

21 EPA

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

16-Jun-1995 12:18pm

TO: Diana M. Fortuna

FROM: Christopher D. Cerf
 Office of the Counsel

SUBJECT: RE: adoption issue

I know of no further action on this. At the time HHS issued its Guidance (April 20, 1995), Metzenbaum was still ranting. I think, however, that he was calmed down. As you know, the Republicans were pushing alternative legislation that would have made it improper to consider race at all. We should figure out where the legislation is. Please let me know how I can assist you in this or any other MEPA related matter. Chris.

MEPA
THE WHITE HOUSE
WASHINGTON

DATE: 10-17

TO: Diana Fortune

FROM: Chris Cerf
White House Counsel
Room 136, OEOB, x6-6229

☒ FYI

☐ Appropriate Action

☐ Let's Discuss

☐ Per Our Conversation

☐ Per Your Request

☐ Please Return

☐ Other

COPY TO DIANA FORTUNA
File: MePA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY *M* D.C.

95 SEP 29 AM 10:50

RECEIVED
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W.D. OF TN, MEMPHIS

BABY JANE DOE, et al.,

Plaintiffs,

VS.

THE STATE OF TENNESSEE
DEPARTMENT OF HUMAN SERVICES, et al.,

Defendants.

No. 93-3083-G

CERTIFIED TRUE COPY
ROBERT R. DI TROLIO
U.S. DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

BY *[Signature]*
DEPUTY CLERK

ORDER GRANTING THE FEDERAL DEFENDANTS' MOTION TO DISMISS

Before the court is the motion of the federal defendants, Janet Reno and Donna Shalala, to dismiss plaintiffs' claims for lack of standing. Plaintiffs are a class of children in the custody of the Tennessee Department of Human Services ("TDHS") who are eligible for adoption. They first filed suit on December 17, 1993 against various Tennessee officials (the "Tennessee defendants"), alleging that TDHS impermissibly considers race in the placement of children for adoption.¹ On February 28, 1995, plaintiffs amended their complaint to challenge the constitutionality of the Multiethnic Placement Act of 1994 ("MEPA"), 42 U.S.C. § 5115a, and added Reno and Shalala as defendants in their respective official capacities as United States Attorney General and Secretary of the United States Department of Health and Human Services. Reno and Shalala (the "federal defendants") now move to dismiss on the grounds that the

¹ Cross-motions for summary judgment are pending in this court, but decision upon those motions has been deferred pending this order ruling on the federal defendants' motion for dismissal.

named plaintiff, Baby Jane Doe, lacks standing to challenge the statute. For the following reasons, the court grants the federal defendants' motion.

The Multiethnic Placement Act, enacted on October 20, 1994, provides that an agency which receives federal assistance may not

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

42 U.S.C. § 5115a(a)(1)(A-B). In addition to these prohibitions, the statute also provides that such agencies "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 the child of this background as one of a number of factors used to determine the best interests of a child."

§ 5115a(a)(2) (emphasis added). MEPA further requires states to ensure that their child welfare plans "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 families are needed." 42 U.S.C. § 622(b)(9) (West Supp. 1995).

Plaintiffs allege that MEPA violates the Fifth Amendment because it (1) affirmatively authorizes states to consider the perceived race of applicants in the adoption and foster care placement process; (2) disparately impacts minority children;

(3) violates plaintiffs' right to privacy in forming familial relationships without unnecessary delay; (4) permits states to classify children in their custody on the basis of race; and (5) affirmatively requires states to recruit potential foster and adoptive parents that reflect the ethnic and racial diversity of children in the state for whom foster and adoptive families are needed. (Am. Compl. ¶¶ 28-34).

Plaintiffs' constitutional challenge to MEPA is attacked by the federal defendants on the ground that the plaintiffs lack standing. Under Article III of the United States Constitution, a court lacks jurisdiction over a case when the plaintiff does not have standing. DeBolt v. Espy, 47 F.3d 777, 779 (6th Cir. 1995). The party invoking federal jurisdiction bears the burden of establishing "at an irreducible minimum" (1) that they personally have suffered an "injury-in-fact"; (2) that the injury was caused by the challenged action of the defendants; and (3) that the injury is one which is likely to be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 540 U.S. 555, 560-61 (1992); Detroit v. City of Franklin, 4 F.3d 1367, 1372 (6th Cir. 1993), cert. denied, 114 S.Ct. 1217 (1994).

At issue in this case is plaintiffs' ability to satisfy the causation prong of the standing inquiry. To establish the requisite causal connection, plaintiffs must show that their injury is "fairly . . . trace[able] to the challenged action of the defendant[s], and not . . . th[e] result [of] the independent action of some third party not before the court." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). Plaintiffs

contend that Baby Jane Doe has been injured by MEPA because the statute affirmatively authorized TDHS to consider her race in the process of placing her for adoption. (Am. Compl. ¶ 28). The federal defendants' argue that named class representative Baby Jane Doe has failed to show how any injury she may have suffered can be fairly traced to the federal defendants because (1) Doe was placed with her adoptive mother approximately ten months before MEPA was enacted; and (2) MEPA provides only that it is permissible for state agencies to consider race when making adoption placement decisions. Since a class action may not proceed where the named representatives lack standing to do so, O'Shea v. Littleton, 414 U.S. 488, 494 (1974), the federal defendants move this court to dismiss the complaint against them. For the following reasons, this court agrees that it is without jurisdiction over the complaint against the federal defendants.

MEPA could not have caused Doe's injury because TDHS's decision to place her in an adoptive home was made prior to the enactment of the statute. While plaintiffs' argue that the record is silent as to Doe's actual date of adoption, MEPA is intended to influence the agencies to whom it is addressed at the point of making a placement decision, see 42 U.S.C. § 5115a(a)(3) (defining "placement decision" as "the decision to place, or to delay or deny the placement of a child"), not at the actual point of adoption. The record is perfectly clear that the decision to place Doe was made on December 21, 1993. (See Pls.' Resp. Br. at 5). Since that decision was made approximately ten months before MEPA was enacted, Doe's alleged injury could not have been caused

by the enactment of the federal statute.²

Second, even had MEPA been in effect at the time of Doe's placement, her injury could not have been fairly traced to the federal defendants because the statute provides that race is a permissible, not a mandatory, factor to consider when placing a child for adoption. MEPA permits but does not require TDHS and similar agencies to consider race as "one of a number of factors used to determine the best interests of the child." 42 U.S.C. § 5115a(b). The "Policy Guidance on the Use of Race, Color or National Origin as Considerations in Adoption and Foster Care Placements" (the "Guidance"), issued by the Department of Health and Human Services on April 25, 1995, consistently notes that agencies may choose to consider race as a factor, and if they do so, must comply with the requirements of the Constitution, MEPA, and Title VII. 60 Fed. Reg. 20,272, 20,273 (April 25, 1995). The Guidance neither lists the other factors to be considered nor assigns any order or preference to be used in making that consideration. TDHS thus is free to choose to consider race as one of two factors, as one of a hundred, or not at all when

² This court acknowledges that, under Tennessee law, Baby Jane Doe remains under the authority of TDHS until an adoption petition is filed on her behalf, at which point she becomes a ward of the court. TENN. CODE ANN. § 36-1-106(d) (1991). Accordingly, until such petition is filed (which TDHS recommends should be after the child has resided with the prospective adoptive family for at least six months), it would appear that TDHS retains the power to extract Doe from one family and "place" her again with another. Nonetheless, since plaintiffs bear the burden of establishing all elements of their standing to sue, Lujan, 504 U.S. at 560-61, and since the record is silent on the question of when or if an adoption petition was filed thus transferring custody from TDHS to the court, this court finds that plaintiffs have failed to meet their burden of showing that TDHS retains the power to make a placement decision as to Doe.

making a placement decision. The agency is also free to determine for itself the weight it wishes to assign to the factors which it chooses to consider. These choices are guided only by the general admonition issued by MEPA that all choices must be made in the "best interests of the child," 42 U.S.C. § 5115a(b), and by the Guidance requirement that any consideration of race as a factor must be done on an individualized basis. 60 Fed. Reg. at 20,273. This court finds that these directives do not serve to create a causal link between plaintiffs' injury and the federal defendants which is sufficient to confer standing.³

Plaintiffs advance three alternative grounds which they assert are sufficient to confer standing. The court, however, does not agree. Plaintiffs first argue that the federal defendants should be retained in this lawsuit because of the "juridical relationship" which binds them to TDHS, and thus "a single resolution of the dispute . . . would be expeditious and promote judicial economy." Pls.' Resp. to Defs.' Mot. to Dismiss at 12. It is the opinion of this court, however, that this

³ The federal defendants cite the D.C. Circuit's recent en banc ruling in Alliance for Community Media v. Fed. Communications Comm'n, 56 F.3d 105 (D.C. Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3104 (Aug. 9, 1995), for the proposition that a federal statute which merely permits a private actor to take some action, does not serve to make that action "state action" for the purposes of a constitutional challenge. In holding that a federal statute which permitted but did not require operators of cable television systems to ban sexually explicit programming was not subject to a First Amendment challenge, the D.C. Circuit stated that "[i]f the government had commanded a particular result . . . the operator's compliance would plainly be attributable to the government." Alliance, 56 F.3d at 113. This court agrees with the federal defendants that this holding "provides a useful analogy" to the causation prong of the standing analysis at issue in this case. Federal Defendant's Br. at 7 n.5.

argument misreads the applicable caselaw. Both the Sixth Circuit in Thompson v. Bd. of Educ. of Romeo Community Schs., 709 F.2d 1200 (6th Cir. 1983) and the Ninth Circuit in LaMar v. H & B Novelty and Loan Co., 489 F.2d 461, 462 (9th Cir. 1973), which first advanced the concept of a juridical link as a way to avoid the requirement that each named plaintiff must have standing as against each defendant, were operating in the context of a request to certify a defendant class under Rule 23. That setting is entirely different from the one which confronts this court. Nothing in LaMar or its progeny suggests that the juridical link exception would apply in a case where individual named defendants are the subject of suit. In fact, the "crux" of the LaMar decision was that the "exercise of judicial power is generally inappropriate in a case where the named plaintiffs do not have a cause of action against each defendant." Thompson, 709 F.2d at 1205 (citing the lower court's opinion, 71 F.R.D. 398, 407 (W.D. Mich. 1976)). Given this well-settled principle, considerations of judicial economy alone are insufficient to confer standing upon a plaintiff who otherwise fails to meet the constitutional requirements.

Plaintiffs argue next that TDHS relied upon MEPA in making adoption placement decisions and that "but for" the actions of the federal defendants, plaintiffs would not have been injured. Contrary to plaintiffs' allegation, however, TDHS never indicates that it relied upon MEPA in making decisions about placements. Rather, TDHS's reference to MEPA in its Response to Plaintiffs' Motion for Summary Judgment serves merely to bolster

a policy which was already in place long before MEPA was in existence, a proposition which is further supported by the fact that plaintiffs' suit challenging TDHS's allegedly discriminatory practices was filed almost a year before MEPA was even enacted.⁴

Lastly, plaintiffs argue that suit against the federal defendants is proper due to language in the Supreme Court's opinions in Lujan, 504 U.S. at 560-61, and Simon, 426 U.S. at 41-42, which denies standing where a plaintiff's injury is caused by the independent action of some third party not before the court" (plaintiffs' emphasis). Plaintiffs argue that since the Tennessee defendants are before the court in this action, standing should be conferred. The Sixth Circuit, in Lugo v. Miller, 640 F.2d 823 (6th Cir. 1981), however, has considered and rejected exactly this argument. Joinder of defendants, without meeting the other constitutional prerequisites, is insufficient to confer standing. See id. at 828. As the Lugo court stated, while plaintiffs may have "remedied [the] deficiency" present in Simon by including the hospitals whose policies were being challenged as defendants, plaintiffs were still required to prove injury traceable to the government in order to satisfy the constitutional requirement of standing. Id. at 827-28. Plaintiffs in this case have not done so.

⁴ Plaintiffs request that, if they are not permitted to challenge MEPA, the Tennessee defendants be enjoined from defending their allegedly racially discriminatory policies based upon the Act. While the court finds it unnecessary to make any determination upon the issue at this time, given that TDHS's policy regarding consideration of race was in place before MEPA was enacted, any attempt to defend that policy solely on the basis of the Act is unlikely to succeed.

The court finds that plaintiffs have not sustained their burden of showing how Baby Jane Doe's injury could fairly be traced to the federal defendants. Accordingly, as Baby Jane Doe, the named class representative, lacks standing to challenge MEPA, the federal defendants' motion to dismiss the complaint against them is GRANTED.⁵

IT IS SO ORDERED.

Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

September 28, 1995
DATE

⁵ Due to this disposition of the federal defendants' motion, the court finds it unnecessary to address the arguments regarding ripeness which are raised by both parties.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF THE GENERAL COUNSEL
CIVIL RIGHTS DIVISION

FAX FORM

DATE : 2/21/96
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cc Chns Cerf
counsel's office
from Diana Fortuna
Minnesota
MEPA

TO : DIANA FORTUNA
AGENCY : WHITE HOUSE
TELEPHONE : _____
FAX # : 456-7431
NUMBER OF PAGES WITH COVER: 3

COMMENTS: Per Request to LISA SILVERBERG

§ 259.55

CHANGE OF NAME, ADOPTION

Historical and Statutory Notes

1994 Legislation

Laws 1994, c. 631, § 27, enacted this section, which was originally coded as § 259.271.

Laws 1994, c. 631, § 31, par. (c), instructed the revisor of statutes to renumber chapter 259 in

order to eliminate seven-digit section numbers and to make room for future sections. The revisor was also instructed to make appropriate cross-reference changes to reflect the new section numbers in chapter 259.

259.57. Hearing, decree

Subdivision 1. Findings; orders. Upon the hearing,

(a) if the court finds that it is in the best interests of the child that the petition be granted, a decree of adoption shall be made and recorded in the office of the court administrator, ordering that henceforth the child shall be the child of the petitioner. In the decree the court may change the name of the child if desired. After the decree is granted the court administrator shall immediately mail a copy of the recorded decree to the commissioner of human services;

(b) if the court is not satisfied that the proposed adoption is in the best interests of the child, the court shall deny the petition, and shall order the child returned to the custody of the person or agency legally vested with permanent custody or certify the case for appropriate action and disposition to the court having jurisdiction to determine the custody and guardianship of the child.

Subd. 2. Protection of heritage or background. The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due, not sole, consideration of the child's race or ethnic heritage in adoption placements. For purposes of intercountry adoptions, due consideration is deemed to have occurred if the appropriate authority in the child's country of birth has approved the placement of the child.

In reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child, or if that is not feasible, to (c) a family of different racial or ethnic heritage from the child that is knowledgeable and appreciative of the child's racial or ethnic heritage.

If the child's birth parent or parents explicitly request that the preference described in clause (a) or in clauses (a) and (b) not be followed, the court shall honor that request consistent with the best interests of the child.

If the child's birth parent or parents express a preference for placing the child in an adoptive home of the same or a similar religious background to that of the birth parent or parents, in following the preferences in clause (a) or (b), the court shall place the child with a family that also meets the birth parent's religious preference. Only if no family is available as described in clause (a) or (b) may the court give preference to a family described in clause (c) that meets the parent's religious preference.

Subd. 3. Compliance with Indian Child Welfare Act. The provisions of this chapter must be construed consistently with the Indian Child Welfare Act of 1978, United States Code, title 25, sections 1901 to 1963.

Historical and Statutory Notes

Derivation:

Laws 1994, c. 631, § 31.
St.1993 Supp., § 259.28.
Laws 1993, c. 291, §§ 12, 13.
Laws 1992, c. 557, § 5.
Laws 1986, 1st Sp., c. 3, art. 1, § 82.
Laws 1984, c. 654, art. 5, § 58.
Laws 1983, c. 278, § 10.
Laws 1969, c. 685, § 49.
LAWS 1961, C. 508, § 8.

1993 Legislation

Laws 1993, c. 291, §§ 12 and 13, in subd. 2 inserted ", not sole," preceding "consideration of a child's race or ethnic heritage"; and added subd. 3 requiring that the chapter comply with the Indian Child Welfare Act.

1994 Legislation

Laws 1994, c. 631, § 31(a), in par. (a), instructed the revisor of statutes to substitute "birth parent" for "natural parent" and "genetic parent", and in

§ 259.27**CHANGE OF NAME, ADOPTION**

under this subdivision and inform them that upon their request the agency will share information regarding a terminal illness with the adoptive or birth parents or an adopted person age 19 or older.

Historical and Statutory Notes**Derivation:**

Laws 1994, c. 631, § 31.

St.1992, § 259.253.

Laws 1987, c. 173, § 1.

1994 Legislation

Laws 1994, c. 631, § 31, in par. (a), authorized the revisor of statutes to substitute "birth parent" for "natural parent" or "genetic parent", and in par. (c), instructed the revisor of statutes to re-

number chapter 259 and make appropriate cross-reference changes to reflect the new numbers, in order to eliminate seven-digit section numbers and make room for future sections.

Former section: St.1992, § 259.27, which related to adoption petitions investigations and reports, was renumbered as § 259.53 in St.1994 by the revisor of statutes pursuant to Laws 1994, c. 631, § 31.

259.271. Renumbered 259.55 in St.1994

Historical and Statutory Notes

Laws 1994, c. 631, § 31, par. (c), instructed the revisor of statutes to renumber chapter 259 in order to eliminate seven-digit section numbers and to make room for future sections. The revisor was

also instructed to make appropriate cross-reference changes to reflect the new section numbers in chapter 259.

259.28. Renumbered 259.57 in St.1994

Historical and Statutory Notes

Laws 1994, c. 631, § 31, par. (c), instructed the revisor of statutes to renumber chapter 259 in order to eliminate seven-digit section numbers and to make room for future sections. The revisor was

also instructed to make appropriate cross-reference changes to reflect the new section numbers in chapter 259.

259.29. Protection of heritage or background

The policy of the state of Minnesota is to ensure that the best interests of the child are met by requiring due, not sole, consideration of the child's race or ethnic heritage in adoption placements. For purposes of intercountry adoptions, due consideration is deemed to have occurred if the appropriate authority in the child's country of birth has approved the placement of the child.

The authorized child-placing agency shall give preference, in the absence of good cause to the contrary, to placing the child with (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, (b) a family with the same racial or ethnic heritage as the child, or, if that is not feasible, (c) a family of different racial or ethnic heritage from the child which is knowledgeable and appreciative of the child's racial or ethnic heritage. In implementing the order of preference, an authorized child-placing agency may disclose private or confidential data, as defined in section 13.02, to relatives of the child for the purpose of locating a suitable adoptive home. The agency shall disclose only data that is necessary to facilitate implementing the preference.

If the child's birth parent or parents explicitly request that the preference described in clause (a) or clauses (a) and (b) not be followed, the authorized child-placing agency shall honor that request consistent with the best interests of the child.

If the child's birth parent or parents express a preference for placing the child in an adoptive home of the same or a similar religious background to that of the birth parent or parents, in following the preferences in clause (a) or (b), the agency shall place the child with a family that also meets the birth parent's religious preference. Only if no family is available that is described in clause (a) or (b) may the agency give preference to a family described in clause (c) that meets the parent's religious preference.