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Adoption: Interethnic Placement Legislation In the 104th Congress

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Summary

Legislation was enacted during the 104th Congress that is intended to promote adoption by prohibiting racial and other discrimination in adoptive placements and by establishing tax credits for adoptive parents (P.L. 104-188, H.R. 3448). These provisions are components of the Small Business Job Protection Act, which also contains provisions to increase the minimum wage. Congress earlier had included similar adoption provisions in various versions of welfare reform legislation and in a free-standing bill (H.R. 3286) that also contained amendments to the Indian Child Welfare Act (ICWA). The 104th Congress took no final action on the ICWA amendments.

INTRODUCTION

On August 20, 1996, President Clinton signed legislation that is intended, among other things, to decrease the length of time that children wait to be adopted as a result of policies that require or encourage adoption by families of the same race or ethnic origin. The multipurpose Small Business Job Protection Act (P.L 104-188, H.R. 3448) also provides tax incentives for adoption. These provisions had earlier been included in free-standing legislation (H.R. 3286) that also would have amended the Indian Child Welfare Act to limit its scope with regard to children whose parents have no significant tribal affiliation.

The Adoption Promotion and Stability Act (H.R. 3286) was introduced on April 23, 1996. The House Resources Committee reported the bill on April 30, after voting to remove the ICWA provision (H.Rept. 104-542, Part 1). The interethnic adoption and tax provisions were reported by the Ways and Means Committee on May 3 (H.Rept. 104-542, Part 2). Resources Committee Chairman Young offered an amendment on the House floor in a second attempt to delete the ICWA provision, but this amendment was defeated by a vote of 195-212. The full House passed H.R. 3286 on May 10, by a vote of 393-15.

The Senate Finance Committee amended the interethnic adoption and tax incentive provisions of H.R. 3286 on June 12 (S.Rept. 104-279), and the Senate Indian Affairs

Committee voted on June 19 to strike the ICWA provision (S.Rept. 104-288). However, the full Senate took no action on H.R. 3286.

In their respective versions of welfare reform legislation (H.R. 3734), the House included the interethnic adoption provisions and the Senate included the adoption tax credits. (The provisions also were included in welfare reform measures passed during the first session of the 104th Congress, H.R. 4 and H.R. 2491, both of which were vetoed.) However, both provisions were dropped from the final conference agreement on welfare reform and instead were incorporated into the conference agreement on the minimum wage bill (H.R. 3448, H.Rept. 104-737). The House and Senate passed the conference agreement on H.R. 3448 on August 2, 1996, and President Clinton signed the bill into law on August 20 (P.L. 104-188).

The ICWA amendments were not included in the minimum wage legislation, but a subsequent proposal to amend ICWA was passed by the full Senate (S. 1962, S.Rept. 104-335) and by the House Resources Committee (H.R. 3828, H.Rept. 104-808). However, Congress adjourned without taking final action on this measure.

This report focuses primarily on the interethnic adoption provisions enacted into law during the 104th Congress. Adoption tax credits and amendments to ICWA are briefly discussed and references for further reading are provided.

INTERETHNIC ADOPTION

Background. P.L. 104-188 amends legislation that was originally passed during the 103rd Congress. Named for its chief Senate sponsor, the Howard Metzenbaum Multiethnic Placement Act (MEPA) was enacted on October 20, 1994 (P.L. 103-382). Passage of MEPA reflected congressional concern that many children in foster care -- particularly minority children -- wait too long for adoption and that any barriers to adoption resulting either from discrimination in placement or a shortage of adoptive homes should be eliminated. As stated in the Act, its purposes were (1) to decrease the length of time that children wait to be adopted; (2) to prevent discrimination in the placement of children on the basis of race, color, or national origin; and (3) to facilitate identification and recruitment of foster and adoptive families that can meet children's needs.

MEPA prohibited any agency or entity that received federal assistance from categorically denying someone the opportunity to adopt or foster a child, solely on the basis of the race, color, or national origin of the individual or of the child. The Act further prohibited such agencies from delaying or denying the placement of a child into adoption or foster care, or otherwise discriminating in making a placement decision, solely on the basis of the race, color, or national origin of the prospective parents or of the child. However, MEPA *did* allow agencies to consider the child's cultural, ethnic, or racial background, and the capacity of the prospective foster or adoptive parents to meet the child's needs, as one of the factors used to determine the best interests of the child.

The Act established that individuals who were aggrieved by an action that they believed violated MEPA could seek relief in U.S. district court and that noncompliance with the Act's provisions was deemed a violation of Title VI of the Civil Rights Act. The Act further required states to provide for the diligent recruitment of potential foster and

adoptive families that reflect the ethnic and racial diversity of children in the state who need foster or adoptive homes.

The Department of Health and Human Services (HHS) issued policy guidance in the April 25, 1995, *Federal Register*, with respect to compliance with MEPA. Agencies or entities covered by MEPA were required to be in full compliance by October 21, 1995. In May 1996, HHS reported that all states except three -- Arkansas, Kentucky, and Minnesota -- were in compliance. To comply with MEPA, these three states had to enact statutory changes; extensions were granted until July 1996 (Kentucky and Minnesota) and April 1997 (Arkansas), because of the schedules of their state legislatures.

1996 Amendments. Following passage of MEPA, concern was raised about whether the Act was sufficiently strong to achieve its goals. In particular, some observers objected to the provision that allowed agencies to consider a child's cultural, ethnic, or racial background in making placement decisions. Concern also was expressed about the lack of an enforcement mechanism other than judicial action. As a result, Congress included interethnic adoption provisions in budget reconciliation (H.R. 2491) and omnibus welfare reform proposals (H.R. 4), which were vetoed by President Clinton in December 1995 and January 1996. Similar provisions were included in the Adoption Promotion and Stability Act (H.R. 3286) and in the minimum wage legislation that was passed by Congress on August 2 (H.R. 3448) and signed into law on August 20 (P.L. 104-188).

As enacted, P.L. 104-188 repeals the MEPA provision that allowed states to consider a child's cultural, ethnic, or racial background in making placement decisions. The new law requires states, in their foster care and adoption assistance plans under Title IV-E of the Social Security Act, to provide that neither the state nor any other entity that receives federal funds may deny a person the opportunity to adopt or foster a child on the basis of the race, color, or national origin of the person or of the child, nor may they delay or deny the placement of a child on the basis of the race, color, or national origin of the prospective parent or child. This provision is effective on January 1, 1997.

These prohibitions are similar to those formerly contained in MEPA. However, the word "solely" does not appear in the new provision. In addition, MEPA established that agencies could not "otherwise discriminate" in making placement decisions on the basis of race, color, or national origin. This language was originally included in the introduced version of H.R. 3286 but deleted during a Ways and Means Committee markup after Members expressed concern that the bill's language might be overly restrictive. The specific concern raised was that if two otherwise qualified families of different racial backgrounds wished to adopt a child, the adoption agency would be unable to select the family of the same race as the child because that would constitute racial discrimination.

Therefore, the final version of the interethnic adoption provision does not explicitly *allow* consideration of race, color, or national origin in making placement decisions. However, the law does not explicitly *prohibit* consideration of these factors, unless such consideration resulted in denying or delaying the child's placement.

Because P.L. 104-188 makes these prohibitions components of state foster care and adoption assistance plans, they are automatically subject to review by HHS as part of the federal review of state child welfare programs. P.L. 104-188 also provides that if a state is found to be in violation of these provisions, either as a result of a federal review or

otherwise, HHS must reduce quarterly foster care and adoption assistance payments otherwise due to the state. States will have up to six months to implement a corrective action plan and thereby avoid the penalty. These penalties will equal 2% of federal funds for a first violation, 3% for a second violation, and 5% for 3 or more violations. HHS may not reduce any fiscal year payment to a state by more than 5%. Private agencies that violate the interethnic provisions will be required to pay back any federal funds received.

As under MEPA, private individuals may seek relief under these provisions in U.S. district court. However, P.L. 104-188 provides that no action may be brought more than 2 years after the alleged violation occurs. The law also applies these discrimination prohibitions to any person or government involved in adoption or foster care; noncompliance will be deemed a violation of Title VI of the Civil Rights Act.

P.L. 104-188 does not affect the current law provision in Title IV-B of the Social Security Act that requires states to diligently recruit ethnically and racially diverse foster and adoptive families. Likewise, these provisions do not affect the application of ICWA.

Issues. At the end of fiscal year 1990, the most recent year for which detailed data are available, adoption had been established as the goal for 69,000 foster children.[1] Of these children, 20,000 were legally free for adoption and waiting for a placement. During the same year, adoptions were finalized for approximately 17,000 children who formerly had been in foster care. A comparison of the children who were adopted in fiscal year 1990 and those who were still waiting for an adoptive home at the end of the year indicates that African-American children in particular are more likely to wait for adoption than to be placed. Specifically, 29% of the children whose adoptions were made final in fiscal year 1990 were African-American, compared to 43% of the children who were still waiting for adoptive homes. Among children of all races who were waiting for adoptive placements at the end of the year, 46% had been waiting 2 years or longer.

An analysis by the American Public Welfare Association (APWA) of foster children in 12 states during the period 1984 to 1990 indicates that the rate at which African-American and Hispanic children leave foster care is slower than that of white children, and was substantially lower in 1990 than it was in 1984.[2] APWA further noted that in FY1990, the number of black children in foster care in 31 states exceeded the number of white foster children in the same states. In sum, black children are more likely than white children to enter foster care in the first place, and stay in foster care longer.

Interethnic adoption -- particularly adoption of African-American children by white parents -- is a highly controversial and emotional issue. On the one hand, as noted above, minority children are disproportionately in need of adoptive homes and spend more time in foster care than white children. There is concern that state policies or practices that prohibit or discourage interethnic adoption exacerbate the plight of these children. Allowing children to be adopted by the first suitable family available, regardless of race or

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[1] Characteristics of Children in Substitute and Adoptive Care. Voluntary Cooperative Information System, American Public Welfare Association, Washington, DC, October 1993.

[2] Tatara, Toshio. A Comparison of Child Substitute Care Exit Rates Among Three Different Racial/Ethnic Groups in 12 States, FY1984 to FY1990. VCIS Research Notes No. 10, American Public Welfare Association, Washington, DC, June 1994.

ethnicity, could speed up adoptions and reduce stays in foster care for minority children. In addition, adoption advocates point to studies that show successful outcomes for African-American and other minority children who are raised in white homes.

On the other hand, some argue that minority children are disproportionately placed in foster care because of a shortage of family support services, including services that recognize cultural differences among families, that could avoid the need to remove children from their biological families in the first place and help reunite families after children have been removed. In addition, aggressive recruitment of minority families could result in more and faster adoptions for minority children. Observers express concern about the long-term adjustment of children raised outside their racial or ethnic heritage, and point to research that indicates confusion among these children about their cultural identity and adjustment difficulties in school and in the community. Some advocates of same-race placements argue that agencies should be able to discriminate, at least as long as such discrimination does not prolong a child's stay in foster care.

For additional reading, see *Transracial Adoptions and Foster Care Placements*, by Gina M. Stevens, CRS General Distribution Memorandum, American Law Division; and *State Statutes Which Consider Race as a Factor in Foster Care Placements and a List of State Agencies Responsible for Regulating Foster Care*, by Gloria P. Sugars, CRS Report 91-193 A.

ADOPTION TAX CREDITS

P.L. 104-188 also is intended to promote adoption through tax incentives. As enacted, the law establishes a nonrefundable personal tax credit of up to $5,000 for qualified adoption expenses incurred by families, including adoption fees, court costs, and attorney fees. For parents adopting a child who is not an American citizen or resident, the credit can be taken only after the adoption becomes final. In the case of adoptive children with special needs, the credit can equal up to $6,000. After December 31, 2001, the tax credit will be available only for adoptions of children with special needs.

The definition of a special needs child is the same as in the Title IV-E adoption assistance program; i.e., a child that the state has determined cannot or should not return to his or her parents, and for whom it would be reasonable to conclude could not be placed for adoption without assistance because of a specific factor or condition (such as ethnic background, age, membership in a minority or sibling group, medical condition, or physical, mental, or emotional handicap).

The adoption tax credit is reduced for families with adjusted gross incomes above $75,000 and ends entirely for families with adjusted gross incomes of $115,000 or more. If a family does not have sufficient tax liability to claim the full amount of its adoption expenditures eligible for the credit in a single year, the family may carry forward any unclaimed part of the credit into subsequent tax years, for up to 5 years. The tax credit may not be taken for any adoption expenses if the family received funds for such expenses from any federal, state, or local program.

In addition to the adoption tax credit, P.L. 104-188 establishes an exclusion from income of up to $5,000 received by a family from an employer's adoption assistance program (or up to $6,000 for special needs adoptions). Again, the amount of income that

can be excluded is reduced for families with incomes above $75,000, and eliminated entirely for families with incomes of $115,000 or more. This exclusion from income will terminate after December 31, 2001.

Finally, P.L. 104-188 requires the Secretary of the Treasury to study the effects of the adoption tax credit and income exclusion on adoptions, including special needs adoptions, and report to Congress by January 1, 2000. For further information on the tax credit and accompanying revenue offsets, see *Adoption Tax Credit and Exclusion*, by Louis Alan Talley, CRS Report 96-692 E.

INDIAN CHILD WELFARE ACT AMENDMENTS

ICWA was enacted in 1978 to promote the stability and security of Indian tribes by establishing minimum federal standards for removal of Indian children from their families and for their placement in foster or adoptive homes. Implementation of ICWA has been controversial, with adoption advocates arguing that the Act has had a "chilling effect" on all adoptions because of the possibility that a child may have a distant relative with Indian blood. At the same time, the tribes have strongly opposed attempts to limit ICWA's scope, claiming they would infringe on tribal rights to determine their own membership.

As passed by the House, H.R. 3286 would have limited the cases in which ICWA would apply. Specifically, the bill provided that ICWA would not apply to a child custody proceeding involving a child who does not live within a reservation, unless at least one of the child's biological parents is of Indian descent, and at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the tribe of which either parent is a member. The bill also would have required that individuals age 18 or older who are not already members of an Indian tribe could become tribal members only upon their written consent, and that, for purposes of a child custody proceeding, tribal membership would be effective from the date of admission and not be retroactive.

The House Resources Committee objected to the ICWA provision in H.R. 3286, stating in its bill report that the amendment would create a "gigantic loophole" in ICWA by allowing state courts, instead of tribal courts, to determine whether ICWA applies in individual cases. Representative Young again attempted to delete the ICWA provision through a House floor amendment, which was defeated. The Senate Indian Affairs Committee also voted to strike the ICWA provision from the adoption bill.

Representative Young and Senator McCain subsequently introduced identical bills to amend ICWA (H.R. 3828, S. 1962), as an alternative to the language in the adoption bill. The Senate Indian Affairs Committee reported S. 1962 on July 26 (S.Rept. 104-335) and the full Senate passed the bill on September 26. H.R. 3828 was reported by the House Resources Committee on September 19 (H.Rept. 104-808); however, the 104th Congress adjourned without taking final action on this legislation.

H.R. 3828 and S. 1962 would have defined the exclusive jurisdiction of Indian tribes in child custody proceedings involving Indian children; provided conditions for voluntary termination of parental rights to Indian children; established conditions for the withdrawal of consent to adoption of an Indian child and the revocation of voluntary termination of parental rights to an Indian child; established a timetable for notice, and the specific contents of the notice, to be given to Indian tribes in the case of a voluntary placement of

an Indian child or the voluntary termination of parental rights to an Indian child; defined conditions under which an Indian tribe could intervene in a voluntary child custody proceeding in a state court; and established criminal sanctions for anyone convicted of fraudulent representation in a proceeding subject to ICWA.