the degree to which the child is dependent on the person claiming to be standing in loco parentis; the amount of support, if any, provided; the extent to which duties commonly associated with parenthood are exercised;"[45] the amount of time the child has lived with the person and the degree to which a "psychological family" has developed.

4. Legal custodian:

a. Legal custodian granted specific authority in a **custody order**: If, in a custody order, the judge specifically authorizes the legal custodian to consent to medical and psychiatric care, then the legal custodian is an LRP for purposes of the confidentiality rules.

b. Legal custodian granted specific authority **by law** to consent for treatment: Under certain conditions, provisions of the Juvenile Code grant the director of DSS the authority to arrange for, provide, or consent to "any psychiatric, psychological, educational, or other remedial evaluations or treatment" for the juvenile.[46]

[45] *Hush*, 77 Mich. App. at 649, 259 N.W.2d at 174-75.

[46] See G.S. 7B-903(2)(c); 2503(1)(c); and 2506(1)(c). This authority arises only if the following conditions have been met:

a. a judge has placed the child in the custody or physical custody of a county department of social services pursuant to a dispositional order under G.S. 7B-903, -2503, or -2506;
b. the judge has not "otherwise ordered" (i.e., no provision of the court order overrides the statutory authority of DSS to consent to treatment);
c. the parent is unknown, unavailable, or unable to act on the child's behalf; and
d. the director has made reasonable efforts to obtain consent from the parent or guardian of the affected child.

III. ACCESS TO EDUCATION RECORDS: THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) [20 U.S.C. §1232g]

§ 11.8 Introduction and Overview of FERPA [47]

FERPA is a federal law that governs the disclosure of information by all public elementary and secondary schools.

Before an educational agency or institution may provide personally identifiable information from a student's education records, the parent or eligible student must give written consent. The consent must contain specific information indicating that the records may be disclosed, explaining the purpose of the disclosure, and identifying to whom the disclosure may be made. **[20 U.S.C. 1232g (b) (1) and (b) (2) (A)]**

There are several exceptions to the prior consent requirement, four of which may apply specifically to guardians ad litem: if the information provided is (1) to comply with a judicial order or subpoena; (2) needed in relation to a health or safety emergency; (3) defined as directory information; and (4) to comply with a state statute relating to the juvenile justice system.

Under the first applicable exception, an educational agency or institution may disclose personally identifiable information from a student's education record without the required written consent if the disclosure is to comply with a judicial order or subpoena. The agency or institution must first make a reasonable effort to notify the parent or eligible student of the order before complying so that the parent or eligible student is given the opportunity to seek legal recourse. Reasonable effort to notify is not required if the disclosure is in compliance with a federal grand jury subpoena or any other subpoena issued for a law enforcement purpose, and the court has ordered that the existence or the contents of the subpoena or the information provided not be disclosed to any other person. **[20 U.S.C. 1232g (b)(1), (b)(2)(A), (2)(B), and (b)(1)(J)]**

The second applicable exception states that an educational agency or institution may disclose personally identifiable information from a student's education record to appropriate parties without the required written consent, if the disclosure is in connection with a health or safety emergency. That is, prior written consent is not pertinent if knowledge of the information disclosed is necessary to protect the health and safety of the student or other individual. **[20 U.S.C. 1232g (b)(1) (I)]**

Under the third applicable exception, prior written consent is not required if the disclosure is of information defined as "directory information" by the agency or institution, and public notice has been given to the parents and/or eligible student. Directory information includes but is not limited to, the student's name, address, and telephone number; date and place of birth; major field of study; official activities; dates of attendance; height and weight for sports; degrees and honors received; most recent previous education institution; and photograph. **[20 U.S.C. 1232g (a)(5)(A) and (B)]**

Under the fourth applicable exception, prior written consent is not required if the disclosure is being made to state and local officials or authorities to comply with a state statute relating to the juvenile justice system and the system's ability to effectively serve the student whose records are being released before adjudication. If disclosure is permitted by a state statute that was adopted after Nov. 19, 1974, and concerns the juvenile justice

[47] Thanks to Julie Bickham for her work on this summary which was based on the following Department of Justice Public Document.

system, the authorities receiving the information shall certify in writing that the information will not be disclosed to any other party. [20 U.S.C. 1232g(b)(7)(E)]

EXCERPTS FROM "SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS*

§ 11.9 Information Sharing Between Schools and Other Youth-Serving Agencies Under the Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act (FERPA) is a complex Federal law that protects the privacy interests of parents and students with regard to education records. It affects every public elementary and secondary school and virtually every postsecondary institution in the country. First enacted in 1974, FERPA has been amended by Congress seven times, most recently through the Improving America's Schools Act of 1994 (IASA).

FERPA defines the term "education records" broadly to include all records, files, documents, and other materials, such as films, tapes, or photographs, containing information directly related to a student that an education agency or institution or a person acting for the agency or institution maintains. For example, education records include information that schools maintain on students in report cards, surveys and

---

* The following information on the Family Educational Rights and Privacy Act (FERPA) in sections 11.9 through 11.15 consists of excerpts from a publication titled: "Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs," June 1997, from the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, and the U.S. Department of Education, Family Policy Compliance Office. Principal Authors are Michael L. Medaris, Office of Juvenile Justice and Delinquency Prevention; Ellen Campbell, Family Policy Compliance Office; and Professor Bernard James, J.D., Pepperdine University School of Law.

To view this publication in its entirety, please go to the homepage for the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and click on "publications," where you will be able to access this publication by title.

The website containing this publication states the following with respect to permission to reprint:

> Share With Your Colleagues. Unless otherwise noted, OJJDP publications are not copyright restricted. We encourage you to reproduce these documents, share them with your colleagues, and reprint them in your newsletter or journal. However, if you reprint, please cite OJJDP and any other authors found on the title page. We are also interested in your feedback, such as how you received a copy, how you intend to use the information, and how OJJDP materials meet your individual or agency needs. Hard copies of OJJDP publications can be ordered by sending an e-mail request to puborder@ncjrs.org. Please direct your comments and questions to:
>
> The Juvenile Justice Clearinghouse
> Publication Reprint/Feedback
> P.O. Box 6000- Rockville, MD 20849-6000
> Phone: 800-638-8736 Fax: 301-519-5212
> E-mail: askncjrs@ncjrs.org

assessments, health unit records, special education records, and correspondence between the school and other entities regarding students. Education records also include information that a school maintains about parents.

> **Examples of Valid Disclosures Under FERPA--Jane**
> Jane, 10, has been reported to the child protective services agency as a possible sex abuse victim. The agency contacts Jane's teachers to determine if Jane has exhibited any unusual behavior. FERPA permits Jane's teachers to share information about their observations regarding Jane. Oral information based on personal observation or knowledge is not subject to the provisions of FERPA.

Generally, FERPA gives parents the right to inspect and review their children's education records, request amendment of the records, and have some control over the disclosure of information from the records. When a student turns 18 or enters college, FERPA classifies him or her as an "eligible student" and transfers the rights under the Act from the parent to the student. FERPA requires school districts to notify parents and eligible students annually of their rights under the Act. (See appendix B for a sample notification document.)

The recent IASA amendments to FERPA enhanced the penalty for improperly disclosing information from education records. FERPA now prohibits a school from providing information for at least 5 years to a third party who received information and redisclosed it without the required consent.

> **Examples of Valid Disclosures Under FERPA--Ryan (Part I)**
> Ryan, 13, is adjudicated delinquent for breaking into a warehouse. As this is his first offense, the court returns Ryan to school and shares information about the offense with the school. FERPA does not govern the decision by local juvenile justice system officials to divulge this information to the schools. Schools may receive and use information from law enforcement, courts, and other justice system components in order to provide services to Ryan and to maintain a safe and effective learning environment. However, once the information on Ryan is received and maintained by the school, it is subject to FERPA and exceptions.

The Prior Consent Requirement for Disclosure of Education Records

For elementary or secondary school students, FERPA restricts the release of their school records or information from their records that could identify the student ("personally identifiable information"). Before releasing such records or information to a party outside the school system, the school must obtain the consent of the student's parents unless the student is 18 or over, in which case only the student can consent to the release, or unless the release falls under one of the exceptions to the consent requirement.

Educators are free to share information with other agencies or individuals concerning students based on their personal knowledge or observation, provided the information does not rely on the contents of an education record. Oral referrals to other agencies based on personal observations are not subject to the provisions of FERPA. Of course, the process of interagency information sharing is a dynamic process, and educators should take care not to circumvent the requirements of FERPA by making a referral that is predicated on knowledge obtained from education records.

Exceptions to the Prior Consent Requirement

Statutory exceptions applicable to the prior consent requirement are set forth in detail under §99.31 of the FERPA regulations. As a general rule, educators may disclose information without prior consent if they can answer yes to any of the following questions.

Is the disclosure being made--

- To other school officials, including teachers, within the school or school district who have been determined to have legitimate educational interests? (A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.) (See §99.31(a)(1) of the FERPA regulations.)

- To officials of another school, school system, or postsecondary institution where the student seeks or intends to enroll? (See §99.34 of the FERPA regulations.)

- To authorized representatives of the Comptroller General of the United States, the U.S. Secretary of Education, or State and local education authorities? This exception applies only under certain conditions. Typically, disclosures under this provision must be in connection with an audit or evaluation of a Federal- or State-supported education program or in compliance with Federal legal requirements related to those programs. (See §99.35 of the FERPA regulations.)

- In connection with the student's application for or receipt of financial aid? (See §99.31(a)(4) of the FERPA regulations.)

- To State and local officials or authorities in compliance with a State statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are being released? (This condition is discussed further in "Disclosures Under the Juvenile Justice System Exception," p. 8.) (See §99.31(a)(5) and §99.38 of the FERPA regulations.)

- To organizations conducting studies for, or on behalf of, education agencies or institutions, in order to develop tests, administer student aid, or improve instruction? (See §99.31(a)(6) of the FERPA regulations.)

- To accrediting organizations to carry out their accrediting functions? (See §99.31(a)(7) of the FERPA regulations.)

- To parents of a dependent student, as defined by the Internal Revenue Code, even if the student is an "eligible student" under FERPA? (See §99.31(a)(8) of the FERPA regulations.)

- To comply with a judicial order or lawfully issued subpoena? The regulations direct the school to make a reasonable effort to notify the parent or eligible student of the court order or subpoena in advance of compliance. (See appendix C for sample court orders.) However, the IASA amendments removed this notification requirement for instances in which a court or other agency issues either a Federal Grand Jury subpoena or a subpoena for a law enforcement purpose and the court has ordered the school not to disclose the existence of the subpoena. (See §99.31(a)(9) of the FERPA regulations.)

- In connection with a health or safety emergency? (See §99.31(a)(10) of the FERPA regulations. See also "Disclosures Under the Health or Safety Emergency Exception," p. 7.)

- To teachers and school officials in other schools who have legitimate educational interests in the behavior of the student when the information concerns disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community? (See §99.36 of the FERPA regulations.)

- To provide information that the school district has designated as "directory information"? (See §99.37 of the FERPA regulations. See also "Disclosures Under the Directory Information Exception," p. 7).

- To provide information from the school's law enforcement unit records? (See §99.3 definition of "education records" and §99.8 of the FERPA regulations. See also "Disclosures Under the Law Enforcement Unit Records Exception," p. 5).

Four of the exceptions specified above require additional explanation:

- Disclosures Under the Law Enforcement Unit Records Exception.

- Disclosures Under the Directory Information Exception.

- Disclosures Under the Health or Safety Emergency Exception.

- Disclosures Under the Juvenile Justice System Exception.

Each of these types of disclosures is discussed in the sections that follow.

Disclosures Under the Law Enforcement Unit Records Exception

Under FERPA, schools may disclose information from "law enforcement unit records" to anyone--Federal, State, or local law enforcement authorities, social service agencies, or even the media--without the consent of the parent or eligible student. FERPA specifically exempts from the definition of "education records"--and thereby from the restrictions of FERPA--records that a law enforcement unit of a school or school district creates and maintains for a law enforcement purpose. In some instances, State open records laws may require that schools provide public access to law enforcement unit records because FERPA does not protect these records. (Educators may wish to check with their State attorney general's office on this point.)

> **Examples of Valid Disclosures Under FERPA--Rodney, Jeff, and Mark (Part I)**
> A School Resource Officer (SRO) who is a member of the school's law enforcement unit receives a report from the local police department that Rodney, Jeff, and Mark are active members of the Five Crew gang. The SRO creates a file and places the report in it. The SRO also informs the principal, who makes appropriate notations in each student's education record. Several weeks later, a detective from a neighboring jurisdiction contacts the SRO. The detective is investigating a rideby shooting involving gangs at a basketball game between the two schools. FERPA does not restrict the SRO from sharing information about the Five Crew members from the law enforcement unit record with the investigator.

A "law enforcement unit" is an individual, office, department, division, or other component of a school or school district--such as a unit of commissioned police officers or noncommissioned security guards--that is officially authorized or designated by the school district to (1) enforce any Federal, State, or local law, or (2) maintain the physical security and safety of schools in the district. Educators may employ commissioned police officers who are responsible for enforcing laws or officially designate an individual in the school district to carry out the responsibilities of a law enforcement unit.

Additionally, some school districts make special arrangements with local law enforcement authorities for the purpose of maintaining safe and drug-free schools. Although the Departments of Justice and Education encourage schools without separate law enforcement units to develop working relationships with local police authorities, compliance with FERPA calls for certain precautions. School districts should use a contract or memorandum of understanding to officially designate a local police officer(s) as the district's law enforcement unit. Without this designation, FERPA would prohibit the school from disclosing information from a student's education records, unless one of the other exceptions to FERPA applies, such as the health or safety exception. Regardless of whether the school district has designated one individual or a group of commissioned officers as the law enforcement unit, the district should include this designation in the annual notification of rights to parents and students under the section concerning the disclosure of information to school officials with a legitimate educational interest in the records. This is so that schools may freely share information about students with their law enforcement units and so that parents and students will know that information from education records may be disclosed for the purpose of maintaining safe schools.

Because this FERPA exemption applies specifically to records that a law enforcement unit creates and maintains for a law enforcement purpose, FERPA would protect records that the law enforcement unit created for a purpose other than law enforcement--even when they are in the possession of the law enforcement unit. On the other hand, even if the law enforcement unit shares with another component of the school a copy of a record the unit created for a law enforcement purpose, FERPA would not restrict dissemination of the records maintained by the law enforcement unit.

Law enforcement unit records should not be confused with the records of a school's disciplinary actions or proceedings, which are education records. Although schools may disclose information from their law enforcement unit to other school officials (including educators in other schools), the *copy* that the law enforcement unit gives to a principal or other school official becomes an education record once that official receives and maintains it. As such, the information is subject to FERPA and the principal or other official cannot disclose it to a third party without prior parental consent, unless one of the other exceptions to FERPA applies. However, the original document that the law enforcement unit created and maintained, which relates to activity that formed the basis for subsequent disciplinary actions or proceedings, does not become an education record merely because the unit shared it with another component of the school or because a copy is placed in the student's education file. It is, therefore, disclosable like other law enforcement unit records.

Examples of Valid Disclosures Under FERPA--Donna and Linda

Donna, 13, and Linda, 14, get into an argument and begin shoving each other. A school resource officer (SRO), who is a member of the school's law enforcement unit, separates them and makes an incident report. Several days later, the SRO again breaks up a fight between the two girls and makes another incident report. Copies of the two incident reports are forwarded from the law enforcement unit to the Assistant Principal who is responsible for school discipline. Because this is the second time the girls have been involved in a fight, they are suspended for a day. The incident reports that provided the basis of the disciplinary hearing and the disposition are entered into each girl's education record. Several days later, Donna and Linda see each other at a neighborhood record store and begin fighting again. The police are called and take the girls into custody. An officer contacts the school SRO and learns that Donna and Linda have gotten into fights at school. While the record of the school discipline hearing is an education record that is subject to FERPA constraints, the incident reports created and maintained by the SRO are disclosable under the law enforcement unit record exception.

It should be noted that nothing in FERPA prevents a school official from disclosing to local law enforcement authorities information that is based on that official's personal knowledge or observation and not from an education record. As long as the reporting of the information does not rely on information contained in education records, FERPA does not restrict the reporting of crime to local law enforcement.

For instance, if a teacher were to observe that a student is involved in a gang or in illegal activities, FERPA would not prevent that teacher from reporting the student to law enforcement authorities. Should the authorities decide to investigate the teacher's observations and need information from the student's education record, they should obtain a subpoena unless circumstances trigger one of the other exceptions under FERPA.

Disclosures Under the Directory Information Exception

A school can disclose "directory information" from the education record without prior parental consent after giving notice of its intention to do so. "Directory information" is information in a student's education records that is not generally considered harmful, and its release is not considered an invasion of the student's privacy. A critical distinction exists between directory information and all other information present in school files. School districts can choose how much directory information from education records they will disclose. Directory information includes, but is not limited to, the following data about the student:

- Name.
- Address and telephone.
- Date and place of birth.
- Major field of study.
- Official activities.
- Dates of attendance ("from and to" dates of enrollment).
- Height and weight for sports.
- Degrees and honors received.
- Most recent previous education institution.
- Photograph.

The Department of Education considers these items to be directory information. In most instances, disclosure is helpful to both the institution and the student. However, school districts must establish a policy and give notice as to the specific types of directory information they intend to disclose. Parents can, however, retain the right to consent to the disclosure of directory information. Parents who wish to retain this right must so advise the school. (See §99.3 and 99.37 of the FERPA regulations.)

With the passage of the juvenile justice system exception, discussed on p. 8, education records, including directory information, may be shared with juvenile justice system agencies, prior to adjudication of the student, to the extent that State law allows.

Disclosures Under the Health or Safety Emergency Exception

The health or safety emergency provision is a commonsense acknowledgment that there may be situations when the *immediate* need for information to avert or diffuse certain unusual conditions or disruptions requires the release of information. Educators determine what constitutes an "emergency," but FERPA requires that they construe the term strictly. For example, on-campus disruptions that constitute criminal acts, particularly those involving weapons and drugs, fall within the scope of the term, as do crisis situations off campus that affect school campuses or the public health or safety. When a health or safety emergency exists, schools may share relevant information about students involved in the emergency with appropriate parties--that is, those whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. (See discussion of recordation requirements on p. 11.)

Examples of Valid Disclosures Under FERPA--Rodney, Jeff, and Mark (Part II)
The principal receives information from a student that members of Five Crew are planning an assault at the other high school in retaliation for the previous shooting. Under the emergency exception, the principal can provide information from each student's education record to the appropriate school officials and law enforcement agencies.

Disclosures Under the State Law Juvenile Justice System Exception

FERPA allows schools to play a vital role in a community's efforts to identify children who are at risk of delinquency and provide services prior to a child's becoming involved in the juvenile justice system. The 1994 IASA amendments modified FERPA to permit educators to share information with juvenile justice system agency officials on children who are at risk of involvement or have become involved in the juvenile justice system, prior to adjudication, to the extent State statute allows. System officials to whom the information is disclosed must certify in writing that they will not disclose personally identifiable information to any third party except as provided by State law. Consequently, schools in States with such statutes may disclose information about students to other State and local agencies as part of an effort to serve the student whose records are being released, prior to adjudication. As more and more States establish information sharing programs to serve students through cooperation with the juvenile justice system, the emphasis on neighborhood school participation in interagency information sharing agreements will increase. FERPA need not be a barrier to this progress toward proactive information sharing networks.

Examples of Valid Disclosures Under FERPA--Mary
Mary, 13, is arrested for shoplifting. This is her first offense, and the police department's juvenile division contacts the school for information about Mary's school attendance and academic performance. The school can release school attendance, academic performance, or other information from Mary's education record with the consent of one of her parents. If State law authorizes the disclosure to juvenile justice system agencies, the school can share information from Mary's education record without parental consent. Absent such a State law, the school should ask the police department to obtain a subpoena for the records.

The juvenile justice system exception to FERPA's prior written consent provision allows the disclosure of education records, or information from education records, without consent of the parent or eligible student, if four conditions (see §99.38 of the FERPA regulations) are met:

(1) The disclosure or reporting of the records must be to a State or local juvenile justice system agency.

(2) The disclosure must be based on a State statute authorizing the disclosure.

(3) If the State law was passed after November 19, 1974 (the date FERPA was enacted), the disclosure must relate to the juvenile system's ability to serve, prior to adjudication, the student whose records are being released.

(4) The State or local officials must certify, in writing, that the institution or individual receiving the personally identifiable information has agreed not to disclose it to a third party, other than another juvenile justice system agency.

Adjudication is the process of determining whether a juvenile has committed an act which, if committed by an adult, would be considered criminal conduct. The process is triggered by a "petition" alleging an act of delinquency. The petition may result in a finding or determination that the juvenile committed the alleged act of delinquency. For the purposes of FERPA, once this finding or determination is made and the court has made a disposition of the case, the juvenile would be considered an "adjudicated delinquent." The disposition of a delinquency case is the equivalent of a "sentence" in a criminal case.

The fact that a juvenile has been adjudicated delinquent is not, in and of itself, determinative of whether the State law juvenile justice system exception for the release of information that concerns the "juvenile justice system's ability to effectively serve a student prior to adjudication" is applicable.

If the juvenile justice system seeks the disclosure of information on a student in order to identify and intervene with a juvenile at risk of delinquency, rather than to obtain information solely related to supervision of an adjudicated delinquent, the juvenile could be classified as a preadjudicated delinquent for purposes of this exception. The Secretary of Education believes that each school, working in conjunction with State and local authorities, can best determine whether a release of personally identifiable information from an education record "concerns the juvenile justice system's ability to effectively serve a student prior to adjudication." Thus, FERPA gives schools flexibility in determining whether an education record of a juvenile may be released without the prior written consent of the parent.

Florida provides an example of a State law that allows State and local officials to make use of this IASA amendment to FERPA. The State enacted legislation requiring Florida's Department of Juvenile Justice (DJJ) to establish an early delinquency intervention program with the cooperation of local law enforcement agencies, the judiciary, district school board personnel, the office of the State's Attorney, the office of the Public Defender, and community service agencies that work with children.

The Florida law specifies the type of information the cooperating agencies are to share with DJJ and directs specified agencies and persons to develop information sharing agreements within each county. The law states, "Within each county, the sheriff, the chiefs of police, the district school superintendent shall enter into an interagency agreement for the purpose of sharing information about juvenile offenders.... The agreement must specify the conditions under which summary criminal history information is to be made available to appropriate school personnel, and the conditions under which development records are to be made available to appropriate department personnel." In addition, the law requires the school district to be notified when a youth is arrested for a felony or a crime of violence. FERPA further requires that juvenile justice system agencies certify in writing that they will not redisclose education records to any third party except as provided by State law.

Examples of Valid Disclosures Under FERPA--Johnny (Part I)

Johnny, 11, is having problems in school. He is inattentive, does not complete homework assignments, falls asleep in class, and is hostile to some of the other children. When the school counselor interviews him, Johnny is sullen and unresponsive. The school counselor makes several unsuccessful attempts to reach the parents. In this situation, the teacher or the counselor can share personal observations with a family services agency but cannot rely on an education record as the source of this personal knowledge

of Johnny's situation. If, however, State law authorizes the disclosure and the receiving entity is a juvenile justice system agency, the teacher or the counselor can, to the extent authorized by State statute, then also use information contained in Johnny's education record in making the referral. Thus, FERPA gives schools flexibility in determining whether an education record of a juvenile may be released without the prior written consent of the parent.

Examples of Valid Disclosures Under FERPA--Johnny (Part II)
Before the counselor can refer Johnny to an appropriate agency, the police department picks him up on the street at 2 a.m. on a school night. No one is home when the police attempt to contact the parents. Johnny spends the night in a temporary foster home, and the police refer his case to family services the next day. During the assessment process, the agency contacts the school and asks for information about Johnny's attitude and school performance. The school can provide information from Johnny's education record if at least one of these conditions is met:

(1) A parent consents, or
(2) There is a court order or lawfully issued subpoena directing the release of information, or
(3) A State law authorizes information sharing between educators and juvenile justice agencies.

§ 11.10 Recordkeeping Requirements Under the Family Educational Rights and Privacy Act

A school district must follow certain FERPA recordkeeping requirements. Section 99.32 of the FERPA regulations requires that schools maintain with each student's education records a record of all individuals, agencies, or organizations that requested or obtained access to the student's education records, specifying the legitimate interest that each party had in obtaining the information. Accordingly, educators should document all disclosures of information from a student's education records unless the request is from and the disclosure is to one of the following:

- The parent or eligible student.
- A school official within the school system.
- A party with written consent from the parent or eligible student.
- A party seeking directory information.
- A party requesting or receiving the records as directed by a Federal grand jury or other law enforcement subpoena when the issuing court or agency has ordered that no one disclose the existence or the contents of the subpoena or the information furnished in response to the subpoena.

Examples of Valid Disclosures Under FERPA--Ryan (Part II)
Ryan, now 14, is adjudicated delinquent for breaking into several vehicles on a parking lot. This is his second offense. As a condition of his probation, the court orders Ryan to attend school regularly and to achieve passing grades in his classes. FERPA does not prevent a school from receiving information about Ryan's status as an adjudicated delinquent. The school, in turn, can assist juvenile probation by providing information from Ryan's education record concerning Ryan's attitude and performance in school. However, because of the fact that Ryan has been adjudicated and the information being sought is solely related to Ryan's status as an adjudicated delinquent, his school can only provide this information if one of the following conditions is met:

(1) A parent consents, or
(2) There is a court order or lawfully issued subpoena directing the release of the information.

§ 11.11 Administration of the Family Educational Rights and Privacy Act

The U.S. Department of Education's Family Policy Compliance Office

The Family Policy Compliance Office in the U.S. Department of Education administers FERPA. The Office provides technical assistance on FERPA to education agencies and institutions, State and local officials, and parents. The Office also investigates alleged violations of the law.

Family Educational Rights and Privacy Act Regulations

Another responsibility of the Family Policy Compliance Office is to develop and issue regulations to aid in effective administration of FERPA. On November 21, 1996, the Department of Education published regulations to implement the IASA amendments to FERPA. At the same time, in an effort to reduce the burden on schools and to streamline the complaint procedures, the Department of Education also revised the FERPA regulations to do the following:

- Give schools greater flexibility by removing the requirement for adoption of a formal written student records policy.

- Require schools to include additional information in the mandatory annual notification of rights so that parents and students will receive more effective notification of their rights and procedures to pursue them. (A sample notification is included in appendix B.)

- Clarify FERPA requirements for State education agencies (SEA's) to afford parents access to any education records that SEA's maintain on their children.

- Clarify what constitutes legal standing to file FERPA complaints with the Department of Education. The complainant must be a parent or an eligible student affected by an alleged violation.

- Clarify the requirement that a school district make a reasonable effort to notify in advance the parent or student of its intent to disclose information from education records to a court in cases where a school district is initiating legal action against a parent or student.

The Family Educational Rights and Privacy Act and State Laws

If a school wishes to continue to receive Federal funds, the recipient must comply with FERPA's provisions on the disclosure of education records. (A school district is considered a "recipient" if it receives any funds directly from a program administered by the Secretary of Education or is under the auspices of a State education agency that receives such funds.) Compliance with portions of a State law that conflict with FERPA may jeopardize continued eligibility to receive Federal education funds. If educators believe that a State law conflicts with FERPA, they should bring this to the attention of appropriate State officials.

§ 11.12 Multiagency Agreements to Facilitate Cooperation and Information Sharing

RELEVANT FEDERAL LAWS

Purpose

Multiagency agreements formulated to be consistent with Federal, State, and local laws provide an organizing framework for State and local juvenile justice reform efforts. These agreements are crucial to the development of a juvenile justice network. Typically agencies involved in these agreements provide a wide range of services to juveniles. Parties to such an agreement may be child welfare, mental health, and social services agencies; licensed private community organizations; law enforcement agencies; juvenile courts; district attorney (or State's attorney), probation, corrections, and public defenders offices; and local schools.

Generally, delinquency prevention and intervention, community safety, efficiency, and coordination are the objectives that drive the development of multiagency agreements. More specifically, these objectives may include the following:

- Providing appropriate programs and services to intervene with juveniles currently involved in the juvenile justice system.
- Providing appropriate programs and services designed to deter at-risk juveniles from delinquent behavior.
- Increasing the safety and security of the community and its children by reducing juvenile crime.
- Eliminating duplication of services.
- Coordinating efforts to share resources and training programs.

The contents of interagency agreements underscore the commitment of each agency to offer a maximum degree of cooperation and planning to achieve the group objectives. Typically these agencies agree to participate in interagency planning and development meetings, assign staff to participate in consolidated case management systems where feasible, develop internal policies and procedures to implement the agreement to the fullest extent, and comply with Federal and State laws in implementing the agreement.

Other provisions of the agreement may identify the unique role of each agency. Law enforcement officials might agree, for example, to promptly notify other agencies when juveniles are arrested for truancy or certain violent crimes. The juvenile court might agree to provide periodic information on the disposition of cases or seek input from agencies on dispositional alternatives. The probation office might agree to share information about the move of a juvenile offender into or out of the jurisdiction and the terms, if any, of probation. Other agencies might be willing to share information on the achievement, behavioral, and attendance history of juvenile offenders to improve assessment and proper treatment. Educators might also agree to make referrals to appropriate agencies when students or staff commit certain offenses or exhibit at-risk behavior. (See sample interagency agreement in appendix D.)

Legal Considerations

Relevant Federal and State record confidentiality laws can resolve potential legal problems that arise in connection with interagency agreements. Laws that govern the activities of each State agency may also create standards for information sharing. Policies on juvenile record information vary greatly from State to State. For example, some States treat juvenile court records as public information (see Washington Revised Code 13.50.050; 13.50.010). Other States permit access to court records only by the juvenile and the agencies directly involved in the juvenile justice system. Most States use a method of conditional disclosure of juvenile court

records in which a judge permits access to agencies that are not a part of the juvenile justice system by court order (see Pennsylvania Revised Code 6307, 6308).

State law may occasionally require local agencies to share information. Some States direct law enforcement units to report arrest information to schools when the arrest involves violent offenses of an enrolled student (see Florida Statutes 39.045). Other States require the formation of interagency teams for specific purposes (see Illinois Statutes, Chapter 75, Section 405/1-8.2). State law may also regulate the disclosure of records that other child care agencies maintain on juveniles. These laws should be consulted as well. All agencies are vital components of a comprehensive local strategy to combat juvenile delinquency. Those interested in developing a comprehensive local strategy should identify State laws that frustrate strategies of local teams to share files of record information and advocate for their appropriate reform. Statutes from Florida and Illinois (see appendix E) illustrate comprehensive legislative approaches to delinquency prevention designed to both prevent delinquency and intervene in the lives of at-risk juveniles.

An Effective Program Based on Multiagency Agreements: the Serious Habitual Offender Comprehensive Action Program

A current example of multiagency agreements that unify community resources to improve the delivery of services to juveniles is the Serious Habitual Offender Comprehensive Action Program (SHOCAP). When research indicated that a small proportion of offenders commit most serious and violent juvenile crime, OJJDP introduced the Serious Habitual Offender/Drug-Involved Program in 1983. SHOCAP, which grew out of those initial efforts, seeks to improve public safety by involving those agencies working within the juvenile justice system, for example, law enforcement, prosecution, education, probation, corrections, and social services in a cooperative process to share information and manage juvenile justice system agency cases. The program provides the structure for focusing attention on serious habitual offenders (SHO's) and enhances the quality and relevance of information exchanged through active interagency collaboration.

SHOCAP has four main goals:

- To provide a structured, coordinated juvenile justice system focus on habitual juvenile offenders.
- To establish specific juvenile justice policies that enhance the effectiveness of system procedures for handling habitual juvenile offenders.
- To promote public safety by identifying, tracking, arresting, and prosecuting the most violent habitual juvenile offenders.
- To identify pre-Serious Habitual Offender juveniles (pre-SHO's) and provide early intervention services designed to prevent these juveniles' development into SHO's.

In short, SHOCAP identifies a community's most dangerous and violent juvenile offenders and focuses community resources on immediate and aggressive intervention, including detention, vertical prosecution, and enhanced sentences when they offend or reoffend. The program prevents youth from falling through the cracks by ensuring that relevant case information is made available immediately for juvenile justice decisionmakers. With increased interagency cooperation and information sharing, SHOCAP provides a framework for more efficient service delivery by reducing duplicate services. This increased efficiency allows SHOCAP programs to establish additional early intervention and treatment resources for pre-SHO youth before they become more serious habitual offenders.

Examples of Valid Disclosures Under FERPA--Ronald

Ronald has been involved in several strong-arm robberies and is at risk of becoming a career criminal offender. The county SHOCAP program designates Ronald as a serious habitual offender and develops a supervision and treatment program. He is required to go to school each day, attend a jobs program three times a week, and go to counseling. Nothing in FERPA restricts Ronald's school from receiving information regarding his SHO status. If there is a State law authorizing information sharing with juvenile justice system agencies, Ronald's school can assist in the treatment program by sharing information from his education record about his attendance, performance, and behavior with other agencies providing supervision and services to Ronald.

Florida is developing a statewide SHOCAP program. The program involves a Federal and State partnership: selected county sites receive SAFE POLICY training, provided by OJJDP, and technical assistance, provided by the Florida Department of Law Enforcement. Currently there are 26 SHOCAP sites in Florida with 5 additional sites scheduled for implementation in 1997. For more information regarding SHOCAP, please refer to "Sources of Technical Assistance," p. 21.

Schools are indispensable partners in effective SHOCAP programs because adjudicated offenders who are not placed in detention are likely to return to campus. As noted previously, where State law authorizes or directs disclosures, educators should be advised when alleged juvenile offenders return to the school population and given appropriate information about the youth's offense and current status. Educators can assist in this partnership, to the extent authorized by Federal and State law, by providing information to supervising agencies to better assess the rehabilitation process by tracking attendance, academic achievement, and in-school behavior.

§ 11.13 Appendix A: Family Educational Rights and Privacy Act Regulations

Family Educational Rights and Privacy Act Regulations

34 CFR Part 99

(Current through June 21, 2007; 72 FR 34179)

SUBPART A--GENERAL

§ 99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws?

§ 99.62 What information must an educational agency or institution submit to the Office?

§ 99.63 Where are complaints filed?

§ 99.64 What is the complaint procedure?

§ 99.65 What is the content of the notice of complaint issued by the Office?

§ 99.66 What are the responsibilities of the Office in the enforcement process?

§ 99.67 How does the Secretary enforce decisions?

§ 11.14 Appendix C: Court Order Allowing Interagency Information Exchange

STATE OF _____, SUPERIOR COURT

COUNTY OF _____, JUVENILE COURT

ORDER OF THE JUVENILE COURT AUTHORIZING RELEASE AND EXCHANGE OF INFORMATION BETWEEN SCHOOL DISTRICTS, LAW ENFORCEMENT, PROSECUTORS, COUNTY COUNSELS, CHILD PROTECTIVE SERVICES, AND PROBATION DEPARTMENT OF _____ COUNTY

Pursuant to the authority vested in the court by

(Code, Sections)

IT IS HEREBY ORDERED that juvenile court records and any other information that may be in the possession of school districts, law enforcement, prosecutors, county counsels, child protective services, and probation departments regarding minors may be released, for governmental purposes only, to the following persons who have a legitimate and official interest in the information:

1. The minor
2. The minor's attorney
3. The minor's parents or guardians
4. Foster parents
5. All district attorneys offices
6. All law enforcement agencies
7. All county attorneys
8. All school districts
9. All probation departments
10. All public welfare agencies
11. All youth detention facilities
12. All corrections departments
13. Authorized court personnel
14. All courts
15. All treatment or placement programs that require the information for placement, treatment, or rehabilitation of the minor
16. All multidisciplinary teams for abuse, neglect, or delinquency
17. All juvenile justice citizens advisory boards
18. All State central information registries
19. All coroners
20. All victims may receive information from law enforcement, probation or the prosecutor to enable them to pursue civil remedies. These same agencies may release information to identifiable potential victims that a minor constitutes as a threat to their person or property. They may release the name, description, and whereabouts of the minor and the nature of the threat toward the potential victim.

All information received by authorized recipients listed above may be further disseminated only to other authorized recipients without further order of this court.

IT IS FURTHER ORDERED that the release of information to the media regarding minors shall be as follows:

District attorneys, probation and law enforcement officials may divulge whether or not an arrest has been made, the arresting offenses, and disposition of the arrest.

District attorneys, county counsels, law enforcement, child protective services, and probation officials may divulge whether or not they plan to file a petition and the charges alleged therein, the detention or release status

of the minor, the date and location of hearings, the names of the judge or referee who will hear the matter, and the finding and disposition of the court.

In the event of runaways or escapes from juvenile placements or institutions, district attorneys, law enforcement, child protective services, and probation officials may confirm the fact of the runaway or escape to the media and the name of the juvenile, the general type of record of the juvenile, and the city of residence of the juvenile.

IT IS FURTHER ORDERED that this order does not prohibit release of information by law enforcement, probation officials, or district attorneys about crimes or the contents of arrest reports except insofar as they disclose the identity of the juvenile.

This order supersedes the previous order of the Court concerning release of information dated _____ .

_____ _____

DATE PRESIDING JUDGE, JUVENILE COURT

§ 11.15 Appendix D: Model Interagency Agreement

This Agreement made and entered into as of the date set forth below, by and between the

[List Agencies Here]

WITNESSETH:

WHEREAS, all parties are committed to providing appropriate programs and services to prevent children from becoming at risk and to intervene with children already involved in the juvenile justice system; and

WHEREAS, the parties to this agreement desire a maximum degree of long range cooperation and administrative planning in order to provide for the safety and security of the community and its children; and

WHEREAS, all parties are committed to improving services to children in the juvenile justice system through sharing information, eliminating duplication of services and coordinating efforts; and

WHEREAS, all parties mutually agree that sharing resources, where feasible, and in particular, training efforts, may result in improved coordination; and

WHEREAS, it is the understanding by all parties that certain roles in serving children and youth are required by law, and that these laws serve as the foundation for defining the role and responsibility of each participating agency; and

WHEREAS, all parties mutually agree that all obligations stated or implied in this agreement shall be interpreted in light of, and consistent with governing State and Federal laws;

NOW, THEREFORE in consideration of the following agreements, the parties do hereby convenant and agree to do the following:

EACH OF THE PARTIES AGREE TO:

1. Promote a coordinated effort among agencies and staff to achieve maximum public safety with the goal of reducing juvenile crime.

2. Participate in interagency planning meetings, as appropriate.

3. Assign staff, as appropriate, to participate in a consolidated case management system, reentry into school of children returning from detention or commitment program, and other information-sharing activities to assess and develop plans for at-risk youth and those involved in the juvenile justice system.

4. If applicable, participate in the planning and implementation of a juvenile assessment, receiving, and truancy center to the extent feasible for each party.

5. Jointly plan, and/or provide information and access to, training opportunities, when feasible.

6. Develop internal policies and cooperative procedures, as needed, to implement this agreement to the maximum extent possible.

7. Comply with relevant State and Federal law and other applicable local rules which relate to records use, security, dissemination, and retention/destruction.

THE JUVENILE COURT AGREES TO:

1. Notify the Superintendent, or designee, of the name and address of any student found to have committed a delinquent act or who has had adjudication withheld. Notification shall be within 48 hours and shall include the specific delinquent act found to have been committed or for which adjudication was withheld, or the specific felony for which the student was found guilty.

2. Identify sanctions for youth who are in contempt of court due to violation of a court order on school attendance.

3. Upon request by the school district, share dispositional information with the Superintendent or his designee regarding juveniles who are students within the educational system for purposes of assessment, placement, or security of persons and property.

4. Consider the issuance of court orders necessary to promote the goals of this agreement, particularly information sharing between the agencies involved.

5. Develop, in corporation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

6. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

THE DEPARTMENT OF PROBATION AGREES TO:

1. Notify the Sheriff and Superintendent of Schools or designees, immediately upon learning of the move or other relocation of a juvenile offender into, out of, or within the jurisdiction, who has been adjudicated, or had adjudication withheld for a violent misdemeanor or felony.

2. Share dispositional, placement, and case management information with other agencies as appropriate for purposes of assessment, placement, and enhanced supervision of juveniles.

3. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

4. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

THE DEPARTMENT OF HEALTH [OR SOCIAL SERVICES OR SIMILAR AGENCY] AGREES TO:

1. Provide notice to the Superintendent of Schools or a designee, immediately upon the initiation of planning efforts with private nonprofit entities or governmental entities, including agencies part of this Agreement, which could result in the creation, relocation, or expansion of youth services programs and which may impact the school district.

2. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

3. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

THE SCHOOL SUPERINTENDENT AGREES TO:

1. Notify, within 24 hours, the child's principal of juveniles arrested for crimes of violence or violation of law upon receipt of such information from law enforcement or the court system or probation department. The principal, within 24 hours of such notice, shall provide such information to student service personnel, the school resource officer, the student assistance coordinator, and the student's immediate teachers.

2. Designate the contact person to be responsible for receiving juvenile arrest information and inform all parties as to the Superintendent's designee.

3. Request criminal history information only for the purposes of assessment, placement, or security of persons and property.

4. Designate the contact person(s) to be responsible for receiving confidential criminal history information and inform all parties as to the names of those individuals.

5. Develop appropriate internal written policies to insure that confidential criminal history information is disseminated only to appropriate school personnel.

6. Share information on student achievement, and behavioral and attendance history on juvenile offenders and juveniles at risk of becoming offenders with the parties to this agreement, for the purpose of assessment and treatment.

7. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

8. Notify the appropriate law enforcement agency when an adult or a student commits any of the following offenses on school property, on school sponsored transportation, or at school sponsored activities: Homicide; Sexual Battery; Armed Robbery; Aggravated Battery on a teacher or other school personnel; Kidnapping or abduction; Arson; Possession, use, or sale of any firearm; Possession, use, or sale of any explosive device; Possession, use, or sale of any controlled substance; or any act that compromises school or community safety. Additionally, if the offense involves a victim, school officials shall notify the victim and the victim's parents of the offense and the victim's right to press charges against the offender. School personnel shall cooperate in any investigation or other proceedings leading to the victim's exercise of right as provided by law.

EACH LAW ENFORCEMENT CHIEF [OR SHERIFF] AGREES TO:

1. Notify the Superintendent, or designee, of the name and address of any student arrested for crimes. Notification shall be within 24 hours and shall include the specific delinquent which led to the arrest.

2. Upon request by the school district, share summary criminal history information with the Superintendent or his designee regarding juveniles who are students within the educational system for purposes of assessment, placement, or security of persons and property.

3. Develop appropriate internal written policies to insure that confidential education record information is disseminated only to appropriate personnel.

4. Develop, in cooperation with School and law enforcement, and local service providers, a written plan to determine the procedures to take when a child is identified as being truant from school.

5. Notify the Superintendent, or designee, of the name and address of any employee of the school district who is charged with a felony or with a misdemeanor involving the abuse of a minor child or the sale or possession of a controlled substance. Notification shall be within 24 hours and shall include the specific act which led to the arrest.

THE STATE ATTORNEY [OR DISTRICT ATTORNEY] AGREES TO:

1. Notify the Superintendent or designee when a student is formally charged with a felony, or with a delinquent act which would be a felony if committed by an adult in a timely manner.

2. Provide copies to the Superintendent or designee of all Petitions, Informations, or No File decisions, as to students for violent misdemeanors and felonies or delinquent acts which would be a felony if committed by an adult in a timely manner.

ADMINISTRATIVE

TERM OF AGREEMENT:

This agreement shall be in effect as of the date the agreement is signed by the majority of the initiating parties and shall renew automatically unless otherwise modified. All parties are signatory to this agreement when signing or when the majority of the initiating parties signs, whichever is later. Any party signatory to this agreement may terminate participation upon thirty days notice to all other signed parties to the agreement.

AGENCY REPRESENTATIVES:

The parties will develop procedures for ongoing meetings and will, at least annually review and if necessary, recommend any changes.

MODIFICATION OF AGREEMENT:

Modification of this agreement shall be made only by consent of the majority of the initiating parties. Such shall be made with the same formalities as were followed in this agreement and shall include a written document setting forth the modifications, signed by all the consenting parties.

OTHER INTERAGENCY AGREEMENTS:

All parties to this agreement acknowledge that this agreement does not preclude or preempt each of the agencies individually entering into an agreement with one or more parties to this agreement. Such agreements shall not nullify the force and effect of this agreement. This agreement does not remove any other obligations imposed by law to share information with other agencies.

SIGNATURES OF PARTIES TO THIS AGREEMENT:

Upon signing this agreement, the original agreement and signature shall be filed with the clerk of the court and placed in the public records of the jurisdiction. A certified copy of the agreement and the signatures shall be provided to each signatory to the agreement.

Cautions for Model Interagency Agreement

As educators and juvenile justice professionals work on developing interagency information sharing agreements, they should ensure that the laws of their State permit information and record sharing. Further, the interagency agreement should contain a clause prohibiting the release of information to third parties not covered by the agreement.

IV. THE MULTIETHNIC PLACEMENT ACT AND INTERETHNIC ADOPTION PROVISIONS

§ 11.16 A Guide to the Multiethnic Placement Act of 1994, As Amended by the Interethnic Adoption Provisions of 1996*

Chapter 1: Introduction

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

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

This monograph was prepared by the American Bar Association under Cooperative Agreement No. 90CW1087/01 from the Administration for Children and Families. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Health and Human Services.

This monograph was funded through the National Resource Center on Legal and Court Issues.

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

A. Overview of MEPA-IEP

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

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

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

(1) It prohibits states and other entities that are involved in foster care or adoption placements, and that receive federal financial assistance under Title IV-E, Title IV-B, or any other federal program, from delaying or denying a child's foster care or adoptive placement on the basis of the child's or the prospective parent's race, color, or national origin;

(2) It prohibits these states and entities from denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent's or the child's race, color, or national origin; and

(3) It requires that, to remain eligible for federal assistance for their child welfare programs, states must diligently recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state who need foster and adoptive homes.

Although MEPA-IEP does not explicitly incorporate a "bests interests" standard for making placements, the 1997 and 1998 HHS Guidances note that "the best interests of the child remains the operative standard in foster care and adoptive placements." Nonetheless, to be consistent with constitutional "strict scrutiny" standards for any racial or ethnic classifications, as well as with MEPA-IEP, a child's race, color, or national origin cannot be routinely considered as a relevant factor in assessing the child's best interests. Only in narrow and exceptional circumstances arising out of the specific needs of an individual child can these factors lawfully be taken into account. Even when the best interests of an individual child appear to compel consideration of these factors, caseworkers cannot assume that needs based on race, color, or national origin can be met only by a racially or ethnically matched parent. Much will depend on the nature of the child's specific needs and on the capacity of individual prospective parents to respond to these needs.

MEPA-IEP is fully consistent with President Clinton's Adoption 2002 Initiative, with its goal of doubling by the year 2002 the number of adoptions of children who cannot return to their biological parents. MEPA-IEP also

complements the emphasis of the 1997 Adoption and Safe Families Act (ASFA) on a child's health and safety as the paramount concern in child welfare decisions. This emphasis implies that no factors, including racial or ethnic factors, should be taken into account in placement decisions unless they have a specific and demonstrable bearing on the child's health and safety.

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

B. Children in Out-of-Home Care

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

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

According to HHS-VCIS data, nearly 60,000 children in out-of-home care at the end of 1994 had a goal of adoption, of whom around 16,000 were legally free. Of these children, 54% were African American, 42% were white, and 1.3% were Hispanic. Most of these children were over six years of age, but nearly a third were between one and five years of age. Of the total number of children in out-of-home care at the end of fiscal year 1995, estimates are that more than 45% were African American, 36.5% white, 11.3% Hispanic, 1.6% American Indian\Alaskan Native, 1.0% Asian\Pacific Islander and around 4% of unknown racial or ethnic origin. The annual number of finalized adoptions in the 1990s has not exceeded 18,000-19,000, or not quite 4% of the total number of children in out-of-home care.

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

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

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

twice as likely to be adopted as to remain in care. Hispanic children were about as likely to remain in care as to be adopted.

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

C. Standard Practice Before MEPA-IEP

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

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

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

Both proponents and critics of matching policies became concerned about these delays and about allegations that some children were being removed from stable transracial fost-adopt homes solely in order to prevent a permanent transracial placements. No one doubts the adverse effects on children's emotional and cognitive development if they spend considerable time in their early years in institutional care or in a succession of foster placements. Research conducted from a variety of theoretical perspectives indicates that children who are deprived of an early, continuing, stable relationship with at least one psychological parent may lack the capacity to form deep emotional attachments or close social relationships. This risk is exacerbated if children are subject

to additional neglect or abuse while in out-of-home care. Claims about the harms attributable to delays in achieving permanency gain support from studies that show how much better adopted children do on most outcome measures than do children who remain in foster care. Moreover, being placed at an early age is positively correlated with generally more positive adoption outcomes for all kinds of children.

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

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

Studies that focus on adolescence, when most children experience doubts about their identity and capacity for autonomy and independence, do not find unusual difficulties among transracial adoptees. The few studies that track children into their twenties indicate that transracial adoptees are doing well, maintain solid relationships with their adoptive families, and may have higher educational attainments than same-race adoptees.

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

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

D. The Law Before MEPA-IEP

Discrimination within the child welfare system based on race, color, or national origin was illegal before MEPA or the 1996 amendments were enacted. Under the Constitution's Equal Protection Clause, racial classifications are generally invalidated unless they meet the "strict scrutiny" test. To survive this test, racial and other "suspect classifications" must be justified by a compelling governmental interest and must be necessary to achieve this interest. If the state's interest can be served through a less restrictive, non-discriminatory means, the non-discriminatory means must be used. The strict scrutiny test similarly applies to cases arising under Title VI of the Civil Rights Act which prohibits discrimination based on race, color, or national origin in all federally funded programs.

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

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

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

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

Chapter 2: The Provisions of MEPA-IEP

A. Substantive Provisions

1. What entities are subject to the Act?

MEPA-IEP applies to any state or other entity that receives funds from the federal government and is involved in some aspect of adoptive or foster care placements. All state and county child welfare agencies involved in placements that receive federal title IV-E and title IV-B funds are subject to MEPA-IEP. The Act also applies to other public or private agencies involved in placements that receive federal funds from any source, whether they receive the funds directly or through a subgrant from a state, county, or another agency. This means that a child placement agency that receives no funding from either the federal foster care or child welfare programs under titles IV-E or IV-B, but does receive financial assistance from other federal programs, including the Adoption Opportunities Act, the Child Abuse Prevention and Treatment Act (CAPTA), ot Title XX, is subject to MEPA-IEP.

2. Placements

(a) What is prohibited?

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

> delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.

(b) What is denial?

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

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

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

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

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

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

While the adoption worker might wish to counsel the child, the child's ideas of what would make her or him most comfortable should not be dismissed, and the worker should consider the child's willingness to accept the family as an element that is critical to the success of the adoptive placement.

(c) What is delay?

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

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

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

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

One of the best ways to reduce delays, regardless of their cause, is for agencies to undertake a comprehensive and well-documented assessment of each child's placement needs as promptly as possible once a child is likely to enter out-of-home care. If placement with a relative is an option, the relative should be notified and assisted in completing any requirements for serving as the child's caregiver. If the court determines that reunification efforts are not required for a particular child, a permanency case plan should be prepared and reasonable efforts devoted

to its prompt implementation. Active recruitment and retention of appropriate and diverse foster and adoptive families is also essential to any overall policy aimed at achieving permanency.

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

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

3. The opportunity to become an adoptive or foster parent

Entities covered by MEPA-IEP may not:

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

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

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

The equal protection clause and Title VI prohibit agencies from using race or ethnicity to deprive individuals of the general opportunity to serve as a foster or adoptive parent, assuming they are otherwise qualified to do so. Nonetheless, in individual cases, MEPA-IEP focuses on the specific and distinctive needs of the child and on the capacity and willingness of particular individuals to meet those needs. Because placement decisions are based on the needs of the child, no one is guaranteed the "right" to foster or adopt a particular child.

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

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

The 1995 Guidance makes clear that the prohibition on discrimination includes not only denials overtly based on race, color, or national origin but also using race-neutral policies that have the effect of excluding groups of

prospective parents on the basis of race, color, or national origin, where those standards are arbitrary or unnecessary or where less exclusionary standards are available. Race-neutral policies that may have the effect of discriminating on the basis of race, color, or national origin may include those related to income, age, education, family structure, and size or ownership of housing, where such policies are not shown to be necessary to the program's objectives or there are no less discriminatory alternatives available that will achieve those objectives. Restrictive criteria such as these have been cited as barriers to the inclusion of African American and other minority families in the pool of prospective foster and adoptive parents who can provide homes for children. Other barriers to participation include lack of minority staff and management in placement agencies, lack of recruitment in appropriate communities, lack of communication about the need for families in appropriate communities, fees and costs that make adoption difficult or impossible for low income families, negative perceptions about child welfare agencies in minority communities, and the traditional use of informal rather than formal adoption in certain cultures. Barriers to participation can be addressed in an appropriate recruitment plan.

4. Diligent Recruitment

MEPA-IEP requires states to develop plans that:

> provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.

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

The Guidance specifies that an appropriate comprehensive recruitment plan includes:

(1) A description of the characteristics of waiting children.

(2) Specific strategies to reach all parts of the community.

(3) Diverse methods of disseminating both general and child specific information.

(4) Strategies for assuring that all prospective parents have timely access to the home study process, including location and hours of services that facilitate access by all members of the community.

(5) Strategies for training staff to work with diverse cultural, racial and economic communities.

(6) Strategies for dealing with linguistic barriers.

(7) Non-discriminatory fee structures.

(8) Procedures for a timely search for prospective parents for a waiting child, including the use of exchanges and other interagency efforts, provided that such procedures must ensure that placement of a child in an appropriate household is not delayed by the search for a same race or ethnic placement.

The Guidance recognizes that both general and targeted recruitment activities are important. These include use of the general media (radio, television and print), dissemination of information to targeted community

organizations, such as religious groups and neighborhood centers, and the development of partnerships with community groups to make waiting children more visible and to identify and support prospective adoptive and foster parents. Recruitment activities should provide potential foster and adoptive parents with information about the characteristics and needs of the available children, the nature of the foster care and adoption process, and the financial, medical, counseling and other assistance and support available to foster and adoptive families.

5. Interaction with Indian Child Welfare Act

MEPA-IEP specifically provides that it has no effect on the Indian Child Welfare Act (ICWA). ICWA was enacted in 1978 in response to concerns about the large number of Native American children who were being removed from their families and their tribes and the failure of states to recognize the tribal relations of Indian people and the cultural and social standards of Indian communities. ICWA establishes standards and procedures for certain "custody proceedings" that affect Indian children, including voluntary and involuntary terminations of parental rights and foster care, pre-adoptive, and adoptive placements. An "Indian child" for purposes of ICWA is an unmarried individual under the age of 18 who is either a member of a federally recognized Indian tribe or is eligible for membership and is the biological child of a tribal member. ICWA gives tribal courts exclusive jurisdiction over proceedings concerning Indian children whose "domicile" (permanent home) is on a reservation and allows tribes to intervene in state court proceedings concerning non-reservation Indian children. MEPA-IEP does not alter ICWA's recognition of tribal rights, nor does it affect ICWA's preferences for placing Indian children with members of their extended families or other tribal members. Because MEPA-IEP does apply, however, to placement activities not covered by ICWA, Indian adults are protected by MEPA-IEP against discrimination if they want to become foster or adoptive parents of non-Indian children.

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

6. Implementation

Compliance with the original provisions of MEPA was required by October 21, 1995, and compliance with the 1996 IV-E provisions was required by January 1, 1997. States had to submit their recruitment plans to HHS by October 31, 1995. They had the option of doing so as part of a consolidated state plan that includes the plans submitted under title IV-B subparts 1 and 2 or, for states submitting a separate title IV-B subpart 1 plan, as a separate plan amendment.

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

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

Staff from ACF and the Office for Civil Rights (OCR), in addition to conducting Compliance Reviews, are available for technical assistance, and teams from ACF and OCR have gone to at least one state in each region to provide technical assistance. They are also available to respond to requests from other states. In addition, states may request the assistance of groups like the American Bar Association Center on Children and the Law and the National Resource Center on Special Needs Adoption and the National Resource Center on Permanency Planning through a request to their regional Administration on Children and Families (ACF) office. For more information on this, please contact the ACF Regional Offices or the Resource Centers listed in the Appendices.

7. Enforcement

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

(a) Administrative enforcement

(1) Title VI

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

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

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

HHS is required to seek the cooperation of recipients of federal funds in obtaining compliance with Title VI, and HHS is committed to working closely with covered agencies to promote voluntary compliance. An agency may

agree to come into voluntary compliance at any point during the investigation or any action to terminate funding.

(2) Title IV-B

In order to receive title IV-B funds for child welfare services, promoting safe and stable families, and family preservation and support services, States and Tribes must develop a plan that meets the requirements of IV-B including the requirements for a recruitment plan. States and Tribes are required periodically to submit new plans under title IV-B. Failure to develop a recruitment plan could result in the loss of title IV-B funding. Before granting federal assistance, HHS must determine whether a state plan complies with federal statutes, regulations and guidelines. This determination must be completed within ninety days of the date the state submits the plan. After the initial plan is approved, HHS may withhold future payment of federal funds if the plan no longer complies with federal law, either because of changes in federal requirements or because of plan amendments submitted by the state. Federal funds also may be withheld if the state fails to administer the plan in substantial compliance with federal law. However, HHS is working jointly with States and Tribes to achieve voluntary compliance, and could afford States and Tribes an opportunity for corrective action before withholding funds.

(3) Title IV-E

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

ACF will start screening for indications of MEPA-IEP compliance as part of the child welfare review process starting in 1999. OCR will continue to address compliance by investigating complaints and conducting independent reviews. ACF and OCR are working together to develop common protocols and review standards along with policies and procedures for monitoring compliance, developing corrective action plans, and imposing penalties. The formal review standards and protocols will be published in the Federal Register.

(b) Private law suits

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

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

8. Barriers to Implementation

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

(a) Confusion

Confusion about the requirements of MEPA-IEP is likely to exist among child welfare workers and the general public as a result of the public debate about transracial adoption and same race placement policies. Confusion is also likely to result from the changes MEPA-IEP will require in law and policy in some states. It is important that administrators act quickly to say what is and what is not required by the law and to specify which current policies and practices must change and which are not affected. Administrators should develop clear written guidelines that detail mandatory requirements and areas where professional judgment is appropriate.

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

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

(b) Lack of resources

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

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

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

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

(c) Resistance

Agencies may also encounter resistance from individual workers either because of their personal views or a perception that the federal law is dictating decisions in individual cases where professional discretion should be

exercised. Administrators can overcome this resistance by discussing with workers the basic goals and underlying values of the law in addition to its specific provisions. Staff meetings or discussion groups can provide an opportunity for value clarification that will promote consistent decision making in individual cases. Open discussion is particularly important because implementation of MEPA-IEP can raise explosive and emotional issues concerning the needs of children and the meaning of racism and discrimination.

(d) Fear of litigation

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

Chapter 3: Common Questions About MEPA-IEP

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

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

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

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

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

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

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

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

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

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

> ...neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may--
>
> > (a) deny to any person the opportunity to become an adoptive or foster parent, on the basis of the race, color, or national origin of the person, or of the child involved or (b) delay or deny the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.

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

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

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

On rare occasions, the distinctive needs of an individual child may warrant consideration of the child's race, color, or national origin. Any consideration of these factors must pass the strict scrutiny test: Is it necessary to take into account the child's needs related to race, color, or national origin in order to make a placment that serves this particular child's best interest? If it appears that the child does have these distinctive needs, caseworkers should document their response to the following questions:

- What are the child's special or distinctive needs based on race, color, or national origin? Why is it in the child's best interests to take these needs into account?

- Can the child's needs related to race, color, or national origin be taken into account without delaying placement and placing the child at risk of other harms?

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

- Can these needs be met only by a same race/ethnic placement? If so, is some delay justified in order to search for a parent of the same race or ethnicity, if an appropriate person is not available in the agency's current files?

- In a foster care placement, can the child's special needs be taken into account without denying the child an opportunity to be cared for in a readily available foster home?

- What are the child's other important needs?

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

MEPA-IEP encourages child welfare workers to make decisions on the basis of the individualized needs of each child, and renders suspect any placement decision based on stereotypical thinking or untested generalizations about what children need. From now on, it should be clear that any use of race, color, or ethnicity is subject to the strict scrutiny standard of review, and that the use of racial or ethnic factors is permitted, only in exceptional circumstances where the special or distinctive needs of a child require it and where those needs can be documented or substantiated.

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

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

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

4. Can state law or policy include a preference for racial or ethnic matching so long as no child or prospective parent is precluded from being considered for placement on the basis of their race, color, or national origin?

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

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

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

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

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

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

Generalizations about the wisdom of placing with a relative, even when a relative has not yet been located or evaluated should not necessarily result in removing a child from the child's current placement. For example, caseworkers should exercise caution before removing a child from a stable, long-term, transracial fost-adopt home in order to make a racially-matched placement with a relative the child may have never met. To avoid this situation, caseworkers should attempt to locate all relatives who might serve as a child's caregiver as promptly as possible whenever a child is likely to require out-of-home care.

7. Does MEPA-IEP apply to white children?

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

8. How does MEPA-IEP apply to infants?

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

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

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

Nevertheless, in order to comply with the Indian Child Welfare Act (ICWA), children entering the child welfare system who may have some Native American heritage should have their existing or potential tribal affiliations ascertained immediately so that ICWA notice, jurisdictional, and placement requirements can be followed. Because ICWA is not based on a child's race as such, but on the child's cultural and political ties to a quasi-sovereign federally recognized Indian tribe, ICWA is not affected by MEPA-IEP. This means that a child with a certain quantum of "Indian blood" may or may not be subject to ICWA. Caseworkers generally have to rely on tribal determinations whether or not the child is a tribal member or eligible for membership.

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

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

11. Can agencies conduct targeted recruitment?

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

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

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

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

Under MEPA-IEP, individuals cannot be denied an opportunity to be considered as a potential adoptive parent. They have a right to an assessment of their suitability as adoptive parents which is not based on discriminatory criteria. If accepted into the pool of qualified applicants for an agency, a state, or an interstate exchange, they have a right to be considered as a possible adoptive parent for children for whom they have expressed an

interest, and whose needs they believe they can meet. However, neither they nor anyone else has an absolute right to adopt a particular child.

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

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

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

Chapter 4: Checklists for Implementation of MEPA-IEP

A. What Agencies Can Do

1. Promote good child welfare practice

MEPA-IEP is consistent with good child welfare practice. Both MEPA-IEP and good practice require: individual decisionmaking; consideration of all of the child's needs from the time the child first comes into contact with the child welfare system; consistent attention to all those needs throughout the child's relationship with the agency and in each placement decision; active recruitment of potential foster and adoptive parents from all segments of the community; development of a pool of foster and adoptive parents that respond to the needs of the children in care; eligibility criteria for foster and adoptive parents that are related to their ability to care for a child; and support and respectful treatment of all prospective parents. Good practice will improve permanence for children and decrease the chances that MEPA-IEP will be violated.

2. Decrease delays in permanence caused by other factors

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

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

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

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

4. Monitor agency compliance with MEPA-IEP

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

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

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

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

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

5. Implement a comprehensive recruitment plan

States were required to submit an appropriate comprehensive recruitment plan to HHS no later than October 31, 1995. States should take into consideration both the mechanisms they will use to reach all segments of the community and the protections they will implement to ensure compliance with the nondiscrimination provisions

of MEPA-IEP. For example, the state may choose to use targeted efforts to reach minority communities, but these efforts may not exclude whites who wish to become foster or adoptive parents.

Public and private agencies should assist the state in developing an appropriate recruitment plan that meets the needs of the children they serve. Agencies should ensure state plans include creative and affirmative efforts to reach communities that reflect the ethnic and racial diversity of children who need homes. The diversity and cultural competency of the recruitment staff should be reviewed as should any written or audiovisual materials used. Recruitment efforts should also address how parents are treated in the home study and placement process. Recruitment is wasted if the system does not make appropriate use of interested parents who respond, or if such efforts are not timely.

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

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

6. Issue clear policies and standards for placement

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

7. Provide training for workers

Training on the provisions of MEPA-IEP and discussion of how those provisions apply in individual situations is important to ensure that workers understand and implement the law properly. Appropriate training will also help protect agencies from claims they have engaged in discriminatory practices.

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

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

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

9. Provide opportunities for discussion and value clarification

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

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

10. Get good legal advice

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

11. Get help

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

B. What Workers Should Do

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

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

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

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

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

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

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

3. Consider permanence from the first contact with the child

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

4. Read the statute and the federal guidance

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

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

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

6. Document the reasons for decisions

MEPA-IEP emphasizes individualized decision making based on the needs of the child. Workers should document the basis for their decisions including all the factors they considered in reaching that decision.

Documentation will help workers clarify for themselves the factors taken into consideration and the reasons for the decision. It will provide a record a supervisor or another worker can refer to in understanding the case, and it will provide evidence of appropriate action in the event the worker is charged with violation of the law.

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

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

Conclusion

The overriding goals of MEPA-IEP are to reduce the length of time children spend in out-of-home care, and to prevent discrimination in placement decisions. However, we should have realistic expectations about what MEPA-IEP can accomplish. The waiting children in the child welfare system have multiple needs, and the child welfare system faces multiple challenges in achieving permanence for these children. MEPA-IEP is only one part of the comprehensive effort that is needed to improve the lives of children who are waiting for permanent homes.

Implementation of MEPA-IEP provides an opportunity for states and agencies to improve permanency for children. Agencies and social workers will need to have a clear understanding of the requirements of MEPA-IEP and Title VI and of good social work practice to avoid the problems and controversies that can arise. Attention to the goals of MEPA-IEP and the best interest of the individual children being served are the keys to successful implementation.

§ 11.17 Turning Law into Practice: A National Snapshot of MEPA/IAP*

CLP caught up with Margaret Burt, JD, to discuss how states are implementing the six-year old Multiethnic Placement Act of 1994, as amended by the Interethnic Adoption Provisions of 1996. MEPA/IAP prohibits the use of a child's or prospective parent's race, color or national origin to delay or deny the child's placement. MEPA/IAP also requires diligent efforts to expand the number of racially and ethically diverse foster and adoptive parents. This interview reflects the often-difficult process of applying law in practice.

Drawing on her 20 years of practice as a child welfare agency attorney, public defender and law guardian in Monroe County, NY, Margaret earns lots of frequent flier miles giving child welfare training and technical assistance to judges, lawyers, and social workers around the country.

In the past several years Margaret has provided MEPA/IAP training and technical assistance to "many urban and rural areas with very diverse foster care populations," in 13 states, several regional conferences, and Washington, D.C. Through this work, she has found MEPA/IAP poses many challenges for practitioners in the field.

Q&A Margaret, what part of MEPA/IAP provokes the most questions?

I get the most questions about when or under what circumstances it's permissible to consider the racial background of a child in making a placement decision. I hear many questions from foster/adoptive parents and agency staff about what questions are permissible and what violates the statute. Parents want to know if they can request a child of a certain background or race. (For a discussion of these questions and examples, see the federal policy guidance and information memoranda in the appendices of *A Guide to the Multiethnic Placement Act of 1994* cited in the *Resources* sidebar below.)

Agency personnel ask about birth parents who express preferences in placing their child. I tell them: if the birth parent asks, you have to say the agency can't guarantee the birth parent's preference. Agencies cannot do racial matching.

Q&A What do *you* think are the biggest problems or barriers state agencies face in implementing the Act?

Clashing Philosophies. I think many front-line caseworkers do not agree with the philosophy behind the Act. There are essentially three mandates to MEPA/IAP for state agencies. One of them--the mandate for recruiting a diverse group of foster and adoptive parents--makes sense to agencies. They want to do it and are anxious to learn ways to do it better. The other two mandates: (1) no discrimination in placement or (2) delays in placement based on race are appropriate on their face. However, the practical implementation of those mandates is a significant problem for agencies.

So some of my training and education deals with the fact that some may not agree with the law, but the *law has to be followed.* In my experience, agency personnel, lawyers, judges--everybody--is extremely uncomfortable discussing difficulties they see inherent in MEPA/IAP. No one wants to appear culturally insensitive, or hurt

---

* This article was written by Sally Small Inada and was published in Child Law Practice, Volume 19, No. 5, by the ABA Center on Children and the Law.

Sally Small Inada, MA, is Director of Marketing and Information Design at the ABA Center for Children and the Law.

anyone. Having said that, it is clear when I lead discussions of the Act, there is anger and frustration in the room. People are afraid to say that what the Act requires doesn't make sense to them. This is a challenge for all of us, because if people won't admit their problems with the Act, we can't get to the next step of solving those problems.

I feel it is important for agency personnel to be able to express disagreements or opinions while we're training. We need to recognize how difficult it can be to implement a law or policy a worker may not agree with.

Judicial Training Needed. Another barrier is judges who are unfamiliar with the Act and don't follow its requirements. When I'm training, I'm often told of instances of court-ordered placements that directly violate MEPA/IAP. So it's not just caseworkers and lawyers who need to be trained.

Practical Guidance Is Hard to Find. A big problem is that a plain reading of the statute does not prepare agencies for some of the complicated practical areas that are discussed in the federal guidance. The Act is more complicated to put into practice than it seems on its face. I usually try to wrap up training on the Act by saying that as it is written, we have to comply with it. And I emphasize that working out the practical applications of the Act presents challenges even for people who agree with it. (For more information see *A Guide to the Multiethnic Placement Act of 1994* cited in the *Resources* sidebar)

Q&A What, in your experience, has been the biggest motivation/help in getting states to enforce MEPA/IAP?

Even agency personnel disagreeing with MEPA/IAP recognize there are powerful sanctions backing this Act. These include upcoming federal audits, which could result in penalties and loss of federal funds to agencies in violation (for more information on penalties, see "New Federal Regulations on ASFA," cited under *Resources*, previous page). The statute also provides that private lawsuits could be filed against agencies that violate the Act. Obviously, the most important motivator is to find children permanent placements, although some caseworkers do not believe MEPA/IAP enhances permanency.

Q&A What steps can states take to improve how they implement MEPA/IAP?

Look at your forms, especially your adoption and foster care/parent forms. Do they comply with the Act? Review and, if necessary, rewrite your forms. Training workers to use the new forms is a good way to educate them on what the Act requires.

Are your front-line staff returning adoption and foster care phone calls with accurate information? For example, if someone calls saying they are interested in adopting or fostering a child, are they discouraged because they are not the same race as the majority of kids in care?

Judges and attorneys need to understand what are appropriate and inappropriate requests. Judges must be educated to not issue placement decisions or court orders that violate MEPA/IAP. If your judge issues a placement order that appears to violate the Act, *tactfully--very tactfully* --point out that his order could violate the federal law.

Bottom Line
MEPA/IAP can be difficult to implement because it touches upon sensitive issues surrounding race, placement and children. The law being the law, each state, locality, agency and court must grapple with practical ways to make MEPA/IAP work.

Selected Answers to GAO Questions about MEPA/IAP

Q: May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with foster parents of a specific racial, national origin, ethnic and/or cultural group?

A: No.

Q: May public agencies assess the racial, national origin, ethnic and/or cultural capacity of all adoptive parents, either by assessing that capacity directly or as part of another assessment such as an assessment of strengths and weaknesses?

A: No. The factors discussed above concerning the routine assessment of race, color, or national origin needs of children would also apply to the routine assessment of the racial, national origin, or ethnic capacity of all foster or adoptive parents.

Q: How does HHS define "culture" in the context of MEPA guidance?

A: HHS does not define culture. Section 1808 addresses only race, color, or national origin, and does not directly address the consideration of culture in placement decisions. A public agency is not prohibited from the nondiscriminatory consideration of culture in making placement decisions. However, a public agency's consideration of culture must comply with Section 1808 in that it may not use culture as a replacement for the prohibited consideration of race, color or national origin.

§ 11.18 The Multiethnic Placement Act and Amendments to MEPA by the Provisions for Removal of Barriers to Interethnic Adoption Included in the Small Business Job Protection Act

The Multiethnic Placement Act (MEPA) of 1994

PART E. MULTIETHNIC PLACEMENT
Subpart 1. Multiethnic Placement

SEC. 551. SHORT TITLE.

This subpart may be cited as the "Howard M. Metzenbaum Multiethnic Placement Act of 1994".

SEC. 552. FINDINGS AND PURPOSE.

(a) FINDINGS.--The Congress finds that--

(1) Nearly 500,000 children are in foster care in the United States;

(2) tens of thousands of children in foster care are waiting for adoption;

(3) 2 years and 8 months is the median length of time that children wait to be adopted;

(4) child welfare agencies should work to eliminate racial, ethnic, and national origin discrimination and bias in adoption and foster care recruitment, selection, and placement procedures; and

(5) active, creative, and diligent efforts are needed to recruit foster and adoptive parents of every race, ethnicity, and culture in order to facilitate the placement of children in foster and adoptive homes which will best meet each child's needs.

(b) PURPOSE.--It is the purpose of this subpart to promote the best interests of the children by--

(1) decreasing the length of time that children wait to be adopted;

(2) preventing discrimination in the placement of children on the basis of race, color, or national origin; and

(3) facilitating the identification and recruitment of foster and adoptive families that can meet children's needs.

SEC. 553. MULTIETHNIC PLACEMENTS. [This section was repealed in 1996—see IEP, below.]

(a) ACTIVITIES.--

(1) PROHIBITION.*--An agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not--*

(A) categorically deny to any person the opportunity to become an adoptive or a foster parent, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) PERMISSIBLE CONSIDERATION.*--An agency or entity to which paragraph (1) applies 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.*

(3) DEFINITION.*--As used in this subsection, the term "placement decision" means the decision to place, or to delay or deny the placement of, a child in a foster care or an adoptive home, and includes the decision of the agency or entity involved *4057 to seek the termination of birth parent rights or otherwise make a child legally available for adoptive placement.*

(b) EQUITABLE RELIEF.*--Any individual who is aggrieved by an action in violation of subsection (a), taken by an agency or entity described in subsection (a), shall have the right to bring an action seeking relief in a United States district court of appropriate jurisdiction.*

(c) FEDERAL GUIDANCE.*--Not later than 6 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall publish guidance to concerned public and private agencies and entities with respect to compliance with this subpart.*

(d) DEADLINE FOR COMPLIANCE.--

***(1) IN GENERAL**.--Except as provided in paragraph (2), an agency or entity that receives Federal assistance and is involved with adoption or foster care placements shall comply with this subpart not later than six months after publication of the guidance referred to in subsection (c), or one year after the date of enactment of this Act, whichever occurs first.*

***(2) AUTHORITY TO EXTEND DEADLINE**.--If a State demonstrates to the satisfaction of the Secretary that it is necessary to amend State statutory law in order to change a particular practice that is inconsistent with this subpart, the Secretary may extend the compliance date for the State a reasonable number of days after the close of the first State legislative session beginning after the date the guidance referred to in subsection (c) is published.*

***(e) NONCOMPLIANCE DEEMED A CIVIL RIGHTS VIOLATION**.--Noncompliance with this subpart is deemed a violation of title VI of the Civil Rights Act of 1964.*

***(f) NO EFFECT ON INDIAN CHILD WELFARE ACT OF 1978**.--Nothing in this section shall be construed to affect the application of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901 et seq.).*

SEC. 554. REQUIRED RECRUITMENT EFFORTS FOR CHILD WELFARE SERVICES PROGRAMS.

Section 422(b) of the Social Security Act (42 U.S.C. 622(b)) is amended--

(1) by striking "and" at the end of paragraph (7);

(2) by striking the period at the end of paragraph (8) and inserting "; and"; and

(3) by adding at the end the following:

"(9) provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.".

Subpart 2--Other Provision

SEC. 555. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.

(a) IN GENERAL.--Part A of title XI of the Social Security Act (42 U.S.C. 1301-1320b-13) is amended by inserting after section 1122 the following:

"SEC. 1123. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.

"In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan *4058 or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M., 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in Suter v. Artist M. that section 471(a)(15) of the Act is not enforceable in a private right of action.

(b) APPLICABILITY.--The amendment made by subsection (a) shall apply to actions pending on the date of the enactment of this Act and to actions brought on or after such date of enactment.

Amendments to MEPA by the Provisions for Removal of Barriers to Interethnic Adoption (IEP) Included in the Small Business Job Protection Act, P.L. 104-188, 110 Stat. 1755 sec. 1808, 1996

SEC. 1808. REMOVAL OF BARRIERS TO INTERETHNIC ADOPTION.

(a) STATE PLAN REQUIREMENTS.--Section 471(a) of the Social Security Act (42 U.S.C. 671(a)) is amended--

(1) by striking "and" at the end of paragraph (16);

(2) by striking the period at the end of paragraph (17) and inserting "; and"; and

(3) by adding at the end the following:

"(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may--

"(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or

"(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.".

(b) ENFORCEMENT.--Section 474 of such Act (42 U.S.C. 674) is amended by adding at the end the following:

"(d)(1) If, during any quarter of a fiscal year, a State's program operated under this part is found, as a result of a review conducted under section 1123A, or otherwise, to have violated section 471(a)(18) with respect to a person or to have failed to implement a corrective action plan within a period of time not to exceed 6 months with respect to such violation, then, notwithstanding subsection (a) of this section and any regulations promulgated under section 1123A(b)(3), the Secretary shall reduce the amount otherwise payable to the State under this part, for that fiscal year quarter and for any subsequent quarter of such fiscal year, until the State program is found, as a result of a subsequent review under section 1123A, to have implemented a corrective action plan with respect to such violation, by--

"(A) 2 percent of such otherwise payable amount, in the case of the 1st such finding for the fiscal year with respect to the State;

"(B) 3 percent of such otherwise payable amount, in the case of the 2nd such finding for the fiscal year with respect to the State; or

"(C) 5 percent of such otherwise payable amount, in the case of the 3rd or subsequent such finding for the fiscal year with respect to the State.

In imposing the penalties described in this paragraph, the Secretary shall not reduce any fiscal year payment to a State by more than 5 percent.

"(2) Any other entity which is in a State that receives funds under this part and which violates section 471(a)(18) during a *1904 fiscal year quarter with respect to any person shall remit to the Secretary all funds that were paid by the State to the entity during the quarter from such funds.

"(3)(A) Any individual who is aggrieved by a violation of section 471(a)(18) by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.

"(B) An action under this paragraph may not be brought more than 2 years after the date the alleged violation occurred.

"(4) This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.".

(c) CIVIL RIGHTS.--

(1) *PROHIBITED CONDUCT*.--A person or government that is involved in adoption or foster care placements may not--

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.

(2) *ENFORCEMENT*.--Noncompliance with paragraph (1) is deemed a violation of title VI of the Civil Rights Act of 1964.

(3) *NO EFFECT ON THE INDIAN CHILD WELFARE ACT OF 1978*.--This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978.

(d) CONFORMING AMENDMENT.--Section 553 of the Howard M. Metzenbaum Multiethnic Placement Act of 1994 (42 U.S.C. 5115a) is repealed.

V. THE INDIAN CHILD WELFARE ACT (ICWA) [25 U.S.C. § 1901 - 1963]

§ 11.19 The Indian Child Welfare Act: A Primer*

In cases involving Indian children, tribes must receive notice and are subject to transfer to tribal court. You must make special findings in dependency and termination trials. You must follow special consent procedures in voluntary placement and relinquishment cases.

GOALS

The Indian Child Welfare Act (ICWA) protects tribal ties of Indian children. Congress passed ICWA in 1978 to address the misuse of state child protection power to remove Indian children and place them in non-Indian homes. Before the Act was passed, Indian children were placed in foster care at two to three times the rate of non-Indian children. 25 U.S.C.A. §1901

ICWA seeks to preserve Indian families. It mandates preventive services before removal. An Indian child who must be removed should be placed in a home that
reflects the unique values of Native American culture.

25 U.S.C.A. §1902

WHEN ICWA APPLIES

ICWA controls child custody proceedings involving Indian children. "Child custody proceedings" include:

- Foster care placement
- Termination of the parent-child legal relationship
- Preadoptive placement
- Adoption
- Any transfers of placement.

It does *not* include custody disputes in dissolution cases or juvenile delinquency cases. 25 U.S.C.A. §1903(1); 25 U.S.C.A. §1916(b)

An Indian child is, or is eligible to be, a tribal member. An "Indian child" is any unmarried person under age 18 who is a member of an Indian tribe or is an Alaskan native. Also included are children eligible for tribal membership if one of their [biological] parents is a member. 25 U.S.C.A. §1903

---

* This article was written by Debra Ratterman Baker, JD, who is Knowledge Management Director at the ABA Center on Children and the Law, Washington, D.C.

The text of this article was published in Child Law Practice, Volume 18, No. 12, by the ABA Center for Children and the Law, 740 15th Street. NW, 9th Floor, Washington, D.C. 20005-1022, and is reprinted with permission from the American Bar Association and the author.

Does ICWA apply if a child is not in an "existing Indian family?" Although the statute is silent on this issue, some state courts have held ICWA does not apply to children raised by a non-Indian parent with no tribal contact. However, other state courts have rejected this exception as inconsistent with ICWA's goal to encourage tribal ties. *Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982); *Adoption of Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *C.C.G.*, 942 P.2d 1380 (Colo. App. 1997).

Questions on Applying ICWA

- Is the child a tribal member?
- Is the parent a tribal member and the child eligible for membership?
- Is the child being placed in foster care or for adoption or are parental rights being terminated or relinquished?

JURISDICTION

Tribal court has exclusive jurisdiction over children living on its reservation. This includes children who reside or are domiciled on the reservation and any wards of tribal court regardless of where they live. A "tribal court" means a Court of Indian Offenses, a court established under a tribe's code or custom, or any tribal administrative body vested with child custody jurisdiction. 25 U.S.C.A. §1911(a); 25 U.S.C.A. §1903(12)

Parent's actions cannot defeat the tribal court's jurisdiction. The U.S. Supreme Court held that the state did not have jurisdiction over a child whose Indian parents lived on the reservation but gave birth and relinquished custody off the reservation. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

You have jurisdiction for emergency protection of Indian children. You may order emergency removal of an Indian child temporarily off the reservation to prevent imminent physical danger or harm. The placement must terminate as soon as the danger has passed. If you do not return the Indian child home, you must swiftly transfer the case to tribal court or file a dependency action and comply with ICWA requirements. 25 U.S.C.A. §1922

Any Indian child's case is subject to transfer to tribal court. For an Indian child living off the reservation, a parent, Indian custodian, or the tribe may petition for transfer to tribal court. You must grant the transfer to tribal court unless:

- Either parent opposes it.
- The tribe declines jurisdiction.
- There is good cause to retain state jurisdiction.

25 U.S.C.A. §1911(b)

The BIA guidelines state good cause to deny transfer exists if:

- The request for transfer was not timely.
- An Indian child over age 12 objects to transfer.

- Evidence necessary could not be presented in tribal court without undue hardship on the parties or witnesses.

- Parents of a child over age five have had little or no contact with the tribe or tribal members.

44 Fed. Reg. 67, 591.

State courts must give "full faith and credit" to tribal court decisions. The tribal court must have proper jurisdiction over the child custody proceeding. Tribal courts must give full faith and credit to other tribal court orders. 25 U.S.C.A. §1911(d)

NOTICE

The child's tribe must be notified of any involuntary foster care or termination proceeding. You must give the tribe notice if you know or *have reason to know* the child is Indian. If the child is a member or eligible to be member in more than one tribe, you only need to notify the tribe with which the child has more significant contacts. 25 U.S.C.A. §1912(a); 25 U.S.C.A. §1903(5)

What about voluntary proceedings? The Indian Child Welfare Act allows tribes to intervene in both involuntary placements and terminations and voluntary placements and relinquishments. However, the tribal notice provisions mention only involuntary proceedings. If parents domiciled on the reservation are consenting to voluntary placement or relinquishment, you should notify the tribe because of jurisdictional issues. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). It may be simpler to give tribes notice in all voluntary proceedings to avoid risking the finality of these orders.

Parents must be given notice. "Parent" is defined as the natural parent or adoptive Indian parent of an Indian child. The definition excludes nonmarital fathers who have not acknowledged or established paternity. Note that the definition includes a non-Indian natural parent of an Indian child. 25 U.S.C.A. §1912(a); 25 U.S.C.A. §1903(9)

Any Indian custodians must be given notice. An "Indian custodian" is any Indian person with legal custody of an Indian child under tribal law or custom, under state law, or by agreement of the parents. 25 U.S.C.A. §1912(a); 25 U.S.C.A. §1903(6)

Notice must be by registered mail. It must include the petition and a notice of the tribe's right to intervene. If you don't know the identity or location of a parent or Indian custodian and the tribe, you must notify the Secretary of the Interior. The Secretary has 15 days after receipt to provide notice to the parent or Indian custodian and the tribe. 25 U.S.C.A. §1912(a)

No foster care or termination proceeding may be held until notice is made. You cannot hold a hearing until at least 10 days after the parent or Indian custodian and the tribe (or the Secretary) receive notice. You must grant another 20 days to prepare if they request it. 25 U.S.C.A. §1912(a)

Questions on ICWA Notice

- Has the tribe been notified by registered mail?

- Have the parents been notified by registered mail?

- Does the child have an Indian custodian?
- Has the Indian custodian been notified by registered mail?
- If any of these are unknown, has the Secretary of the Interior been notified by registered mail?
- Has it been at least 10 days since notice was received?

PROCEDURAL RIGHTS

The tribe and Indian custodian have a right to intervene. This right applies to any foster care or termination proceeding (both voluntary and involuntary). They may request to intervene at any point in the proceeding. 25 U.S.C.A. §1911(c)

Parents and Indian custodian have a right to counsel. The court must appoint them attorneys if they are indigent. 25 U.S.C.A. §1912(b)

The tribe and Indian custodian may access court records. Once they intervene as parties, they are entitled to all reports and other documents filed with the court upon which any decision will be based. 25 U.S.C.A. §1912(c)

Higher state or federal standards apply. If federal or state law provides a higher standard of protection for a parent, Indian child or Indian custodian's rights than ICWA, those rights apply.

INVOLUNTARY PROCEEDINGS

Proof of harm must be shown in addition to state grounds. An Indian child cannot be placed in foster care and a parent cannot have their rights terminated unless continuing custody with the parent or Indian custodian would result in serious emotional or physical damage to the child. A qualified expert witness must testify to this. Proof must be made by clear and convincing evidence for foster care placement. It must be beyond a reasonable doubt for termination. 25 U.S.C.A. §1912(e) & (f)

The child welfare agency must show "active efforts" to prevent placement or termination. Before removing Indian children to foster care or terminating their parent's rights, the state must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs to prevent the breakup of Indian families and that these efforts have proved unsuccessful. 25 U.S.C.A. §1912(d)

VOLUNTARY PROCEEDINGS

Voluntary placement and relinquishments require judicial safeguards. For an Indian child:

- The parent or Indian custodian's consent must be in writing.
- It must be signed before a judge.
- The judge must certify that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian.
- This certificate must note whether the instrument was explained in English or was interpreted into another language the parent or Indian custodian understood.

RELEVANT FEDERAL LAWS

Any consent given before or within 10 days of the Indian child's birth is invalid. 25 U.S.C.A. §1913

A parent or Indian custodian may revoke consent to voluntary placement at any time. Once consent is withdrawn, the child must be returned. Revocation of consent to adoption is summarized in the box [below]. 25 U.S.C.A. §1913

PLACEMENT PREFERENCES

There is a preference for placing Indian children in Indian homes. Indian children must be placed in the least restrictive setting and within a reasonable proximity to their home, taking into account their special needs. Every time a child leaves a placement, except when returned home, the ICWA placement preferences apply. 25 U.S.C.A. §1915

For foster care or preadoptive homes, preference must be given in the absence of good cause to the contrary to:

- Extended family members
- Foster homes approved by the tribes
- Licensed Indian foster homes
- Indian-approved institutions.

25 U.S.C.A. §1915(b)

For adoptive homes, preference must be given in the absence of good cause to the contrary to:

- Extended family members
- Tribal members
- Other Indian families.

25 U.S.C.A. §1915(a)

The tribe's law or custom defines an "extended family member." If there is no law or custom, it includes any adult grandparent, aunt, uncle, sister, brother, sister-in-law, brother-in-law, niece, nephew, first or second cousin, or stepparent. 25 U.S.C.A. §1903(2)

The tribe may also establish its own placement preferences. If it does, the state must follow them as long as the placement is the least restrictive setting appropriate to the child's needs. You may also consider the parent and child's preferences where appropriate. If a parent wishes anonymity, you must give weight to this in applying the preferences. 25 U.S.C.A. §1915(c)

Prevailing Indian social and cultural standards apply. In meeting the preference requirement, you must follow the standards of the Indian community where the parent or extended family member resides or maintains social and cultural ties. 25 U.S.C.A. §1915(d)

The state must maintain records of its compliance with the placement preferences. The tribe or Secretary of the Interior may request these records at any time. 25 U.S.C.A. §1915(e)

Adult adoptees are entitled to information on their Indian heritage. An adopted Indian child who reaches age 18 may petition the court that entered the adoption decree for information on their Indian heritage. The court must inform them of their tribal affiliation and give them any other information necessary to protect any rights flowing from the tribal relationship. 25 U.S.C.A. §1917

SANCTIONS

If the state fails to comply with ICWA, court orders are voidable. The parent, Indian custodian, or tribe may petition to invalidate a foster care placement or termination of parental rights. 25 U.S.C.A. §1914

You must dismiss a petition of anyone with improper custody of an Indian child because of lack of jurisdiction. You must return the child to the parent or Indian custodian unless it would subject the child to a substantial and immediate danger or threat of such danger. 25 U.S.C.A. §1920

PERMANENCY PLANNING FOR INDIAN CHILDREN

The Indian Child Welfare Act does not prevent you from protecting Indian children or freeing them for adoption. Most of its requirements, such as efforts to prevent placement, are similar to state requirements for all children. It does require you consider Indian children's cultural heritage as part of any "best interests" determination, which is good practice for all children.

REVOCATION OF RELINQUISHMENT

If an Indian child's adoption:	Then the parent or Indian custodian may:	And the court must:
Is not yet final	Revoke the consent at any time.	Return the child to the parent or Indian custodian.
Has been final less than two years	Revoke the consent if it was obtained through fraud or duress.	Return the child to the parent or Indian custodian.
Has been final for two years	Never revoke the consent.	Reject requests to revoke.
Is set aside or vacated	Petition for return of the child.	Grant the petition unless there is a showing that it would not be in the child's best interests.

ICWA CHECKLISTS

Removing an Indian child in dependency proceedings:

- Tribe notified of right to intervene.
- Proof by clear and convincing evidence by a qualified expert that the child will suffer emotional or physical harm if returned home.
- Proof DSS made active efforts to prevent the placement.

- Preference to placement with extended family members, approved tribal home, Indian foster home or Indian approved institution.

Approving the voluntary placement of an Indian child:

- Parent signs written consent before judge.
- Consent is signed more than 10 days after child's birth.
- Certify you explained terms and consequences and parent understood.
- Certify if explanation was in English or translated into another language the parent understands.
- Preference to placement with extended family members, approved tribal home, Indian foster home or Indian approved institution.

Terminating parental rights to an Indian child:

- Tribe notified of right to intervene.
- Proof beyond a reasonable doubt by a qualified expert that the child will suffer emotional or physical harm if returned home.
- Proof DSS made active efforts to reunify the family.
- Preference to placement with extended family members, tribal members, or other Indian families.

Accepting relinquishment of an Indian child:

- Parent signs written consent before judge.
- Consent is signed more than 10 days after child's birth.
- Certify you explained terms and consequences and parent understood.
- Certify if explanation was in English or translated into another language the parent understands.
- Preference to placement with extended family members, tribal members, or other Indian families.

For more information on ICWA, refer to B.J. Jones, *The Indian Child Welfare Act Handbook* (American Bar Association 1995). This book summarizes case law nationally, includes the BIA guidelines, and lists the addresses of all federally recognized tribes. To order it, call 800/285-2221.

§ 11.20 The Indian Child Welfare Act

TITLE 25. INDIANS

Chapter 21. Indian Child Welfare

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

(Pub.L. 95-608, § 2, Nov. 8, 1978, 92 Stat. 3069.)

1. So in original. Probably should be capitalized.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

(Pub.L. 95-608, § 3, Nov. 8, 1978, 92 Stat. 3069.)

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or

individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

(Pub.L. 95-608, § 4, Nov. 8, 1978, 92 Stat. 3069.)

Subchapter I. Child Custody Proceedings

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

(Pub.L. 95-608, Title I, § 101, Nov. 8, 1978, 92 Stat. 3071.)

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(Pub.L. 95-608, Title I, § 102, Nov. 8, 1978, 92 Stat. 3071.)

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

(Pub.L. 95-608, Title I, § 103, Nov. 8, 1978, 92 Stat. 3072.)

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

(Pub.L. 95-608, Title I, § 104, Nov. 8, 1978, 92 Stat. 3072.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

(Pub.L. 95-608, Title I, § 105, Nov. 8, 1978, 92 Stat. 3073.)

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

(Pub.L. 95-608, Title I, § 106, Nov. 8, 1978, 92 Stat. 3073.)

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

(Pub.L. 95-608, Title I, § 107, Nov. 8, 1978, 92 Stat. 3073.)

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

(Pub.L. 95-608, Title I, § 108, Nov. 8, 1978, 92 Stat. 3074).

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

(Pub.L. 95-608, Title I, § 109, Nov. 8, 1978, 92 Stat. 3074.)

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

(Pub.L. 95-608, Title I, § 110, Nov. 8, 1978, 92 Stat. 3075.)

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

(Pub.L. 95-608, Title I, § 111, Nov. 8, 1978, 92 Stat. 3075.)

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

(Pub.L. 95-608, Title I, § 112, Nov. 8, 1978, 92 Stat. 3075).

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

(Pub.L. 95-608, Title I, § 113, Nov. 8, 1978, 92 Stat. 3075.)

Subchapter II. Indian Child and Family Programs

§ 1931. Grants for on or near reservation programs and child welfare codes

(a) Statement of purpose; scope of programs

The Secretary is authorized to make grants to Indian tribes and organizations in the establishment and operation of Indian child and family service programs on or near reservations and in the preparation and implementation of child welfare codes. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and, in particular, to insure that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be a last resort. Such child and family service programs may include, but are not limited to--

(1) a system for licensing or otherwise regulating Indian foster and adoptive homes;

(2) the operation and maintenance of facilities for the counseling and treatment of Indian families and for the temporary custody of Indian children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care;

(4) home improvement programs;

(5) the employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters;

(6) education and training of Indians, including tribal court judges and staff, in skills relating to child and family assistance and service programs;

(7) a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as foster children, taking into account the appropriate State standards of support for maintenance and medical needs; and

(8) guidance, legal representation, and advice to Indian families involved in tribal, State, or Federal child custody proceedings.

(b) Non-Federal matching funds for related Social Security or other Federal financial assistance programs; assistance for such programs unaffected; State licensing or approval for qualification for assistance under federally assisted program

Funds appropriated for use by the Secretary in accordance with this section may be utilized as non-Federal matching share in connection with funds provided under Titles IV-B and XX of the Social Security Act [42 U.S.C.A. §§ 620 et seq., 1397 et seq.] or under any other Federal financial assistance programs which contribute to the purpose for which such funds are authorized to be appropriated for use under this chapter. The provision or possibility of assistance under this chapter shall not be a basis for the denial or reduction of any assistance otherwise authorized under Titles IV-B and XX of the Social Security Act or any other federally assisted program. For purposes of qualifying for assistance under a federally assisted program, licensing or approval of foster or adoptive homes or institutions by an Indian tribe shall be deemed equivalent to licensing or approval by a State.

(Pub.L. 95-608, Title II, § 201, Nov. 8, 1978, 92 Stat. 3075.)

§ 1932. Grants for off-reservation programs for additional services

The Secretary is also authorized to make grants to Indian organizations to establish and operate off-reservation Indian child and family service programs which may include, but are not limited to--

(1) a system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate State standards of support for maintenance and medical needs;

(2) the operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children;

(3) family assistance, including homemaker and home counselors, day care, afterschool care, and employment, recreational activities, and respite care; and

(4) guidance, legal representation, and advice to Indian families involved in child custody proceedings.

(Pub.L. 95-608, Title II, § 202, Nov. 8, 1978, 92 Stat. 3076.)

§ 1933. Funds for on and off reservation programs

(a) Appropriated funds for similar programs of Department of Health and Human Services; appropriation in advance for payments

In the establishment, operation, and funding of Indian child and family service programs, both on and off reservation, the Secretary may enter into agreements with the Secretary of Health and Human Services, and the latter Secretary is hereby authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services: Provided, That authority to make payments pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

(b) Appropriation authorization under section 13 of this title

Funds for the purposes of this chapter may be appropriated pursuant to the provisions of section 13 of this title.

(Pub.L. 95-608, Title II, § 203, Nov. 8, 1978, 92 Stat. 3076; Pub.L. 96- 88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

§ 1934. "Indian" defined for certain purposes

For the purposes of sections 1932 and 1933 of this title, the term "Indian" shall include persons defined in section 1603(c) of this title.

(Pub.L. 95-608, Title II, § 204, Nov. 8, 1978, 92 Stat. 3077.)

Subchapter III. Recordkeeping, Information Availability, and Timetables

§ 1951. Information availability to and disclosure by Secretary

(a) Copy of final decree or order; other information; anonymity affidavit; exemption from Freedom of Information Act

Any State court entering a final decree or order in any Indian child adoptive placement after November 8, 1978, shall provide the Secretary with a copy of such decree or order together with such other information as may be necessary to show--

(1) the name and tribal affiliation of the child;

(2) the names and addresses of the biological parents;

(3) the names and addresses of the adoptive parents; and

(4) the identity of any agency having files or information relating to such adoptive placement.

Where the court records contain an affidavit of the biological parent or parents that their identity remain confidential, the court shall include such affidavit with the other information. The Secretary shall insure that the confidentiality of such information is maintained and such information shall not be subject to the Freedom of Information Act (5 U.S.C. 552), as amended.

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment

Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from

the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.

(Pub.L. 95-608, Title III, § 301, Nov. 8, 1978, 92 Stat. 3077.)

§ 1952. Rules and regulations

Within one hundred and eighty days after November 8, 1978, the Secretary shall promulgate such rules and regulations as may be necessary to carry out the provisions of this chapter.

(Pub.L. 95-608, Title III, § 302, Nov. 8, 1978, 92 Stat. 3077.)

Subchapter IV. Miscellaneous Provisions

§ 1961. Locally convenient day schools

(a) Sense of Congress

It is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families.

(b) Report to Congress; contents, etc.

The Secretary is authorized and directed to prepare, in consultation with appropriate agencies in the Department of Health and Human Services, a report on the feasibility of providing Indian children with schools located near their homes, and to submit such report to the Select Committee on Indian Affairs of the United States Senate and the Committee on Interior and Insular Affairs of the United States House of Representatives within two years from November 8, 1978. In developing this report the Secretary shall give particular consideration to the provision of educational facilities for children in the elementary grades.

(Pub.L. 95-608, Title IV, § 401, Nov. 8, 1978, 92 Stat. 3078; Pub.L. 96- 88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

§ 1962. Omitted

§ 1963. Severability

If any provision of this chapter or the applicability thereof is held invalid, the remaining provisions of this chapter shall not be affected thereby.

(Pub.L. 95-608, Title IV, § 403, Nov. 8, 1978, 92 Stat. 3078.)

VI. THE FOSTER CARE INDEPENDENCE ACT OF 1999 [48] AND THE NORTH CAROLINA LINKS PROGRAM

§ 11.21 Introduction and Explanation of the Act

The Foster Care Independence Act of 1999 (H.R. 3443) provides important help to young people transitioning from foster care. The Act provides incentives for states and communities to reform independent living programs. The North Carolina LINKS program is the new Independent Living Program in North Carolina and was created to effectively implement the Chafee Foster Care Independence Program which was part of the Foster Care Independence Act.

Title I of the Act, which contains the most relevant provisions for young people transitioning from foster care, does the following:[49]

- Establishes the John H. Chafee Foster Care Independence Program, which totally replaces the former Independent Living Initiative authorized under Title IV-E of the Social Security Act
- Allows states to provide Medicaid coverage to young people between the ages of 18 and 21 who were in foster care on their 18th birthday
- Increases from $1,000 to $10,000 the assets that a young person in foster care can have and still maintain his or her eligibility for Title IV-E-funded foster care
- Requires states to ensure that foster parents are adequately prepared, both initially and on a continuing basis, to care for the children placed with them
- Authorizes additional funding for adoption incentive payments to the states to assist in finding permanent homes for children in foster care

The Chafee Foster Care Independence Program improves upon the former Independent Living Initiative by:[50]

- Increasing funding for independent living activities
- Offering increased assistance, including room and board, for young people ages 18 to 21 who are leaving foster care
- Emphasizing the importance of securing permanent families for young people in foster care
- Expanding the opportunity for states to offer Medicaid to young people transitioning from care
- Increasing state accountability for outcomes for young people transitioning from foster care

§ 11.22 North Carolina's LINKS Program [51]

[48] P.L. 106-169, amending Section 477 of the Social Security Act (Part E of Title IV of the Social Security Act).
[49] The following information was obtained from "Frequently Asked Questions about the Foster Care Independence Act of 1999 and the John H. Chafee Foster Care Independence Program," prepared by members of the National Foster Care Awareness Project (NFCAP), February, 2000. This document can be found online at www.casey.org and www.abanet.org In addition, the NFCAP has published a follow-up document called Frequently Asked Questions II which can be found at the same website.
[50] *Id*.

The Independent Living Program has a brand new name, a broadened range of services, and a strong commitment to offering real assistance to adolescents and young adults leaving the foster care system. The name "LINKS" doesn't stand for anything in itself. Rather, it expresses in one word what the program is intended to do- to provide, nurture, and create connections for youth:

- connections with people who care: family, mentors, and friends who make up a personal support system that can last a lifetime;
- connections with the home community- opportunities for jobs, recreation, spiritual fellowship, and for developing interests;
- connections with educational and vocational training that is affordable and relevant;
- connections with mentors who can help youth learn life skills;
- connections with agencies that can provide services during the rough times; and
- connections with financial resources to pay for needed goods and services.

Who is eligible for the LINKS program?

Youth and young adults ages 13 through 20 who are or were in the foster care system after age 13 are eligible for LINKS services if they need them. Eligibility does not automatically end with adoption or emancipation. The funds can be used for both IV-E and non IV-E children. The purpose of these funds and the implementation program is to help youth and young adults who have been in the foster care system to successfully transition to be self-sufficient adults.

While eligibility for the service is very broad, the primary focus of the LINKS program is on those youth who are at highest risk:

- Young people who are living in foster care and who are likely to remain in care until their eighteenth birthday;
- Young adults who aged out of foster care at age 18, who are not yet 21, and who need transitional services; and
- Youth and young adults who have already been discharged from the foster care system, are between the ages of 18 and 21, and who need assistance.

  NOTE on Illegal and Undocumented Alien Youth: No federal funds can be applied to assistance or services for illegal and undocumented aliens. If an otherwise eligible youth is disqualified from LINKS because of residency status, the agency can serve him or her so long as no Federal funds are used to provide those services and if no eligible youth is denied services because of participation by the ineligible youth. Once legal residency is established, LINKS funds may be used to provide services.

Youth are not eligible for LINKS funds if they have personal reserves of more than $10,000.

What is required of the youth/young adult participant?

[51] This section was originally written by Joan McAllister, North Carolina LINKS Coordinator. Note that procedures and amounts can vary over time. It is best to access the DHHS Online Manual for up to date information.

Youth/young adult participants must participate directly in designing their program activities and must accept personal responsibility for doing their share in achieving self-sufficiency.
On a practical level, this means that youth/young adults must be "at the table" at every phase of assessment, resource development, and planning and plan implementation. These young people have ideas and resources that, when used in partnership with the agency, are likely to lead to successful outcomes.

How does LINKS fit in with the State's push toward permanence for every child?

Every good parent wants his or her child to be as self-sufficient as possible and begins teaching necessary skills early. As the child develops, the parent provides more and more opportunities for the child to develop the skills he or she will need as an adult. This does not mean that the child does not need emotional support offered by the family or will be cut off from that support as an adult.

Similarly, young people in foster care need and deserve permanent connections with family and with other adults that they will continue to enjoy throughout their lives. They also need skills and knowledge to be self-sufficient adults. When a child knows how to take care of himself, he has more positive options in his life choices. LINKS programs are not an alternative to permanency efforts, but are offered concurrently.

What kind of services are available through the LINKS program?

1. Each county receives funding to operate its LINKS program, based on a per capita allocation for eligible children. These funds are used to provide basic services to youth 16-21 and, at county option children 13-15. Activities include:

    - A thorough assessment by the youth and caregiver, discussion of goals, and development of a plan.
    - skill-building activities and real-life learning experiences,
    - exposure to community and state resources for educational and vocational training,
    - assistance in strengthening the young person's personal support system;
    - transitional services for youth, including voluntary placement agreements, and
    - out-reach services to young adults who have left foster care and may need further assistance.

2. Additional funding called "LINKS Special Funds" is available by reimbursement through the state LINKS coordinator on behalf of specific youth and young adults. LINKS Special Funds are reimbursed to the county for expenditures made on behalf of eligible foster teens and young adults up to age 21 who are or were in foster care as teens. LINKS Special Funds are available to promptly reimburse counties for additional expenditures on behalf of eligible youth and young adults. These funds are in addition to the county LINKS. Eligibility can be cumulative: one young adult may be eligible for both categories of funding, for a total of as much as $3250 per year.

3. **Purpose of Special Funds**. The purpose of LINKS Special Funds, as with all LINKS funds, is to help youth successfully transition to self-sufficiency by reducing barriers to achieving that goal. LINKS Special Funds were created to help to assure that every eligible youth or young adult will have timely, equal access to financial resources regardless of county of residence. There are two categories of Special Funds:

    - **Housing Funds** are **only** available to young adults who aged out of foster care at 18 but are not yet 21 years of age. Up to $1000 per individual per year is available to help with transitional housing costs, which is defined as rent, rent deposits, or room and board arrangements that include meals as a part of a rental agreement. Utility costs are not included in this fund, but those types of costs may be paid from LINKS Transitional Funds. Funding is intended to help youth get moved into a permanent home, not to prolong unnecessary dependency nor to pay for continued residential treatment. An eligible young

adult who is participating in a CARS Arrangement may use these funds to transition to their independent living arrangement.

A youth "ages out" of foster care if he/she is in foster care on his or her 18th birthday. To be eligible, the young adult must have been in DSS custody on his or her 18th birthday and must have been living in a licensed foster care facility or with a relative that was not the removal home or in other court-approved placement. Youth who are in secure facilities specifically designed for correctional purposes on their 18th birthdays are specifically excluded from receiving transitional housing assistance but are eligible for other LINKS funds and services.

Youth who are under the age of 18 and young adults who did not age out of foster care are not eligible for Transitional Housing Funds, and no other LINKS funds can be used to procure housing for them. The Chafee Act is very specific on this point, and until the law is changed, there is no LINKS money to pay for rent, rent deposits, or down payments on dwellings for youth who did not age out of care.

- **LINKS Transitional Funds (up to $2250)** are available to help any youth or young adult ages 13 through 20 who, because of life circumstances, behaviors, or lack of needed resources is evaluated by the county DSS to be at risk of not making a successful transition to self-sufficiency unless appropriate intervention is initiated. LINKS Transitional Funds may not be used for rent, rent deposits, room and board, or down payments on housing.

  LINKS Special Funds may only be used to assist the youth or young adult to achieve one or more of the seven following outcomes: 1) economic self-sufficiency; 2) safe and stable housing; 3) academic or vocational achievement; 4) connections to a personal support network; 5) postponed parenthood; 6) avoidance of high risk behaviors and/or 7) access to needed health care not covered by Medicaid or public health insurance.

If a youth is in DSS custody but is placed in a residential program, how do they get access to these services?

The county that has custody is responsible for coordinating with the program staff to assure that the assessment and plan is developed. The custodial county would apply for any state administered LINKS funds on behalf of the child, and would be responsible for advancing the funds to be reimbursed. A portion of the county funds allocated through the LINKS program should be made available to the residential program providing the services unless the cost of care includes provision of these services.

The new LINKS program has great potential for providing timely assistance to young people to help them at critical junctures in their transition to self-sufficient adulthood.

§ 11.23 Chart Describing Eligibility for LINKS Funds

RELEVANT FEDERAL LAWS

SITUATIONAL ELIGIBILITY FOR LINKS FUNDS					
Situation	**Base county allocation**	**Trust Funds (up to $500)**	**Transitional Housing Funds**	**Scholarship/Conference Funds ($500)**	**Funds for Very High Risk Youth**
Youth in custody under the age of 13 or discharged prior to age 13	NO Incorporate into IV-E Foster Care Services	NO	NO	NO	NO
Youth 13-15 in DSS custody	X	NO	NO	NO-schol X-conferences	X
Youth 16-20 in DSS custody or placement responsibility	X	X 17 through 20 and is being discharged w/in 3 months	NO	X	X
Youth discharged from custody between age 13 and 18 or emancipated before 18th birthday	X	X 17 through 20	NO	X	X
Young adults who were discharged from custody/PR on or after their 18th birthday	X	X	X	X	X
Youth who are or were in DSS custody/PR after age 13+ who are now homeless or are are facing discharge within 3 months from a correctional, mental health, substance abuse treatment facilities, etc. and need	X	X If 17 through 20 years of age	X **Only if in custody at age 18**	X	X

ACCESS AND APPROPRIATE USE OF FUNDING SOURCES FOR LINKS SERVICES		
LINKS funding resource	**How accessed**	**Permissible Uses**

Base county allocation	Reimbursement via 1571	Costs for program: may be used for worker time; expenses for group activities; expenses specific to youth and/or young adult participants in program ages 13-21. Should be used to reimburse agencies that provide residential care for child under contract, e.g. CCI's, for providing **LINKS** assessments and services to youth in county custody or placement authority.
County Salary Supplement	Reimbursement via 1571	May only to be used for salary and/or contracted services to eligible youth and young adults for **LINKS** services/aftercare case management.
LINKS Trust Fund	Youth and young adults must be authorized via certification to the State **LINKS** coordinator. See Administrative Letter C.S. #1-100. Once authorized, request for reimbursement sent to LINKS Coordinator who will arrange for reimbursement.	May be used for any expense allowable under the former Independent Living Program: see policy manual.
Scholarship/conference Fund ▪ Scholarships for college or vocational training	Determination of eligibility for scholarships is done on county level. Eligible youth are listed on the authorization form. Reimbursement is handled the same as other funds, through the LINKS Program Coordinator.	$500 scholarships may be provided to youth/young adults eligible for LINKS program and who have finished high school or received their GED. For students who are not capable of finishing high school or receiving their GED, scholarships may be used to help them get vocational training after they are 18. Exceptions must be approved through the LINKS coordinator.
▪ Financial assistance for youth	Request for funding assistance for conferences should be submitted to the LINKS	Limited financial assistance with registration, conference

participation in national conferences	Program Coordinator in advance of the conference. Reimbursement is provided to the counties via EFT upon receipt of certification of expenses.	housing and/or transportation costs for youth participation in national Independent Living conferences.
Transitional Housing Funds	Counties must pre-register eligible young adults with the State LINKS Coordinator. For the next Federal Fiscal year (Oct. 1-Sept 30) authorized funds will be reimbursed to counties by EFT (or included on the county's allocation for the month if that can be arranged through County Administration). These funds are only available to young adults ages 18-21 who aged out of foster care, i.e. were in agency custody on their 18th birthday and are no longer in agency custody or placement authority. Young adults who are on a VPA are eligible for Transitional Housing Funds when they are within one month of discharge. This fund is only accessible if the youth is receiving concurrent LINKS Transitional Services from the agency that are in line with assessed needs of the young adult. This could include skill training, conflict management, job skills, etc.	Funds may be used for transitional housing costs, including rent, required utilities, and deposits. Transitional Housing Funds may only be used in conjunction with appropriate supportive services. Funds may only be used to supplement and may not be used to supplant other federal funding sources.

Funds for Extremely High Risk Youth	Counties must pre-register eligible youth with the State LINKS Coordinator. These funds are available to supplement other funding sources for youth who are at extremely high risk of homelessness, dropping out of school, drug/alcohol abuse, pregnancy, criminal behaviors, or other negative outcomes as indicated by their prior behavior.	These funds are available to supplement other programmatic funds for eligible youth and young adults 13-21. These funds should be accessed when other funding sources are inadequate to meet critical needs. These funds are limited to $1500 per year per individual and are not, therefore appropriate for long-term treatment needs. Funds may only be used to supplement and may not be used to supplant other federal funding sources.

§ 11.24 Educational Training Vouchers [52]

Legislation authorizing Education Training Vouchers was a separate section of the Chafee Act, authorized effective October of 2003. Use of these funds has no impact on LINKS county allocations or LINKS Special Funds except that young adults receiving ETV's may not access other Chafee Funds for expenses covered by the ETV, even after the $5000 limit is exhausted.

A. Qualifying schools

1. The term "institution of higher education" is defined in Sections 101 and 102 of the Higher Education Act (HEA) of 1965, as amended. The U.S. Department of Education, Office of Postsecondary Education, can help States determine which institutions meet the law's criteria. In general, the term includes three different types of institutions: public and nonprofit institutions of higher education; proprietary institutions of higher education; and postsecondary vocational institutions. A public or nonprofit institution of higher education must meet the following criteria (section 101(a) and (b) of HEA):

    a. admits as regular students only persons with a high school diploma or General Equivalency Degree (GED), OR students above the age of compulsory school attendance in the State where the institution is located;
    b. is authorized by the State to provide postsecondary education;
    c. provides an educational program for which the institution awards a bachelor's degree or at least a two-year program (e.g., an associate's degree) that is acceptable for full credit toward such a degree OR provides at least a one-year training program to prepare students for gainful employment in a recognized occupation; and
    d. is accredited by a nationally recognized accrediting agency or association, recognized by the Department of Education, or has been granted pre-accreditation status by the agency or association, and the Secretary has determined that there is a satisfactory assurance that the

[52] The following information on ETV's is excerpted from the DHHS Family Services Manual, Chapter XIII, October 2006.

institution will meet the accreditation standards of the agency or association within a reasonable time.

A proprietary (for-profit) institution of higher education must provide a training program to prepare students for gainful employment in a recognized occupation and meet the same criteria as described in (1) and (2) above for public or nonprofit schools. In addition, the institution must: be accredited by an agency or association recognized by the Department of Education; be in existence for at least two years; and, have at least 10 percent of its funding come from sources other than title IV of HEA (section 102(a)(1)(A) and 102(b) of HEA).

A postsecondary vocational institution must be a public or nonprofit school in existence for at least two years, which provides a training program to prepare students for gainful employment in a recognized occupation. The school must also meet the criteria described in (1), (2) and (4) above (section 102(a)(1)(B)) and 102(c) of HEA). Certain institutions may not be considered an "institution of higher education" without obtaining special Secretarial approval if they have a high percentage of distance learning classes or students, incarcerated students and students without a high school degree, or have previously filed for bankruptcy or have been convicted of fraud using HEA funds (section 102(a)(3) and (a)(4) of HEA). Schools outside of the United States cannot be considered institutions of higher education for the purposes of the Educational and Training Voucher program (section 102(a)(1)(C) of HEA).

B. Eligibility of Students

- The student must be eligible for the NC LINKS program.
- Students younger than 18 may be approved for ETV if they were in foster care after their 17th birthday and have finished high school or their GED and**/or** have been accepted into a qualifying college or vocational training program.
- A student adopted from foster care after his/her 16th birthday (date of finalization) is also eligible for ETV.
- Adult students who are attending GED/Adult High School at the same time that they are participating in postsecondary classes may qualify for an ETV for the costs of the postsecondary classes if the postsecondary school qualifies.
- Eligibility can continue until age 23 for students who were receiving vouchers on 21st birthday if they are making satisfactory progress toward completion of their certificate or degree.

C. Eligible costs

The amount of the ETV grant is based on the Cost of Attendance, which is the total amount it will cost a student to go to school, usually expressed as a yearly figure. Includes:

- Tuition, fees and other equipment or materials required of all students in the same course of study;
- Books, supplies and an allowance for transportation costs and miscellaneous personal expenses, including computers;
- Room and board (which may vary depending on whether the student lives at home, in student-housing or an apartment);
- Child care expenses for a student who is a parent;
- Accommodations related to the student's disability, such as a personal assistant or specialized equipment that is not paid for by another source;

- Expenses related to the youth's work experience in a cooperative education program; and
- Student loan fees or insurance premiums on the student loan.

The student's cost of attendance is determined and evaluated with their existing Federal financial awards in order to determine how much money they can get. A student may receive both the Pell Grant and the ETV, if, when combined, are equal to or less than the cost of attendance.

Note: A student is not required to be participating in a CARS/VPA to qualify for assistance through the ETV.

D. Procedures

1. Student Application: The student applies on line over the internet. The web address is www.statevoucher.org. Once into the web site, the student should click on the North Carolina state outline to get to the home page and the application form. The student is required to fill out the application, to submit a brief essay about their future plans, and to send a copy of their financial award letter to the contracting agency, Orphan Foundation of America (OFA). The application requires a budget, contact information for the DSS and information about the student's interests. This web site has a number of links to other valuable information that can be accessed from the site. Information on other scholarships, study habits, time management, budgeting, and supports for former foster youth, etc. is available.

Note: the college student will need his or her own email account while in college, since contact from the ETV administrator and volunteer mentors will be primarily over the internet. If necessary LINKS Special Funds can be used to help purchase basic internet services.

E. Referral from agency

1. The county refers their eligible young adults using the state voucher web site. The referral is completed by clicking on the Social Worker Student Referral form (left column) The user ID is nc- and the referring county's name (e.g. nc-Dare); the password is a unique 4 digit number, available from either OFA or the state LINKS coordinator. The referral is the agency's certification that the student meets eligibility criteria. This referral also prompts contact from OFA to the student. Agency codes should never be given to unauthorized users, including students. The data base has been constructed to provide access to the authorized county worker regarding the application status, funds distributed, and frequency of contact between the ETV administrator and the student.
It is important that social workers in foster care and adoptions be aware of this resource and be assisted to complete these referrals and to use the database for case management purposes.

2. Administration: Currently, all North Carolina ETV vouchers are being administered by Orphan Foundation of America. The Foundation will send checks directly to third party providers or, in some circumstances, directly to the youth for approved budgeted expenses. If the DSS incurs ETV expenses prior to the student's approval for a training voucher, the student should be instructed to include that amount in their budget and to request reimbursement from OFA to the DSS.

VII. THE ADOPTION AND SAFE FAMILIES ACT OF 1997 [P.L. 105-89]

§ 11.25 Introduction

The federal Adoption and Safe Families Act of 1997 called upon states to make some significant changes to child protection laws in order to improve systems for getting children into safe, permanent homes within a reasonable amount of time. This Act began as H.R. 867 and can be found at the following website: http://thomas.loc.gov/ or by accessing the U.S. Code in 42 U.S.C.

Since 1997, the North Carolina General Assembly has made a number of changes and additions to the North Carolina Juvenile Code in order to comply with ASFA. Some of the changes are minor, but many are quite significant. The first and most significant piece of North Carolina legislation addressing ASFA was House Bill 1720 introduced in 1997.
The Children's Services Division of the N.C. Department of Health and Human Services, the Guardian ad Litem Program, the Court Improvement Project, and other organizations have worked together to attempt to educate all of the players in North Carolina child protection proceedings about ASFA and the resulting changes to North Carolina law.

ASFA regulations became effective in January of 2000 and served to clarify and expand upon the language contained in ASFA. These regulations emphasize the loss in federal funding that states can suffer if their courts do not comply with ASFA. In addition, the "[North Carolina] General Assembly added the thirty day filing requirement to these statutes [7B-807(b), 7B-905(a), 7B-1110] in 2001…logic and common sense lea us to the conclusion that the General Assembly's intent was to provide parties with a speedy resolution of cases where juvenile custody is at issue." *In re E.N.S.*, 164 N.C. App. 146, 155 (2004).

The following two articles, both from the American Bar Association, should provide the reader of this manual with an understanding of the most significant requirements of ASFA, the impact of ASFA, and the ASFA regulations. The ASFA provisions and regulations themselves should be consulted if more detail is desired.

§ 11.26 Impact of the Adoption and Safe Families Act (ASFA) on Judicial Resources and Procedures*

The Adoption and Safe Families Act of 1997, Public Law 105-89 (ASFA) presents a number of major challenges for state courts. State compliance with the law is a condition of state eligibility for funding to public child welfare agencies. The law, which is designed to achieve more timely decisions and stronger safety guarantees for abused and neglected children, includes the following new provisions that affect courts:

- In certain extreme cases of child abuse and neglect, courts are authorized to decide that states need not provide services to reunify families. ASFA §101(a), 42 U.S.C. §671(a)(15)(D).

- Once it is decided that the plan for a foster child is no longer reunification, agencies are required to make reasonable efforts to secure a new permanent home for the child. Courts are to monitor these efforts. ASFA §101(a), 42 U.S.C. §671(a)(15)(C).

- After a child enters foster care, earlier and more decisive hearings are required to determine a permanent plan (e.g., return home, adoption) for the child. ASFA §302, 42 U.S.C. §675(5)(C).

* This section is based on an article by Mark Hardin, ABA Center on Children and the Law, titled "New Requirements for State Courts in Child Abuse and Neglect Cases," © 1998 by the American Bar Association. The article is reprinted with permission from the American Bar Association and the author.

Any recommendations set forth in this section have not been adopted by the American Bar Association House of Delegates or Board of Governors and therefore do not represent official policy of the American Bar Association.

- After a child has been in foster care for 15 of the last 22 months, the state must -- subject to certain exceptions -- petition for the termination of parental rights. ASFA §103(a)(3), 42 U.S.C. §675(5)(E).

- Foster parents, preadoptive parents, and relative caretakers must be given notice and the opportunity to speak in court hearings, but need not be made parties to the proceedings. ASFA §104. 42 U.S.C. §675(5)(G).

New Demands on State Court Resources

The new requirements make new demands on state court resources in a number of specific ways. First, courts are expected to decide, early in the case, whether reunification services are required. Requests for court decisions that such services are not required will require more, earlier, contested hearings. It will also trigger earlier permanency hearings and, in turn, earlier termination of parental rights hearings.

Second, permanency hearings are required at 12 months, several months earlier than in the past. Further, permanency hearings are to be more decisive and comprehensive hearings than before. For example, in the absence of compelling circumstances to the contrary, the court is to order the initiation of termination proceedings. The court is also expected to thoroughly review all permanency options. Additional court and attorney time is required.

Third, there are now deadlines for filing or joining in termination petitions. As a result, petitions will be filed earlier in each case, causing a temporary bulge in termination hearings and a higher proportion of termination proceedings will be contested. There will be additional appeals of termination decisions.

Fourth, foster parents, preadoptive parents, and relative caretakers now must receive notice and have the opportunity to participate in court hearings in child abuse and neglect cases. This will require both additional court time and additional time and costs for court staff.

To meet these new resource demands, courts may need to reconsider their internal budgets, allocations of judges, and budget requests to state legislatures. Besides needing additional judge time, they may also need more specialized court staff, further funding for court appointed attorneys, and automated systems to monitor, among other things, the timeliness of judicial decisions.

New Procedural Issues for State Courts

There are a number of important procedural issues for state courts to resolve in implementing the new federal requirements. Depending on the state, these procedural issues might be addressed through legislation, court rules, case law, and court forms. The following is a list of some of the key procedural areas presented by ASFA.

First, states must adopt procedures for determining, early in the case, whether to require the state to provide services to reunify a family with a child in foster care. For example, the state must decide:

- At what precise stage of the court process is this decision to be made?

- Who initiates this decision? Can the judge inquire about whether reunification services should be required?

- Are there ways of ensuring that the agency and court will have enough information, early in the case, to make an informed decision about providing reunification services? For example, such information might include parents' criminal records, mental health histories, and past substance abuse treatment records.

- What procedural protections should apply in connection with the decision? Should the rules of evidence apply? What should be the burden of proof?

- Must there be repeated and duplicative hearings concerning whether reunification services are required? ASFA seems to call for the following sequence of hearings: an initial decision that reunification services are not required, a permanency hearing within 30 days (in which the decision may be reexamined), and a termination of parental rights hearing. Can these proceedings be consolidated or at least the early hearings be conducted as preliminary proceedings?

- What are the grounds for deciding, early in the case, that reunification services will not be provided? Note that legislatures must enact such grounds. The grounds may or may not be similar to grounds for terminating parental rights.

Second, states must adopt procedures for earlier and more decisive permanency hearings. For example, the state will need to consider:

- What notice and reports should be provided prior to the hearing? When should they be required?

- Will court oversight of agency efforts to preserve the family need to occur earlier and more rigorously to make it possible for courts to decide upon permanent plans at permanency hearings?

- Should judicial findings be required at permanency hearings? If so, should agency reports be formatted to address issues for inclusion in judges' findings?

- If judicial findings should be required, how should they be organized to encourage more decisive permanency hearings?

- Can permanency hearings be designed to help ensure that states meet their 15 month deadlines for either filing termination of parental rights proceedings or providing written explanations why termination proceedings are not appropriate?

Third, states must adopt procedures to ensure the participation of foster parents, preadoptive parents, and relative caretakers of abused and neglected children. For example, they will need to decide:

- Who should provide the notice to the foster parents, preadoptive parents, and relative caretakers and what should be the courts' role in overseeing such notice?

- What should be the procedures to allow foster parents, preadoptive parents, and relative caretakers to speak at hearings?

- Should foster parents, preadoptive parents, and relative caretakers be able to be present throughout the court hearings? Should they be permitted to become parties under specific conditions?

ASFA cannot succeed without effective judicial leadership. Individual judges must follow both the letter and the spirit of ASFA. They must have high expectations of the parties and develop an efficient and fair court process.

In turn, state supreme courts and state court administrators must communicate to the courts that they expect full implementation of ASFA and that they will do their best to provide the resources to make it possible.

§ 11.27 The New Federal Regulations on ASFA*

Overview

The U.S. Department of Health and Human Services (HHS) published final regulations on the Adoption and Safe Families Act (ASFA) on January 25, 2000. While these regulations, for the most part, reiterate the federal statute, they do clarify and expand on certain issues. The 74 pages in the *Federal Register* also have extensive commentary to guide state compliance. 65 Fed. Reg. 4020 (2000) (to be codified at 45 C.F.R. §§ 1355, 1356 & 1357)

Time Periods

The regulations use two different starting points in defining requirement time periods: actual removal and foster care entry. Actual removal is the date the child is removed from the home. A child "enters foster care" the earlier of:

- The date the court found the child neglected or abused.
- Sixty days after the child's actual removal. **[45 C.F.R. § 1355.20(a)]**

Requirement	Deadline	Starting Date
Case Plan	60 days	Actual Removal
Reasonable Efforts to Prevent Removal	60 days	Actual Removal
Six-Month Periodic Review	6 months	Foster Care Entry
Permanency Hearing	12 months	Foster Care Entry
Reasonable Efforts to Finalize Permanency Plan	12 months	Foster Care Entry
Mandatory Termination Petition Filing	15 of the last 22 months[53]	Foster Care Entry

The commentary clarifies that states are free to choose to hold these hearings earlier. For example, a state may run all time periods from actual removal.

A child may already be living with a relative when the state intervenes. The agency may decide the child should remain with the relative with that relative as the child's foster parent. In this situation, the child is "constructively removed" for time period requirements even though the child does not change homes. The date of constructive removal by court order is used as the date of actual removal. 45 C.F.R. § 1356.21(k)

* This section is based on an article written by Debra Ratterman Baker that originally appeared in the June 2000 issue of ABA Child Law Practice (Volume 19, No. 4), published by the ABA Center on Children and the Law. For more information about this publication, contact Lisa Waxler, Publications Coordinator, at (202) 662-1743.

This article is reprinted with permission from the American Bar Association and the author.

[53] N.C.G.S. § 7B-907(d) requires mandatory filing for TPR if the child has been placed out of the home **12 of the 22** months.

"Contrary to Welfare" Findings

A court finding that "continuation in the home is contrary to the welfare of the child" must be made at the *first* court ruling on the child's removal, even if temporary. If it is not made at this hearing, the child's "stay in care" is ineligible for Title IV-E. In other words, it cannot be remedied by a finding at a later hearing, unless the child has returned home and a new placement in foster care is necessary. 45 C.F.R. § 1356.21(c)

Contrary to welfare findings must be "detailed" and be in the court order or hearing transcript. Affidavits, *nunc pro tunc* orders, or orders simply referring to a state law requiring such findings for removal do not meet this requirement. 45 C.F.R. § 1356.21(d) The finding does not have to follow the exact wording of the federal statute. For example, a finding that placement is in the child's best interests is okay.

Reasonable Efforts

A court finding that "reasonable efforts have been made to prevent the child's removal from home" must be made within 60 days of the child actual removal from home. If it is not made within this period, the child's entire "stay in care" is ineligible for Title IV-E. 45 C.F.R. § 1356.21(b)

The court must also make a finding that the agency has made reasonable efforts to finalize a permanency plan. The permanency plan may be to reunify the family or secure the child a new permanent home. In other words, the regulations have consolidated these two reasonable efforts findings into one. The finding is based on the agency's permanency plan at the time of the hearing, not on a prior plan the agency has abandoned.

This finding must be made within 12 months from when the child "enters foster care," presumably at the permanency hearing. It must then be made every 12 months to retain Title IV-E for the child. A negative, insufficient, late, or missing finding means the child is ineligible for Title IV-E until the court makes a positive finding.

The court may find that a lack of efforts is reasonable, such as when there is no safe way to make efforts to prevent removal. Reasonable efforts findings must be detailed-they must include relevant case facts. These findings must be in the court order or hearing transcript. Affidavits, *nunc pro tunc* orders, and orders simply referring to state laws requiring reasonable efforts for removal do not meet the requirement. 45 C.F.R. § 1356.21(d)

The exact wording of the federal statute does not have to be used as long as the findings make clear that the agency made reasonable efforts.

Aggravated Circumstances

The court may waive reasonable efforts to reunify if it finds aggravated circumstances. If reasonable efforts are waived, a separate reasonable efforts finding is not required.

The regulations clarify that the court must waive reasonable efforts if a parent has been convicted of an enumerated felony. However, if criminal proceedings are pending or under appeal, the court has discretion to determine if it is reasonable to proceed with reunification. This decision is based on the child's developmental needs and the length of time before the criminal proceedings or appeal will be resolved. 45 C.F.R. § 1356.21(i)

Permanency Hearings

The permanency hearing is a state plan requirement. It is not a Title IV-E eligibility requirement. If the state fails to hold a permanency hearing for a child, it is out of compliance with the state plan. However, the child remains eligible for Title IV-E. 45 C.F.R. § 1356.21(h) The permanency hearings must be held by a court or a court-approved administrative body that is not under the supervision or direction of the state agency. 45 C.F.R. § 1355.20(a)

A full hearing is required. Paper reviews, *ex parte* hearings, agreed orders, and hearings not open to parental participation are *not* permanency hearings.

The regulations clarify that the court may order reunification as the permanent plan at this hearing if:

- The parents have been diligently working toward reunification.
- Reunification is expected in a time frame consistent with the child's developmental needs.

The agency may change the child's permanency plan at any time. It does not have to wait for the permanency hearing to do so. It does not need to get court approval of the change. 45 C.F.R. § 1356.21(b)(2)

Guardianship

Like ASFA, the regulations define a "legal guardianship" as a judicially-created relationship between the child and caretaker that is permanent and self-sustaining. It must transfer the child's protection, education, care and control, custody, and decision-making to the caretaker. The caretaker does not have to be a relative. States are not required to adopt the statutory definition into their law. 45 C.F.R. § 1355.20(a)

Guardianship subsidies may not be paid out of Title IV-E monies unless the state has received a federal waiver. However, this does not preclude states from funding guardianship subsidies.

Trial Home Visits

Child welfare agencies may continue to receive Title IV-E for children with parents on "trial home visits." These visits can be for no more than six months unless the court authorizes them for a longer period. The court order must explicitly extend the trial home visit-a court hearing continuance is not sufficient. 45 C.F.R. § 1356.21(e)

If the trial home visit exceeds six months without court authorization, then the child's return to care is considered a new placement. To establish Title IV-E, new "contrary to the welfare" and "reasonable efforts to prevent removal" findings must be made.

Termination of Parental Rights

While the child is on a trial home visit, the "clock stops" for the mandatory termination petition filing deadline ("15 of the last 22 months"). For example, if the child is in foster care for 10 months, then goes home for a trial home visit, the deadline for filing a termination will be *five* months after the child returns to foster care. However, if the trial home visit is over seven months long, the clock starts over. Runaway episodes also stop the clock. 45 C.F.R. § 1356.21(i)

The state has discretion to file a termination petition whenever it is in the child's best interests. The "15 of the last 22 months" is a maximum, not a minimum. States have the option of making the child's length of stay a termination ground, but are not required to do so. The agency must file a termination within 60 days of a judicial determination that:

- The child is an abandoned infant.
- Reasonable efforts are not required because the parent's felony conviction.

The agency must begin the adoptive family search and approval process when it files the termination petition.

Compelling Reasons

The term "compelling reasons" is used in two different provisions in ASFA:

- The agency may determine it has a "compelling reason" not to file a termination petition within the "15 of the last 22 months" time period.
- The court may determine at a permanency hearing that there is a "compelling reason" that reunification, adoption, guardianship, and relative placement are not the child's best interests. If it makes such a finding, it may order "another planned permanent living arrangement" for the child.

45 C.F.R. § 1356.21(i)

"Compelling reasons" not to file a termination petition must be considered on a case-by-case basis considering the individual circumstances of the child and family.

The commentary gives examples of "compelling reasons:"

- Adoption is not the appropriate permanency plan for the child.
- There are no grounds to file a termination petition.
- The child is an unaccompanied refugee minor.
- An international legal obligation or compelling foreign policy reasons would preclude termination.

These examples are just illustrations. The state may not specify categories of children for whom filing a termination petition is not appropriate.

The compelling reason must be documented in the case plan. This is an agency decision-court approval is not required. The agency does not lose federal funding even if the court disagrees.

This decision is only required to be made once. Review at subsequent hearings is recommended, not required.

The commentary also gives examples of "compelling reasons" for a court to order "another permanent planned living arrangement:"

- An older teen who specifically requests emancipation as his or her permanency plan.
- A child who has a significant bond to a parent unable to care for the child because of an emotional or physical disability. The foster parents are willing to raise the child and facilitate visitation with the parent.

- An Indian child for whom the tribe has identified another planned permanent living arrangement.

The state may not identify a specific category of children who are excluded from one or more permanency options. For example, it cannot categorically exclude delinquents from being considered for adoption. 45 C.F.R. § 1356.21(h)

Responsibility for Placement

For Title IV-E eligibility, the public child welfare agency must have "responsibility for the child's placement and care." This means that the agency decides the child's specific placement, not the court. If the court orders the child into a specific placement, the child is ineligible for federal matching funds. 45 C.F.R. § 1356.21(g)

Foster Family Home

All foster family homes, including relative homes, must meet the same licensing standards. Any state that has separate standards for relative homes will have six months to come into compliance with this requirement. The commentary does allow states to waive some non-safety standards, such as square footage requirements, for relatives. 45 C.F.R. § 1355.20(a)

The regulations allow states to claim Title IV-E from the date the foster parent satisfies all licensing requirements, even if the actual license has not yet been issued. However, the license must be issued within 60 days.

Criminal Records Checks

ASFA requires states to run criminal records checks on potential foster and adoptive parents. States may opt out of this requirement. 45 C.F.R. § 1356.30

To opt out, the state must adopt legislation or the governor must send HHS a letter. States who opt out must still document they considered safety issues in licensing a foster or adoptive parent.

States who do not opt out must document they made criminal records checks for all foster and adoptive parents licensed after November 19, 1997 (the effective date for ASFA). States do not have to go back and make these checks on those approved before this date. Checks are required for foster and adoptive parents only, not on other household members.

The state cannot license anyone convicted of a violent felony. It also cannot license anyone convicted of a drug-related felony in the last five years. "Drug-related felonies" include alcohol-related felonies.

This is both a Title IV-E state plan and child eligibility requirement. The state cannot claim Title IV-E funds for a child placed with a foster parent with any of the enumerated convictions.

Foster Parent Rights

ASFA gives the child's caregiver a right to notice and an opportunity at any hearing on the child. It does not require states give foster parents "party" status. 45 C.F.R. § 1356.21(o); 45 C.F.R. § 1355.34(b)(2)(v)

The regulations require this notice to be "timely" and to be given for permanency hearings and six-month periodic reviews. They do not prescribe how to notify the foster parents, but recommends the same procedure as for parties.

The regulations do not define "opportunity to be heard." However, the commentary states that foster parents do not have a right to appear at the hearing as long as they can give input to the court, such as through a written submission.

Delinquents in Foster Care

The regulations clarify that delinquents and status offenders placed in Title IV-E eligible placement must meet the same requirements as dependent children. The child welfare agency does have flexibility to do appropriate individual case planning. 45 C.F.R. § 1356.21

A delinquent or status offender "enters foster care" 60 days after the child is removed from home. The only exception is when a child is first placed in detention and then moved to foster care: the time period runs from the date the child is placed in a Title IV-E eligible placement.

There must be a "contrary to the welfare" finding at the first hearing on the actual removal. However, a finding that "continuation in the home is contrary to the interests of society" is not acceptable for Title IV-E eligibility.

Voluntary Placements

The same requirements apply whether the child's placement is involuntary or voluntary. A child in voluntary placement "enters foster care" 60 days after actual removal. The agency has no affirmative duty to notify parents who voluntarily place a child of ASFA requirements. 45 C.F.R. § 1356.22

Indian Child Welfare Act

The regulations clarify that Indian children must meet the same requirements as other dependent children. States must still meet Indian Child Welfare Act (ICWA) and nothing in the regulations supercedes ICWA.

The definition of "foster family home" includes foster parents living on or near an Indian reservation who are licensed or approved by the tribe. "Child care institutions" also includes those facilities licensed by the tribe. 45 C.F.R. § 1355.20(a)

One example of a "compelling reason" mentioned in the commentary is an Indian child for whom the tribe has identified another planned permanent living arrangement. 45 C.F.R. § 1356.21(h)

Tribes are encouraged to form agreements with states to receive Title IV-E monies. However, all Title IV-E funds must go through state agencies, not directly to tribes. Under such agreements, a tribe may have "responsibility for a child's placement and care."

Tribes do not have authority to adopt their own definitions of "aggravated circumstances." However, if a tribe has responsibility for the child's placement and care, it could determine there is a "compelling reason" not to file a termination petition. However, it may not categorically exempt children-it must make the determination on a case-by-case basis.

Multiethnic Placement Act

The Multiethnic Placement Act (MEPA) prohibits discrimination based on race, color, or national origin in foster care or adoptive licensing and child placement. States may not routinely consider ethnicity in placement decisions. 45 C.F.R. § 1355.38

HHS will impose penalties on a state for individual violations determined by a court finding or Justice Department investigation. States may lose from two to five percent of fiscal year Title IV----E funds based on the number of violations.

If a state agency has a statute, regulation, policy, procedure, or practice that, on its face, violates MEPA, it has six months after HHS notification to remedy this violation before penalties are imposed. It must submit a corrective action plan which must be approved by HHS. Private agencies that violate MEPA must return all federal foster care and adoption funds to HHS.

States do not violate MEPA by:

- Making special recruitment efforts for minority foster and adoptive parents.
- Using a relative placement preference.
- Following Indian Child Welfare Act requirements.

Effective Date

The final rule went into effect March 27, 2000. These include:

- The consolidation of the finding on reasonable efforts to reunify the family and the finding on reasonable efforts to secure the child another permanent home into a single finding on reasonable efforts to "finalize a permanency plan."
- The permanency hearing requirement for children who were formerly exempt-children in long-term foster care and preadoptive homes.